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4 This case was constructed by the authors based on their vast clinical experience in working with sexual trafficking victims. The name 'Blessing' is fictional, and her story is based on many stories and cannot be traced back to a single person.

JOURNAL OF TRAFFICKING AND HUMAN EXPLOITATION; VOL. 3, NR. 1, 1-6, PARIS LEGAL PUBLISHERS

Editorial: Introduction

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Impact: Center against Human Trafficking and Sexual Violence in Conflict

In its 2018 report on conflict-related sexual violence (S/2018/250, 23 March 2018) the UN Secretary-General stressed the urgency of addressing the nexus between trafficking in persons for sexual exploitation and conflict-related sexual violence, further to UN Security Council Resolutions 2331 (2016) and 2388 (2017). The articles in this Special Issue – partly in support of the UN Secretary-General's call – investigate academic and practical perspectives in varied threads of the nexus between both crimes in times of conflict. This Special Issue illustrates the manifold predicaments which exist in looking at conflict-related sexual violence and human trafficking for the purpose of sexual exploitation in concert, despite the progress that has been made in recent decades towards a climate of international criminal justice for both crimes separately. The articles of this Journal's Special Issue are grouped to categorically confront the nexus between both crimes accordingly, namely based on (legal) definitions of the crimes (Section 1); prevention (section two); legal redress (Section 4); and case studies (Section 4). In light of the importance and urgency of the matter, together with the Journal's main editor, Nicole Siller, we decided that the production of this Special Issue should be quick. Abstract submissions came by 1 June 2018 and it took 'only' half a year until this Special Issue was published in January 2019. This collection includes contributions from academics and practitioners from different fields of expertise and backgrounds, with the idea to bridge both worlds and to come to a better understanding of the issues involved.

In the first section on definitions, *Ghafoerkhan, Scholte, De Volder and De Brouwer*'s article examines the nexus between conflict-related sexual violence and trafficking for sexual exploitation in situations of conflict from a psychological and legal perspective. In general, but in particular during conflict, being victimized by sexual violence once, can put individuals at risk for similar or other forms of sexual re-victimization. For a victim who endured sexual violence, context hardly matters for its psychological impact. Therefore, the authors argue that from a psychological viewpoint there is no justification for a clear-cut distinction between CRSV and THB for purposes of sexual exploitation. Yet, from a legal perspective, this differentiation does matter: the legal definitions form the basis for the prosecution of perpetrators on the one hand and for access to

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particular rights for victims on the other. With this line of argumentation, the authors offer a first exploration into the nexus between both crimes, focussing on the psychological impact on the lives of victims/survivors, the legal definition of the criminalities, and subsequent access to rights for victims and survivors.

Following this, *Mahmood* investigates the legal definition of human trafficking as a crime stipulated in Article 7(2) of the Rome Statute (enslavement as a crime against humanity) of the International Criminal Court (ICC) by reviewing the international definition as per the United Nations Trafficking Protocol, the Rome Statute's drafters' intentions regarding the crime against humanity of enslavement, and the interpretation expounded in the case of *Kunarac et al.*[1] The author argues that, 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. The author states 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, she states 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, *Mahmood* argues, that 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.

Adamczewska in the Prevention section of the Journal (section two) expounds that the Women, Peace, and Security Resolutions (WPS Resolutions) of the United Nations Security Council are a vital part of the international framework to prevent conflict-related sexual violence and human trafficking. Yet, the Resolutions' potential is not fully realised as they are insufficiently implemented by Member States. The author explains that the lack of implementation of the Resolutions is caused by debatable uncertainties about their legal status, their scope of applicability, and the implementation mechanisms. But, so she argues, a human rights-based approach could resolve these ambiguities and protect the Resolutions' potential to strengthen conflict-related sexual violence and human trafficking preventions. Furthermore, the author holds the view that States' obligations incorporated within the WPS Resolutions overlap with obligations stemming from international human rights treaties and consequently mean that the core of the Resolutions are binding and applicable during peacetime.

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[1] International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (IT-96-23 & 23/1).

Adamczewska maintains the proposition that WPS Resolutions' implementation can and should be enhanced through UN Human Rights System mechanisms and by increased involvement of civil society organisations.

Major General (retired) *Cammaert*, was interviewed by *De Volder* and *De Brouwer* for this Special Issue to discuss the prevention of conflict-related sexual violence and human trafficking for sexual exploitation in conflict. Peacekeepers in multifaceted peacekeeping missions square up to atrocities every day during conflict and post conflict situations. These brutalities include sexual violence in armed conflicts and human trafficking cases. As someone with a decorated career in the military, *Cammaert* discusses how peacekeepers attend to these crimes and what they could do to prevent these crimes whilst being on the ground. The unique standpoint is substantiated by *Cammaert*'s extensive and first-hand military experience with how he perceives both crimes and how peacekeeping missions can most aptly prevent both crimes; by being proactive, collecting intelligence for early warning and acting upon it, and by ensuring a better gender balance within peacekeeping personnel.

Section 3 examines legal responses to sexual violence during conflict and human trafficking for sexual exploitation in situations of conflict. *Pulvirenti* and *Abrusci* scrutinise national legal frameworks and contents of relevant norms of the 13 countries mentioned by the UN Secretary General in its 2018 report on CRSV, for the investigation and prosecution of conflict-related sexual violence and sex trafficking at the national level whilst taking into account four different variables. The variables include whether the country has ratified or accessed the Palermo Protocol; whether human trafficking is criminalised; and whether sexual violence is criminalised during peace and war-time. The comparison of these variables for all 13 countries interestingly illustrates that none of them satisfactorily addresses these phenomena. It shows the limits of domestic legislation in understanding the nexus between the two crimes and effectively criminalising them. The challenges in enforcing and applying these laws lead to the suggestion that both crimes are better addressed internationally, specifically at the ICC, even if this does not come without its own set of obstacles. The authors propose a few suggestions to bridge the interpretive gap between sexual violence in conflict and sexual trafficking crimes and conclude that sexual violence-related crimes and human trafficking for sexual exploitation are strictly related in the context of armed conflicts as both stem from the same root of criminality and supplement each other. Due to the issues of impunity and lack of resources for effective national enforcement of legal frameworks, the article surmises that, apart from prosecution, a joint effort by both states and the ICC is required to successfully address these crimes.

Comrie clearly draws the growing awareness of the intersections between trafficking in persons for the purpose of sexual exploitation and sexual violence in times of conflict by considering the requirements for each crime under transnational and international criminal law legal frameworks, and analysing the common evidential challenges in the investigation of prosecution of both

crimes based on conflict and post-conflict backgrounds. The author concludes that both legal structures must be treated as complementary and mutually reinforcing. Due to the many shared evidential challenges, the author puts forth that there is the potential for increased cooperation between Member States for investigating and prosecuting transnational organised crime and international justice mechanisms. The article draws several important lessons learnt at the International Criminal Court in the management of intermediaries by the prosecution and investigative teams in early cases. The author deduces that the key strategy in promoting complementarity and ending the impunity gap for sexual violence in conflict internationally that also improves international cooperation on mutually relevant cases is through effective investigation and prosecution of transnational organised crime.

Viseur Sellers, a distinguished international criminal lawyer and Special Advisor on Gender to the Prosecutor of the International Criminal Court, shares her views with *De Brouwer and De Volder* on the nexus between conflict-related sexual violence and human trafficking for sexual exploitation. *Sellers* considers the similarities and differences between both crimes and demonstrates instances where persons are both victims and/or survivors of conflict-related sexual violence and human trafficking for sexual exploitation in conflict. Through her vast experience, *Sellers* elucidates how national and international legal mechanisms tackle prosecuting trafficking in persons and sexual violence in conflict, and details the challenges during investigation and prosecution of nexus between the two crimes, the importance of prosecuting perpetrators under which definition for the victims and survivors, and the distinction between transnational and international crimes in the context of trafficking. *Sellers* also propounds that it is vital to understand victims and survivors' perspectives in determining which support measures were positive, negative, and most valuable so as to address the legal protection gap whereby victims and survivors of human trafficking have more access to support on the basis of legal status as opposed to those of conflict-related sexual violence. The interview ends on an optimistic note towards prosecuting perpetrators and protecting victims of human trafficking and sexual violence in conflict in conjunction nationally, transnationally, and internationally.

In the final section of this Special Issue – section 4 – the nexus between conflict-related sexual violence and human trafficking for sexual exploitation is discussed on the basis of specific case studies. *Hee-soon* explores the phenomenon of up to 200,000 undocumented North Korean refugee women and girls hiding across mainland China who are highly exposed to being trafficked into China's sexual trade. This occurrence is incidentally encouraged by the Chinese government seeking these refugees' arrest and in case of repatriation, torture, interrogation, imprisonment, and even execution may ensue. The author recounts North Korean women and girls in China living in exile and documents their entry into prostitution, online pornography, and forced marriage by way of conditions and tactics used to identify victims and lure them into the industry.

It is a highly lucrative illicit industry that is dominated and defined by transnational networks and layers of organisations involving brokers, human traffickers, criminal organisations, public officials, and men who pay to rape and sexually assault women and girls. The author shows that the sobering realities and aftermath of being trapped within the industry means that these victims never escape the drug addictions, sexually transmitted diseases, physical violence, and long-term ramifications of sexual violence.

Akhtar, on the other hand, investigates how the protected armed conflict in Afghanistan has amplified the vulnerability of adolescent boys to become victims of sexual violence, known as Bacha Bazi. Bacha Bazi as an Afghan custom is where young men and boys are subjected to being forced to dress as girls and women, dance seductively for an audience of wealthy, powerful, older men, and also sexually exploited. This case study focuses on the evolution of Bacha Bazi into a systematic war tactic used by both parties to the conflict such as underaged boys being trained to be undercover spies, suicide bombers to launch insider attacks on Afghan military bases and police checkpoints under the guise of Bachas. The article provides an overview of Afghanistan's international legal obligations towards children's protection to identify the minimum standards to be adhered by Afghanistan as well as the history of this tradition alongside a scrutiny of the nexus between conflict-related sexual violence and sexual trafficking in the form of Bacha Bazi. Whilst identifying the main factors of the Bacha Bazi and numerous impediments that victims face in striving for justice and rehabilitation, the author considers the cultural context of deep-seated Afghan traditions, oppression of women, and hypermasculinity and critically examines the United States led international military intervention's role in the rise of Bacha Bazi.

What the above contributions show is that when there is lack of cultural/social recognition of these crimes and when there are many limitations in the prosecution of rape and sexual violence in national and international criminal tribunals, significant normative progress attained to prosecute these sexual crimes as war crimes, crimes against humanity, and genocide cannot continue to develop and improve for the benefits of suffering victims in particular. As the UN Secretary-General stated in its 2018 report on conflict-related sexual violence, such acts of brutality must never be allowed to 'become entrenched in post-conflict societies, because countless women, girls, men, and boys still live under the shadow of sexual violence.'[2] Extended warfare induce desperations whereby victims become vulnerable of entangling themselves in sexual exploitation for survival and perpetrators in turn prey on them in the disguise of providing better futures. The economic maxim of supply and demand denote

[2] United Nations Security Council, *Report of the Secretary-General on Conflict-Related Sexual Violence* (S/2018/250), 23 March 2018, para 9.

that victims are exploited from the onset of sexual trafficking as they are beguiled by fallacious job opportunities and desires to acquire brighter prospects only to be buried in torments of sexual slavery and forced prostitution. The complex and harrowing ramifications of sexual violence could cause a negative chain reaction to the victims' experience of their self-worth, dignity, sense of identity and safety. In the absence of accountability, conflict-related sexual violence and human trafficking in the form of sexual exploitation will continue to prosper. Prevention of these crimes is therefore key. This Special Issue Journal represents a solid progression towards making a positive impact on the international criminal justice system and the victims of these horrendous atrocities.

I. Defining CRSV and THB for sexual exploitation in times of conflict

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The nexus between conflict-related sexual violence and trafficking for sexual exploitation in times of conflict

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Abstract

In its 2018 report on conflict-related sexual violence[1] the UN Secretary-General reiterated the importance of addressing the nexus between conflict-related sexual violence and trafficking in human beings for purposes of sexual exploitation in conflict. In this article we will explore this nexus from a psychological and a legal point of view. During conflict the climate of impunity and the extreme contrast between the mighty and the powerless offers an optimal setting and inevitable ground for sexual violence. In general, but in particular during conflict, being victimized by sexual violence once can put individuals at risk for similar or other forms of sexual re-victimization. For the victim who endured sexual violence, context hardly matters for its psychological impact. Therefore, in accordance with the UN Secretary-General report, from a psychological view there is no justification for a clear-cut distinction between conflict-related sexual violence and trafficking in human beings for purposes of sexual exploitation in conflict. Yet, from a legal perspective, this differentiation does matter: the legal definitions form the basis for the prosecution of perpetrators on the one hand and for access to particular rights for victims on the other. This article should be seen as a first exploration into the nexus between both crimes, when it comes to the impact on the lives of the victims/survivors, the definition of the crimes, and the resulting access to rights for victims/survivors of these crimes.

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[1] UN Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence (S/2018/250), 23 March 2018.

1. Introduction

Over the last decade sexual violence has increasingly been recognized as a 'weapon of war' in ongoing conflicts. In the 2018 UN Secretary-General's report on conflict-related sexual violence (CRSV)[1] it is put forward that credible information regarding the scope and magnitude of CRSV is available for at least 19 countries. A shocking picture emerges from these numbers in the UN report, especially when considering the alleged underreporting of CRSV incidents by its victims.[2] Not only do numbers indicate that CRSV is widespread across the globe, it seems that CRSV is an integral part of conflict. In its 2018 report the UN Secretary-General stressed once more the urgency of addressing the nexus between trafficking in human beings (THB) for the purpose of sexual exploitation and CRSV, further to UN Security Council Resolutions 2331 (2016) and 2388 (2017).[3] That is, THB for purposes of sexual exploitation in conflict has been put forward as part of CRSV. According to the UN report, CRSV – which may include rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict – encompasses trafficking in persons when committed in situations of conflict for the purpose of sexual exploitation. For example, it is reported that in response to the demand for sexual services by certain Columbian armed groups, drug trafficking cartels have facilitated the sexual exploitation of women and girls. Likewise, fear of rape is frequently cited by female Syrian refugees as a primary factor inducing flight, but the risk of sexual violence, exploitation and trafficking remains high in and around refugee and displaced persons camps, owing to overcrowding, lack of privacy, financial desperation and lawlessness.

In this article we will address (the definitions of) the crimes of CRSV and THB in conflict for the purpose of sexual exploitation in order to explore how these crimes are inter-related from a psychological and a legal point of view. In particular from the victim's perspective it is unclear what the legitimacy of such differentiations is, and, most importantly, how these serve victims in the recognition of their experiences. Based on the few information available, it seems that for some victims, recognition of what has been done to them is important; recognition in the sense that their experiences are explicitly recognized in the crimes for which the accused are charged and prosecuted or in the legal

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2 S. Davies & J. True, 'The Politics of Counting and Reporting Conflict-Related Sexual and Gender-Based Violence: The Case of Myanmar', *International Feminist Journal of Politics* 19:1 (2017): 4-21.

3 UN Security Council Resolution 2331 (S/RES/2331), 20 December 2016; UN Security Council Resolution 2388 (S/RES/2388), 21 November 2017.

judgements explaining their experiences. For most, if not all victims, access to rights that comes with the recognition of their victimhood is for sure very important.

In this article, first, a narrative of a woman who has experienced both sexual violence in conflict and human trafficking for sexual exploitation will set the scene. Second, the specificity of conflict as a setting for sexual violence and processes for sexual (re)victimization are outlined, as well as the psychological aspects of experiencing sexual violence. Third, the legal definitions of the crimes will be discussed and analyzed on the basis of relevant legal instruments (e.g. Palermo Protocol, Rome Statute of the International Criminal Code (ICC)) and case law (e.g. of the Special Court of Sierra Leone (SCSL), ICC) most applicable to these crimes to determine the scope of the definitions and where the nexus begins and where it ends. Finally, it will be discussed why these definitions matter (e.g., fair labelling of victims' experiences and access to rights). This article should be seen as a first exploration in trying to find the nexus between CRSV and THB in conflict for the purpose of sexual exploitation when it comes to the impact of the crimes on the lives of the victims/survivors, the definition of the crimes, and the resulting access to rights for victims/survivors of these crimes. The hypothesis of this article is that because of the interrelatedness of crimes that victims/survivors may experience in conflict situations, there might be a mismatch between the distinctive legal terminology used for both crimes and the victim's perspective. Experiencing one incidence of sexual violence puts victims at-risk for future sexual revictimization. Furthermore, when it comes to experiencing sexual violence the context in which this occurs hardly seems to matter.

2. The Story of Blessing[4]

Blessing thinks she was born in 1995, in a village in Nigeria. A woman found her in a basket when she was three months old. The woman brought her to an orphanage ran by Christian nuns. She never found out anything about her family; she only grew up with the girls and nuns at the orphanage. At the local school she completed education till grade 3. One day she was told she would no longer go to school, instead she had to help with taking care of other orphans. She was sad to leave school but liked to take care of the children.

In 2013, when Blessing was 18 years old, Boko Haram attacked her village. Houses were burned, people were raped and murdered. Also, the orphanage

4 This case was constructed by the authors based on their vast clinical experience in working with sexual trafficking victims. The name 'Blessing' is fictional, and her story is based on many stories and cannot be traced back to a single person.

was set on fire and many girls and nuns were murdered that day. Blessing gathered some younger girls and together they fled into the forest. After running for some days, they encountered another rebel group. At first, they helped the girls with shelter and some food, and the girls felt relieved. They thought they were safe. However, then Blessing was taken aside and asked to take off her clothes. The soldiers jokingly discussed who would have her first. Then the 'chief' came in and he told Blessing to put her clothes back on, she would now only be his wife. He carried a gun, so she did not dare to refuse. Then he beat her hard on the head and in her stomach and he raped her. She was a virgin and she was not sure what he did, but it was very painful, and she was bleeding a lot. She stayed with the chief for some months, he offered her protection and food. He had many women and he raped Blessing many times. She also became pregnant once, but she miscarried.

One day she managed to escape; she kept on running deeper into the forest. Finally, she arrived in Chad, at a camp, but they did not have much food there. Blessing stayed for some time. There was an older Nigerian lady taking care of her. After a few weeks the lady introduced Blessing to a white man called John. The man was very nice to her and appeared to be very rich. He owned a bar, where Blessing started to work. One day he said there was a way for Blessing to make more money. He introduced her to two men. She was told about staying in Europe and working as a housekeeper. Blessing agreed to go; she felt that she had little choice, because life was hard in Chad. She left in a truck with the two men and two other women and they traveled to Morocco. It was a tough journey, because it was hot and there was not enough water or food. Finally, they were brought to Italy.

The two men were very rude to her and beat her. They took her to a house, where there was a woman who told her she had to pay 40,000 euros for the journey. Blessing wanted to earn the money as soon as possible, as she was very scared. Every day men came to have sex with her. The woman threatened to kill her if she would not cooperate. Sometimes Blessing had to do the 'rough job', that is sex without a condom, because it raised more money. That is how she got pregnant twice.

The first time the woman gave her an abortion pill, but the second time it turned out she was 5 months pregnant, so abortion was no longer possible. She had to keep working during her pregnancy. After the delivery of her daughter Hope, she stayed at the home of the woman for 2 months. After that, she had to work again and pay an additional 40,000 euros to compensate for the time she did not work. Now the woman threatened to harm Hope to urge Blessing to work more.

One day the woman left the house; Blessing took her chance and ran with her daughter. A man approached her, and she told her story. He was on his way home to the Netherlands. He took her along and dropped her off at a bus station in a city unknown to her. He told her which bus she had to take and so she finally ended up at a reception center. There she was identified as a victim

of human trafficking, and it was acknowledged that she had been sexually exploited. Two weeks later, she was taken to a specialized shelter for victims of human trafficking. There, Blessing and her daughter received practical, legal and psychological support. Blessing pressed charges against her perpetrators, but her case was soon dismissed, due to lack of evidence because the exploitation occurred outside of the Netherlands. She was transferred to an asylum seekers center. She currently awaits the result of her asylum application.

3. Dynamics of Sexual Violence in Conflict

From the moment the non-state armed group Boko Haram entered Blessing's life it has been a concatenation of various forms of sexual violence. As illustrated through this narrative, CRSV can come in many forms by various perpetrators, directly or more indirectly linked to conflict. These dynamics will be discussed in more detail below.

3.1. The setting and interplay between actors involved in or victimized by CRSV

Most individuals living in low-resource areas, due to poor economic and social circumstances, have a limited say over the course of their lives. This gives rise to feelings of powerlessness and worthlessness and affects future expectations of life. Armed conflicts, most of which take place in low-resource areas, sharpen this discrepancy between the relatively powerless and the mighty. This, in combination with state collapse and a climate of impunity, offers an optimal setting and inevitable ground for sexual violence. By its very nature, conflict tears apart societies, social structures, and families, and corrodes justice, bonds, and moral values usually protective against violence. This has many implications, one of which being that in particular the powerless are at increased risk of falling victim to sexual violence. The powerless are frequently members of a persecuted political, ethnic or religious minority, or are targeted on the basis of actual or perceived sexual orientation and gender identity. In traditional cultures, the increased vulnerability to sexual violence during conflict may only add to a pre-existing perception of marginalized persons *and* women as less worthy and dignified. Such judgments may imply that there is no need for a respectful approach or consent when engaging in sexual acts. The implicit or sometimes explicit message is that certain persons' lives and bodies are not fully theirs. As underlined in the 2018 UN report on conflict-related sexual violence:

Although it is increasingly clear that self-reliance, economic empowerment and having a political voice are the most effective forms of protection from sexual violence, desperate families are increasingly resorting to harmful and negative coping mecha-

nisms, including child marriage, polygamy, withdrawal from educational and employment opportunities, transactional sex and/or 'survival sex' and commercial sexual exploitation.[5]

Over the last decades the concept of sexual consent has been fiercely debated among scholars.[6] Although there is no consensus on its definition, one common view is that it refers to 'free verbal or nonverbal communication of a feeling of willingness'.[7] This implies that for consent there needs to be freedom to express whether one is willing or not. Even though such freedom is lacking in conflict areas controlled by armed groups victims are often still held accountable and blamed for the CRSV events. More often than not, rather than the perpetrator, it is the victim who is considered as dishonorable and tainted. They are often 'treated by their families and communities as if they have committed a crime'.[8] The lack of being able to give consent has also been recognized in the laws and case law by international tribunals, where coercion, coercive circumstances or (threat of) force are important elements to establish for instance, the crime of rape as a crime against humanity or a war crime, rather than the element of 'lack of consent', which is generally not an issue in times of conflict.[9] The introduction of the element 'lack of consent' would also mean that it needs to be proven and may only burden the victims of these crimes.[10] In relation to human trafficking similar considerations apply. The Palermo Protocol underlines that the consent of the victim of the exploitation is irrelevant, as long as any of the forcible means to lure someone into a situation of exploitation is used. In the case of children, coercion by any of the means does not even have to be proven.

3.2. Sexual Revictimization

Considering the case of Blessing, the chain of events in her story are inter-related. Being forced to flee from Boko Haram put her at-risk, she was alone and vulnerable when she encountered the other rebel group. Thereafter residing as a displaced person in Chad with limited resources available to her put her at risk of exploitation. A vast amount of research shows that people who have been victimized by sexual violence face an increased risk for

5 UNSC, *Report of the SG on CRSV* (2018).
6 M. Cowling, *Making Sense of Sexual Consent* (London: Routledge, 2017).
7 K. Jozkowski et al., 'Consenting to Sexual Activity: The Development and Psychometric Assessment of Dual Measures of Consent', *Archives of Sexual Behavior* 43.3 (2014): 437-450.
8 R. Mollica, *Healing Invisible Wounds: Paths to Hope and Recovery in a Violent World* (Orlando: Harcourt, 2006), 230.
9 P. Viseur Sellers, 'The 'Appeal' of Sexual Violence: Akayesu/Gacumbitsi Cases' in *Gender-based Violence in Africa*, ed. K. Stefisyn (Pretoria: University of Pretoria 2007), 51-103.
10 Ibid.; W. Schomburg and I. Peterson. 'Genuine Consent to Sexual Violence under International Criminal Law', *American Journal of International Law* 101.1 (2007): 125, 128-131, 139.

sexual revictimization later in life.[11] Unfortunately, data on the course of sexual revictimization is lacking in areas of conflict. When considering victims of sexual exploitation in general, including those originating from areas of (post-) conflict, studies show that about one third have experienced sexual abuse prior to the sexual exploitation.[12] Although it needs more studying, these findings indicate the interrelatedness of various forms of sexual violence.

3.3. Victims' Psychological Strategies

Sexual violence disrupts a person's expectation of the existence of morality, and the capability to manage one's world. Sexual violence belies such trust, perverts one's relationship to the outside world and may result in general distrust and social detachment. In the setting of conflict, morality and trust have obviously already been corroded. Sexual violence makes this worse, whether experienced in an assault or during exploitation, inducing an even greater loss of basic beliefs and agency.

In such context, with the danger of sexual violence ever lurking, one needs to be constantly on guard. Many will develop strategies to avoid violence or limit its severity. If sexual violence seems inevitable, one may try to partly regain control by pro-actively setting conditions for surrender, e.g., to prevent a group rape by negotiating to only 'allow' one rebel soldier to have sex. Or, as in the case of Blessing, to sexually engage with a high-ranking soldier to ensure the provision of basic needs (e.g., food, shelter, protection). One may choose to give one's body to protect others, like close relatives. Also, one may go along with sexual violence, i.e., 'not putting up a fight', in hopes that the perpetrator may be less violent.

One strategy to escape the dreary living situation is to go along with people pretending to offer a solid income-generating opportunity somewhere else. This way, many ended up being exposed to sexual exploitation. In conflict areas, however, victims are often threatened or brutally forced into such situation, thereby being dehumanized and treated as property for trade.

4. The Experience of Sexual Violence

Enduring sexual violence is a horrific experience in many ways. Rape, probably the most frequent form of sexual violence in conflict and

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11 C. Classen, O. Palesh & R. Aggarwal, 'Sexual Revictimization: A Review of the Empirical Literature', *Trauma, Violence, & Abuse* 6.2 (2005): 103-129.

12 S. Oram et al, 'Prevalence and Risk of Violence and the Physical, Mental, and Sexual Health Problems associated with Human Trafficking: Systematic Review', *PLoS Medicine* 9.5 (2012): e1001224.

situations of exploitation, is far more than an unwanted physical penetration.[13] It entails the involuntary exposure of private body parts, the shattering of self-determination where one values it most, the maculation of one's very locuses of intimacy. Someone else's genital is often used for penetration, an event representing ultimate usurpation. Violence used may be life threatening, and cause pain and damage to body tissues. Several emotions dominate the psychological experiences during and after sexual violence.[14] Four of these emotional consequences are outlined below. It may become obvious that emotional responses to sexual violence do not vary much per context. Here, it concerns universal phenomena specifically related to the actual violation of physical integrity, rather than expressions of distress whose manifestation depends on contextual background – whether this is conflict or exploitation.

4.1. Fear

It is self-evident that any form of sexual violence causes great fear in victims. This fear is felt during the violent experience but can also manifest itself as anticipated fear when there is repeated sexual violence. Sexual violence, while being a violent act in itself, is often accompanied by other physical violence, or the threat of being injured, mutilated or killed.[15] Extreme fear may also be evoked when perpetrators threaten to abuse close relatives (children, spouses, parents) if the victim does not surrender. As perpetrators' superior force, physical or psychological, mostly makes fighting pointless and fleeing impossible, surrender is often the only option.

A far-reaching but common consequence of fear and powerlessness during sexual violence is the phenomenon of 'tonic immobility': an emotionally induced state of complete loss of control over one's body, leading to the inability to make any movement or sound.[16] It is an involuntary response to great threat, seen in animals and humans alike. Although performing reflexively and thus beyond one's control, tonic immobility may later lead to feelings of shame and guilt in victims of sexual violence for 'not having offered resistance'.[17] The latter misun-

13 L. Kelly, *Surviving Sexual Violence* (New Jersey: John Wiley & Sons, 2013).

14 S. Ullman et al., 'Structural Models of the Relations of Assault Severity, Social Support, Avoidance Coping, Self-blame, and PTSD among Sexual Assault Survivors', *Psychology of Women Quarterly* 31.1 (2007): 23-37.

15 S. Oram et al, 'Prevalence and Risk of Violence and the Physical, Mental, and Sexual Health Problems associated with Human Trafficking'.

16 J. Kalaf et al., 'Sexual Trauma is more Strongly Associated with Tonic Immobility than Other Types of Trauma – A Population Based Study', *Journal of affective disorders* 215 (2017): 71-76.

17 A. Möller, H. Söndergaard & L. Helström. 'Tonic Immobility during Sexual Assault – a Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression', *Acta Obstetricia et Gynecologica Scandinavica* 96.8 (2017): 932-938.

derstanding may also give rise to blaming by others – among whom officials in legal procedures.

Another psychological state often appearing in victims of sexual abuse is that of 'dissociation'.[18] It is the involuntary inner mechanism through which elements of an intense experience are kept apart from one's full awareness, in particular from one's awareness of the event's full emotional impact. It thus causes a disruption between the actual reality and one's perceived reality. A dissociative state may be considered as protection against too much emotional intrusion of the mind, therefore being an adaptive psychological response. In later life, however, it may cause problems in several ways.[19] First, it leads to the inability to (fully) remember the event in question, which may give rise to disbelief about the abuse(s), e.g., during legal procedures.[20] For instance, the narrative of victims may be perceived as incoherent and inconsistent due to fragmented memories. Second, stimuli linking to the event in question – whether on a conscious level or not – may either lead to sudden extreme emotions and disturbed behaviour or, in contrast, to a striking emotional flatness and unfocused speech in victims. Stimuli triggering such states may be sensory perceptions like images or smells associated with the event, and certain conversation topics or questions. Legal procedures around the event may therefore yield emotional states and related behaviours in victims, not rarely misunderstood by, and leading to irritation among the involved officials. With sudden emotional outbursts, the victims' account might be perceived as unreliable. Conversely, victims might share their story with little emotion, which might be wrongly interpreted as an indication that the event did not have much impact.

Extreme levels of fear experienced during sexual violence may disrupt the body's so-called stress system, i.e., the whole of neurobiological mechanisms regulating the response of body and mind to stress. A common consequence of sexual violence is the continuous activation of the victim's stress system, even after the event.[21] An ongoing high tension then results in emotional hyperreactivity, sleeping problems, and physical complaints, and may even develop into mental health disorders, such as a post-traumatic stress disorder.

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18 I. Schalinski, T. Elbert & M. Schauer, 'Female Dissociative Responding to Extreme Sexual Violence in a Chronic Crisis Setting: The Case of Eastern Congo', *Journal of Traumatic Stress* 24.2 (2011): 235-238.

19 R. Gower et al., 'Reported Sexual Abuse and Subsequent Psychopathology among Women Attending Psychology Clinics: The Mediating Role of Dissociation', *British Journal of Clinical Psychology* 37.3 (1998): 313-326.

20 M. Tankink, & R. Lambrichts, 'Rammelende Verklaringen en de Vrije Wil. Over Inconsistente Verklaringen en Keuzevrijheid bij Slachtoffers van Seksuele Uitbuiting', *Delict en Delinkwent* 2.1 (2017): 13-25.

21 A. Martinson, J. Craner, & S. Sigmon, 'Differences in HPA Axis Reactivity to Intimacy in Women with and without Histories of Sexual Trauma', *Psychoneuroendocrinology* 65 (2016): 118-126.

4.2. Shame

Shame can arise when personal boundaries protecting privacy are threatened or violated and there is risk of loss of dignity. Although shame, like guilt, is mostly thought of as a feeling related to the unveiling of one's own wrongdoing, it can be elicited by any unwanted exposure, including of everything considered private. Shame is an emotional state featuring prominently in victims of sexual violence. Sexual violence may be preceded, accompanied or followed by intentional psychological humiliation of any kind, be it through words or deeds, thereby inducing shame and loss of dignity in the victim.

Other sources of shame are possible physical responses to the sexual violence situation and the very penetration: vaginal lubrication in women, penile erection in men.[22] It is common biological knowledge that such phenomena can be elicited by tactile stimulation and similarly by extreme fear. For victims, however, awareness of such body reactions may be highly confusing as they usually express sexual arousal. This may lead to misinterpretation of one's own physical reaction (erection or vaginal lubrication) as a sexual response instead of either a tactile or a fear response, to great uncertainty about 'secretly having enjoyed the experience', and to accompanying shame. Another physical response to feelings of shame is tonic immobility and dissociation, as already addressed above.[23]

After sexual violence, shame may urge the victim to silence the event and socially withdraw in order to prevent even more exposure.[24] Particularly in non-western cultures, openness about it may have major negative consequences, and often leads to ostracism by the spouse and relatives, social marginalization, and (for women) not being marriageable any more.[25] Speaking out may thus lead to a radical loss of social and family life. Silencing the event then becomes the preferred option, leaving the victim to suffer in solitude – and perpetrators to remain untouched.

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22 C. Bullock & M. Beckson, 'Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology'. *The Journal of the American Academy of Psychiatry and the Law*, 39.2 (2011): 197-205.

23 A. Schultz, *Does Dissociation Produce Shame? An Exploration of Adults with Sexual Abuse Histories* (Unpublished dissertation, 2018).

24 C. Decou et al., 'Assault-Related Shame Mediates the Association Between Negative Social Reactions to Disclosure of Sexual Assault and Psychological Distress', *Psychological Trauma: Theory, Research, Practice, and Policy* 9.2 (2017): 166.

25 F. Mukananga et al., 'Gender Based Violence and its Effects on Women's Reproductive Health: the Case of Hatcliffe, Harare, Zimbabwe', *African Journal of Reproductive Health* 18.1 (2014):110-22; M. Tankink, 'The Silence of South-Sudanese Women: Social Risks in Talking about Experiences of Sexual Violence', *Culture, Health & Sexuality* 15.4 (2013): 391-403.

4.3. Disgust

Forced physical contact or penetration may evoke disgust: a strong feeling of revulsion.[26] This mostly concerns sensory experiences associated with the abuse, such as the sound of a perpetrator's heavy breathing or body smell, the image of a perpetrators' face or intimate parts, the feeling of his genital or semen inside one's body. The latter in particular can cause a victim to feel soiled and dirty. This feeling may persist long after the actual abuse, despite the fact that the body will have excreted liquids and regenerated tissues quite soon. Aversion of oneself may give rise to long-lasting avoidance of any further intimacy – even with a loved one –, or even worse, to the inability to watch or touch one's own body. It is self-evident that such highly debilitating impacts are direct consequences of a sexual assault itself, regardless of its context.

4.4. Identity

One of sexual violence's worst impacts is that it corrodes the feeling of identity. Indeed, identity is based on an inner feeling of continuity and the experience of personal boundaries. Both underlie the perception of oneself (or another person) as an integral and consistent entity. Sexual violence violates this integrity. It shatters the seeming self-evidence of being a delimited creature, an entity, and thereby causes damage to one's image of the self.[27] Thus, the act of sexual violence entails penetration of both the physical body and the psychological self.

Men who are victims of sexual violence experience broadly similar problems as women. Fear and humiliation are similarly evoked, and so are shame and identity problems. The latter may apply even stronger in patriarchal cultures, where images of masculinity may be more traditional. Shame originating from humiliation and surrender may then be particularly intense in males. Forced penetration often makes victims doubt of their sexual identity, as if the event would have disclosed a concealed homosexuality. The latter idea may be reinforced by shameful awareness of one's penile erection while being raped (see above).

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26 C. Badour et al., 'Disgust as a Unique Affective Predictor of Mental Contamination Following Sexual Trauma', *Journal of Anxiety Disorders* 28.7 (2014): 704-711.

27 J. Clark, 'A Crime of Identity: Rape and Its Neglected Victims' *Journal of Human Rights* 13.2 (2014) May 2014, 13(2): 146-169; C. Perilloux, J. Duntley & D. Buss, 'The Costs of Rape', *Archives of Sexual Behavior* 41:5 (2012): 1099-1106; C. Draucker et al., 'The essence of healing from sexual violence: a qualitative metasynthesis', *Research in Nursing & Health* 32.4 (2009): 366-378.

4.5. Physical Problems and Mental Health Disorders

Sexual violence may cause physical damage to the body. This can be the consequence of ruthless manipulation or penetration. In the case of conflict-related sexual violence, damage to the genital area is often caused intentionally in order to inflict pain and destroy a person's dignity and even procreative capacity. Indeed, sexual violence as a weapon of war particularly aims to damage the reproductive functioning of victims, thereby contributing to the extermination of targeted populations.[28]

Physical problems resulting from sexual violence may be diverse. Mutilation may evoke great shame and inconvenience due to malformation or dysfunction of organs (e.g., sexual dysfunction, or the unwanted spilling of urine or stool). Infections may come with serious symptoms and even be life-threatening (e.g., HIV infection).

Emotional problems may lead to the development of mental disorders, such as a posttraumatic stress disorder, depression, or other psychiatric conditions. Unfortunately, specialist treatment, although obviously indicated, is not always provided, its availability often being determined by a victim's socio-economic or legal position.

4.6. Contextual Factors

The listing above is dreary and may illustrate that the devastating effect of sexual violence on victims is mostly determined by characteristics of the act itself and can vary greatly between individuals. Bearing in mind the case of Blessing, the various acts of CSRV she has encountered are best understood within the same range of experiences rather than separate categories. Certainly, each act of CSRV had its particular setting, dynamics and level of severity, however experiencing the act itself can be considered to have a similar emotional impact. Furthermore, the meaning given to the act by the victim afterwards influences the effect of CRSV. Sexual violence – exposure and penetration – causes terror, loss of dignity, and shame. This happens in particular when sexual violence is used as a weapon of war and is even harsher when it is a gang rape. Purposeful humiliation and gang rapes happen frequently in situations of sexual exploitation as well. While in common life power and sexuality are implicitly intertwined, conflict presents prime examples of the distortion of this dyad towards sadism. Thus, contextual factors, such as conflict

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[28] I. Ba, and R. Bhopal. 'Physical, Mental and Social Consequences in Civilians who have Experienced War-Related Sexual Violence: A Systematic Review (1981–2014)', *Public Health* 142 (2017): 121-135; A. McAlpine, M. Hossain & C. Zimmerman. 'Sex Trafficking and Sexual Exploitation in Settings Affected by Armed Conflicts in Africa, Asia and the Middle East: Systematic Review', *BMC International Health and Human Rights* 16.1 (2016): 34.

situations, may add particular setting to the experience, however the lasting impact of its intrinsically gruesome nature and its negative emotional sequelae can vary between individuals.

As outlined above, the psychological impact of sexual violence on the victim is severe regardless of the context in which the act took place. The setting of conflict may, however, offer a particular dynamic to the sexual violence. Therefore, there is a need to explore whether the victim's perspective corresponds to the present legal framework for these crimes.

5. The Scope of the Legal Definitions of CRSV and THB

5.1. Where Does the Nexus between CRSV and THB Begin?

In light of increasing violent extremism and mass migration, United Nations Security Council (UNSC) Resolution 2331 (2016) underlined the urgency of addressing the nexus between trafficking in persons, (conflict-related) sexual violence, terrorism and transnational organized crime; the first of its kind. The UNSC Resolution recognized that:

Trafficking in persons in areas affected by armed conflict and post-conflict situations can be for the purpose of various forms of exploitation, including exploitation of the prostitution of others or other forms of sexual exploitation, forced labour, slavery or practices similar to slavery, servitude or the removal of organs.[29]

It further recognized that:

Trafficking in persons in armed conflict and post-conflict situations can also be associated with sexual violence in conflict and that children in situations of armed conflict and persons displaced by armed conflict, including refugees, can be especially vulnerable to trafficking in persons in armed conflict and to these forms of exploitation.[30]

Thus, the acknowledgment of the nexus between conflict-related sexual violence and trafficking in persons for the purpose of sexual exploitation was unprecedentedly made on the international level with similar resolutions following suit.[31]

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29 UN Security Council Resolution 2331 (S/RES/2331) 20 December 2016.
30 Ibid.
31 UNSC Res. 2388.

In order to even better understand this nexus, the UN Secretary-General's report on CRSV (2017) defined the term 'conflict-related sexual violence' and held it to encompass trafficking in persons.[32] In precise terms, the report stated that CRSV referred to:

Rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict. This link may be evident in the profile of the perpetrator (often affiliated with a State or non-State armed group, including a terrorist entity or network), the profile of the victim (who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, or is targeted on the basis of actual or perceived sexual orientation and gender identity), the climate of impunity (which is generally associated with State collapse), cross-border consequences (such as displacement or trafficking in persons) and/or violations of the provisions of a ceasefire agreement. The term also encompasses trafficking in persons when committed in situations of conflict for the purpose of sexual violence/exploitation.[33]

Not only does the report make clear that it sees CRSV to encompass trafficking in persons when committed in situations of conflict for the purposes of sexual exploitation, it also stresses the circumstances under which the 'conflict' may reveal itself, e.g., in situations of armed group violence, State collapse, cross-border movement or violations of a ceasefire agreement. Indeed, according to the above definition, the CRSV may be either 'directly or indirectly' linked to a conflict. When reading the annual reports of the UN Secretary-General on conflict-related sexual violence, it becomes clear who the suspects of CRSV, including human trafficking, are, and to what kind of conflict-related situations they are linked. A total of 47 parties have so far been listed by the UN Secretary-General with the majority of listed parties being non-State actors, of which seven designated as terrorist groups; other listed parties include national military and police forces.[34]

CRSV can be random or isolated acts in conflict situations; CRSV can also be a so-called 'weapon of war', an integral part of the operations, ideology and economic strategy of the perpetrators thereby forming a threat to international security and peace.[35] In the 2018 UN report, a division is made between sexual violence in conflict-affected settings (e.g. including Afghanistan, Central African Republic, Iraq, Libya), post-conflict settings (e.g. Ivory Coast, Nepal)

32 UN Security Council, *Report of the Secretary-General on Conflict-Related Sexual Violence* (S/2017/249), 15 April 2017.
33 Ibid., para. 2; see also UNSC, *Report of the SG on CRSV* (2018), 2 (with slight alterations).
34 UNSC, *Report of the SG on CRSV* (2018), para. 3.
35 UN Security Council Resolution 1820 (S/RES/1820), 19 June 2008.

and other difficult situations (e.g. Burundi, Nigeria), again making clear what kind of conflict situations the UN Special Rapporteur has in mind when addressing CRSV and human trafficking in conflict.

The language found in the above-mentioned UN Resolutions and reports mirrors the conflict-related sexual violence crimes found in the 1998 Statute of the International Criminal Court (ICC or Court). This Court is based in The Hague, the Netherlands, and has – under certain conditions – the mandate to prosecute the most senior individuals suspected of having committed international crimes, such as genocide, crimes against humanity and war crimes, as of 2002, and when States themselves are unable or unwilling to do so. The Statute of the ICC provides for an extensive list criminalizing conflict-related sexual violence. In Articles 7 and 8 of the Rome Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity are explicitly outlawed as crimes against humanity and war crimes. In addition, persecution against any identifiable group or collectivity on the ground of gender, and the crime of enslavement (which may include trafficking in persons, in particular women and children), are prohibited as a crime against humanity. Although the Rome Statute definition of genocide does not include specific sexual violence crimes amongst its acts, the ICC's guiding Elements of Crimes do recognize that rape and other forms of sexual violence could be prosecuted as such (under 'serious bodily or mental harm').[36] The sexual and gender-based violence crimes become international crimes only, however, when certain general requirements of the international crimes are fulfilled; i.e., for genocide, there needs to be a specific intent against a particular group; for crimes against humanity, there needs to be a widespread or systematic attack against a civilian population; and for war crimes, there needs to be the presence of an international or non-international armed conflict. Only then can we speak of CRSV; an umbrella term for specific sexual violence crimes that can amount to genocide, crimes against humanity or war crimes.

Thus, apart from the crimes of forced marriage and forced abortion, the conflict-related sexual violence crimes mentioned by the UN in its above-mentioned resolutions and reports are partly similar to – and it seems inspired by – the conflict-related sexual violence crimes prohibited in law by the ICC as well as several other international criminal tribunals, such as the Special Court for Sierra Leone (SCSL). Whereas forced marriage and forced abortion are not currently criminalised in law, it should be noted that international criminal tribunals have in the past noted that other sexual and gender-based crimes, such as forced marriage, forced nudity, sexual mutilation, and forced abortion, may constitute international crimes. In fact, the SCSL has successfully prose-

36 ICC, *Elements of Crimes* (The Hague: Official Journal of the International Criminal Court, 2011).

cuted not only rape and sexual slavery, but also forced marriage as the crime against humanity of an 'other inhumane act'.[37]

The question remains: where does conflict-related sexual violence and human trafficking meet? The answer can partly be found in some of the most applicable laws and case law interpreting these laws. When looking specifically at the Statute of the ICC and its Elements of Crimes document, this is in particular the case where it concerns the crimes of 'enslavement' (a crime against humanity and a non-specific sexual violence crime) and 'sexual slavery' (both a crime against humanity and a war crime and a specific sexual violence crime) as both these two crimes incorporate trafficking in persons. According to Article 7(2)(c) of the Statute of the ICC: ''Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.' The Elements of Crimes further explain that the exercise of power attached to the right of ownership includes the 'purchasing, selling, lending or bartering [of] such a person or persons, or by imposing on them a similar deprivation of liberty', and that this conduct includes trafficking in persons, in particular of women and children.[38] The Elements of Crimes with regard to the crime of sexual slavery are similar to enslavement (and thus may also include trafficking in persons), with the addition that an act of a sexual nature needs to have been committed.[39]

While the Rome Statute and the Elements of Crime encompass trafficking in persons in the crimes of enslavement and sexual slavery, they do not give a further definition of THB. For a definition of 'trafficking in persons' one has to look at the Palermo Protocol, which includes the first and internationally recognised definition, which is also referred to by the UN Security Council and

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37 I. Haenen. *Force & Marriage: The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law* (Antwerp: Intersentia, 2014).

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

39 Sexual slavery – Elements of Crimes, Article 7(1)(g)-2: '(1) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.' It should be noted that it has been argued that the crime of sexual slavery is somewhat redundant as it would also fit under the crime of enslavement. See, on this latter issue, A. Adams, 'Sexual Slavery: Do we Need this Crime in Addition to Enslavement?' *Criminal Law Forum* 29.2 (2018): 279-323; and P. Viseur Sellers, 'Wartime Female Slavery: Enslavement?' *Cornell International Law Journal* 44.1 (2011): 115-143.

the UN Secretary General in the relevant resolutions and reports linking THB and CRSV. Article 3 of the Palermo Protocol defines THB as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Trafficking thus requires: (1) an act; (2) a means; and (3) a purpose, that of exploitation. The acts include the recruitment, transportation, transfer, harboring or receipt of a person. 'Means' refers to various ways of distorting the free will of a person.[40] The final element, the purpose of exploitation, is not well defined: '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'. What is precisely meant with these terms is left to national governments to decide. The element of exploitation is one of specific intent ('dolus specialis'). Or as Siller puts it: 'It is the actual purpose of the perpetrator, as opposed to the 'practical results' which satisfies the mens rea element. For a situation to be considered as trafficking in persons, the exploitation does not necessarily have to take place. The action taken and the means used must be carried out with the specific intention to exploit'.[41]

Yet, the question that has more recently been raised is whether 'trafficking in persons' (a transnational crime) is either a crime which comes under the crime of enslavement (an international crime[42]), or whether enslavement is only one of the potential exploitative manifestations of trafficking as laid down in the Palermo Protocol?[43] Siller argues that, seen from an international criminal law perspective, there is a need for judicial clarity and decision in either merging the crimes or distinguishing them.[44] This will involve an analysis as to what constitutes 'powers attaching to the right of ownership'. According to her, the addition of a separate crime against humanity of trafficking in persons may be the only way to hold individuals accountable under international criminal law. Until that time, however, it appears that traffickers who also engage in the enslavement of their victims in the context of a crime against humanity can be

40 N. Siller, '"Modern Slavery": Does International Law Distinguish between Slavery, Enslavement and Trafficking?', *Journal of International Criminal Justice* 14 (2016): 417; A. Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010), 30.

41 Ibid, 418.

42 A similar comparison could be made with regard to the crime of sexual slavery.

43 Siller, 'Modern Slavery', 405-427.

44 N. Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments among International Courts and Tribunals', *European Journal of Comparative Law and Governance* 2 (2015): 260.

held accountable before international courts and tribunals based on the current interpretation of the crime of enslavement in case law.[45] In fact, before the ICC, steps are currently underway to investigate whether charges related to trafficking in persons can be made in the situation of Libya.[46] On the other hand, as trafficking in persons is considered a transnational crime with different requirements from enslavement being an international crime (e.g. trafficking does not rely upon the exercise of ownership over a person and could have a defence of consent), it could also be held that trafficking is not slavery and should therefore be removed from the crimes against humanity provision of enslavement.

5.2. Where Does the Nexus between CRSV and THB End?

Finally, the question to be answered is where the nexus between conflict-related sexual violence and human trafficking ends. Surely, as mentioned above, the reports of the UN Secretary-General give some indication, by stating that CRSV includes THB and that CRSV can be either directly or indirectly linked to conflict, and can happen in conflict, post conflict situations and other situations of concern. At the same time, the crime of THB is much broader in scope than as a form of conflict-related sexual violence.[47] The following question is then raised: how long we can still speak of 'conflict-related' sexual violence? When should THB for purposes of sexual exploitation still be considered as a form of conflict-related sexual violence, and when should it be seen as a stand-alone crime? In other words, when does the nexus between conflict-related sexual violence and THB end?

It seems as if in literature on the term CRSV no attention has been devoted to the scope of 'conflict-related'. It may be that this is due to the fact that while CRSV is an umbrella term for all sorts of sexual violence acts related to conflict, it is not a legal term in and of itself. Therefore, there has been no need to define 'conflict-related' as an element of the crime of CRSV. Rather, forms of CRSV have been criminalised as discussed above. The term at a minimum implies a direct or indirect correlation to conflict. That CRSV exists beyond conflict situations is reflected in, for instance, the fact that enslavement is also considered a crime against humanity, which can occur in peace time as well. In addition, the UN reports cited above speak of conflict and post-conflict situations. This would actually imply that exploitative practices refugees face while fleeing from conflict and that amount to THB might still be considered CRSV. Just as in the narrative of Blessing: her refuge from the conflict and sexual violence actually led her into a trafficking situation abroad. Her lack of resources and psycholo-

45 For case law references, see: Siller, 'Modern Slavery', 405-427.
46 ICC, 'Statement of ICC Prosecutor to the UNSC on the Situation in Libya', 9 May 2017.
47 See section above and the definition of THB in general.

gical vulnerability put her at risk to enduring future sexual revictimization. To determine whether trafficking in persons is linked to a particular conflict is sufficiently widespread or systematic to speak of enslavement as a crime against humanity, this is relevant. Traffickers in Libya and Italy, who make use of the migration crisis, can then be prosecuted for enslavement as a crime against humanity. Then, what about the situation when a refugee flees from conflict and arrives at a destination country by his/her own means? Would a trafficking situation in the destination country then still be considered as related to conflict, since the person would not even be in the destination country if it were not for the conflict? While the victims' vulnerable position might be conflict-related, the perpetrators generally have no connection with the conflict anymore. Yet, on the other hand, perpetrators make, most of the time, deliberate use of the consequences of the conflict, by exploiting people who fled and are in a vulnerable position. Therefore, in these situations, THB should be considered as a stand-alone crime. The nexus with the conflict seems to end when the perpetrators are no longer linked, directly or indirectly, to the conflict anymore, although they do benefit from the conflict-related vulnerability of the victims.

6. Sexual Violence, Legal Labelling and their Impact on Wellbeing

Why do we bother so much to determine when a situation can be considered as conflict-related sexual violence, including trafficking in persons, or when trafficking can be considered as a stand-alone crime? For whom does this actually matter? Sexual violence has long-term consequences for the victims' wellbeing. At the very least, it impacts one's sense of safety and worldview. In addition, sexual violence may have serious physical and mental health consequences requiring treatment. In principle, victims should have access to (mental) health care for these problems. Currently, the legal labelling determines whether people have access to such services. It legally matters how (and where) certain acts can be prosecuted, and what type of protection is awarded to victims. But it also matters socially/psychologically, for the victims, that the terminology used to define what has happened to them matches their experiences.

6.1. Recognition

It may be clear that all aforementioned psychological aspects around sexual violence are common human phenomena, and that emotional responses to abuse are universal. CRSV and THB with the purpose of sexual exploitation are connected phenomena, not only by their intertwined appearance but also by their similar destructive impact on a victim's psychological balance. Both act through humiliation, the shattering of a person's self-determination, the brutal violation of personal boundaries, and a fierce attack on an individual's

feeling of identity. It is not hard to imagine how a disturbed feeling of identity and a distorted worldview may have a negative impact on psychological wellbeing and social functioning. Emotional sequalae are severe and long-lasting, and urge for attention, to start with recognition of victimhood with respect to both kinds of sexual violence. The recognition of harm from sexual violence can mean an important first step to recovery.

6.2. Labeling of the Crime (legal definitions) and access to rights

One of the reasons why (legal) labeling matters is that there are different rights attached to a situation being considered conflict-related sexual violence (not being trafficking) and human trafficking. While there is no such thing as an international CRSV convention, the trafficking framework is well defined and offers (in Europe even far-reaching) protection for victims, beyond protection during criminal proceedings. The Palermo Protocol is ratified by virtually all States and includes specific provisions aimed at protecting victims.[48] Linked to the criminal proceedings, the Palermo Protocol includes the right to information, the right to participation, and the right to compensation.[49] Further, it urges States to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including appropriate housing, medical, psychological and material assistance, counselling and information in a language that a victim can understand and employment, educational and training opportunities. In providing these protective mechanisms, States are required to take into account the age, gender and special needs of victims.

After the adoption of the Palermo Protocol in 2003, the protection of THB victims has been elaborated further by the United Nations Human Rights Office of the High Commissioner, as the Palermo Protocol was criticized for its criminal justice response, aimed at prosecuting the perpetrators, rather than a human rights based approach, which puts the victim at the center of any credible action and thus requires an analysis of human rights violations in the trafficking cycle. Based on the role and obligations of States under international human rights law, the OCHR (2002) developed 'The Recommended Principles on Human Rights and Human Trafficking'. The subsequent anti-trafficking documents adopted in Europe have incorporated this human rights-based approach to trafficking, including far-reaching protective mechanisms for victims. First with the adoption of the Council of Europe's Convention on Trafficking and

48 Currently 173 States have ratified the Palermo Protocol, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en.

49 Article 6 sub 2 and sub 6 Palermo Protocol.

later, for EU countries, with the adoption of the Framework Decision of the EU, which was replaced by the EU Directive on trafficking in 2011.

Let us come back to the example of Blessing, who was exploited both in the conflict zone and Italy, and then managed to escape her situation and ask for asylum in the Netherlands. As soon as there was an indication, based on her story, that she was a presumed victim of trafficking, she was entitled to a temporary residence permit, a place in a shelter for victims of trafficking as a third country national, and access to medical and psychological support. This was the case even though the exploitation did not take place in the Netherlands.[50] If, however, her story had indicated that she had been a victim of sexual violence during the conflict, which cannot be considered trafficking in human beings, these protective mechanisms on the national level would not, or rarely, have been available.[51]

6.3. The importance of (legally) labeling the crime for victims?

There is little empirical research available on how victims of CRSV and THB really think about how the crimes committed against them are legally labeled. Some anecdotal evidence seems to indicate that to a certain degree the labeling of the crimes does matter to victims. For example, a Rwandan victim of sexual violence of the 1994 Genocide against the Tutsi held that she was shocked to find out that the violence committed against her was labeled by the Rwanda Tribunal Judges as a crime against humanity rather than genocide.[52] Furthermore, it is not without reason that for centuries women's and human rights organizations have fought hard to have CRSV recognized as crimes rather than by-products of war or criminalized under vaguely formulated provisions such as 'outrages upon personal dignity', not doing justice to the harms suffered by the victims of these crimes at all.[53] Yet, it is still a different question altogether whether today's specific sexual violence crimes (such as rape and sexual slavery) or non-specific sexual violence crimes (such as enslavement) do justice to victims

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50 It needs to be indicated that when your trafficking situation occurred outside of the Netherlands, this might form an obstacle to building a criminal case against any person implicated in the crime. As the protection is only temporarily not linked to the criminal case, during the reflection and recovery period of 30 days, after that the case might be dismissed and the access to support ended.

51 Note that on the *international* level, before the ICC, where some victims of CRSV can participate or appear as witnesses in the proceedings, certain rights are granted to them, including protection, participation and reparation. In addition, assistance (e.g. socio-economic or psychological support) can even be provided to victims outside the case against a particular accused.

52 U. Kaitesi, *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts* (Cambridge/Antwerp/Portland: Intersentia, 2013), 174.

53 K. Askin, 'Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward', in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. A. de Brouwer et al. (Antwerp: Intersentia, 2013), 21-64.

of CRSV and THB. The specific sexual violence crimes recognize the sexual nature of the crimes but the non-specific sexual violence crimes may not. There is a risk that when charging CRSV under the latter category, such as enslavement as a crime against humanity, the sexual violence components are overlooked by the Prosecutor or Judges.[54] However, when, for instance, the sexual aspects of the enslavement come explicitly to light in the final Judgment, this may provide sufficient 'justice' for victims of these crimes. In order to answer this question properly – to what extent would a CRSV, incorporating THB, judgement be adequately satisfying the victims? – it should therefore be asked to a significant number of actual victims of these crimes. This does not seem to have been done so to date.

7. Concluding Remarks and the Way Forward

During conflict the climate of impunity and the extreme contrast between the mighty and the powerless set an optimal setting and inevitable ground for sexual violence. In general, but in particular during conflict, a victim of sexual violence can be at risk of similar or other forms of sexual revictimization. As outlined above, contextual factors, such as (post) conflict, may add particular dynamics to the experience of sexual violence, but retain its intrinsically gruesome nature and negative emotional sequelae. Therefore, from a psychological viewpoint, in line with the 2018 UN Secretary-General report, there is no justification for a clear-cut distinction between CRSV and THB for purposes of sexual exploitation in conflict. Based on the few information available, it seems that for some victims, recognition of what has been done to them is important; recognition in the sense that their experiences are explicitly recognized in the crimes for which the accused are charged and prosecuted or in the legal judgements explaining their experiences. For most, if not all victims, whether CRSV or THB related, access to rights that comes with the recognition of their victimhood is definitely very important. More quantitative and qualitative research will need to be done to better understand the victims and survivors' perspective on the nexus of CRSV and THB and its legal and psychological consequences.

54 H. Zawati. *Fair labelling and the dilemma of prosecuting gender-based crimes at the international criminal tribunals* (Oxford: Oxford University Press, 2014); A. de Brouwer. *Supranational criminal prosecution of sexual violence: The practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2005).

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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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II. Prevention of CRSV and THB for sexual exploitation in times of conflict

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Strengthening Prevention of Conflict-related Sexual Violence and Trafficking in Human Beings: Saving the Potential of the Women, Peace and Security Agenda with the Human Rights-Based Approach

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Abstract

The Women, Peace and Security (WPS) Resolutions of the United Nations Security Council are an essential part of the international framework to prevent conflict-related sexual violence (CRSV) and trafficking in human beings (THB). However, the WPS Resolutions' potential is not fully realized, as they are not sufficiently implemented by States. This article argues that the struggles with the implementation of the WPS Resolutions are substantially caused by the unresolved uncertainties about their legal status, their scope of applicability and the mechanisms of their implementation. It is discussed that a human rights-based approach to the WPS Resolutions can resolve these ambiguities, thus save the potential of the WPS Resolutions to strengthen prevention of CRSV and THB. Building on the concept of positive correlation between peace and realization of women's rights, the article defends the view that States' obligations included in the WPS Resolutions are binding and applicable in peacetime, as they overlap with the obligations established by international human rights treaties. These findings give ground to the further argument that implementation of the WPS Resolutions can and should be enhanced through the mechanisms of the UN Human Rights System as well as through the increased involvement of civil society organizations.

1. Introduction

It seems impossible today to discuss prevention of conflict-related sexual violence (CRSV) and trafficking in human beings (THB) without making reference to the Women, Peace, and Security (WPS) Agenda of the United Nations (UN). Since its formal inauguration with UN Security Council's Resolution 1325 (hereafter Resolution 1325) in October 2000, the WPS framework has grown significantly. Together with seven subsequent resolutions on the

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topic (hereafter WPS Resolutions),[1] the landmark Resolution 1325 sets the standard of a gender perspective in international peace and security governance, urges for protection from sexual violence, empowering women through equal representation and tackling gender inequalities. While the content of the WPS Resolutions did not avoid scholarly criticism,[2] one could say that the WPS Agenda has the normative potential to bring positive change and contribute to the prevention of CRSV and THB.[3]

However, reality did not meet the expectations and the UN and its Member States have been widely criticized for failing to implement the WPS Resolutions.[4] Statistics show that the objectives of the WPS Agenda are far from being globally met,[5] and the latest conflicts reveal the continuous occurrence of sexual violence.[6] The questions of how to tackle and prevent these atrocities remain open and so does the question of how to enhance the implementation of the WPS Resolutions and use them as tools to increase the prevention of CRSV and THB.

The aim of this article is to engage in the debate on these questions. The author's preliminary argument, which will be supported by the analysis of section 2, is that the WPS Resolutions can contribute to the prevention of CRSV and THB, but this potential is currently not fully reached because the WPS Resolutions are not sufficiently implemented by the States. Section 3 of the ar-

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1 UN Security Council Resolution 1325 (S/RES/1325), 31 October 2000; UN Security Council Resolution 1820 (S/RES/1820), 19 June 2008; UN Security Council Resolution 1888 (S/RES/1888), 30 September 2009; UN Security Council Resolution 1889 (S/RES/1889), 5 October 2009; UN Security Council Resolution 1960 (S/RES/1960), 16 December 2010; UN Security Council Resolution 2106 (S/RES/2106), 24 June 2013; UN Security Council Resolution 2122 (S/RES/2122), 18 October 2013; and UN Security Council Resolution 2242 (S/RES/2242), 13 October 2015. For a practical overview of key issues covered by each Resolution see: P. Kirby & L. Shepherd, 'Reintroducing Women, Peace and Security', *International Affairs* 92.2 (2016): 251, Table 1.

2 See e.g., D. Otto, 'Women, Peace and Security: A Critical Analysis of the Security Council's Vision', in *The Oxford Handbook of Gender and Conflict*, eds. F. Aoláin et al., (United States of America: Oxford University Press, 2018); I. Renzulli, 'Women and Peace: A Human Rights Strategy for the Women, Peace and Security Agenda', *Netherlands Quarterly of Human Rights* 35.4 (2017): 210-229.

3 However, it must be acknowledged that the WPS Resolutions improves the prevention of CRSV primarily for women and girls, which constitutes a noteworthy limitation of their potential. More and more studies reveal that there is a lack of response to CRSV against men and boys and this issue is marginalized. See, e.g., E. Gorris, 'Invisible Victims? Where Are Male Victims of Conflict-Related Sexual Violence in International Law and Policy?', *European Journal of Women's Studies* 22.4 (2015): 412-27.

4 See, e.g., J. True, 'Explaining the Global Diffusion of the Women, Peace and Security Agenda', *International Political Science Review* 37.3 (2016): 307-23; J. Irvine, 'Leveraging Change: Women's Organizations and the Implementation of UNSC Resolution 1325 in the Balkans', *International Feminist Journal of Politics* 15.1 (2013): 20-28.

5 UN Women, 'Facts and Figures: Peace and Security', www.unwomen.org/what-we-do/peace-and-security/facts-and-figures, accessed 20 July 2018.

6 UN Security Council, *Report of the Secretary-General on Conflict-Related Sexual Violence* (S/2018/250), 23 March 2018.

ticle will argue that these implementation challenges are mainly caused by unresolved ambiguities around the WPS Resolutions. Not only is their legal status unclear, but also which States should implement them and how they should do it.

The analysis of section 4 will turn to the central argument of this contribution, the claim that a human rights-based approach to the WPS Resolutions can resolve the problems highlighted in section 3 and, consequently, realize the WPS Agenda's potential to contribute to the prevention of CRSV and THB. The choice of looking at the WPS Agenda from a human rights perspective is not new.[7] However, there has not been enough discussion on its benefits and why it should be exercised. The goal of the article will be to fill this gap as well as to suggest how States can ensure the human rights-based implementation of the WPS Resolutions.

2. WPS Resolutions as Tools of Prevention of Conflict-related Sexual Violence and Trafficking in Human Beings

Building on Resolution 1325, all the eight WPS Resolutions are focused on the overall objective of promoting and protecting women's rights in conflict and post-conflict settings. The issues covered by the WPS Resolutions are connected to the women's participation, representation and empowerment and the prevention of, protection from, and recovery after CRSV.[8] While each of the WPS Resolutions refers to the discussed crimes in at least one provision, five of them are almost entirely focused on the issue of CRSV.[9] Although the WPS Resolutions do not mention THB specifically, they continuously refer to 'all forms of sexual violence in situations of armed conflict'.[10] Therefore, THB committed in conflict-related situations for the purpose of sexual exploitation should be considered as included under the scope of CRSV by the WPS Resolutions, on the basis of the nexus between THB and CRSV, established by the UN Security Council Resolutions 2331 (2016) and 2388 (2017), and repeated by the UN Secretary General in his 2018 report on CRSV.[11]

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7 UN Security Council, *Report of the Secretary-General on Women, Peace and Security* (S/2017/861), 16 October 2017, para. 72; UN Women, *The Global Study on the Implementation of The UN Security Council Resolution 1325* (New York, 2015), 346.

8 Kirby & Shepherd, 'Reintroducing Women, Peace and Security', 249-54; Otto, 'Women, Peace and Security', 4.

9 UNSC Res. 1820; UNSC Res. 1888; UNSC Res. 1960; UNSC Res. 2106; and UNSC Res. 2242.

10 See e.g., UNSC Res. 1325, para. 10.

11 UNSC, *Report of the SG on CRSV* (2018), para. 2. For the discussion on the nexus see R. Ghafoerkhan, W. Scholte & E. De Volder, 'The Nexus between Conflict-Related Sexual Violence and Trafficking for Sexual Exploitation in Times of Conflict' in this special issue.

The WPS Agenda repeatedly reaffirms that 'rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide',[12] and to do so, refers to international law, including the Geneva Conventions and its Additional Protocol, the Refugee Convention, the Rome Statute of the International Criminal Court and the statutes of the ad hoc international criminal tribunals. In this regard, the WPS Resolutions do not establish new obligations for their addressees – they only recall the norms established in other instruments, stress their importance for the context of WPS, and emphasize that States should follow international obligations applicable to them. This confirmation of existing duties is apparent especially in the field of protection from sexual violence during armed conflicts and prosecution of CRSV crimes. The WPS Resolutions stress that the latter need to be excluded from amnesty provisions, investigations of alleged abuses must be timely and all States should prosecute perpetrators of CRSV[13], in line with the Security Council's commitment to consider sexual violence crimes when establishing and renewing state-specific sanction regimes.[14]

However, this is just the foundation that the WPS Resolutions build on. The operational value of the WPS framework lies in the detailed formulation of positive measures, which States should adopt in order to fulfill their international obligation of protecting women and girls from all forms of sexual violence, in case of the eruption of conflict. For instance, Resolution 1820 and Resolution 1960 specify that the appropriate measures from the field of prevention should include, among others:[15]

- upholding disciplinary rules within the military structures,
- training military and security forces on prohibition and prevention of CRSV,
- tackling stereotypes that fuel CRSV,
- protecting women in case of imminent threat of sexual violence,
- enforcing prohibition of CRSV in military codes of conducts.

These measures are mere suggestions and the WPS Resolutions leave States the choice of implementing other positive means in order to achieve the objective of preventing CRSV. However, the instruments stress that the measures should be, at a minimum, 'specific and time-bound'.[16] With this regard, the WPS

12 See e.g., UNSC Res. 1820, para. 4; UNSC Res. 1888, para. 1, THB, included here in 'other forms of sexual violence', can constitute the crime against humanity of enslavement or the war crime of sexual slavery, on the basis of Art. 7(2)(c), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi) of the Rome Statute of the International Criminal Court.

13 UNSC Res. 1325, para. 11.

14 UNSC Res. 1820, para. 5.

15 UNSC Res. 1820, para. 3; UNSC Res. 1960, para. 5.

16 Ibid.

Resolutions undoubtedly enrich the other instruments of the international legal framework and offer the practical dimension of specificity.

However, the core focus and unique features of the WPS Agenda are meant to impact the prevention of CRSV before an armed conflict occurs. The fundamental principle behind the whole WPS framework is that sexual violence which occurs during armed conflicts is inseparably connected to pre-existing gender inequalities. Consequently, prevention from the first cannot be achieved without targeting the latter. This focus on gender inequalities, seen not only as a root cause of conflict-related sexual violence but also as a root cause of conflicts as such,[17] marks the international significance of the WPS Agenda. Although it is not a controversial concept today that CRSV can be a manifestation of structural gender-based discrimination,[18] and studies have revealed a positive correlation between gender equality and the stability of peace,[19] the novelty which WPS Resolutions offer lies in translating these revelations into a responsibility to act.

Therefore, States are expected to combat gender inequalities and to empower women and girls during peace, and as such to (indirectly) prevent CRSV and THB. As in the case of conflict-related duties discussed before, these obligations are not new but reflected in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[20] While this synergy between the CEDAW and the WPS Agenda will be discussed in detail in section 4.1, it is important to mention here that each of the WPS Resolutions[21] urges States to ratify the CEDAW and its Additional Protocol, or to comply with them if already a party thereto. Nevertheless, the reaffirmation of existing international obligations of States is again followed by the establishment of an open, yet broad, catalogue of specific measures, which States should implement in order to meet the expected goals. With regard to prevention from CRSV through women's empowerment, the WPS Resolutions urge States, for instance, to guarantee gender equal representation at all decision-making levels in the processes of conflicts' resolution[22]; support women's leadership in bodies related

17 See e.g., UNSC Res. 2242, preamble.

18 UNSC, *Report of the SG on CRSV* (2018); Renzulli, 'Women and Peace', 211-213. However, it should also be acknowledged that some academics state that gender inequalities cannot explain why the crimes of CRSV occur in some situations but not in others, and they should be considered as results of perpetrators' individual choices. See e.g., D. Cohen & R. Nordås, 'Sexual Violence in Armed Conflict: Introducing the SVAC dataset, 1989-2009', *Journal of Peace Research* 51.3 (2014): 418-428, after S. Davies & J. True, 'Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In', *Security Dialogue* 46 (2015): 2.

19 Institute for Economics and Peace, *Positive Peace Report 2017* (Sydney, October 2018).

20 UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination Against Women', (UN Treaty Series, vol. 1249), 18 December 1979.

21 See e.g., UNSC Res. 2242, preamble.

22 UNSC Res. 1325, para. 1.

to maintenance of peace and security;[23] or to ensure that development, coordination, and implementation of policies and programs are inclusive.[24] The application of these directives would not only guarantee compliance with the general duties under the CEDAW, to 'condemn discrimination of women in all its forms (...) by all appropriate means'.[25] It would also bring the particular value of lowering the risk of CRSV crimes, in case of the eruption of conflict.

In conclusion, both the specific, time-bound, positive measures which States are expected to implement to prevent sexual violence in conflict situations and the responsibilities related to combating structural gender inequalities which the instruments include, are not new international obligations. Nevertheless, they certainly enrich, specify and operationalize the international legal framework on the prevention of CRSV and THB. This would imply that when the WPS Resolutions are fully implemented by all States, significant effort will be undertaken at the national level to prevent these crimes. However, as will be discussed in more detail in the next section, the universal applicability of the Resolutions is not uncontested – neither is the legal status of these instruments. Therefore, the universal responsibility of States to realize the abovementioned objectives is still a matter of debate.

3. Highlighting the Ambiguities

3.1. Uncertainty about the Legal Status of the WPS Agenda

Since the adoption of Resolution 1325, the legal status of the document, and consequently of all the following resolutions of the WPS framework, has been unclear.[26] The lack of agreement on the issue is not a surprise, as the question whether the WPS Resolutions create legally binding obligations for States echoes the highly controversial issue of the law-making authority of the UN Security Council.[27] Although it is explicitly stated in Article 25 of the UN Charter that the UN Member States are obliged 'to accept and carry out the decisions of the Security Council in accordance with the Charter', the acceptance of a general law-making competence of the Security Council

23 UNSC Res. 2242, para. 1.
24 Ibid.
25 CEDAW, Art. 2.
26 A. Swaine, 'Globalizing Women, Peace and Security: Trends in National Action Plans', in *Rethinking National Action Plans on Women, Peace and Security,NATO Science for Peace and Security Series*, ed. S. Aroussi (Amsterdam: IOS Publishing, 2017), 9.
27 T. Tryggestad, 'Trick or Treat? The UN and Implementation of Security Council Resolution 1325 on Women, Peace and Security', *Global Governance* 15.4 (2009): 544-45.

raises fair concerns. A number of scholars[28] have pointed out that the Council is a highly politicized body, neither checked nor balanced by any other entity. Therefore, the increasing amount of quasi-judicial and quasi-legislative actions that the Security Council undertakes raises questions about the interpretation of Article 25 and its scope of applicability. While it is not contested that on the basis of Article 39 of the UN Charter, in situations considered a threat to international peace and security, the Council has the competence to adopt coercive resolutions binding for the UN Member States, this competence to become 'a global executive *sans pareil*'[29] is argued not to be a rule, but an exception. However, since the late 1990s[30] the sphere of the Council's decision-making has broadened significantly, which resulted in new forms of resolutions referred to as thematic or declaratory. The legal power of these instruments, with the WPS Resolutions among them, is, on the one hand, supported by the general obligation of Article 25 and the global authority of the Security Council, and on the other hand, opposed by the abovementioned concerns to accept the fact, that the political organ, dominated by five permanent members with a veto power, can create universally binding international law without checks and balances.

It must be stated here that although the issue of reviewing the sources of international law is a very present discussion in legal scholarship,[31] what remains the basis of the sources of public international law is Article 38(1) of the Statute of the International Court of Justice. However, although the resolutions and decisions of international organizations' organs are not included in the said provision, they can become binding sources of law for organizations' members, if they agreed for that in the accession instrument. As the UN Charter is a treaty with binding effect, and the Security Council and its prerogatives are established by the Charter, the Council has the competence to create *hard law* for the UN Member States, but only within the limits of its authority delineated in the Charter. This brings the reasoning back to the interpretation of Article 25 and to the question of which resolutions of the Council are legally binding, and which are not.

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28 See e.g., J. Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency', *Northwestern Journal of Human Rights* 6.1 (2008): 24; M. Wood, 'The Interpretation of Security Council Resolutions, Revisited', *Max Planck Yearbook of United Nations Law Online* 20.1 (2017): 1-35; A. Tachou-Sipowo, 'The Security Council on Women in War: Between Peacebuilding and Humanitarian Protection', *International Review of the Red Cross*, 877.92 (2010): 212-13.

29 Schott, 'Chapter VII as Exception', 29.

30 Tryggestad, 'Trick or Treat?', 544.

31 See e.g., J. Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?', in *Informal International Lawmaking*, eds. J. Pauwelyn, R. Wessel & J. Wouters (Oxford: Oxford University Press, 2012), 125-61.

One of the approaches to the problem supported by the Advisory Opinion of the International Court of Justice is that the legal effect of the Security Council's resolutions should be assessed on a case specific-level, by analysis of certain features of a particular instrument. The Court has stated that:

'The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.'[32]

While this view makes a strong argument in the theoretical debate on the law-making authority of the Council, it does not resolve the ambiguities around the legal effect of the WPS Resolutions particularly.[33] The discussion on the latter stays open and different scholars have formulated rather opposite opinions on the legal status of the framework.[34] What seems to be a dominant view though – and most probably evolving from the remaining uncertainties – is that the WPS Agenda consists of *soft law* instruments, building a policy framework, nevertheless with a normative value.[35] Although this approach partially solves the problem on the level of definitions, it does not clarify how to ensure the implementation of the WPS Resolutions. As will be argued in section 4, the human rights-based approach has the potential to resolve the remaining ambiguities.

3.2. Uncertainty about the Scope of Application of the WPS Agenda

As discussed in part 2, the WPS Agenda is multidimensional and touches upon several thematic issues, related not only to conflict and post-conflict situations but also to prevention of CRSV during times of peace. The measures which States should implement during peacetime are addressed in

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32 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *I.C.J. Reports*, 21 June 1971, 16.

33 Swaine, 'Globalizing Women, Peace and Security', 9; M. Adamczewska, 'Transforming Commitment into Compliance: Realizing the Women, Peace and Security Agenda in the United Nations System' (unpublished thesis, 2018. For more information contact the author at mil-aadamczewska@gmail.com.

34 A. Barrow, 'Operationalizing Security Council Resolution 1325: The Role of National Action Plans', *Journal of Conflict and Security Law* 21.2 (2016): 251; C. Fuijo, 'From Soft to Hard Law: Moving Resolution 1325 on Women, Peace and Security Across the Spectrum', *Georgetown Journal of Gender and the Law* 9.1 (2008): 231.

35 Swaine, 'Globalizing Women, Peace and Security', 9-10.

the WPS Resolutions to '[UN] Member States',[36] which could seem to leave their universal applicability uncontested. Although it is indeed a dominant view that the WPS Resolutions are addressed to all UN Member States, whether it is a conflict-related situation or not, there are nevertheless some dissenting voices in the debate.

Building on the argument that the Security Council's decision-making powers should not go beyond situations directly related to threats or breaches of international peace and security,[37] it can be raised that the WPS Agenda is addressed only to the States in conflict situations or post-conflict phase. The opinion of the limited applicability of the WPS Resolutions is continuously brought up at the UN Security Council by Russia, which refuses to implement the WPS Agenda, and argues that even for conflict-affected States, the national implementation is still voluntary.[38]

Although being in strong minority, the abovementioned views have considerable consequences in practice. If a permanent member of the UN Security Council refuses to engage in the implementation process, the matter clearly stays open to contestation and dependent on the political will of States. And Russia is not the only country to blame. It can also be argued that in the course of the WPS Agenda's development, it was not stressed enough that the Resolutions are applicable also during peace, and that only recently the UN has started to strongly advocate for this approach.[39]

3.3. Uncertainty about the Implementation of the WPS Agenda

In line with the growing recognition of the WPS Agenda on the one hand, and with the increased demand for some kind of indicators of States' commitment on the other,[40] the National Action Plans (NAPs) on WPS have gained significant international attention in the recent years. As national policy instruments which incorporate the WPS Resolutions into domestic jurisdictions, they give national expression of the objectives of the WPS Agenda and can serve as States' commitments of engagement in the implementation process.

Although the first reference to NAPs was made already in 2002 in a Security Council Presidential Statement, it was not until 2015 that they were incorporated in the operational part of one of the WPS Resolutions, namely Resolution 2242. Before that, merely brief references to the NAPs have been made in preambular paragraphs of Resolution 1889 (2010) and Resolution 2122 (2013). Even when

36 See e.g., UNSC Res. 1325, para. 1; UNSC Res. 2242, para. 1.
37 See section 3.1.
38 Swaine, 'Globalizing Women, Peace and Security', 11-12.
39 Renzulli, 'Women and Peace', 211.
40 Swaine, 'Globalizing Women, Peace and Security', 9-10.

included in the operative part, adoption of a NAP has been nevertheless far from a strong directive. On the contrary, the Security Council only '[w]elcome[d] the effort of Member States to implement [R]esolution 1325 (2000), including the development of national action plans.'[41] The weak and non-directive language leaves no doubt that the WPS Agenda itself does not introduce NAPs as an obligatory implementation tool. Therefore, its adoption stays under the full discretion of States and dependent on their political will and policy interests.

Nevertheless, the number of NAPs adopted by the UN Member States has been continuously growing and reached the number of 74 (38% of the total of UN Member States) in June 2018.[42] The instruments have been optimistically presented in the literature as 'major mechanisms of policy diffusion for the WPS agenda',[43] 'vehicles to drive the implementation of SCR1325'[44] and a 'remedy to the implementation deficit'.[45] On the other hand, they are at the same time subject to ongoing examinations and critique.[46]

The extensive engagement of different actors in the development and examinations of NAPs, accurately called a 'NAP Industry in itself',[47] can also be seen as a reflection of the uncertainties surrounding these instruments. In the absence of clear and coherent guidelines on NAPs, the number of opinions, recommendations and suggestions, both from scholars and practitioners, is on the rise.[48] The fragmentation of ideas on the appropriate adoption and implementation of a NAP is reflected in the reality of their global diversity. The existing NAPs are very far from representing any standardization: they vary with regards to focus, content, form, and structure. While in some countries they are considered part of foreign policymaking (usually in the Western States), in others (usually in States in the conflict or post-conflict phase) as a nationally-oriented issue. Some NAPs (like Ireland's NAP of 2015[49]) are comprehensive and aim to reflect all the issues covered by the WPS Resolutions, while others (like the Norwegian NAP of 2015)[50] are very selective or even focused solely on

41 UNSC Res. 2242, para. 2.
42 PeaceWomen 'National Action Plans for the Implementation of UNSCR 1325 on Women, Peace, and Security', http://www.peacewomen.org/member-states, 27 September 2018.
43 True, 'Explaining the Global Diffusion of the Women, Peace and Security Agenda', 309.
44 Barrow, 'Operationalizing Security Council Resolution 1325', 273.
45 Swaine, 'Globalizing Women, Peace and Security', 8.
46 See e.g., S. Aroussi (ed.) *Rethinking National Action Plans on Women, Peace and Security* (Amsterdam: IOS Press, 2017).
47 Swaine, 'Globalizing Women, Peace and Security', 23.
48 See e.g., Aroussi, *Rethinking National Action Plans on Women, Peace and Security*; Z. Lippai & A. Young, *Creating National Action Plans: A Guide to Implementing Resolution 1325* (Inclusive Security, 2017); PeaceWomen, 'National Action Plans for the Implementation of UNSCR 1325 on Women, Peace and Security'.
49 Government of Ireland, *Ireland's Second National Action Plan on Women, Peace and Security 2015-2018* (Dublin, 2015).
50 Norwegian Ministries, *National Action Plan Women, Peace and Security 2015-18* (Oslo, 2015).

the development assistance for specific States. Moreover, only 52% of existing NAPs include any reporting or reviewing mechanism, and as much as 77% of them do not include any budget allocated for its realization.[51]

3.4. Saving the Potential of the WPS Agenda

The previous section has shown the implementation challenges (the remaining uncertainties about their legal status, their scope of applicability and the mechanisms of their implementation) which the WPS Resolutions are facing. It is contested whether the WPS Agenda consists of binding obligations or guiding principles and although States' duty to comply with the WPS Resolutions derives from Article 25 of the UN Charter, the instruments are nevertheless dominantly perceived as *soft law*. Therefore, the scope of applicability and expected ways of implementation of the WPS Resolutions can be contested and interpreted in different ways. Consequently, the measures to prevent CRSV introduced by the WPS Agenda are not incorporated by States in their domestic policies as they should be, which has impacted the potential of the WPS Resolutions to enhance the prevention of CRSV and THB in national policies and laws. To remedy this, there is a need for a coherent conceptual approach to the WPS Agenda, which could resolve the remaining uncertainties, enhance the implementation of the Resolutions and use their capacity to improve the prevention of CRSV in domestic policies. The remaining part of the article will argue that the human rights-based approach can fulfill this role.

4. The Solutions Offered by the Human Rights-Based Approach

The idea of looking at the WPS Agenda from a human rights perspective is not new – it has been proposed and even highly recommended by the UN Global Study on the implementation of Resolution 1325[52] and by the UN Secretary-General in his annual reports on the issue.[53] Furthermore, this 'conceptual framework'[54] is more widely used in international development programs and humanitarian policies, following the premise that they should be planned, implemented and evaluated with consideration for international

51 PeaceWomen, 'National Action Plans for the Implementation of UNSCR 1325 on Women, Peace and Security'.
52 UN Women, *The Global Study*, 350.
53 UN Security Council, *Report of the Secretary-General on WPS*, para. 72.
54 UN Development Group – Human Rights Working Group, 'HRBA Portal – What Is a Human Rights-Based Approach?', https://hrbaportal.org/faq/what-is-a-human-rights-based-approach, accessed 20 August 2018.

human rights standards. This trend is complemented by the scholarly view that International Humanitarian Law does not surpass International Human Rights Law, thus that the latter is applicable also in the time of conflict.[55] Consequently, each policy or legal framework can be reviewed through human rights lenses, to see which rights and corresponding obligations are related to the framework at stake. Several advantages of this perspective can be identified. Firstly, the human rights-based approach to policy or *soft law* instruments can offer them the normative support of international human rights treaties. Secondly, it can clarify States' responsibility and provide instruments for holding them accountable. Thirdly, the approach guarantees that the fundamental values of human rights, for instance, non-discrimination, are put at the centre of policies and programs, which is argued not only to be morally correct but also to bring better realization of the policy objectives.[56]

This article will adopt the above-mentioned advantages to the case of the WPS Agenda. It will discuss the synergies between the international human rights system and the WPS Resolutions as well as the practical consequences of this approach to the Agenda's implementation struggles. It will be argued that the Agenda should be seen as consisting of women's human rights, as this perspective can back the WPS Resolutions with legality and consequently, resolve the remaining ambiguities about their legal effect, applicability, and implementation.

4.1. Clarifying the Legal Status - the Synergy with the Human Rights System

Despite the ongoing discussion on the obligations of States under Article 25 of the UN Charter to comply with all the decisions of the UN Security Council, the years since the adoption of Resolution 1325 has shown that it is dominantly considered as a *soft law* instrument.[57] While the issue of reviewing the sources of international law is presently discussed in legal scholarship,[58] it is uncontested that by Article 38 of the Statute of the International Court of Justice, treaties are, and will be, the source of binding obligations for States. Therefore, a human rights-based approach based on treaty-based obligations of States can offer normative support to the WPS Resolutions, and clarify the legal status of obligations included in the latter. The analysis of how

55 S. Sivakumaran, 'International Humanitarian Law', in *International Human Rights Law*, ed. D. Moeckli (Oxford: Oxford University Press, 2014).

56 UN Development Group – Human Rights Working Group, 'HRBA Portal – What value does a human rights-based approach add to development?', https://hrbaportal.org/faq, accessed 20 August 2018.

57 See section 3.1.

58 See e.g., Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?'.

the WPS Resolutions overlap with the International Human Rights Treaties, especially with the CEDAW, supports the argument that the obligations of the WPS Agenda are binding for 189 State Parties to the CEDAW[59] and other treaties at stake.[60] Consequently, also the monitoring and enforcement mechanisms of the UN Human Rights System, safeguarding compliance with the human rights treaties, can contribute to fostering the implementation of the WPS Resolutions. Due to the scope of this article, the main focus here will be on the synergy between the WPS Agenda and the CEDAW, as well as the role of the CEDAW Committee deriving from it. However, to highlight that the relationship between the WPS Resolutions and international human rights framework is broader than their crossover with the CEDAW, reference will also be made to the Universal Periodic Review, being the primary mechanism of the UN Human Rights Council to assess the situation of overall compliance with human rights in each UN Member State.

While the CEDAW obliges States in Article 6 to suppress all forms of trafficking in women, neither violence against women in general, nor conflict-related sexual violence are specifically mentioned in a single provision of the Convention. However, the international women's rights framework has matured over the years, with a special role played by General Recommendation No. 19 of the CEDAW Committee. Adopted in 1992, General Recommendation No. 19 made it clear that all forms of violence against women (in times of peace and conflict) should be seen as a form of discrimination as defined by Article 1 of the CEDAW,[61] thus State parties to the Convention are obliged to condemn these crimes, on the basis of Articles 2 and 3. This interpretation has been confirmed by several instruments of the international women's rights framework developed over the years, like the Declaration on the Elimination of Violence against Women,[62] the Beijing Declaration and Platform for Action[63] or lately, the General Recommendations No. 35 of the CEDAW Committee.[64] Although neither General Recommendations of the UN Treaty Bodies, nor the declarations mentioned above, are binding on the basis of Article 38(1) of the Statue of the ICJ, and the CEDAW remains the only instrument on women's rights with the legal effect as such, the interpretations of the Convention consequently proposed

59 'United Nations Treaty Collection', https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en, accessed 20 September 2018.
60 For instance, Convention on the Rights of the Child or International Covenant on Economic, Social and Political Rights.
61 UN CEDAW Committee, *General Recommendation No. 19, para. 6.*
62 UN General Assembly, *Declaration on the Elimination of Violence against Women* (A/RES/48/104), 20 December 1993.
63 United Nations, *Beijing Declaration and Platform for Action* (A/CONF.177/20), 17 October 1995.
64 UN CEDAW Committee, *General Recommendation No. 35: Gender-Based Violence against Women, Updating General Recommendation No. 19* (CEDAW/C/GC/35), 14 July 2017.

by 'the most highly qualified publicists of the various nations'[65] can serve as the subsidiary source of international law. As the view that CEDAW is applicable to gender-based violence is confirmed in legal scholarship,[66] it can be stated that the Convention obliges its State Parties to condemn sexual violence – both in peacetime and situations of conflict.

However, as argued in section 2, the WPS Resolutions build on the general duty of States' to prevent sexual violence against women, but also go further, and specify which positive measures States should undertake to realize their obligations. Among them are the responsibilities related to combating structural gender inequalities, which the WPS Agenda proposes as a form of prevention from CRSV. The synergy of the WPS Resolutions and the CEDAW is thus broader than the direct obligation to eliminate discrimination in the form of sexual violence. In fact, it can be said that 'all the areas of concern addressed in those [WPS] resolutions find expression in the substantive provisions of the Convention'.[67] This view, proposed by the CEDAW Committee in General Recommendation No. 30, finds its grounds in the argument that both the CEDAW and the WPS Resolutions have the fight against gender inequality as their core objective.

The standard tool which the CEDAW Committee uses to review and urge for compliance with the CEDAW is its reporting procedure.[68] Every four years, the State parties are obliged to report what measures they have adopted in order to implement the Convention and, according to General Recommendation No. 30, they should include in their reports information on the implementation of the WPS Resolutions.[69] The CEDAW Committee can thus monitor this implementation process, as well as urge States to improve it. While the value of the reporting procedure is dependent on the involvement of States in that process, it must be nevertheless acknowledged that the Committee is doing its best to go beyond States' reports and review the real situation *on the ground*. The concluding observations on the situation in Syria[70] can serve as good example of these efforts, as the Committee based them dominantly on the demands submitted by Civil Society Organizations in their shadow reports.[71]

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65 International Court of Justice, Statute of the International Court of Justice, Art. 38(1).

66 See e.g., C. Chinkin, 'Violence against Women: The International Legal Response', *Gender & Development* 3.2 (1995): 23-28.

67 UN CEDAW Committee, *General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations* (CEDAW/C/GC/30), 1 November 2013, para. 26.

68 CEDAW, Art. 18(1).

69 UN CEDAW Committee, *General Recommendation No. 30*, para. 27.

70 UN CEDAW Committee, *Concluding Observations on the Second Periodic Report of Syria* (CEDAW/C/SYR/CO/2), 18 July 2014.

71 For the explanation of 'shadow reporting' see UN, 'NGO Participation in CEDAW Sessions', http://www.un.org/womenwatch/daw/ngo/cedawngo, 15 October 2018.

However, a lot has been said to criticize the effectiveness of the CEDAW Committee and its dependence on State Parties' fulfillment of their reporting duties.[72] The Committee is also limited in its reviewing prerogatives to the exact provisions of the Convention it monitors, which does not reflect the interdependence of human rights. Women's rights particularly need a universal and integrated approach, as they should not be regarded as a separate field of human rights, but instead, as an integrated part of each human rights convention. Enforcement of the WPS Resolutions by the CEDAW Committee can also face the risk of being regarded as a *women's issue*, thus not being treated seriously by States.[73] What can save the WPS Agenda from this opinion though, is the counter-practice of States, which have the power of influencing each other and building certain social norms in their international relations.

An excellent example of a diplomatic forum, where these standards of behavior are created towards human rights, is the UN Human Rights Council. Its monitoring mechanism, the Universal Periodic Review (UPR)[74], should be thus assessed as a possible tool to enhance compliance with the WPS Agenda which the human rights-based approach to the latter suggests. The famous quote of the Secretary-General on the role and significance of the UPR characterizes it as a mechanism 'with a great potential to promote and protect human rights in the darkest corners of the world'.[75] Indeed, the procedure engages all the UN Member States, making it possible to check and address compliance with human rights obligations even in countries which are not parties to human rights treaties. This substantial universality, being one of the fundamental principles of the UPR,[76] is relevant not only with regards to the participants in the discussions. The issues discussed are also universal. Any topic can be highlighted and raised, and any recommendation can be made for the State undergoing the review. Consequently, which topics are raised and discussed becomes much more than statistics. It can be seen as both indicator and trigger of the international importance of a particular issue.

The available statistics reveal that the UPR is not using its forum to put the spotlight on the WPS Resolutions. Since April 2008, when the first cycle of the

72 A. Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women', *Yale Journal of International Law* 14.1 (1989): 1-67.

73 J. Riddle, 'Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process Note', *George Washington International Law Review*, 34 (2002): 605-38.

74 UN Human Rights Council Resolution 5/1 (A/HRC/RES/5/1), 7 August 2007; the Resolution sets out the framework of the Universal Periodic Review.

75 UN Secretary General, 'Secretary-General's Video Message for the Opening of the Fourth Session of the Human Rights Council', https://www.un.org/sg/en/content/sg/statement/2007-03-12/secretary-generals-video-message-opening-fourth-session-human-rights, 18 July 2018.

76 Moeckli, *International Human Rights Law*, 363-64.

UPR began, until 2016 when the second cycle was completed,[77] a total of 57,686 recommendations were made.[78] Of these recommendations, 10 718 were related to the general issue of women's rights, 1177 to either the ratification of or compliance with CEDAW, and only 36 to the WPS Agenda.

It is impossible to predict if a higher number of recommendations would contribute to resolving the WPS Resolutions' implementation struggles, but there are reasons to believe so. If the WPS Agenda would be brought up at the UPR forum more often, it would get more recognition and attention, and States would have to prove that they value the WPS Resolutions, respect the obligations they include and wish to hold other States to account for their implementation. The human rights-based approach to the WPS Agenda gives ground to the argument that these obligations are binding human rights obligations of States, which also supports the call for broader engagement with the issue of their implementation at the forum of the Human Rights Council.

4.2. Confirming the Universal Applicability

Approached from the human rights-based perspective, the issue of applicability of the WPS Resolutions during peacetime gains new arguments against opponents. Since, as UN Women suggests, Resolution 1325 was 'conceived of and lobbied for as a human rights resolution',[79] it becomes clear that universal applicability of international human rights relates to the WPS framework as well. This means first and foremost that all UN Member States should have a NAP and get genuinely involved in realizing the WPS Resolutions. Further, it also means that the obligations established by these instruments are applicable during peacetime and that States are required to implement the measures of prevention irrespective of the existence of an armed conflict.

As it was indicated in section 2 of this article, the peaceful aspect of the framework is envisaged in the prevention pillar, which requires action 'before, as well as irrespectively of the likelihood of, the eruption of conflict'.[80] Prevention understood as such, refers then to both short-term strategies, preventing the immediate threat to security, and to the efforts which address the root and structural causes of conflict.

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77 The third cycle, started in May 2017 is currently ongoing, thus the statistics on recommendations are not available yet.

78 UPR Info, 'Universal Periodic Review Global Statistics on the Recommendations and Voluntary Pledges', https://www.upr-info.org/database/statistics/, accessed 18 July 2018.

79 UN Women, *The Global Study*, 15.

80 Renzulli, 'Women and Peace', 212.

Although the recognition of the positive correlation between gender equality and international peace and security is certainly not new[81] and seems to be increasing, the awareness is not reflected in actions. CRSV is regarded, as the UN Special Rapporteur on Violence Against Women has phrased it, as 'different and exceptional, as opposed to it being a continuation of a pattern of discrimination'.[82] Consequently, prevention from CRSV is dominantly discussed with regards to conflict-affected countries, as if it was a duty of wealthy donor States to support prevention in States where CRSV has recently occurred. With regards to the WPS Agenda, this approach is very much visible in the foreign policy-oriented NAPs[83] focused on development support for the other States instead of applying the WPS prevention objectives also to the internal policy context.

The human rights-based perspective, adopted in the NAPs, has the potential to overturn the abovementioned pattern. It highlights that the WPS Resolutions are universally applicable, that they consist of normative obligations already applicable to States, and puts the focus on their prevention facet, which shall be realized by all UN Member States through, inter alia, combating gender inequalities *in their own backyards*. This means, for instance, addressing gender equality in their own military structures by increasing the proportion of women, as well as educating the troops on preventing sexual and gender-based crimes. The remaining part of the article will suggest how this universal applicability could be realized in practice, through human rights-based implementation of the WPS Resolutions.

4.3. Explaining the Implementation Duties – Strengthening Prevention of CRSV and THB through the Engagement of Civil Society Organizations

With the ever increasing number of NAPs and the 'NAP industry' developed alongside of them, it is fair to say that they became the most common tool of implementation of the WPS Resolutions. To give more than empty promises, it is thus particularly important that the NAPs follow transnational standards and fulfill certain requirements. While it is a current challenge for policy-makers and scholars to define which features make these instruments effective and transformative drivers of implementation, the concept defended here is that they should incorporate the human rights-based approach to the WPS framework and put more focus on combating domestic gender inequalities. What derives from this perspective is that NAPs should include more

81 See e.g., Institute for Economics and Peace, *Positive Peace Report 2017*; Human Rights Council, *Report of the Special Rapporteur on Violence against Women* (A/HRC/26/38), 28 May 2014; UN Women, *The Global Study*, 350.

82 Human Rights Council, *Report of the Special Rapporteur on Violence against Women*, para. 66.

83 As Norwegian National Action Plan on Women, Peace and Security 2015, see section 3.3.

strategies aimed to change social norms and constructs which are at the roots of gender-based discrimination, which 'trigger violence before, during and after the war'.[84] This part aims to argue that in practice, these objectives shall be realized through the comprehensive involvement of Civil Society Organizations (CSOs).

Although the existing guidelines[85] for the adoption of a NAP highlight that the process must be based on a partnership with CSOs, their importance is still very often undervalued. States' opinions on the matter are also divided, as some countries (for example, Norway, Finland, and Denmark) conducted consultations only once the draft plans were made, while the Dutch government invited civil society stakeholders to participate from the very beginning of the planning process. The latest NAP of the Netherlands (2016-2019)[86] can therefore serve as an example of the inclusive approach to its development process and good results of the approach as such. Not only is it recognized in the instrument that WPS Resolutions shall be seen as a part of the international human rights framework but that harmful gender norms are also obstacles to sustainable peace. Consequently, the NAP formulates numerous specific activities focused on increasing gender equality and assigns them to different signatories, with governmental and non-governmental entities among them.

Although following the Dutch example (or any of the available guidelines on NAPs development) can undoubtedly result in a high-impact, inclusive and transformative plan, the creation of the NAP is when the implementation process should begin, not end. The reality is notoriously proving that States' commitments are very often no more than empty promises, which is particularly common in the field of women's rights and gender-mainstreaming policies. The role of CSOs is crucial at this stage – they serve as watchdogs, conduct monitoring activities, become the voice of the voiceless, lobby for the political will of action and step in when the government is unwilling or unable to act. The significance of CSOs in the particular case of gender-based violence has been confirmed by numerous studies,[87] with the most prominent example being the research by Htun and Weldon (2012)[88], focused on the patterns of global proliferation of national policies tackling violence against women. The authors conducted a comprehensive empirical study to check which variables had the most significant influence on the diffusion of the norms at stake, which revealed

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84 UN Women, *The Global Study*, 71.

85 See e.g., Lippai & Young, 'Creating National Action Plans'.

86 1325 Dutch NAP Partnership, *National Action Plan on Women Peace and Security 2016-2019* (The Hague, 2016).

87 S. Zwingel, 'How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective', *International Studies Quarterly* 56.1 (2012): 118-20.

88 M. Htun & S. Weldon, 'The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975-2005', *American Political Science Review* 106.3 (2012): 548-69.

that strong, independent feminist movements had the most significant impact, both time and geographical wise.[89] Moreover, what Htun and Weldon suggest in their analysis is that the influence of civil society is related to the crucial role they play in translating international norms into the local context. Therefore, it can be argued that CSOs have the potential to guarantee that the implementation of international norms *on the ground* is effective and fits local priorities and context. The development of a framework on prevention from domestic violence can serve as an example of the role played by CSOs in the process of norms' translation. As the understanding of what constitutes domestic violence significantly depends on the cultural context, the international framework on prevention of this phenomenon would not have been implemented with the researched success, if it was not for the CSOs that worked on changing the social norms and beliefs.

The above-discussed case supports the argument that civil society should be engaged not only in the development of a NAP but also, or even especially, in the process of actual realizing WPS objectives. It should be acknowledged here that this is not an unrealized wish. There are numerous examples of the involvement of CSOs in the implementation of WPS Resolutions – both studied in literature,[90] like the case of the Balkans,[91] and summarized by UN Women in the 2015 Global Study.[92] The latter revealed not only the impactful work of the organizations but also the obstacles which limit their effectiveness. The majority of responding CSOs identified the lack of resources as the biggest constraints. This does not come as a surprise, considering the fact that only 23% of 74 States which have adopted an AP until June 2018 have allocated any budget for its realization.[93]

The organizations that participated in the discussed survey further pointed out the urgency of prioritizing the preventive component of the WPS Agenda and repeatedly stressed the need for long-term, comprehensive strategies that target root causes, not the symptoms of conflicts. This call for action supports the core argument made here: the human rights-based approach to the WPS Resolutions' implementation is urgently needed. As was demonstrated, CSOs have the potential to realize this theoretical approach in practice and to guarantee that NAPs on WPS are more than empty promises. However, they cannot fulfill this role unless the States acknowledge the importance of addressing the root

89 Ibid.
90 True, 'Explaining the Global Diffusion of the Women, Peace and Security Agenda', 316.
91 Irvine, 'Leveraging Change', for the case of Bosnia and Herzegovina and Kosovo.
92 Its results —based on 317 responses from CSOs active in 71 countries and on 17 focus group discussions held in 16 countries with over 200 participants, are summarized in UN Women.
93 PeaceWomen, 'National Action Plans for the Implementation of UNSCR 1325 on Women, Peace and Security'.

causes of CRSV and THB, engage in human rights-based implementation and foremost, provide for the CSOs operational and financial support.

5. Conclusion

The WPS Resolutions of the UN Security Council are an essential part of the international framework to prevent conflict-related sexual violence and trafficking in human beings. The impact of the WPS Agenda derives not only from its historical significance of bringing gender perspective and women's rights to the forum of the Security Council but also from the normative value of the WPS Resolutions. If genuinely implemented by States, the WPS Resolutions could effectively prevent violations of women's rights in conflict settings, including CRSV against women. Yet, this implementation process is still far from meeting the expectations.

The preliminary argument of this article was that the the WPS Agenda's implementation struggles are to some extent caused by the uncertain legal status of the WPS Resolutions, as well as the other ambiguities deriving from the latter. It has been highlighted and discussed that despite the general duty of UN Member States to comply with decisions of the Security Council on the basis of Article 25 of the UN Charter, the WPS Resolutions are nevertheless dominantly considered as *soft law* instruments. Consequently, it is contested that the WPS Resolutions are applicable in peacetime and should be implemented by all the UN Member States. Neither is it clear for all States how they should implement the WPS Resolutions (through a NAP or otherwise) and what should be content and place of the NAP in the national legal system.

According to this study, these ambiguities impact the potential that the WPS Resolutions have with regards to the prevention of CRSV and THB. Therefore, it has been argued that there is a need for a consistent approach to the WPS Agenda, which will clarify the existing uncertainties and resolve some of the implementation struggles. Following the proposals already made at the international forum, the human rights-based approach has been chosen and presented here as the conceptual framework which can contribute to strengthening the role played by the WPS Resolutions in preventing CRSV and THB. To support the choice of a human rights-based perspective, the article discussed how this approach clarifies the legal status of obligations included in the WPS Agenda and how it confirms their applicability in peacetime. Furthermore, it has also been explained how the States should implement it in practice.

For women and girls,[94] the risks of becoming victims of CRVS or THB exist before the time of conflict, in the form of discrimination and structural gender inequalities.[95] The correlation between peace and the realization of women's rights, core to the WPS Resolutions approached from the human rights perspective, is reflected in the way the WPS Agenda foresees the prevention of CRSV and THB. It should start during peacetime and should be guaranteed by measures that empower, not victimize women and girls – for instance, equal access to decision-making and policy-making on security-related issues, or equal representation in the military and peace-keeping forces. Therefore, the WPS Resolutions require States to combat gender inequalities and discrimination, tackle social norms that fuel them and address in this way the root causes of conflicts and conflict-related crimes.

The human rights perspective on these (indirect) prevention measures included in the WPS Resolutions, reveals that they do not create new international obligations of States. On the contrary, they build on the norms established by international human rights treaties and enrich them with specification and operational context. Consequently, the synergy between the existing international (human rights) laws and the WPS Resolutions sidelines the debate about the resolution's legal status. The legal status of the instruments *per se* becomes irrelevant, to the extent that the norms included in them are already binding upon State-Parties to particular human rights treaties. This synergy has been discussed here primarily with regards to the CEDAW, a treaty that has almost universal ratification. Therefore, the human rights-based approach to the WPS Resolutions also confirms their applicability in peacetime and highlights the importance of applying preventive measures already during peacetime.

The remaining question that is then answered is how these theoretical advantages of the human rights-based approach could be translated into practice and contribute to strengthening the WPS Agenda. This study provided two possible pathways.

Firstly, it has been analyzed how the monitoring mechanisms of the UN Human Rights System can hold States accountable for their WPS commitments. Although the crucial role in this regard is played by the CEDAW Committee, which has already done much to call for reports on the implementation of the WPS Resolutions, the analysis revealed that there is still much space for broader engagement with the issue during the Universal Periodic Review, where States could pressure their peers to implement the WPS Agenda and consequently, confirm the international relevance of the framework.

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94 For the acknowledgment of the limitation of excluding CRSV crimes against men and boys, see footnote 3.

95 For the acknowledgement of the opposing scholarly voices, see footnote 17.

Secondly, the article defends the view that human rights-based implementation of the WPS Resolutions in the national frameworks can be realized with the significant involvement of Civil Society Organizations. By reference to other studies on the diffusion of international norms on violence against women, it has been argued that CSOs play a crucial role in translating international law to the local context, especially if, as in the case of the WPS Agenda, addressing structural gender inequalities is required. Therefore, to guarantee that NAPs follow the suggested human rights perspective, the States should involve CSOs at the very beginning of the planning process instead of consulting them at the latest stage. Moreover, next to the role of norm translators, CSOs have the proven position of both watchdogs of NAPs and their signatories, which monitor States' actions, lobby for the realization of commitments and operationalize the WPS Resolutions *on the ground*. However, they will not be able to fulfill these roles if States do not acknowledge their importance. Firstly, by offering space at the table. Secondly, by providing necessary budget.

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Q & A – The nexus between conflict-related sexual violence and human trafficking during peacekeeping missions: An insider's view

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Major General (ret)

1. Introduction

One of the key areas related to sexual violence in conflict, including human trafficking, is the prevention of these crimes. Peacekeepers in complex peacekeeping missions are confronted on a daily basis with atrocities in (post) conflict. How do they deal with situations of sexual violence in conflict, including trafficking cases, and what can they do to prevent these crimes while on the ground? Patrick Cammaert discusses from extensive and first-hand military experience how he perceives both crimes and how he thinks that Peacekeeping missions can best prevent CRSV and trafficking: by being proactive, collecting intelligence for early warning and acting upon it and by ensuring a better gender balance in peacekeeping personnel.

2. Can you elaborate on what you consider to be the similarities and differences between human trafficking and sexual violence in conflict, if any?

There are two different reasons that link conflict-related sexual violence to human trafficking. One is international terrorism. Since a couple of years ago, we see the nature of conflict changing. Conflicts are generally no longer between states, or interstate, but more intrastate, with dissident soldiers, militia's or rebels fighting the government and each other. Nowadays Jihad groups or other extremist groups are joining these actors and are operating in various parts of the world. So, we are faced with a different threat – a threat of improvised explosive devices, roadside bombs, suicide bombs – and we have never seen that in peacekeeping before, but we see it now, for example in Mali. These conflicts result in an increase of conflict-related sexual violence. The second reason for the changing nature of conflict is because of trafficking itself. Not only drugs trafficking, but in particular human trafficking, in particular women and girls. Men and boys are also victims of trafficking for instance in Libya, where people who want to cross the Mediterranean are picked up and brought back and end up becoming slaves. But there is no immediate link to sexual violence. When we talk about human trafficking of women and girls, an immediate link to sexual violence does exist. Many times, those girls and women are not used for help in the household or cleaning the house. They end up in prostitu-

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tion, pornography, pedophilia, etc. And that is where peacekeeping comes in. This is very much also on the desk of people who are deployed in a mission. For example, in Mali, there is a lot of human trafficking and a lot of trafficking in drugs. When it comes to human trafficking there is such a flow of people up to the north. Mali is a kind of central point where a lot of things come together and lawlessness is rife, with many Jihadists who are very much involved in human and drugs trafficking, and abuse women and girls, in particular sexually. That is the link and the increasing concern of the international community, including the peacekeeping community, about human trafficking.

3. What do you consider to be the differences between the two? Why do you think it is also necessary to consider them separately in conflict, although there are a lot of similarities as well?

Well, you do not immediately link conflict-related sexual violence with human trafficking. If you look at the Democratic Republic of Congo (DRC), sexual violence in the DRC has little to do with trafficking except for a group such as Lord's Resistance Army (LRA). Sexual violence is often used as a weapon of war. Sexual violence exists because there is lawlessness, soldiers are not paid and it is said that they can take whatever they like. As I said, in Mali, it is very much linked to human trafficking because that is what they do there. They traffic persons up the chain, up to the north and across to various places. That is less the case in the DRC. You can argue that the LRA abduction of women and girls in the north of the DRC can be brought under the heading of human trafficking. But this is more human trafficking for 'own use' It is not so much about trafficking and selling those women as in other countries like Syria or Iraq where the ISIS human trafficking resulted in sexual slavery and related forms of exploitation. They went from one to the other. That is not immediately the issue with the LRA because they abduct girls to have their own sex slaves, etc. They are taken with them, can carry ammunition, heavy loads, and are sexually abused. So, these are two different subjects, even if they are linked because human trafficking is used for sexual purposes.

4. Have you ever encountered or heard of situations in which people where both victims of trafficking and sexual violence, while working in the field?

Yes, as I said, with the LRA, in the north of the DRC. When I was there, we were chasing Otti and Kony, the leaders of the Lord's Resistance Army, trying to arrest them and stop this violence. You had thousands of girls who had been abducted from the villages and used as sex slaves. However, it was for their own satisfaction, not so much to sell them somewhere else. They would hold them captive and use them for their own purposes. This was what LRA did, very much around the time I was in the DRC. I have not been deployed in Mali so I cannot give you my personal experience for that country.

5. So how did you, and this actually goes back to the core of your work in DR Congo I believe, respond to these situations of trafficking or sexual violence in conflict that you encountered in your work?

A, to go after the perpetrators when it happens, and B, to prevent these things from happening. Prevention is extremely important. But for prevention you have to be proactive and if you want to be proactive, you must get troop-contributing countries to be proactive. And that is one of the major challenges in peacekeeping at this moment: to make sure that troop-contributing countries (TCCs) are proactive in their attitude. And they often are not. They wait at the compound, or they wait for action until something happens and then, if you are lucky, they react. Sometimes they do not even react. So, if you talk about the reaction to atrocities, I went after the LRA and failed, because we had nine own soldiers being killed in one of our actions, because the people involved made rookie mistakes. And if they had been more professional, Kony and Otti would have been apprehended a long time ago and put in the prison of Scheveningen to appear before the ICC. But they were not. So, it was a pity and nowadays it is difficult to push TCCs, also in South Sudan, to do their job. I did a special investigation for the UN Secretary-General in Juba and the UN camp, where terrible violence took place (not so much human trafficking but rather sexual violence).[1] There it was so difficult to get those militaries out of their compound, to be proactive, to go out and patrol during the night. And if you do not do that, there will be a continuation of the problem.

6. How do you try to change the attitude of UN peacekeepers to actually be more proactive?

During my time in the DRC, you constantly put pressure on your subordinate commanders to make sure that they did it. If they did not do it, you said: 'well if you do not do it then I do it, but then there is no place for you'. So that is why we were relatively successful at that time, because I pushed it so hard. Afterwards, from 2008, I have been advocating in my presentations, teaching, lecturing and all the rest of it, the need to be proactive and preventive in your mindset and make people understand that otherwise, you will fail. You fail the international community, you will fail the whole nation and the local population because you are not doing what you are supposed to do. And you know, when

[1] See, for more information, the Executive Summary of the Independent Special Investigation into the violence which occurred in Juba in 2016 and UNMISS response: UN, 'Public Executive Summary on the Special Investigation', www.un.org/News/dh/infocus/sudan/Public_Executive_Summary_on_the_Special_Investigation_Report_1_Nov_2016.pdf, accessed 16 October 2018.

you are deployed, you raise the expectations, because people say, 'well, now we have peacekeepers, so we will now be safe'. And if you do not come out of your compound, they lose the confidence in you and stones are thrown at your car.

7. But if the violence is widespread and your presence limited, there are limitations to what you can do. So how do you deal with that? The DRC is a very big country and the troops are limited. We can imagine the difficulty in making an impact at that very moment.

Yes, in huge countries, in huge areas of operation, you have to manage the expectations of everybody nationally and internationally, you cannot be everywhere. But if you are deployed, then you have to do the job. A second point I would like to make is that you have to overcome the vastness of the country by using all the air assets possible. To be as mobile as possible: Friday there, Saturday here, two days there. You move all the time to give the impression that you are everywhere. People see that you arrive with the helicopter, that you are in control of the area, then two days later you disappear but you come back again after two days. So, you have to remain very unpredictable, very mobile and quick with a strong, robust posture. It scares people off and gives the impression of 'I have to be careful with those guys, because those guys are tough.'

8. A bit like 'Big Brother is watching you'?

Yes. You have to mislead your enemy a little bit, keep them on the wrong track, and give them the impression you have many more troops that you actually have.

9. You have been discussing that it is a challenge in preventing that for example countries are not really lenient towards taking proactive action. Are there any other challenges that you can identify in the prevention of these crimes?

Yes, that you have to have proper intelligence, proper information, of where, as I always say, the hotspots are. Where things might happen, or where things are cooking. If you patrol somewhere, or you have been observing something happening somewhere, you are driving somewhere and see some women working in the field, you should stop, have a chat, find out what is going on. And then they tell you 'well, we are working in the field today, but we slept in the bush the other night'. 'So why is that?' Then they say: 'Well, we see obscure people moving around in the area.' So, if there are obscure people, it indicates that something might happen down there. So that means that you must organise the rapid action of your quick reaction force in that area to prevent something from happening. So that is the way it works. Everybody must focus on finding the hotspots. That means that you must go and talk to the local population. It means you need to have community engagement. It is a key word. If you do

not engage with the local community, and if you do not have the right people to talk to the local population, for example liaison officers, community liaison officers, advisors and so on, your output is very limited. So, you need to set an early warning system, where you gather intelligence and you find out where things might wrong. Early warning. That is absolutely vital.

10. It always seems that prevention is the most important form of action, because we prevent something from happening, so we do not have to respond, protect victims, but at the same time, it seems to be the least attractive type of action to fund. Because if you are preventing something, that means it has not yet occurred, and because of that, it is very difficult to actually get resources and capacity towards early warning and prevention. So do you experience that, from the perspective of capacity or resources, that also makes it difficult, or is it just the engagement?

My point is that people are simply not active enough in what they have to do. And people are looking at the budget for instance, or resources or capacity to take it down for political reasons. But if you want to be proactive and prevent these atrocities from happening then you need air assets, for example. They are reducing the number of air assets, because the American administration is of the opinion that peacekeeping needs less money. So, you have to reduce the budget, then people say it should be from the air assets, because that's the biggest part of the budget. But if you have that kind of issue then I can assure you, you cannot go out and protect civilians and go after prevention because if you do not have the air assets to go where things are happening. It is the chicken and egg situation.

11. We have been discussed the role of peacekeepers but what role could others play in preventing human trafficking and sexual violence in conflict? We are always looking at the big players but there might be also an individual role to play to have comprehensive prevention in place.

Let us exclude for a second the local population, because they should go and use their own reporting mechanism with the police. But in so many of those countries, there are no authorities, there is no rule of law. So, every individual who can see a hotspot and see that things are not going well should have the responsibility to bring the information to the right place so that people who have the capacity to intervene and be preventive can do their job. An individual cannot go out and say: 'you have to stop it', because he or she might get killed. You bring the information to people who can act. The perpetrators are usually not isolated individuals. They are part of groups, rebel groups and armed groups. Therefore you need a bigger force, a bigger entity, to take care of that and to be preventive. And that is the real problem: where can everybody bring that information? As long as that information is there, they can assemble this information

and link it to other pieces and say 'hey, that is the pattern, so let us see what we can do about that pattern, that trend'. In the UN we have this focal point where everybody can bring their information: Joint Mission Analysis Cell (JMAC).

12. Is there anything else you would like to bring up?

The key issue with respect to both human trafficking and sexual violence is prevention. And that is what the UN Secretary General has said may times. We talk about prevention all the time, but it is easier said than done, because if you want to prevent something you need to be proactive. You have to make that first step to prevent things from happening. It does not come automatically and that means a switch in mindset for everybody, in particular people in uniform who are now risk-averse because increasing targets on the UN. So, there is a bigger risk of causalities on your own side, making troop-contributing countries very reluctant. The peacekeepers, the police, the other organisations, foreign affairs, etc. They do not want to take any risks. Stay away from this, stay away from that. But if you have that attitude, then you lose preventive action.

13. Well, that's the important message to conclude with. Governments needs to be less risk-averse.

That is something that you have to teach and lecture during pre-deployment training. Tomorrow I will do a pre-deployment training for Dutch diplomats, NGO people and business people who will be deployed at the UN, EU, NATO and other international organisations. My message will be exactly what I am saying now. If you want to be successful in the implementation of a mandate to protect people, you must focus on prevention. For that you have be proactive and to take sometimes a risk, a calculated risk.

14. Not just a risk, but a calculated risk?

Yes, based on a threat assessment and a risk analysis. If there is a threat, how can we analyse the risk to counter that threat. Can we do it or not? When we can do it, we need to drive in two vehicles. Can we do it, yes, we can, but do not go alone, go with someone who can support you, have a backup. And then you go to areas where you can talk to the local population who might be scared of consequences, because they see people wandering around the area, they do not know exactly what is going on, etc. You have human rights defenders or others working for Human Rights Watch who are doing these kinds of investigations on what is going on. That is the temperature of the war. I have been travelling with Human Rights Watch in Central African Republic (CAR) a few years back, they are young and very courageous people who are driving for hours and hours through the bush, through check points and there you feel the temperature of the war. You talk to the local population to see what is going

on. Then you bring this information to the organization that can do something about it. And then if the African Union is deployed there or the EU or the UN, you bring the information there. Did you see a village where there are no women or hardly any? Or are there children? Why is that? You have to find out. Have the women been taken away? Have the kids been taken away? All these are indicators that something might be ongoing. So, you have to look around all the time.

We have people who are very smart on that. We have child protection advisors who have studied that subject, who know everything about trafficking in children, the misery, the abuse, child soldiers and the rest of it. They studied it in the Congo and South Sudan. It is good to listen to them and to have them also involved. So that people can be warned what to expect, what to look at and where to probe.

15. So, it is even much more about signalling, what to look for?

Yes, if you do not know what the indicators are, simply because nobody has told you, then you drive past, and you do not see it. If you had been warned, then you would have stopped and started probing. Engage with the community. You probe at the local medical clinics, where all the women and girls are showing up and just start talking. Certainly, you have a lot of women doing this, not men but women, and you speak to these women and get valuable information of what is going on. Because you know, they prefer to talk to women, not me.

UN Women for instance is doing a lot about it. They are organising the 11th female military officers' course for two weeks, where we have 40 female officers from 32 countries, who will be trained how to reach out to the local population and the dos and don'ts when reaching out to victims and survivors of sexual violence. If you know how to reach out to them then you get valuable information of what is going on. That information needs to be reported to your bosses in the peacekeeping chain of command, who can do something about it to address it and to prevent things from happening. Very useful, very interesting.

16. So, you already made a great impact when training all these people.

That is what we do. And at the same time, we raise the number of female officers to be deployed, that is one of the things that the Secretary General has said, he wants to double or triple the number of women in the field and at the United Nations, because they are still underscored. But in order to do that, you must make sure that you convince the troop-contributing countries that they send women. It is as simple as that.

Major General (ret) Patrick Cammaert has a distinguished military career in both The Netherlands with the Royal Netherlands Marine Corps and the United

Nations, where he served as Sector Commander in Cambodia (UNTAC), as Assistant Chief of Staff in Bosnia/Herzegovina (UNPROFOR), as Force Commander in Ethiopia and Eritrea (UNMEE), as Military Advisor to the Department of Peace Keeping Operations (DPKO), and as General Officer Commanding the Eastern Division in the Democratic Republic of Congo (MONUC).

Since his retirement from the military in 2007, he has been an effective expert advocate with regard to issues such as leadership in crisis circumstances, international peace and security, protection of civilians, civil-military cooperation in peace support operations, peacekeeping, and security sector reform. Major General Cammaert has advised the senior management of UN Department for Peace Keeping Operations (DPKO), UN Development Programme (UNDP) and UN WOMEN on strategic planning issues such as Integrated Training Development, the protection of civilians under immediate threat of physical violence and sexual gender-based violence (SGBV) in armed conflict. He was the lead consultant for the drafting and implementation of scenario-based training on conflict related sexual violence and a UN Female Military Officers Course. His responsibilities have included carrying out fact finding/assessment and evaluation missions to several UN Missions such as in DRC, Lebanon, Sudan, S-Sudan, Haiti, Liberia and Chad and as Special Envoy to Sri Lanka for the Special Representative of the Secretary General for Children in Armed Conflict. He was the Head of the UN Secretary General's Board of Inquiry for certain incidents in Gaza in 2014, headed in 2016 the Board of Inquiry for the violence in Malakal S-Sudan and lead the Secretary General's Independent Special Investigation into the violence in Juba at the end of 2016. Major General Cammaert is a regular senior mentor at UN Senior Leadership Courses (SML), at Intensive Orientation Courses for new Force Commanders (IOC), at Female Military Officers Courses (FMOC) and at Contingent Commanders Courses of the Global Peace Operations Initiative (GPOI).

In 2008, Major General Cammaert was awarded the Carnegie-Wateler Peace Prize in the Peace Palace in The Hague. He is a member of the advisory board and Ambassador of the Mukomeze Foundation, which helps women and girls who survived rape and other forms of sexual violence in Rwanda. He is also a member of the Advisory Board of the Georgetown Institute for Women, Peace and Security and he is a member of the International Advisory Group of the Roméo Dallaire Child Soldiers Initiative. Patrick Cammaert joined the board of Center For Civilians in Conflict (CIVIC) in May 2016. In 2015 he was a member of the High Level Advisory Group for the Global study on UNSCR 1325. He graduated at the Dutch Higher Command and Staff College and the Top Management Course at the Armed Forces War College in The Hague.

III. Legal responses to CRSV and THB for sexual exploitation in times of conflict

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Prosecuting Trafficking Crimes for Sexual Exploitation in Times of Conflict: Challenges and Perspective

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Abstract

This article explores the nexus between conflict-related sexual violence and trafficking for sexual exploitation in times of conflict from a prosecutorial perspective. More specifically, it analyses whether those responsible for conflict-related sexual violence can be prosecuted under domestic and international provisions for human trafficking for sexual exploitation in times of conflict. While this practice is broadly condemned, a lot must still be done to combat the culture of impunity. Focusing on the 13 countries identified by the Secretary-General as currently affected by conflicts, the first part of the article analyses the existent domestic legal framework on human trafficking and gender-related violence. This perusal reveals that national legislation is generally inadequate to comprehensively address these issues. With few exceptions, the domestic frameworks fail to comply with international recognised standards and enforcement challenges in time of conflict complicate further the application and implementation of these provisions for an effective prosecution.

Concluding that no prospect of successful convictions exists under national law, the second part of this paper discusses the possibility of international prosecution. Even if the International Criminal Court (ICC) might have jurisdiction on the alleged crimes, this paper highlights that the crime of trafficking is not explicitly criminalised in the Rome Statute as such and its qualification as 'sexual slavery' or 'enslavement' is ambiguous. Nevertheless, the ICC could expand the definition of these two crimes to include the crime of trafficking for the purpose of sexual exploitation. However, the ICC has not yet prosecuted anybody for trafficking despite the existence of evidence on this crime in some of the states under investigation.

In light of this analysis, this article concludes that there are little prospects of successful prosecution for those responsible for human trafficking because both the domestic and international framework have significant limitations, both internal and external and not sufficient deterrent force. Therefore, it suggests that the international community should keep pushing these 13 countries to improve their domestic legislation up to recognised international standards and the ICC to address the interpretative challenges posed by the crime of trafficking.

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1. Introduction

In his 2018 Report on conflict-related sexual violence (2018 Report), the United Nations (UN) Secretary-General urged the international community to address conflict-related sexual violence (CRSV), emphasising the nexus between CRSV and trafficking in persons for sexual exploitation in time of conflicts (hereinafter, trafficking).[1] Taking inspiration from the 2018 Report, this article aims to study the nexus between CRSV and trafficking from an accountability point of view.

The decision to focus on this specific aspect is dictated by several factors. The Palermo Protocol, which provides the first international definition of the crime of trafficking, includes prosecution, together with prevention and protection, within its 'three-P strategy' to combat trafficking.[2] Similarly, ensuring an accountability system can be considered relevant for other crimes, such as CRSV. Scholars agree that prosecution in times of war plays an important deterrent effect.[3] Furthermore, trafficking in time of peace is considered a low-risk but high-profit crime because, while profits are huge, in absence of robust criminal justice responses, traffickers are hardly ever prosecuted.[4] If these circumstances make trafficking a very remunerative business in times of peace, this practice is considered even more attractive during conflict. As the Secretary-General highlighted, certain armed groups not only traffic women and girls internally and across the borders for the purpose of sexual exploitation, but also carry out several conflict-related acts of sexual violence during their raids.[5] Scholars believe that perpetrators of CRSV are often not prosecuted because of the difficulty to gather evidence during the investigation and the inability of linking CRSV to high-ranking accused.[6] Since these two types of crimes are

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1 UN Security Council, *Report of the Secretary General on Conflict-Related Sexual Violence* (S/2018/250), 23 March 2018.

2 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 (hereinafter Palermo Protocol).

3 A. Payam, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *American Journal of International Law* 95.1 (2001): 7-31; J. Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law', *Finnish Yearbook of International Law* 12 (2001): 249-267; D. McGoldrick, 'The Permanent International Criminal Court: An End to the Culture of Impunity?', *Criminal Law Review* (1999): 627-655.

4 D. Hughes, 'The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women', *Journal of International Affairs* 53.2 (2000): 1-18; E. Wheaton, E. Schauer & T. Galli, 'Economics of Human Trafficking', *International Migration* 48.4 (2010): 114-141.

5 Palermo Protocol, paras. 16, 18, 33.

6 A. De Brouwer, 'The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes', *Cornell International Law Journal* 48.3 (2015): 113, 125-129; P. Viseur-Sellers, 'Gender Strategy is Not a Luxury for International Courts', *Amsterdam University Gender Social Policy and the Law* 17.2 (2009): 301-325; M. Marcus, 'Investigation of Crimes of Sexual and Gender-Based Violence Under International Criminal Law' in *Sexual Violence as an Inter-*

deeply intertwined, it is clear that impunity for CRSV allows the sexual trafficking market to flourish, and vice versa. Thus, prosecuting those responsible for CRSV protects potential trafficking victims because it discourages the perpetrators from 'pursuing their business'.

The first necessary step to fight the culture of indifference towards both CRSV and trafficking and to ensure an adequate prosecution is to properly criminalise these acts. The scholarly debate on this point is very limited.[7] Thus, Part I of this article aims to assess domestic legislations and enforcement tools available in the 13 countries in conflict identified by the 2018 Report: Afghanistan, Central African Republic (CAR), Colombia, Democratic Republic of the Congo (DRC), Iraq, Libya, Mali, Myanmar, Somalia, South Sudan, Sudan (Darfur), Syria and Yemen.

In support of the argument according to which CRSV is not adequately addressed at the national level because domestic shortfalls are worsened during war-times, this article suggests that CRSV and trafficking should be prosecuted at the international level. Part II of this article explores the international dimension of CRSV and trafficking focusing on two different issues. First, it analyses whether the ICC has jurisdiction over the countries where the Secretary-General noticed a deep nexus between CRSV and trafficking. Second, it highlights that, while CRSV is within the subject matter of the ICC, the ability of the ICC to investigate and prosecute trafficking crimes is not obvious. In conclusion, it advocates a modification of the Rome Statute to introduce the crime of trafficking as a separate crime from slavery.

2. CRSV and Trafficking as National Crimes

In his 2018 Report, the Secretary-General described the term 'conflict-related sexual violence' as including crimes such as 'rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict'.[8] He also provides a definition for 'trafficking in persons when

national Crime: Interdisciplinary Approaches, ed. A de Brouwer et al. (Antwerp: Intersentia, 2013), 211-242.

7 A. Hourge & K. Lohne, 'End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law', *Law & Society Review* 51.4 (2017): 755. See also: Organisation for Security and Co-Operation in Europe (OSCE), *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges* (Vienna, 2015); and OSCE Mission to Bosnia and Herzegovina, *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014-2016* (Sarajevo, 2017).

8 UNSC, *Report of the SG on CRSV* (2018), para. 2.

committed in situations of conflict for the purpose of sexual violence' indicating that this set of crimes can be considered as a subgroup of the previous category.

However, this article departs from this definition, opting for the more structured and thorough definition of trafficking provided by the Palermo Protocol, underlying the element of movement and prescinding from sexual violence. This definition informs the assessment of the domestic legislation proposed in the following section, which explores how the 13 countries under analysis are facing CRSV and trafficking in the context of conflict through their domestic criminal law framework.

2.1. Screening of Domestic Legal Framework

The body of law that applies during armed conflicts is generally known as international humanitarian law (IHL). However, since IHL was developed to protect civilians from the hostilities and sets the limits on the methods of warfare, it is very difficult to find provisions which prohibit or, even, criminalise trafficking.[9] For this reason, this paper focuses on the Palermo Protocol, the most important international human rights instrument to combat trafficking, which still applies alongside IHL in time of armed conflicts.[10] Moreover, this paper analyses whether states have incorporated this crime within their domestic legislations following its ratification. Furthermore, if one considers CRSV as a mean of war, then the crime can be prosecuted under IHL by domestic courts, and, if they are unwilling and unable, by the ICC.[11] Otherwise, CRSV can be prosecuted by national tribunals under domestic legislations which prohibit such conducts.

In light of these remarks, this paper considers four variables. The first variable verifies whether the country has ratified or accessed the Palermo Protocol. The second one assesses whether trafficking is criminalised and to which extent the domestic legislation matches the international provisions. Category A indicates countries where the crime of trafficking is prohibited, meets the definitional criteria set out by the Palermo Protocol and explicitly includes sex trafficking or trafficking for sexual exploitation. Category B includes countries where the crime of trafficking is prohibited by law but does not fully meet the definitional criteria and/or does not explicitly include sex trafficking. Finally, category C encompasses countries where trafficking is not criminalised.

The third and fourth variables evaluate whether sexual violence is criminalised both a) in war-time and b) in peace-time. As far as the former is concerned, Category A includes all the countries that are parties to the ICC and have an

9 S. Sivakumaran, 'International Humanitarian Law' in *International Human Rights Law*, ed. D. Moeckli, S. Shah, & S. Sivakumaran (Oxford: Oxford University Press, 2010), 521.

10 Ibid.

11 UN General Assembly, Rome Statute of the International Criminal Court, Arts 1-17.

adequate implementing legislation covering CRSV. Category B indicates both the state parties to the ICC without adequate implementing legislation and non-parties but with domestic provisions specifically criminalising international crimes including CRSV as acts, while category C refers to state parties to the ICC and without any domestic provisions criminalising CRSV as international crimes. Sexual violence is a broad term that, as the Secretary-General explained, includes a wide range of acts.[12] This variety, based on Articles 7 and 8 of the Rome Statute, may pose a challenge when looking at the national criminal law framework in time of peace because these acts may constitute different types of domestic crimes, which are often not included under a common label of 'sexual violence', being the latter rather associated with rape. Moreover, cultural, historical, traditional and religious elements may influence the qualification of a specific act as a crime. Sexual violence can be equally perpetrated against women, men, girls or boys. However, the term and the acts that are included are commonly associated with women or children only, and this approach is often reflected in domestic legislation. On this basis, the analysis of sexual violence-related crimes in time of peace opted for a categorisation into three groups: A, B and C. Category A, which mirrors the definition in the 2018 Report, indicates countries where sexual violence is criminalised and includes more than simply rape and establishes that both men and women (adult and children) could be victims. Category B indicates countries where sexual violence is criminalised but the crime includes only rape or is limited to acts against women and children. Finally, category C indicates countries without any provision criminalising sexual violence. Table 1 sums up this analysis.

2.1.1. The Palermo Protocol

As Table 1 shows, almost all the countries under analysis ratified or accessed the Palermo Protocol. Mali, Colombia and Libya were among the participating countries to the drafting process and among the first to ratify the Protocol between 2002 and 2004. Other countries, like Sudan and Afghanistan accessed the Protocol only in 2014. On the contrary, South Sudan, Somalia and Yemen are yet to be signatories to the treaty and no diplomatic measures are in place at the moment to this end. Nevertheless, this promising picture with 10 out of 13 countries bound by the international treaty is of little importance without adequate domestic implementation framework. For this reason, the next section investigates whether such a domestic implementation actually took place.

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12 UNSC, *Report of the SG on CRSV* (2018), para. 2.

Table 1.

	1. Palermo Protocol[13]	2. Crime of Trafficking[14]	3. Sexual violence related crimes[15]	
			a.	b.
Afghanistan	YES	A	A	A
Central African Republic	YES	A	A	B
Colombia	YES	B	A	A
Democratic Republic of Congo	YES	C	A	A
Iraq	YES	B	C	B
Libya	YES	B	C	C
Mali	YES	A	A	B
Myanmar	YES	A	C	C
Somalia	NO	C	C	C
South Sudan	NO	B	C	B
Sudan	YES	B	C	B
Syrian Arab Republic	YES	B	n/a	n/a
Yemen	NO	C	C	A

2.1.2. The Crime of Trafficking

To be able to prosecute someone for having committed sex trafficking, it is necessary to have a crime of trafficking in national legislation. According to Article 3 of the Palermo Protocol, trafficking shall require action (e.g. recruitment, transportation, transfer, or harbouring), means (e.g. by means of the threat or use of force or other forms of coercion, of abduction, of fraud), and purpose (e.g. exploitation). As already clarified above, the analysis of the criminalisation of trafficking made for this article distinguished three categories A, B and C.

Afghanistan, CAR, Mali and Myanmar are included in category A because they meet the criteria set out in the Palermo Protocol. The relevant provisions

14 Afghanistan: Law on the Campaign Against Abduction and Human Trafficking, No. 952 (2008); CAR: Article 151, Penal Code; Colombia: Law No. 985 (2005); Iraq: Law No. 28 (2012); Libya: Penal Code; Mali: Law 23 (2012); Myanmar: Chapter I, Anti-Trafficking in Persons law No. 5 (2005); South Sudan: Article 282, Penal Code; Sudan: Section 7, Chapter III, Combating Human Trafficking Act (2014); Syria: Decree No. 3 (2011).

13 Accession (a) and ratification (r) dates as follow: Afghanistan (a) 15 August 2014; CAR (a) 6 October 2006; Colombia (r) 4 August 2004; Iraq (a) 9 February 2009; Libya (r) 24 October 2004; Mali (r) 12 April 2002; Myanmar (a) 30 March 2004; Sudan (a) 2 December 2014; Syrian Arab Republic (r) 8 April 2009.

15 CAR: Section II (Articles 112-117) and Article 81 Penal Code; Colombia: Law No. 1527 (2008) and Law 1719 (2014) on Sexual Violence in Armed Conflicts; DRC: Laws 18 (2006) and 19 (2006) amending the Penal Code; Iraq: Sections 396-398 Penal Code; Mali: Articles 224-227 Penal Code; South Sudan: Chapter XVIII Penal Code; Sudan: Sections 316-319 Penal Code.

can be contained in the penal code, such as for CAR that in its amended 2010 version included a very detailed and international standards-compliant provision on trafficking.[16] Alternatively, the criminalisation of trafficking can be established by a specific piece of legislation. Mali, for example, approved anti-trafficking legislation in 2012, where the definition of trafficking mirrored that proposed by the Palermo Protocol.[17]

The majority of the countries under analysis (six) falls within category B, according to which the crime of trafficking is prohibited by law but does not fully meet the definitional criteria. For instance, Colombia's 2005 anti-trafficking law lacks the element of the means in its definition of trafficking and, therefore, fails to comply with international standards.[18] On the contrary, Libya's criminal code criminalises trafficking but no reference can be found to both the elements constituting trafficking and the specific instance of sex trafficking.[19]

Finally, DRC, Somalia and Yemen have not criminalised trafficking falling within category C. Nevertheless, although no reference to trafficking is made, Yemen's penal code criminalises slavery.[20] Similarly, Somalia's provisional draft for the new constitution includes a provision prohibiting trafficking but this is not criminalised and thus, not prosecutable.[21]

2.1.3. Sexual Violence and Related Crimes

Considering the focus of this research, the analysis of the domestic framework on trafficking goes hand in hand with that on CRSV. As previously mentioned, when addressing the existing legal framework criminalising CRSV, it is possible to look at the national implementing legislation of the ICC Statute and, in particular, of Articles 7 and 8 of the Rome Statute, respectively, on crimes against humanity and war crimes. For countries that are not parties to the ICC, the analysis focuses on whether their national criminal framework nevertheless include international crimes such as war crimes and crimes against humanity.

Among the 13 countries under analysis only five of them are state parties to the ICC: Afghanistan, Colombia, CAR, DRC and Mali and all of them meet the standard to be labelled as A. Already in 2001, Mali amended its Criminal Code as to include all the international crimes as later established by the Rome Stat-

16 CAR, Penal Code, Law No. 10.001 (2010). See also Afghanistan, Law 1260 (2017) amending the Penal Code.
17 Mali, Law No. 23 (2012). See also Myanmar, Anti Trafficking in Persons Law, No. 5 (2005).
18 Colombia, Law No. 985 (2005).
19 'Libya Country Narrative' in *Trafficking in Persons Report 2018*, US Department of State (Washington DC, 2018).
20 Yemen, Penal Code.
21 Provisional constitutional draft text available at http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf.

ute.[22] CAR enacted two important laws in 2010 and 2015 amending the criminal code and criminal procedure code.[23] Similarly, DRC approved in 2015 three detailed and comprehensive laws amending the criminal code, the criminal military code and the criminal procedure code.[24] On the same page, Afghanistan new 2017 penal code fully implements the Rome Statute provisions.[25] Colombia, on the other hand, already had domestic legislation criminalising CRSV as an international crime well before becoming a party to the ICC and continued to improve its national legislation afterward, including a specific piece of legislation on sexual violence in armed conflict approved in 2014. While none of the countries under analysis fit within category B (since there is no state without adequate implementing legislation which criminalise CRSV anyway), eight countries, which are not parties to the ICC, fit within category C since they have no legislation criminalising CRSV.

As far as the legislation on sexual violence related crimes in time of peace is concerned, only 3 of the 13 countries under analysis (Afghanistan, Colombia and the DRC) criminalise sexual violence falling within Category A. The above-mentioned 2017 amendments to the Afghan Penal Code significantly increase the protection given to victims of sexual violence, including under this umbrella terms a wide range of unlawful acts both against men and women.[26] In addition to its 2008 Law on crimes against women,[27] Colombia approved in 2014 a specific law on sexual violence in armed conflict where the term victim includes men, women, girls and boys and the criminalised acts are complying with the list proposed by the SG.[28] Moreover, Article 6 specifically refers to sex-trafficking in armed conflict, extending the meaning of 'sexual exploitation' to any act of exploitation of a sexual character including servile or forced marriage, sexual servitude, sexual tourism and so on.[29] Similarly, in DRC, the Penal Code, as amended in 2006, criminalises a wide range of sexual violence-related crimes against both men and women.[30]

Five countries fall within category B indicating that in CAR, Iraq, Mali, South Sudan and Sudan, sexual violence is criminalised but the crime includes rape

22 Mali, Law 01.079 (2001) amending the Criminal Code.

23 CAR: Law N.10.002 (2010) amending the criminal and criminal procedure code; Law N.15.003 (2015) bringing the creation, organisation and functioning of the Special criminal Court.

24 DRC, Law modifying law N.024.2002 of 18 November 2002 amending the criminal military code (2015); Law modifying and complementing the act of 30 January 1940 amending the criminal code (2015); Law modifying and complementing the act of 6 August 1959 amending the criminal procedure code (2015).

25 Afghanistan, Law 1260 (2017) amending the Penal Code.

26 Afghanistan, Law 1260 (2017) amending the Penal Code, Section 8, Chapter 1.

27 Colombia, Law No. 1527 (2008).

28 Colombia, Law No. 1719 (2014).

29 Ibid., Article 6.

30 DRC, Laws 18 (2006) and 19 (2006) amending the Penal Code.

only or is limited to acts against women and children. In Mali and Iraq, only rape and sexual assaults are criminalised, although extended as including both men and women as victims.[31] On the contrary, in CAR, South Sudan and Sudan, the range of sexual-related acts that are criminalised is wider but only when committed against women and children.[32]

Finally, no mention of this in the penal code can be found in Myanmar, Somalia and Yemen. In Libya, the crime of rape exists but is configured as a crime against the honour of the family of the woman rather than against her integrity and dignity and, as such, it has been deliberately labelled by as inexistent.[33] All these countries fall under category C.

Syria was not included in this analysis for the impossibility of finding a translated version from Arabic of the penal code and accessories pieces of legislation on the matter.

In conclusion, the domestic framework on trafficking and sexual violence of the 13 countries under scrutiny appears only partially adequate to bring the perpetrators of these crimes to justice. Some countries have sufficient regulation and criminalisation of trafficking or sexual violence but only Afghanistan with its new penal code reached a satisfactory level in both. Considering that the two criminal conducts go hand in hand in the context of CRSV and trafficking, this shows the limits of national legislation to adequately understand the nexus between the two crimes and effectively criminalise sexual violence and sex trafficking. Nevertheless, the legislation analysis highlights some positive developments and efforts made towards a more robust framework to address the multifaceted nature of CRSV and trafficking, in compliance with the international standards. This is the case of, for instance, Colombia, Mali or CAR that are very close to have a suitable criminal framework. On the other hand, countries like Yemen or Somalia, and Libya and Myanmar as well to a lesser extent, seem to be very far from this goal. Yet, the challenge of improving the legal framework goes hand in hand with that of ensuring its enforcement and application. One without the other may result in being completely useless in addressing CRSV and trafficking. The following section explores some of these challenges.

2.2. Enforcement Challenges

Many enforcement aspects may significantly limit the effectiveness of domestic criminal law during an armed conflict. They concern

31 Iraq, Penal Code, Articles 396-398; Mali, Penal Code, Articles 224-227.

32 CAR: Penal Code, Section II Articles 81, 112-117; South Sudan: Penal Code, Chapter XVIII; Sudan: Penal Code, Sections 316-319.

33 See the Human Rights Watch report on Libya, Human Rights Watch, *Priorities for Legislative Reform: A Human Rights Roadmap for a New Libya* (2017).

all the stages from the acknowledgment of the crime, to investigation, prosecution and enforcement of the judgment.

To start with, the existence of a conflict may limit the acquisition of information from the affected regions and complicate the discovery or acknowledgment of the crimes committed. Normal channels of communication and government's peripheral government networks are often suspended or altered. Moreover, government officials are sometimes not able to reach certain areas affected by the conflict, as it happened in Darfur and Syria, with consequential underreporting of crimes.[34]

Furthermore, law requires enforcement agencies with powers to appropriately address the challenges deriving from the fight against the crime of trafficking.[35] More specifically, each state should be equipped with specialist and centralised anti-trafficking units, which should enforce the law.[36] They are a fundamental piece for ensuring the effectiveness of a domestic anti-trafficking criminal law system, as they are in charge of both conducting investigations and enforcing the court's judgments. Out of the 13 countries, only five (Afghanistan, Colombia, Myanmar, Somalia and Sudan) have a specialised law enforcement unit or a sub-unit or team within the law enforcement structure that has specialised mandate to conduct investigations into trafficking.[37] From this perspective, it is interesting to note that trafficking in Somalia has not an exact definition since it is only prohibited in the Draft Constitution, while specific legislations exist for the other four countries.[38] However, there is no evidence that any of these enforcement units are fully funded or have sufficient budget to carry out the duties for which they were created.[39] Therefore, these trafficking units might only be empty shells with no actual functions. From this perspective, it should be recalled that all the countries under analysis are currently experiencing international or national conflicts. This has been affecting their response to crimes because many countries lack basic infrastructures.[40] In Afghanistan, for instance, four specific anti-trafficking units have been recently established:

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34 UN Security Council, *Conflict-Related Sexual Violence: Report of the Secretary General* (S/2014/181), 13 March 2014, 15, 17.

35 A. Gallagher & P. Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line', *International Criminal Justice Review* 18.3 (2008): 323.

36 Ibid., 324.

37 Walk Free Foundation, 'Global Slavery Index 2018: Government Response Data', https://www.globalslaveryindex.org, accessed 26 October 2018; W. Kandiwal, *A Mapping Study: Institutional Mechanisms to Tackle Trafficking in Persons in Afghanistan* (Afghanistan Research and Evaluation Unit Policy Note, 2018).

38 Provisional constitutional draft text available at http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf, accessed 26 October 2018.

39 Ibid.

40 F. Ní Aoláin, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford: Oxford University Press, 2012).

the Anti-Trafficking-in-Persons (TIP) Unit, the Afghanistan Border Police (ABP) Unit, the trafficking units of the National Directorate for Security (NDS) and those of the National Central Bureau (NCB) of the INTERPOL. Nevertheless, a recent study reveals that none of them benefit from the necessary funding to carry out their functions, thus significantly limiting their possibility of action.[41] Similarly, in Somalia, the Somali Police Force (SPF) should have a 40-officer Counter-Trafficking and Organized Crime Unit, but apparently this unit has never received counter-trafficking training and entered into force.[42]

Moreover, it must be recalled that, in order to start an investigation and bring the responsible to justice, the cooperation of victims and witnesses is required. However, victims are generally reluctant to take part in the proceedings and they might suffer from several mental health issues, such as anxiety, depression and post-traumatic stress disorder.[43] Speaking about their experiences might deepen their trauma, especially if they need to testify about intimate details before judges in unfamiliar settings.[44] Also, victims of sexual crimes are often stigmatised for having being raped, having contracted HIV/AIDS, being unmarriable, having children as a result of rape and, consequently, isolated by their families and communities.[45] Thus, they might not come forward for fear of retaliation. To address these issues, states should quickly identify CRSV and trafficking victims and provide them with appropriate protective and supportive measures. However, from the data available, it seems that only Colombia and Mali have protective measures which can be applied inside the courtroom to safeguard witnesses' identity and support them in the difficult phases of the testimony.[46] Conversely, none of the 13 countries have protection mechanism for victims and witnesses outside the courtroom.

This complex pattern is made even more complicated by the very same nature of the crimes, which are not ordinary crimes. Trafficking, for instance, has a transnational dimension. Traffickers exploit this situation to their advan-

41 Kandiwal, *A Mapping Study*, 4.

42 'Somalia Country Narrative' in *Trafficking in Persons Report 2017*, US Department of State (Washington, 2017)

43 De Brouwer A., 'The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes', *Cornell International Law Journal* 48.3 (2015): 113. See also P. Kuwer et al, 'Long Term Effects of Conflict-Related Sexual Violence Compared with Non-Sexual War Trauma in Female World War II Survivors: A matched Pairs Study', *Archives of Sexual Behaviour* 43.6 (2014): 1059; E. Josse, 'They Came with Two Guns: The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts', *International Review of the Red Cross* 92.877 (2010): 183.

44 A. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2015): 231-282.

45 De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, 234; S. Chu et al., 'Survivors of Sexual Violence in Conflict: Challenges in Prevention and International Criminal Prosecution' in *Victimological Approaches to International Crimes: Africa*, ed. Rianne Letschert et al. (Antwerp: Intersentia, 2011), 535-539.

46 Walk Free Foundation, 'Global Slavery Index 2018 Government Response Data'.

tage. Therefore, national institutions which are already weakened by the war context, might be unable to follow both the perpetrators and the victims to a different state. Studies have shown that transnational organised crime groups work in small groups to achieve their criminal purposes since bigger and centralised structures are more easily targeted and caught by law enforcement measures.[47] For this reason, an active coordination and cooperation among governments of different countries is necessary to curb these crimes.

2.3. Challenges and Perspectives: The Limits of National Criminal Law for Addressing CRSV and trafficking and the International Scope of these Crimes

Although national states should be primarily responsible for prosecuting crimes committed within their jurisdiction and bring perpretators to justice, the previous analysis showed that they may not be fully equipped to do so, especially in situations of conflicts. The legal framework in the 13 countries identified by the SG Report proved to be overall inadequate to prosecute CRSV and trafficking and to understand the nexus between these two crimes. Although some countries, such as Colombia and Mali, have a more advanced framework than others, their criminal law machinery remain inappropriate to break the circle of impunity that link them. Moreover, enforcement obstacles imposed by the situation of conflict, the lack of resources and training and the sensitivity of the crimes at stake make the domestic criminal law response to CRSV and trafficking even more limited.

As a consequence, this article suggests that national efforts should be complemented at international level. While CRSV are international crimes recognised by the Rome Statute, the nature of trafficking is still debatable. The Palermo Protocol endorses a traditional approach where trafficking is a transnational crime. This is clear from the fact that the Protocol is designed to promote the cooperation between states to combat trafficking.[48] However, the idea that trafficking should be treated as an international crime is well promoted by many scholars. For instance, Tavakoli believes that, if the international community considers trafficking as a transnational crime, it neglects the essence of the crime, which offends fundamental humanitarian values and conscience

47 S. Mallory, *Understanding Organized Crime (Criminal Justice Illuminated)*, (Sudbury: Jones & Bartlett Publishers, 2007).

48 Gallagher & Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking', 318.

of humankind.[49] This view is also shared by Aston and Chuang.[50] Quoting Robert Cryer, for instance, Aston believes that trafficking should be upgraded from transnational to international crime for principled and practical reasons such as beliefs and the values they are in conflict with are sufficiently important to the international community and that international prosecution is an effective way of dealing with them.[51] With this in mind, this article discusses the role of the ICC, the first permanent international criminal institution, in prosecuting the allegedly responsible for CRSV and trafficking.

3. CRSV and Trafficking as International Crimes

To date, the Rome Statute, the governing multilateral treaty of the ICC, has been signed by 123 States.[52] However, despite its potential global reach, the ICC can only prosecute crimes committed within its jurisdiction.[53] Thus, the first obstacle to prosecute those responsible for CRSV and trafficking is jurisdiction, which is analysed in the next section.

3.1. Jurisdiction

As clarified in the previous section, the ICC can only prosecute crimes which are carried out in the states that have accepted its jurisdiction. However, among the 13 countries indicated in the 2018 Report, only five are parties to the Rome Statute.[54] These states are Afghanistan, CAR, Colombia, DRC and Mali. The lack of ratification of the Rome Statute by the other eight countries constitutes a difficult but not impossible obstacle for the prosecution of CRSV and trafficking by the ICC. Indeed, it can be nuanced in two circumstances.

First, according to Article 13 of the Rome Statute, the jurisdiction of the ICC can be triggered by a State Party, the ICC Prosecutor and the Security Council acting under Chapter VII of the Charter of the United Nations in order to

49 N. Tavakoli, 'A Crime that Offends the Conscience of Humanity:A Proposal to Reclassify Trafficking in Women as an International Crime', *International Criminal Law Review* 9.1 (2009): 78.

50 J. Aston, *Trafficking of Women and Children: Article 7 of the Rome Statute* (Oxford: Oxford University Press, 2016); J. Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts', *Harvard Human Rights Journal* 11 (1998): 66.

51 R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 282.

52 ICC, 'The States Parties to the Rome Statute', https://asp.icc-cpi.int/en_menus/asp/-states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, 1 September 2018, accessed 26 October 2018.

53 UNGA, Rome Statute, Art. 12(1).

54 Ibid.

maintaining international peace and security. In the latter case, it is not necessary that the state is party to the Rome Statute because the legal obligation for the ICC derives from the very same UN Security resolutions, which are binding upon United Nations Member States in accordance with Article 25 of the UN Charter.[55]

The legal provision of the Rome Statute dealing with the referral by the Security Council has been one of the most scrutinised provisions of the entire Rome Statute.[56] Because of this provision, the ICC has been accused of adopting a selective justice system and of letting an obligation never accepted by certain states enter from the backdoor.[57] Despite this criticism, the ICC has used this referral mechanism twice. The first time, the situation in Darfur was at the centre of the Resolution 1593 (2005), which authorised the ICC to exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Darfur or by its nationals from 1 July 2002 onwards.[58] The second time, the ICC referred the situation in Libya so that it could exercise its jurisdiction over crimes committed on the territory of Libya or by its nationals from 15 February 2011 onwards.[59] In Darfur, some Sudanese Government officials, Militia/Janjaweed leaders, and leaders of the Resistance Front were charged only with rape as far as CRSV is concerned.[60] No other charges for sexual violence crimes were issued. However, none of these people were convicted since most of the indicted are still at large. In Libya, the majority of charges involved crimes against humanity, such as murder and persecution although an arrest warrant for rape

55 A. Galand, 'Security Council Referrals to the International Criminal Court as Quasi-Legislative Acts', *Max Planck Yearbook of United Nations Law* 19.1 (2015): 143.

56 V. Ayeni & M. Olong, 'Opportunities and Challenges to the UN Security Council Referral Under the Rome Statute of the International Criminal Court', *African Journal of International and Comparative Law* 25.2 (2017): 239; A. Hehir & A. Lang, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect', *Criminal Law Forum*, 26.1 (2016): 153; A. Knottnerus, 'The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16', *Netherlands International Law Review*, 61.2 (2014): 195.

57 C. Jalloh, 'The African Union, the Security Council and the International Criminal Court' in *The International Criminal Court and Africa*, eds. C. Jalloh & I. Bantekas (Oxford: Oxford University Press, 2017); T. Lattmann, 'Situations Referred to the International Criminal Court by the United Nations Security Council – Ad Hoc Tribunalisation of the Court and its Dangers', *Pecs Journal of International and European Law*, 2 (2016): 68; A. Zimmermann, 'Two Steps Forward, One Step Backwards?: Security Council Resolution 1593 (2005) and the Council's Power to refer Situations to the International Criminal Court' in *Common Values in International Law: Essays in Honour of Christian Tomuschat*, eds. P. Dupuy et al. (Kehl: Engel, 2006), 681.

58 UN Security Council Resolution 1593 (S/RES/1593), 31 March 2005.

59 UN Security Council Resolution 1970 (S/RES/1970), 26 February 2011.

60 *Prosecutor v. Al Bashir, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir'*, ICC-02/05-01/09-1, 4 March 2009; *Prosecutor v. Harun and Kushayb, 'Warrant of Arrest for Ahmad Harun'*, ICC-02/05-01/07-2, 27 April 2007; *Prosecutor v. Hussain, 'Warrant of Arrest for Abdel Raheem Muhammad Hussain'*, ICC-02/05-01/12-2, 1 March 2012.

was issued towards Al-Tuhamy Mohamed Khaled.[61] Furthermore, although no formal charges have been issued in relation to trafficking in Libya, in its Report to the Security Council, Bensouda clarified that the OTP launched several initiatives to disseminate and the profiles of high-priority individuals who are allegedly involved in trafficking of human beings.[62] Although the ICC has caught the nexus between these two types of crimes in certain instance, these episodes show that there is still a lot of work to be done since both countries are included in the 2018 Report among those where a strong link between CRSV and trafficking has been registered. Indeed, in avoiding to prosecute and convict those allegedly responsible for CRSV, the ICC allowed trafficking to flourish.

In addition to this, it must be noted that the issue of jurisdiction must take into consideration the transnational nature of the involved crimes. A good example of this can be found in the referral made by Bangladesh for the alleged deportations of Rohingya Muslims from Myanmar to Bangladesh. While the ICC has no jurisdiction over Myanmar, Bangladesh is a state party to the Rome Statute. Pre-Trial I ruled that the ICC may exercise its jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh since one of the elements of the crime (conduct) is committed on the territory of a State Party and, thus, within the ICC's jurisdiction.[63] This referral has the potential to open new ways to prosecute crimes of inherently transboundary nature. Despite this encouraging perspective, it should be noted that the OTP did not attempt to prosecute those responsible for CRSV and trafficking of Rohingya Muslims. The 2018 Report clarified that when the UN Special Representative visited camps and settlements in Cox's Bazar (Bangladesh) in November 2017, she heard testimonies of 'almost every woman and girl of patterns of rape, gang rape, forced nudity and abduction for the purpose of sexual slavery during military campaigns'.[64] Thus, although it could have been easy to find evidentiary sources to prove that those responsible for CRSV had also trafficked the victims for the purpose of sexual exploitation, the Prosecutor asked the Pre-Trial Division to open an investigation on the basis of Article 7(1)(d) of the Rome Statute only for the crime of deportation of 670,000 Rohingya, lawfully present in Myanmar, who were intentionally deported across the international border into Bangladesh.[65]

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61 For Libya, see *The Prosecutor v. Al-Tuhamy Mohamed Kaled, 'Warrant of Arrest for Al-Tuhamy Mohamed Khaled with under seal and ex parte Annex'*, ICC-01/11-01-13-1, 24 April 2017, 7-9.

62 ICC Office of The Prosecutor, *Fifteen Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011)* (The Hague, 2018), 33.

63 *Request under Regulation 46(3) of the Regulations of the Court, 'Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"'*, ICC-RoC46(3)-01/08-37, 6 September 2018.

64 UNSC, *Report of the SG on CRSV* (2018), 55.

65 *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, President of the Trial Division*, ICC-RoC46(3)-01/18-1, 9 April 2018.

Against this background, it must be noted that while CRSV such as rape, sexual assault, enforced prostitution, forced pregnancy, and enforced sterilisation are now considered international crimes and recognised in Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(b)(e)(vi) of the Rome Statute, trafficking is not contained in any of these categories. This represents a big obstacle to the prosecution of those responsible for trafficking especially considering that sexual crimes in a conflict-related context operate in a vicious cycle.

The absence of the crime for 'trafficking of persons' within the Rome Statute limits the power of the ICC to prosecute the allegedly responsible for trafficking. However, the ICC tried to include the trafficking within the crimes of slavery and enslavement, which are listed among crime against humanity. This is clear from both the Rome Statute and the Elements of Crimes. Indeed, Article 7(2)(c) of the Rome Statute states that enslavement 'includes the exercise of such power in the course of trafficking in persons, in particular women and children'. Similarly, the Elements of Crime clarifies that the conducts of purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty under the crime against humanity of enslavement (Articles 7(1)(c)), crime against humanity of sexual slavery (Article 7(1)(g)-2), war crime of sexual slavery (Article 8(2)(b)(xxii)-2) and war crime of sexual slavery (Article 8(2)(e)(vi)-2) include trafficking, in particular women and children.[66] Regardless of whether the relevant conduct falls within the category of crimes against humanity or war crimes, the two crimes of sexual slavery and enslavement seem to be two umbrella terms which include trafficking.

Under the Rome Statute, the two crimes of slavery and enslavement are synonymous since they are defined using the same terminology, i.e. '[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'.[67] Despite this, Siller tried to distinguish the two terms investigating their relationship with the crime of trafficking. Specifically, she believes that, in light of the international criminal jurisprudence, these two terms should not be considered as synonyms because international jurisprudence supports the view that a material link exists between enslavement and trafficking.[68] Unfortunately, the premises on which Siller's view is based are fallacious since she uses the case-law of other international criminal tribunals to clarify the meaning of the terms 'slavery' and 'enslavement' in the Rome Statute. However, this case-law is not contained among the sources of law applicable by the ICC judges

66 ICC, *Element of Crimes* (The Hague: Official Journal of the International Criminal Court, 2011), footnotes 11, 18, 53 and 66.

67 ICC, *Elements of Crimes*, Arts 7(1)(c), 7(1)(g)-2), 8(2)(b)(xxii)-2), and 8(2)(e)(vi)-2.

68 N. Siller, 'Modern Slavery: Does International Law Distinguish between Slavery, Enslavement and Trafficking', *Journal of International Criminal Justice* 14.2 (2016): 406, 407 and 426.

under Article 21 of the Rome Statute. Conversely, it includes the Rome Statute, Elements of Crimes and Rules of Procedure and Evidence, which support the view that these two terms should be considered as synonyms. In absence of any jurisprudence which clarifies whether the two terms of slavery and enslavement are synonyms, it is not possible to agree with Siller's interpretation. Furthermore, a closer interpretation of the Article 21(3), which reads that the interpretation of law must be consistent with internationally recognised human rights, fosters the idea that the term 'trafficking' should be interpreted in light to the Palermo Protocol and, thus, considered as a separated crime. Thus, in order to understand whether sexual slavery (and its synonymous term of enslavement) can be used to provide legal coverage to the crime of trafficking for the purpose of sexual exploitation, it is necessary to understand the meaning of 'sexual slavery'.

3.2. Sexual Slavery as Trafficking for the Purpose of Sexual Exploitation

Trafficking for the purpose of sexual exploitation and sexual slavery is not necessarily synonymous, although the term 'sexual' indicates the limitations of someone's autonomy and power to decide about their own sexual activity.[69] As already mentioned in Section 1, the key elements of trafficking are the elements of action, means and purpose. As far as 'sexual slavery' is concerned, Article 7(2)(c) provides a definition of 'enslavement' 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 particular women and children'. The key element of this definition, which entails the right of ownership, is akin to the description of the crime of 'slavery' under the 1926 Slavery Convention.[70] In addition to this, Article 7(1)(c) of Elements of Crimes of the Rome Statute clarifies that 'the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'. This definition contains some elements which are similar to the definition of trafficking. As far as the action is concerned, while trafficking requires 'the recruitment, transportation, transfer, harbouring or receipt of persons', slavery focuses on actions like 'purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'. From this perspective, the conducts seem to be quite different. However, since both lists are not exhaustive,

69 C. Hall, J. Powderly & N. Hayes, 'Article 7' in *Rome Statute of the International Criminal Court: a Commentary*, ed. O. Triffterer (Munich: G.H. Beck, Hart, Nomos, 2015), 144, at 212.

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

it is not possible to exclude the overlap of some conducts. Furthermore, the Rome Statute does not explicitly include the element of 'means', since it only refers to the 'the right of ownership over one or more persons'. However, an implicit reference to the elements of 'means', according to which slavery must be the result of coercion, threat or force, as requested by the Palermo Protocol, seems to be supported by Trial Chamber II in *Katanga*.[71] Here, Trial Chamber II clarified that 'the powers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy'.[72] If the element of lack of autonomy is interpreted to imply the use of coercion or force, it can be concluded that the definition of slavery might include the element of means. Furthermore, the third element, the purpose of sexual exploitation, required by the Palermo Protocol, seems to be present in the definition of 'sexual slavery'. Indeed, as clarified by Article 7(1)(g)-2 of the Elements of Crime, 'the perpetrator caused such person or persons to engage in one or more acts of a sexual nature'.

Finally, it should be noted that Article 7(1)(g)-2 of the Elements of Crime indicates that other three elements are necessary to qualify the crime of sexual slavery as a crime against humanity. It says that '[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'. The elements of widespread or systematic attack, the fact that this must be directed against a civilian population and the *mens rea*, i.e. knowledge of the perpetrator, is not required by the definition of trafficking, as defined by the Palermo Protocol. While Aston believes that these elements are always present in the crime of trafficking because they are often directed towards a specific group of people and that the perpetrator is aware of the act of the organised crime supporting the crime against humanity, this article suggests that these elements must be demonstrated on a case-by-case basis.[73]

Also, the ICC's practice shows that the link between these two types of crimes have been neglected by the OTP and Pre-Trial Chambers. The crime of sexual slavery has been charged three times, in the cases of *Katanga and Ngudjolo*, *Ntaganda* and *Kony*.[74] The first two cases are based in the DRC, while

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71 *Prosecutor v. Katanga, 'Judgement Pursuant Article 74 of the Statute'*, ICC-01/04-01/07-3436-tENG, 20 April 2015, 975. For a different view on this point, see Hall, Powderly & Hayes, 'Article 7', 214.

72 Ibid.

73 Aston, 165.

74 *Prosecutor v. Ntaganda, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda*, ICC-01/04-02/06-309, 9 June 2014, 36; *Prosecutor v. Katanga and Ngudjolo, Decision on the Confirmation of Charges*, ICC-01/04-01/07-717, 30 September 2008; *Prosecutor v. Kony et al, 'Warrant of Arrest for Joseph Kony' Issued on 8 July 2005 as Amended on 27 September 2005*, ICC-02/04-01/05-53, 27 September 2005.

the investigation into Kony's conducts are located in Uganda. Although the DRC is indicated by the Secretary-General in its 2018 Report as one the countries where SCSV and trafficking are deeply linked but the ICC has only referred to sexual slavery in the *Ntaganda* and *Katanga*, where the accused were charged (but not convicted) with the crime against humanity of sexual slavery for the actions committed by their troops in the Ituri Province in the DRC.[75] Conversely, no attention has been given to trafficking. Furthermore, the difficulties to charge individuals for trafficking is even clearer in the Arrest Warrant for Al-Bashir because despite the fact that the 2018 Report included Darfur among those regions where a strong link between CRSV and trafficking exists, the Arrest Warrant only mentions the crime of rape.[76] From this analysis, it is clear that the ICC has completely overlooked the crime of trafficking for the purpose of sexual exploitation. This can be explained by the fact that this crime is not explicitly mentioned in the Rome Statute and, thus, the OTP would have no reasons to collect evidence on a crime, which is not within the ICC's jurisdiction.

Rebus sic stantibus, the scope of the crime of sexual slavery could be expanded to include the crime of trafficking for the purpose of sexual exploitation, in line with the Rome Statute and the Elements of Crimes. Although the two crimes are distinct, this would be possible using an evolutive interpretation of the term 'sexual slavery'. Indeed, it must be noted that at the time of the adoption of the Rome Statute, the Palermo Protocol with the definition of trafficking, did not exist yet. However, in absence of any case-law of the ICC on this issue, it is difficult to predict whether the judges will use this broad interpretation and whether, for instance, they would choose to differentiate the crime of 'slavery' from the crime of 'enslavement'. However, this solution would not be in line with internationally recognised human rights under Article 21(3) of the Rome Statute and, more specifically, with the Palermo Protocol which defines the crime of trafficking as a distinct form of crime, separated by the crime of slavery. For this reason, this article suggests a modification of the Rome Statute in order to encompass, among the crimes against humanity, the crime of trafficking, and, more specifically, the crime of trafficking for the purpose of sexual exploitation. This solution has the advantage to safeguard nexus between CRSV and trafficking and stresses that only moving trafficking from the shade of CRSV, the ICC would give the trafficking crimes the attention they deserve.

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75 *Prosecutor v Ntaganda*, ICC-01/04-02/06-309, 36. *Prosecutor v Katanga and Ngudjolo, Decision on the Confirmation of Charges*, ICC-01/04-01/07-717, 30 September 2008.

76 *Prosecutor v. Al-Bashir, Second Decision on the Prosecutor's Application for a Warrant of Arrest*, ICC-02/05-01/09, 12 July 2010, 106.

4. Conclusions

CRSV and trafficking are strictly related, especially in the context of armed conflict since they both spring from the same root of criminality and feed each other. Thus, they should be tackled together because only by breaking the chain of impunity for one it is really possible to ensure justice for the other.

States should be the main stakeholders in fighting against these heinous phenomena even if they are often directly involved in these acts. The analysis of domestic legislation reveals a very diversified picture in the 13 countries currently in conflict identified by the Secretary-General with an overall poor performance. Some of them, such as Colombia, Mali and CAR are making important steps toward complying with international standards by adequately criminalise trafficking in an effective and comprehensive way and have ratified to the Rome Statute. Other countries are lagging behind, far from meeting any minimum standards and without apparent interest in acceding the Palermo Protocol and the Rome Statute.

However, any legal framework can be effective only if properly enforced. In situation of armed conflict, this enforcement is made even harder. In particular, this article identified the lack of specific anti-trafficking law enforcement units or normal law-enforcement units trained on how to deal with trafficking as one big obstacle for adequate investigations and judgments. Especially in the context of conflicts, the lack of staff, resources and training to these units make it sometimes impossible for governmental officials to acknowledge the existence of CRSV or trafficking, to conduct a proper investigation and, to ultimately stop the crime and bring justice. Similarly, the lack of services for victims of both crimes prevent the latter from participating in the investigations and proceedings, limiting their effectiveness. Considering the sensitivity of the issue, the transboundary nature of the crime and role that sometimes is played by cultural, religious and societal concerns, it is fundamental to have dedicated services to apply in these circumstances and adequate staff to enforce it. The variable of conflict further complicates this picture, making the domestic criminal framework unable to practically address CRSV and trafficking.

The international criminal framework could offer an alternative for prosecuting CRSV and trafficking. However, this article showed that, out of the 13 countries where a deep link between these two types of crimes exist, only five are parties to the Rome Statute. This limits the possibility of international prosecution, which can only be carried out in presence of a Security Council resolution authorising such an investigation. In addition to this, this article highlighted that the crime of trafficking is not explicitly criminalised in the Rome Statute as such and its qualification as 'sexual slavery' or 'enslavement' is ambiguous since it does not fully respect Article 21(3) of the Rome Statute. Despite this, the interpretation of these crimes could be expanded to include the crime of trafficking for the purpose of sexual exploitation, in line with the Rome

Statute and the Elements of Crimes. However, the ICC has not yet prosecuted anybody for trafficking despite the existence of evidence on this crime in some of the states under investigation. Thus, it was suggested to modify the legal framework accordingly and, more specifically, to encompass, among the crimes against humanity, the crime of trafficking also for the purpose of sexual exploitation.

In conclusion, neither the domestic criminal law framework nor the ICC seem to be equipped to properly prosecute CRSV and trafficking and fully understand the nexus between the two. This is due to both legal and practical obstacles posed by the conflict situation and the lack of willingness by governments to make it a priority in their prosecution agenda. This is why this article suggests that it is important to keep pushing these 13 countries to improve their domestic legislation up to recognised international standards and the ICC to address the interpretative challenges posed by the crime of trafficking. Until CRSV and trafficking are recognised as an emergency in current days conflicts and their prosecution a priority for the international community, there will not be enough efforts to this extent.

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At the Crossroads: Evidential Challenges in the Investigation and Prosecution of Trafficking in Persons for Sexual Exploitation and Sexual Violence in Situations of Conflict

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Abstract

There is growing socio-political and legal recognition of the intersections between conflict-related trafficking in persons (TIP) for the purpose of sexual exploitation and conflict-related sexual violence. While on first glance, the elements of crimes for TIP and sexual slavery/enslavement as a crime against humanity/war crime are quite distinct and the type of law and choice of forum may vary, both sets of crimes have benefitted from a more expanded and nuanced interpretation of the core definitional terms of each, such as 'ownership', 'vulnerability' and 'consent'. Likewise, a closer examination of the key evidential challenges facing investigators and prosecutors within both legal frameworks reveals a number of striking similarities relating to the investigative context, lack of international cooperation, lack of witness protection, limited availability of sources of evidence, and challenges in the collection of victim-witness and linkage evidence, specifically for victims of sexual violence and child victims.

The author concludes that the two legal frameworks must be seen as complementary and mutually reinforcing. The fact that there are so many shared evidential challenges is an indication of the potential for increased cooperation between Member States (and those supporting national efforts such as international organizations) investigating and prosecuting transnational organized crime, and international justice mechanisms (the International Criminal Court (ICC) and ad-hoc, hybrid or other tribunals). The prosecution of TIP for sexual exploitation in conflict situations at the national level is an important step towards closing the impunity gap for SGBV as international crime.

1. Introduction

There has been a growing cognizance in recent years of the prevalence of trafficking in persons (TIP) in conflict situations, including as a

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form of sexual and gender-based violence (SGBV). From Security Council resolutions to jurisprudence from international courts, to national governmental and non-governmental action, these crimes have been at the centre of a number of important political and legal developments. Armed groups frequently commit SGBV crimes such as forced marriage, sexual slavery, enslavement and TIP as tactics of war, not only against women and girls but also against men, boys and transgender persons. Organized criminal groups are often fueled by ongoing war crimes/conflict situations, increasing their propensity to commit transnational organized crime including TIP. The United Nations Office on Drugs and Crime (UNODC)'s most recent Global Report on TIP furthermore confirmed the correlation between TIP and conflict.[1] The United Nations Special Rapporteur on TIP has also highlighted this nexus, explaining how TIP is a systematic component of conflict amounting in certain circumstances to war crimes and or crimes against humanity, wherein armed criminal groups 'take advantage of the rule of law to carry out the dirty business of trafficking in persons and become more powerful and dangerous.'[2]

In this article, the author 1) outlines the growing recognition of the intersections between TIP especially for the purpose of sexual exploitation and sexual violence in conflict, and then 2) considers the requirements for each under the legal frameworks of transnational criminal law and international criminal law; and 3) analyses the common evidential challenges in the investigation and prosecution of each. The basic premise is that while the elements of the crime and legal thresholds of the two legal frameworks may be different, and while the type of law and choice of forum will vary, there are a number of common evidential challenges stemming from the realities of the conflict and post-conflict settings. The author concludes that the two legal frameworks must be seen as complementary and mutually reinforcing. The fact that there are so many shared evidential challenges is an indication of the potential for increased cooperation between Member States (and those supporting national efforts such as international organizations) investigating and prosecuting transnational organized crime, and international justice mechanisms (the International Criminal Court (ICC) and ad-hoc, hybrid or other tribunals).

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1 United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2018* (Vienna, 2019), 11 and *Global Report on Trafficking in Persons 2016* (Vienna, 2016), 10.

2 United Nations Special Rapporteur on Trafficking in Persons, M. Giammarinaro, 'Video Statement to the United Nations Security Council High Level Open Debate on Trafficking Persons in Conflict Situations', 21 November 2017.

2. Tracing the Nexus

On 20 December 2016, the United Nations (UN) Security Council convened a High Level Open Debate on TIP in Conflict Situations resulting in a historic, unanimous resolution, the first ever on TIP. Resolution 2331[3] calls upon Member States to address ongoing conflict situations, in particular the vulnerability of women and children to TIP, as well as other sexual violence and transnational organized crime. In the subsequent Secretary-General's report on TIP in armed conflict situations, women and children were confirmed to be disproportionately affected by TIP in conflict situations, especially in cases of SGBV.[4] Nearly one year later, the UN Security Council adopted Resolution 2388[5] which calls upon Member States and the UN special political and peacekeeping missions to strengthen and support national investigations and prosecutions of TIP in armed conflict.

The heightened risk of TIP, especially for sexual exploitation, during situations of conflict, had been acknowledged much earlier of course. At the time of the negotiations of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN TIP Protocol)[6], supplementing the United Nations Convention against Transnational Organized Crime, the conflict and post-conflict experience of Member States emerging from the ex-Yugoslav wars became an important backdrop. Much of the first wave of anti-trafficking efforts were thus directed to the Western Balkans, where it became clear that 'the Yugoslav wars and their aftermath intensified the scale of transnational crime and the levels at which criminal networks preyed on the population'[7], especially for TIP. The International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) would go on to successfully prosecute landmark cases of wartime sexual violence, as a war crime, a crime against humanity and genocide. Most notably, convictions were entered at the ICTY that held that rape could be a form of torture, and rape and sexual enslavement, a crime against humanity, while the ICTR found that rape and other forms of sexual violence could con-

3 UN Security Council, Security Council Resolution 2331(S/RES/2331), 20 December 2016.
4 UN Security Council, *Report of the Secretary-General on Trafficking in Persons in Armed Conflict Pursuant to Security Council Resolution 2331* (S/2017/939), 20 November 2017.
5 UN Security Council Resolution 2388 (S/RES/2388), 21 November 2017.
6 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.
7 H. Friman & S. Reich, *Human Trafficking and the Balkans* (Pittsburgh: University of Pittsburgh Press, 2007), 4.

stitute genocide.[8] The investigation and prosecution of SGBV as an international crime continued in the Special Court for Sierra Leone (SCSL), most notably in the conviction of the former Liberian President, Charles Taylor, for rape, sexual slavery and other forms of sexual violence.[9]

However, it was not until the Rome Statute, the founding treaty of the ICC, that the first mention of TIP was explicitly included within the context of international criminal law, in the definition of enslavement as a crime against humanity.[10] To this date, the Prosecutor has not brought charges of enslavement specifically mentioning TIP although there have been charges of sexual slavery, enslavement (without mention of TIP) and forced labor, the factual circumstances of which could have arguably fit the definition of TIP.[11] In early May 2017, the Prosecutor signaled the possibility of an investigation into migrant smuggling and TIP in the context of the Libya situation, should the jurisdictional requirements be met.[12]

While the Security Council met in November 2017 to renew international efforts to tackle TIP in conflict situations, political leaders condemned horrific slave trade footage broadcast by CNN allegedly from Libya, involving the apparent sale/slavery of vulnerable migrants (some who would have been trafficked) documented by investigative reporters[13]. A number of political leaders, including the President of France, decried the crimes allegedly confirmed in this footage as a crime against humanity.[14] The Pontiff of the Roman Catholic Church, Pope Francis, has on several occasions expressed the same view.[15] Thus, in addition to the legal developments increasingly opening the possibility of TIP in conflict times being considered as an international or 'atrocity' crime, there has also been growing socio-political awareness of these linkages.

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8 *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998.

9 *Prosecutor v. Charles Ghankay Taylor (Judgement Summary)*, SCSL-03-1-T, Special Court of Sierra Leone, 26 April 2012.

10 UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

11 See also *Special Issue – Slavery and the Limits of International Criminal Justice, Journal of International Criminal Justice* 14.2 (2016): 253-500.

12 International Criminal Court, 'Statement of ICC Prosecutor to the UNSC on the Situation in Libya', 9 May 2017.

13 'Migrants Being Sold as Slaves', *CNN*, 13 November 2017 and 'People for Sale', *CNN*, 13 November 2017.

14 'Macron Calls Libya Slave Sales "Crimes against Humanity"', *The Independent*, 22 November 2017.

15 'Human Trafficking is a Crime against Humanity', *Vatican News*, 12 February 2018.

3. Analysis of the Legal Elements

In his 2017 report to the Security Council on conflict-related TIP, the UN Secretary General stated that '[t]he collection of reliable evidence is of paramount importance to end the impunity of traffickers and abusers'.[16] Given that the evidence is assessed against the elements of each crime, it is worthwhile to briefly review the thresholds established in the two legal frameworks.

A comparison of the elements of crimes of enslavement and sexual slavery (including TIP) as a crime against humanity and war crime in the Rome Statute, with the crime of TIP of the UN TIP Protocol, shows the distinct legal requirements for each, see *Table 1*.

Table 1. Comparison of the Elements of Crimes

Trafficking in Persons*Article 3(a),* UN TIP Protocol[17]	***Enslavement*** *Article 7(1)(cv), Crimes against Humanity,* Rome Statute of the ICC[18]	***Sexual Slavery****Article 7(1)(g), Crimes against Humanity,* Rome Statute of the ICC[19]	***Sexual Slavery*** *Article 8 (2) (b) (xxii) War Crime,*[20] Rome Statute of the ICC[21]
The action of: recruitment, transportation, transfer, harbouring or receipt of persons;	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar

16 UNSC, *Report of the SG on CRSV* (2018), para. 5.

17 UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. See also UNODC, *Legislative Guide for the Trafficking in Persons Protocol* (Vienna: 2008), 268.

20 Ibid.

21 Ibid.

19 Ibid.

18 ICC, *Elements of Crimes* (The Hague: Official Journal of the International Criminal Court, 2011).

	deprivation of liberty [including TIP] [22]	liberty. [including TIP][23]	deprivation of liberty. [including TIP][24]
By means of: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;		The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.	The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
The purpose of exploitation, which include, at a minimum: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.	The conduct was committed as part of a widespread or systematic attack directed against a civilian population.	The conduct was committed as part of a widespread or systematic attack directed against a civilian population.	The conduct took place in the context of and was associated with an armed conflict not of an international character.

[22] The ICC Elements of Crimes include this footnote: '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.'

[24] Ibid.

[23] Ibid.

	The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.	The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.	The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

It is important to note that the UN TIP Protocol has achieved one of the highest ratification rates in a relatively short period of time in the history of international law – currently 171 Member States have ratified the Protocol as of writing – and the vast majority have adopted criminal legislation in their own countries. These are strong indicators of the international consensus on the Protocol's definition and approach as well as the imperative of addressing this crime.

The UN TIP Protocol's definition of TIP has three core elements; act, means and purpose of exploitation. While the term 'trafficking' evokes the image of border-crossing, the Protocol does not require any movement at all, as the case could involve acts of harboring or receipt of trafficked persons. The Protocol includes both 'hard' and 'soft' means – from force or threat of force and abduction, to fraud, deception and abuse of a position of vulnerability. Emotional abuse and the humiliation of victims are two important psychological forms of control which the courts are increasingly recognizing as constitutive elements of trafficking cases.[25] Evidence to date suggests that traffickers are increasingly relying on more subtle means of control over their victims, increasingly taking advantage of 'willing victims' in dire circumstances. In a UNODC Issue Paper on the means of abuse of a position of vulnerability, it was noted by many practitioners that:

'traffickers are becoming increasingly adept at recognizing and manipulating vulnerability to create dependencies, expectations and attachments. Indeed, the use of other more "tangible" or "direct" means such as force and violence was noted to have decreased in recent years, as more subtle strategies of abuse of vulnerability are refined.' [26]

25 UNODC, *Evidential Issues in Trafficking in Persons Cases: Case Digest* (Vienna, 2017), 67.
26 UNODC, *Abuse of a Position of Vulnerability and Other Means within the Definition of Trafficking in Persons* (Vienna: 2013), 84.

Indeed, strategies of abusing vulnerability may also be at play together with the apparent consent of the victim to their exploitation by the trafficker. Here the language of the UN TIP Protocol could not be more clear: the consent of the victim is vitiated where any of the illicit means are in use.[27] And despite the clear text, a review of national courts' assessment of the role and impact of consent in leading TIP cases reveals that it is often still a key defense strategy, and not so infrequently, a winning one.[28] Nevertheless with time it seems that courts are willing to overlook the apparent consent of victims even in complex cases where there is no physical force, or where there was limited freedom of movement or a constellation of vulnerabilities.[29] The Protocol was forward-looking in that the definition of exploitation is open-ended and allows Member States to adapt their legislation to the national context.[30]

Within the legal framework of international criminal law, SGBV crimes contain two components: the contextual requirements (crimes against humanity, war crimes or genocide) and the underlying act/s (e.g. rape, sexual slavery, forced pregnancy, enslavement, other forms of sexual violence). The underlying acts are thus 'embedded'[31] in this contextual part.[32] For the purposes of this analysis, in addition to the underlying acts (sexual slavery and or enslavement as TIP), the contextual requirements for a prohibited act to be considered a crime against humanity must also be satisfied: i) that it was an attack, meaning a course of conduct involving multiple commission of acts; ii) that it was pursuant to or in furtherance of a state or organizational policy; iii) that the attack was directed against a civilian population (the object of the attack) iv) that it was widespread and systematic (the character of the attack); v) that there was a nexus between the acts of the accused and the attack; and vi) that the accused had knowledge of the attack (mens rea).

What would these contextual elements look like in a possible case of enslavement as TIP in a conflict situation as per Article 7(1)(c) of the Rome Statute? Can we imagine an organized crime scenario that would meet these require-

27 Supra note 7, Article 3(b): 'The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;'.

28 UNODC, *The Role of Consent in the Trafficking in Persons Protocol* (Vienna: 2014), 8-9. For a case in which the defence succeeded on the issue of consent, see Provincial Court of British Columbia, *R. v. Ng*, (Vancouver), 21 June 2007.

29 See discussion of *R. v. Urizar*, trial and appellate judgments from Canada in UNODC's, *Evidential Issues*, 144.

30 Ibid., para. 64.

31 Centre for International Law Research and Policy, *International Criminal Law Guidelines: Legal Requirements of Sexual and Gender-Based Violence Crimes* (2017), 16-20.

32 P. Viseur-Sellers, 'Wartime Female Slavery: Enslavement?', *Cornell International Law Journal* 44 (2011): 115-142.

ments?[33] It would certainly seem possible especially considering the evolution in judicial interpretation of these requirements. Unlike for war crimes, in the case of a crime against humanity, there is no requirement that the underlying crime should be committed as part of an armed conflict. There must be an attack which 'denotes a course of conduct involving the multiple commission of acts'.[34] In the case of a crime against humanity, the term 'attack' is not restricted to the use of armed force but may also encompass mistreatment of the civilian population[35] or a series of violent acts.[36] While the attack must be a course of conduct pursuant to or in furtherance of a state or organizational policy, the plan does not need to be declared expressly or even stated clearly and precisely, according to the interpretation of international courts. It may be surmised from the occurrence of a series of events, or revealed through a variety of factors which taken together suggest the existence of a policy.[37] In the ICC's *Katanga* judgment, the Trial Chamber found that a private group could be found to meet this threshold of organisation:

'It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population. Accordingly, as aforementioned, the organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State.'[38]

International jurisprudence has also similarly expanded on the requirement of widespread and systematic – not requiring a formulaic calculation but allowing for more nuanced analysis.[39] There is no minimum number of civilians. The assessment of what constitutes widespread or systematic is to be conducted on

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33 See also K. Corrie, 'Could the International Criminal Court Strategically Prosecute Modern Day Slavery?, *Journal of International Criminal Justice*, 14:2 (2016): 285–303; H.van de Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts', *Chinese Journal of International Law*, 13:2 (2014): 297-334.

34 See most recently, *Prosecutor v. Bosco Ntaganda, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda'*, ICC-01/04-02/06-309, 9 June 2014, para. 23.

35 See *Prosecutor v. Jadranko Prlić, 'Judgement'*, IT-04-74, 29 May 2013, para. 35 and *Prosecutor v. Radovan Karadžić, 'Public Redacted Version of Judgement'*, IT-95-5/18, 24 March 2016, para. 473.

36 *Prosecutor v. Ndindiliyimana et al., 'Judgement'*, ICTR-00-56, 17 May 201, para. 2087.

37 *Prosecutor v. Blaskic, 'Judgement'*, IT-95-14-T, 3 March 2000, para. 204.

38 *Prosecutor v. Germain Katanga, 'Judgement Pursuant to Article 74 of the Statute'*, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 1119.

39 *Prosecutor v. Kunarac, 'Appeals Judgement'*, IT-96-23 & 23/1, 12 June 2001, para. 95. See also *Prosecutor v. Stakić, 'Judgement'*, IT-97-24-T, 31 July 2003, para. 625.

a 'case by case basis and may take into account the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, and any identifiable patterns of crimes'.[40] According to the Trial Chamber in *Taylor*, the pattern of mistreatment should not be 'isoldated or random' but rather form 'part of a continuous campaign directed against civilians'.[41] Lastly, the accused must have had known that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. Depending on whether the accused is being held directly or indirectly responsible, the prosecution would have to prove at the very least the existence of a superior-subordinate relationship, that the superior had reason to know that the subordinate would commit the crime, and that the superior failed to take necessary and reasonable measures to prevent or punish the commission of crime by the subordinate. The burden of proof in this regard is often most challenging for prosecutors, especially when the accused has not been physically present at the crime scene.[42]

Despite this evolution of the parameters of contextual requirements for crimes against humanity which would appear to show more flexibility, it is likely that the majority of TIP cases would not qualify as crimes against humanity for not fulfilling the contextual elements: imagine cases of TIP for domestic work for instance, or smaller scale TIP operations which could not be seen to constitute an attack, or to be in furtherance of a plan or policy. The clearest exception may be in the case of conflict, where in some cases, organized criminal groups engaging in TIP may commit crimes amounting to crimes against humanity and/or war crimes, where these additional elements are met.

Factors to be considered in assessing a potential organized criminal group's conduct as potentially that of sexual slavery/enslavement (TIP) as a crime against humanity could include whether the group is under a responsible command or has an established hierarchy; whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; whether the group exercises control over part of a territory of a State; whether the group has criminal activities against the civilian population; whether the group articulates, explicitly or implicitly an intention to attack a civilian population; and whether the group is part of a larger group which fulfils some or all of the above criteria. Other factors of the crime pattern to be analyzed would include the number of criminal acts, the modus operandi of crime patterns, logistics and resources involved, the number of victims, the existence of public

40 *Karadžić, 'Public Redacted Version of Judgement'*, paras. 471-472, 477.

41 *Prosecutor v. Charles Ghankay Taylor, 'Judgement'*, SCSL-03-01-A, 18 May 2012, para. 553.

42 ICTR, *Prosecution of Sexual Violence - Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (Tanzania, 2014), 31-34.

statements relating to the attacks, the means and methods used in the attacks and the timing of the attacks, among others.

Once the contextual requirements are established, the underlying act of sexual slavery/enslavement/TIP would need to be established. Here too has there been an important evolution in the international tribunals' jurisprudence on the concept of ownership – the crux of the elements of both enslavement and sexual slavery. In *Kunarac*[43] at the ICTY, the Appeals Chamber upheld a broader understanding of the concept of ownership. In the first case of enslavement before the ICTY, the defendants were charged for acts which included keeping two girls in a house for several months and treating them as personal property, requiring them to do household labour and subjecting them to sexual assault. The Trial Chamber found the abuse of power, the victim's position of vulnerability, psychological oppression or socioeconomic conditions to be relevant indicia of control and ownership.'[44] In a subsequent ICTY case, *Krnojelac*[45], the Appeals Court considered whether the apparent consent of detainees was legally relevant to a determination on the charge of forced labour/enslavement. The Appeals Chamber reversed the Trial decision and convicted on the basis of a prevailing 'climate of fear' which made free consent impossible.[46] Important reasoning on the concept of ownership was advanced at the ICC in *Katanga*[47], although ultimately the charges of enslavement were acquitted (interestingly not for lack of evidence on the alleged acts but on the liability of the accused for the said acts). In *Katanga*, the Trial Chambers listed a number of factors which could be considered relevant to assessing ownership including vulnerability, mental coercion and socioeconomic conditions.[48] The Court in *Katanga* also highlighted the importance of the victim's perception of their situation as an indicator of their status – that is, 'the person's perception of his or her situation as well as his or her reasonable fear'[49].

The elements of crime for sexual slavery as a war crime, including TIP, have been less elaborated on in international jurisprudence than as a crime against humanity. The key contextual element which is different from sexual slavery as a crime against humanity is the requirement of a nexus between the crime and the international armed conflict. Armed conflict is found to exist 'whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups

43 Prosecutor v Kunarac et al., 'Trial Judgment', IT-96-23-T & IT-96-23/1-T, 22 February 2001 and Kunarac, 'Appeals Judgment', IT-96-23 & IT-96-23/1-A, 12 June 2002.
44 *Kunarac Trial Judgment*, para. 539.
45 Prosecutor v. Krnojelac, 'Appeals Chamber Judgment', IT-97-25-A, 17 September 2003.
46 Ibid. para. 194.
47 Katanga, 'Judgement Pursuant to Article 74 of the Statute', para. 975.
48 Ibid. para. 976.
49 Ibid. para. 977.

within a State'.[50] The crime may have been committed 'within the context' of the armed conflict[51] and the armed conflict must have been international although an internal armed conflict may become international when an external State participates through proxies.[52]

In sum, this brief look at the legal elements of the two legal frameworks – on the one hand, as TIP for sexual exploitation and on the other, as a crime against humanity (sexual slavery, enslavement) and/or as a war crime (sexual slavery) – reveals two distinct legal regimes, with separate elements of the crime, definitions of key legal terms, and the presence or not of contextual elements. Despite these differences, both frameworks have seen an evolution in the jurisprudence interpreting the limits of key terms such as 'consent' and 'ownership', towards an enlightened understanding of how victims fall under the control of their abusers, and how difficult it may be for them to leave or take advantage of opportunities to leave and how apparent willingness can be legally irrelevant if certain other conditions exist which negate that voluntariness.

4. Common Investigation and Evidential Challenges

Despite the different architecture of the two legal frameworks, it is asserted that in conflict situations, the commonalities in the investigation and prosecution of both crimes actually outweigh these differences.

4.1. Investigative Context

Investigating SGBV and TIP for sexual exploitation in situations of conflict will involve heightened risks for investigators, victim-witnesses, informants and all persons interviewed or even seen to be cooperating with the investigation. A thorough risk assessment would be even more of a necessity than in non-conflict TIP cases, although the overall reduced rule of law and lack of emergency response capacity of authorities will hinder that task. The investigator must be able to design a responsible evidence collection plan which takes into consideration the duty of care towards victim-witnesses and potential witnesses and elaborates tested risk mitigation strategies. National authorities in conflict countries are typically not able to provide initial response systems whereby witnesses can be removed from harm when faced with credible threats

50 *Prosecutor v. Jadranko Prlić, 'Trial Judgment'*, IT-04-74, 29 May 2013, paras. 84-85, 92-96: see also *Prosecutor v. Tadic, 'Appeals Judgment'*, IT-94-1-A, 15 July 1999.
51 *Tadic, 'Appeals Judgment'*, para. 84.
52 Ibid.

to their safety or that of their family.[53] There is also an increased overall risk of criminality and insecurity which can obstruct, delay or complicate movements or actions of investigators. A further issue which has arisen in conflict cases is that witnesses frequently lack identity documents or have multiple identity cards/documents with variable dates of birth and other basic information. This may be normal for countries in situations of conflict and/or post-conflict, but it can cause – and has caused – serious obstacles for investigators and prosecutors who need to confirm identity of witnesses, as well as their dates of birth. Most of the first cases brought to trial at the ICC have thus far had to address this challenge – in some cases more or less successfully. In the *Lubanga* trial, the date of birth of witnesses, in this case, allegedly former child soldiers, was the critical issue at stake since the Prosecution was required to prove that the children were under the age of 15 at the time of their conscription/enlistment with the armed group.[54] While the Prosecution brought forward other corroborating identity documents such as voter registration cards, baptismal certificates, and forensic evidence, in addition to the testimony of family or community members as well as the victim-witness testimony itself, the Chambers ultimately relied most upon video evidence of the accused in the presence of child soldiers.[55] In the *Taylor* judgment, the Trial Chamber noted the challenge of the lack of reliable official identity documents to confirm age, and expressed caution on relying on witness testimony as to the appearance of the age of children, for instance.[56]

4.2. Witness Protection

The lack of adequate witness protection capacity is often a characteristic of countries in situations of conflict. Countries with a small landsize or population are also typically challenged to provide safe houses or temporary relocation services where local populations are highly aware of whom is moving where. Even where proceedings take place in another jurisdiction, perpetrators may manage to threaten victim-witnesses at trial through their extended families and community networks. The situation of conflict makes it more difficult for judicial authorities to determine what is a threat from a witness cooperation and what is a threat from a conflict situation or insecurity in the

53 S. Arbia 'The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits,' *Commonwealth Law Bulletin* 36:3 (2010): 519-528.

54 A. Comrie, 'The Investigation of International Crimes against or Affecting Children: Early Experience at the International Criminal Court' in *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Eleven Legal Publishing: The Hague, 2018), 135-169.

55 *Prosecutor v. Lubanga, 'Judgement Pursuant to Article 74 of the Statute'*, ICC-01/04-01/06-2842, 14 March 2012, para. 1348.

56 *Taylor, 'Judgement Summary'*, para. 1361.

country of origin. Courts will frequently consider whether there has been an objective threat to the victim-witness before awarding protection measures, but by the time evidence is available to document and confirm this threat, the victim-witness has already been exposed. International courts have thus far addressed the issue of victim witness protection in a number of key cases, trying to find a balance between awarding protective measures including witness relocation and redactions to identifying details in sources of evidence, and protecting the accused's right to a fair trial. The Prosecution's appeal of the Trial Chamber's acquittal of *Ngudjolo* included a ground on the basis of witness interference and intimidation by the accused. The Prosecution submitted that there was evidence of contact between the accused, his defence counsel and defence witnesses, and furthermore that Mr. Ngudjolo had given instructions to locate and initimidate Prosecution victim witnesses and their family members in the DRC.[57]

4.3. International Cooperation

International cooperation is one of the major challenges facing investigators and prosecutors of transnational organized crime, and this is even more so when countries experience conflict. Governments experiencing conflict may be more likely to not cooperate at all with international justice mechanisms if they are seen to be allied to another side of the conflict. Poor response times to mutual legal assistance requests, a challenge for all States, are even more of an obstacle for countries in situations of conflict. A further related challenge for investigators outside of the country where the crimes have occurred is how to secure and preserve crime scene evidence.[58] Lastly, in countries experiencing conflict, the role of corruption may be more marked than in non-conflict situations – it will be difficult to assess but may affect the criminal justice process from evidence collection to trial and sentencing.

Investigators of TIP and SGBV in conflict situations may not have access to the full array of available evidence. Investigations at the ICC thus far have struggled with access to territory – for example in the Prosecutor's investigation into alleged crimes committed in Darfur, upon referral of the Security Council, where the Government of Sudan was not cooperative, investigators had to focus their attention on evidence which was physically located outside of the country. Likewise in the Libya situation, the Prosecutor was not able to investigate or

57 *Prosecutor v. Mathieu Ngudjolo Chui, 'Third Public Redacted Version of "Prosecution's Document in Support of Appeal against the 'Jugement rendu en application de l'article 74 du Statut'*, ICC-01/04-02/12-39-Red2, 19 March 2013, paras. 140-141.

58 R. Rastan & P. Turlan, 'International Cooperation and Judicial Assistance', *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Eleven International Publishing: The Hague, 2018), 31-66.

access the territory due to security threats despite the Security Council referral.[59] In most of the ICC's investigations so far, the Prosecutor had to limit or delay contact with victim-witnesses out of concern for their safety, until appropriate measures were put in place, or declined where they could not be.[60] The Prosecutor's policy is only to interview victim-witnesses where there is an emergency response system put in place in case of any threats to the safety and security of witnesses.[61] Investigators on transnational TIP cases may also need to overcome limited availability of evidence, in part linked to poor international cooperation. Attention is also needed to ensure that evidence collected outside of the jurisdiction is fully admissible in the home jurisdiction where the establishment of a joint investigation team has not been sought or is impossible.

4.4. Limited Access to Sources of Evidence

For all of the above reasons, investigators within these two legal frameworks may need to look to victim service providers, most often non-governmental organisations (NGOs), for access to victim-witnesses.[62] SGBV crimes are characterized by low self-reporting, often linked to fear of social stigma, lack of trust in the criminal justice process and even the fear of being penalized/criminalized for having been a victim in the first place.[63] Likewise in TIP in conflict cases, victims have less reason to trust the authorities since there is likely to be a breakdown of the rule of law if they remain in the conflict zone. When victims are on the move, they are most likely in an irregular status – they may have turned to the services of smugglers, crossing a border irregularly to request asylum in a safe country. Fear of immigration status reprisals is one of the major inhibitors to TIP victims' self-identifying and self-reporting and traffickers regrettably are aware of this and use it as a means of further control over victims. Relying on NGOs to access victim-witness evidence in cases of sexual violence/TIP in conflict situations raises new complications, not only

59 'State Cooperation with International Criminal Court Vital to Ensure Justice for Victims of Atrocity Crimes in Libya, Prosecutor Tells Security Council', *UN News*, 8 May 2017.

60 The ICC's Office of the Prosecutor's 2016-2018 Strategic Plan notes that: "almost all cases in the confirmation of charges and trial phases have been or are confronted with incidents of obstruction of justice - in particular witness tampering." See for instance, ICC cases, *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga* where issues of witness security, witness identity and confidentiality were issues of contention between all parties.

61 ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice* (The Hague: 2007), 4. See also Rome Statute, Article 68(1).

62 Whiting A., 'The ICC OTP Cannot Do It Alone: New Institutions are Required to Support the Work of First Responders', *ICC Forum: How to Improve Cooperation of First Responders to Assist ICC Investigations of SGBV?*, 12 April 2016, https://iccforum.com/sgbv, accessed 31 October 2018.

63 UNSC, *Report of the SG on CRSV* (2018), para. 5.

for victim-witnesses but also for the legal status and staff of the NGO. Should the parties to the conflict learn of the role of the NGO in facilitating contact with victims[64] for a criminal investigation, operating licenses or legal status can be lost which further endangers other victims of SGBV or human rights violations receiving crucial assistance and protection. Whereas international NGOs may cease operating temporarily or over the longer term, national NGOs will not have the benefit of removing their staff from the situation and their lives may be at risk.

A number of important lessons were learned at the ICC in the management of intermediaries by the prosecution/investigation teams in early cases.[65] Questions around the integrity, confidentiality and reliability of intermediaries were tested in early pre-trial jurisprudence, the result being that several intermediaries and victim-witnesses they had facilitated contact for, were deemed to be unreliable at trial due to lack of management oversight by the investigating team.[66]

Given these challenges, an important prosecutorial strategy in international tribunals and national systems has been to reduce the overall number of victim-witnesses called to testify, in some cases relying on expert witnesses to corroborate the crime pattern.[67] Integrating sophisticated crime pattern analysis at the early investigative phase can be an effective way to develop a body of corroborating evidence which reduces the burden on victim testimony, including through secondary analysis of open sources.[68] This can include 'macro' witnesses, or witnesses who can provide statistical analysis using a social science, victim-interview sampling methodology.[69] Expert witnesses have been called upon to establish the nature of sexual violence trauma on victims, on the nature of memory recall,[70] and the nature and extent of the injuries endured, and on

64 ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 35.

65 ICC, *Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries* (The Hague: 2014).

66 See A. Putt, 'Legal Constraints on the Use of Intermediaries in International Criminal Investigations ' in *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Eleven International Publishing: The Hague, 2018), 171-192.

67 L. Baig et al., 'Contextualizing Sexual Violence: Selection of Crimes' in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, eds. S. Brammertz & M. Jarvis (Oxford: Oxford University Press, 2016), 172–219.

68 X. Agirre, 'Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases', *Leiden Journal of International Law* 23.3 (2010): 609-627.

69 J. Hagan, 'The ICC Can Sustain a Conviction for the Underlying Crime of Mass Rape Without Testimony from Individual Victims of Mass Rapes, Basing its Proof Instead on Sample Survey Interviews Including Witness Reports of Mass Rapes and Sexual Victimization Gathered and Aggregated in Statistical Analyses by Social Scientists', *ICC Forum on Mass Rape*, https://iccforum.com/massrape#Hagan, 26 June 2012, accessed 23 November 2018.

70 See for instance *Prosecutor v. Bosco Ntaganda, 'Transcript of Dr. John Yuille, Expert Witness for the Prosecution'*, ICC-01/04-02/06, 18 April 2016.

the cultural norms[71] which may have mediated the trafficking/exploitation experience. Expert witnesses have also been needed in some cases to establish complex political, military and geographic contexts which shape conflict patterns or the rise and fall of armed and organized criminal groups. In TIP for sexual exploitation cases, expert witnesses have successfully explained the effects of control mechanisms used by perpetrators such that the victim did not feel that she or he had the opportunity to escape or could safely take advantage of such an opportunity.[72]

4.5. Victim-Witness Evidence Collection

Despite all its challenges, victim-witness evidence is still often the crux of the prosecution's case in many TIP and SGBV in conflict cases. The continued reliance on victim testimony may be attributed to several factors, including the lack of other available evidence (or lack of efforts to obtain it), and the emotional or narrative power of the victim's story which prosecutors and/or judicial authorities feel important to secure a conviction. In many international and national jurisdictions, despite the lack of a requirement for corroboration,[73] there is still a judicial preference for corroborated witness testimony although some landmark cases have been won without the cooperation or participation of the victim.[74] As one practitioner noted, the absence of corroborating evidence should not diminish the testimonial evidence for sexual violence in conflict crimes.[75]

In conflict situations, low-profile or undercover interviews are difficult to conduct – especially in towns or villages with a high degree of kinship/community ties. Not only do victims face threats to their safety, but they must also overcome the social stigma surrounding SBGV crimes. Victims may not wish to testify, which can at the very least, trigger their memory of the events, and

71 See for instance, E. Schauer, 'The Psychological Impact of Child Soldiering, Expert Witness Brief in support of the Prosecution in *Prosecutor v. Lubanga'*, (2009).

72 High Court of Justice, Edo State of Nigeria, *Attorney General of the Federation v. Constance Omoruyi*, Charge No. B/31C/2004, 22 September 2006, as discussed in UNODC, *Evidential Issues in Trafficking in Persons Cases*, 154-156.

73 ICC, *Rules of Evidence and Procedure*, Rule 63(4) states that: 'Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence'.

74 *Constance Omoruyi*, discussion of *Omoruyi* case, in UNODC, *Evidential Issues in Trafficking in Persons Cases*, 154-156.

75 I. Marcus, 'Positive (and Practical) Complementarity: Practical Tools for Peer Prosecutors and Investigators Bringing Atrocity Crimes Cases in National Jurisdictions' in *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Eleven International Publishing: The Hague, 2018), 297.

at the very worst, expose themselves publicly as witnesses for the prosecution.[76] In addition, many victims of TIP and sexual violence may not want to self-identify as victims of these crimes, but may appear to be focused on material losses – such as loss of income, livestock or home, as much as the damage endured as a result of the sexual violence/exploitation. Attention to lost property, wages and household goods by victim-witnesses can be misread by investigators, prosecutors and judges but may also be an indication of the victim's desire for compensation and restoration of their rights,[77] or be an easier 'mistake' to speak about, in the words of one UK practitioner speaking about victims of TIP:

'Men often do not want to expose their physical or mental ill-treatment, fearing that they will be seen as weak, but are certainly willing to say that they have not been paid, as that is not a reflection of who they are but of what someone else has done wrong.'[78]

4.6. Sexual Violence and Exploitation

The investigation of sexual violence and TIP for sexual exploitation in conflict clearly requires dedicated resources with specialized training on interviewing victims.[79] On the one hand, there is a need to reduce the number of interviews to reduce potential traumatization but yet it is important to establish rapport over time with the victim in order to nurture the victim's own readiness to elaborate testimony.[80] The likelihood of traumatization may be higher because of the added context of conflict which may include mass killings, torture, forced displacement, pillaging and other non-sexual forms of enslavement. The potentially high traumatization can affect all stages of the investigation, from first contact and free narrative account of the violence, to overall lack of detailed memory recall. Victim-witnesses may not be able to recall pertinent details in chronological order and in a consistent way.

Many victims of SGBV in conflict will not reveal the full details of their horrific experiences at the first interview, resulting in several interview statements which can be deemed 'inconsistent' to professionals who are not trained in the dynamics of traumatic memory recall. The victim may initially conceal

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76 M. Jarvis & K. Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, eds. S. Brammertz & M. Jarvis (Oxford: Oxford University Press, 2016), 42.

77 Own practice.

78 As cited in UNODC, *Evidential Issues in Trafficking in Persons Cases*, 19.

79 D. Luping, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court', *American University Journal of Gender, Social Policy & the Law* 17.2 (2009): 431-496.

80 ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 50.

large parts of their narrative due to shame, stigma, or fear of the perpetrator.[81] The victim may resort to euphemisms and show reluctance to discuss the actual acts of rape/penetration and requires specific training techniques on part of interviewer to elicit these in a respectful but comprehensive way. The victim will ideally benefit from psychosocial evaluation/intervention and support prior to interview, during and after the interview to ensure that consent to interview is freely and fairly given, to avoid re-traumatization and to support the victim's own survival/coping strategies. Victims may show exceptional fear for authority figures including law enforcement and international civil servants where police, military and staff of international organizations (including peacekeepers) have been perpetrators of SGBV.

A further challenge is posed by victim-witnesses who have endured repeated traumatic episodes, for example victims who endured in sexual slavery in conflict. A victim-witness who was raped by multiple combatants every day over a period of several months is unlikely to be able to recall the details of one specific episode when asked to distinguish one crime from another or focus on a particular instance unless that instance of sexual violence was different in some way from the other episodes. Victim-witnesses of sexual violence in conflict situations typically have difficulty in identifying perpetrators, who may be concealed from victims.[82] Victims may only remember generic details such as – 'he wore an army camouflage', 'she spoke X language' – but may be unable to remember name, title, rank or other identifying features. Conversely though, in the case of sexual slavery and forced marriage, some victims have the most intimate and compelling evidence against high-level commanders, including detailed knowledge of the organized criminal group and command structure. Victim-witnesses may not behave as they are 'expected to' by prosecutors, defense attorneys and judges – they may not show emotion on cue, they may laugh at inappropriate times, in line with evolved understanding of trauma and impacts on memory recall.

Investigators will need to be prepared to deal with a number of practical health and logistic concerns including the presence of children born of rape, hungry or ill victim-witnesses, breastfeeding mothers, husbands/partners or family members who do not support the interview process because of the shame associated with violence or because of their alignment with a party to the conflict.

At trial, the issue of consent may be at the core of the victim's testimony, both for TIP for sexual exploitation (although it is explicitly deemed to be legally irrelevant, it often finds its way into the courtroom narrative, usually by the Defense) and in SGBV crimes, even where coercion renders the apparent con-

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81 A. de Brouwer, 'The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes', *Cornell International Law Journal* 48.3 (2015): 663-664.

82 ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 45.

sent invalid. Cultural/personal or other norms of judicial authorities can creep into the judicial assessment of consent and manifest itself commonly in questioning as to why victim did not fight back; considering as non-victim a victim who has 'agreed' to their sexual exploitation, who went back to their exploiter/perpetrator despite strong indicators of vulnerability, or victims who initially consented because they sought to better their life conditions. Regrettably it seems that there is a greater challenge to prove SGBV and TIP cases where there is a lack of violence or physical constraint, and when victim had some or limited mobility. A full and informed vulnerability assessment/presentation of will be of essence in showing the full nature of the coercive environment in which victims make decisions.

Protective measures at trial including having an accompanying support person, protective screens preventing the victim from making eye contact with the accused, measures to protect the identity of the victim from the broader public (redactions of any identifying details from public documents, usage of code number instead of names – although the accused will in most jurisdictions have a right to know the identity of the accuser), are all measures which should be requested by the prosecution team in order to protect the victim-witness of TIP for sexual exploitation and SGBV crimes.[83]

In addition to interviewing victims of sexual violence, it is important that the investigative team mainstreams questioning and follow up actions on sexual violence within the broader spectrum of all the crime base, including mass killings, conscription and enlistment of child soldiers, forced labour and forced displacement – in order to ensure that sexual violence is not treated as a 'collateral' crime.[84] This may also involve overcoming the unease of investigators and prosecutors (as well as interpreters) in pursuing these investigations, compelling them to identify own biases.[85]

4.7. Child-Victim Witnesses

Child victim-witnesses of SGBV in conflict will have additional needs and rights. Child victims may have been forced to assume various roles – from combatant to laborer to sexual slave, and may have been forced to commit crimes including very serious crimes (murder, rape, mutilations, pillaging). Age determination is complex, especially in the case of conflict, given the lack of identity papers and reliable institutions to preserve and record civil status documents. Medical examinations of child victims may not yield conclusive

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83 See ICC, *Policy Paper on Sexual and Gender-Based Crimes* (The Hague: 2014) and UK Foreign & Commonwealth Office, *International Protocol on Documenting and Investigating Sexual Violence in Conflict* (London, 2017).

84 ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 29-30.

85 Baig et al., 'Contextualizing Sexual Violence: Selection of Crimes', 172–219.

answers to the question of the age of the victim, which can be a critical issue in child conscription and enlistment cases. Concepts such as age, childhood, victim and wife are also subject to cross-cultural misinterpretation and may require additional attention from the investigator.

Children may have developed coping mechanisms hostile to successful witness testimony, and they may also struggle to tell linear narratives of their victimization. Despite protections in international criminal law for child victim-witnesses, international courts have thus judged child victim-witnesses very harshly.[86] The UN TIP Protocol does contain additional language to the benefit of child victims to the essence that no child can ever consent to their exploitation.[87] A challenge that is frequently reported in TIP cases involving child victims is that children frequently go 'missing' from foster or state care institutions before the trial ever begins. Children fleeing conflict or on the move trying to reunite with lost family members are particularly vulnerable and would be susceptible to returning to a perpetrator if they were made to believe that this would help them achieve their goal of finding their family members. The potential complicity of parents is an additional factor – parents may have 'sold' children in TIP cases or 'agreed' to have their child 'married'. In other instances, parents have testified to counter the testimony of child victim-witnesses, as was the case in the *Lubanga* and *Katanga* cases at the ICC.

4.8. Linkage Evidence

Insider or suspect testimony can be especially persuasive but requires an investment of significant investigative resources, as well as long term and proactive investigative techniques. The difficulty in establishing linkage evidence between perpetrators directly committing the crimes and those higher level perpetrators directing/commanding the criminal conduct is one of the most well-known challenges facing investigators of international crimes.[88] In the *Katanga* case at the ICC, the Court ultimately acquitted the accused of the sexual slavery and enslavement charges, although the Chambers made efforts to note that they found the three female victim-witnesses who were kidnapped and sexually enslaved at the attackers' camp to be credible and that the alleged crimes had occurred.[89] Nevertheless, the Court was not convinced of the liability of the accused – of his link as the commander of the armed group who committed the attack – to the persons who committed the sexual violence.[90]

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86 Comrie, 'The Investigation of International Crimes against or Affecting Children'.
87 See *UN Trafficking in Persons Protocol*, Article 3(c).
88 de Brouwer, 'The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes', 662-663.
89 *Katanga, 'Judgement Pursuant to Article 74 of the Statute'*, para. 1664.
90 Ibid.

In TIP cases, there is a tendency for prosecutors to charge lesser crimes such as prostitution or pimping, facilitating illegal stay – rather than TIP for sexual exploitation which requires act, means, and purpose of exploitation. What is clear for both crime sets is the need for greater investigative resources, advanced investigative techniques and advanced intelligence and analysis in order to identify crime patterns, modus operandi, and the commanders or persons most responsible for the organized criminal groups.[91]

5. Conclusion

Whether a particular case should best be pursued as a sexual violence in conflict crime within international criminal law or as TIP for sexual exploitation within national/transnational criminal law will inevitably need to be evaluated on a case by case basis. Not all cases of TIP for sexual exploitation will amount to a crime against humanity or a war crime. Both represent the gravest human rights violations and violate the dignity of victims and require a rights-based approach. An important first step is to ensure that domestic legislative frameworks are fully harmonized and comprehensive of both TIP and international crimes, including provisions on international cooperation. Whether for the purposes of advancing national prosecutions, or as a last resort, international prosecutions, the existence of comprehensive national legislation helps to facilitate joint investigation and mutual legal assistance. Victims of sexual violence and TIP in conflict should moreover access the full array of assistance and protection measures available to them in national and international law.

While on first glance, the elements of crimes for TIP and sexual slavery/enslavement as a crime against humanity/war crime are quite distinct, both crimes have benefitted from a more expanded and nuanced interpretation of the core definitional terms of each, such as 'ownership', 'vulnerability' and 'consent'. Likewise, a closer examination of the key evidential challenges facing investigators and prosecutors within both legal frameworks reveals a number of striking similarities. Despite the legal irrelevance of consent to TIP for sexual exploitation in the presence of illicit means, and to rape or sexual violence in the presence of coercion or other vitiating factors, it would seem that there remains an important risk that victims will be judged upon whether they were willing participants to their suffering, to whether they act/speak/display 'appropriate' emotional reactions, whether they recall dates and events in chronological order and whether they have identity or other official documents available. In-

91 See also more generally, '*ICC Forum: Do Individual Victims of Mass Rape Have to Testify?*, https://iccforum.com/massrape, 26 June 2012.

vestigators of both sets of crimes would want to avoid relying on victim witness testimony, fully aware of the valid reasons why a victim witness may decline to testify, but may nevertheless face limited sources of evidence due to lack of co-operation across borders, lack of available documentary, forensic, financial or crime scene evidence, in part due to the conflict. And perhaps most crucially, investigators of each crime set will struggle to link the underlying or individual crime with the higher level command of the organized/armed group or leader.

What is clear is that the effective investigation and prosecution of transnational organized crime, including human trafficking, is a key strategy in promoting complementarity and ending the impunity gap for sexual violence in conflict at the international level.

One of the key conclusions of the UN Secretary-General's 2017 Report on TIP in conflict situations is that Member States should 'enhance cross government coordination against trafficking in persons and consider deploying teams of specialized professionals in areas affected by conflict to strengthen the collection of evidence, investigation and identification of victims'.[92]

The development of specialized capacity which could address the full spectrum of evidence and issues in both frameworks throughout the investigation and prosecution chain would be a critical factor in the success of cases brought on either charge. It would also be a step towards improved international cooperation on mutually relevant cases since investigations of both crime sets will likely confront significant and common evidential challenges.

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92 UNSC, *Report of the SG on CRSV* (2018), para. 71.

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Q & A – The nexus between conflict-related sexual violence and human trafficking for sexual exploitation in times of conflict during court proceedings: An insider's view

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Abstract

One of key areas related to sexual violence in conflict, including human trafficking for sexual exploitation, includes the legal avenues to address these crimes. National and international lawyers are confronted with substantive and procedural legal issues to best investigate, prosecute and adjudicate such crimes. Patricia Viseur Sellers discusses from extensive and first-hand legal experience how she perceives both crimes and how she thinks they can best be addressed; e.g. by including the crime of the slave trade and removing the crime of sexual slavery.

Q & A

1. Can you elaborate on what you consider to be the similarities and differences between human trafficking and sexual violence in conflict, if any?

There are significant differences between sexual violence and human trafficking, whether or not it is related to armed conflict. A very basic difference is that trafficking is a transnational crime, not an international crime. It criminalizes how someone is reduced to a form of exploitation. The crime actually centres on the means through which someone is reduced to exploitation, such as when someone is kidnapped, treated violently, or induced, fooled or defrauded, with no physical violence. The form of exploitation could be slavery, forced labour, forced prostitution et cetera. The crime of trafficking does not aim to criminalize the underlying substantive criminal conduct that is the basis of the exploitative situation. Trafficking focuses on, for very good reasons, *how* a person has been reduced to exploitation.

The crime of sexual violence in conflict is a type of residual crime that incorporates various sexual acts considered criminal. It potentially incorporates everything from forms of rape to forms of forced sterilisation. However, within the context of the Rome Statute, those forms of criminal conducts are enumer-

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ated as specific crimes. Sexual violence is a residual provision for criminal sexual conduct of a similar gravity to the enumerated crimes. It is different from trafficking in that sexual violence might address the underlying act that happens after someone is reduced to a form of exploitation. However, sexual violence as a crime does not have to be proceeded by trafficking. A person does not have to be trafficked in order for sexual violence to be inflicted upon them. Sexual violence and trafficking are two very different crimes that might happen sequentially or independently of each other.

2. The Secretary General's report says that conflict-related sexual violence actually includes trafficking. How do you look at conflict-related sexual violence as the umbrella term and then trafficking falling under it? Is it a good way forward?

The Secretary General, with very good intentions, is using descriptive terminology. He is not employing strict legal language. By using the terminology, he draws attention to the egregious acts of sexual violence and the systems that enable wartime sexual violence. He strove to emphasize that during periods of armed conflict, trafficking may occur. Trafficking is more aptly understood as slave trading: when the exploitation is enslavement, especially sexualized enslavement, it could encompass sexual violence, forced sterilisation, et cetera. By putting sexual violence in a nice compact phrase, the Secretary-General could seek to recognize that there exist a myriad of forms of sexual violence and trafficking is a related conduit to sexual violence. The Secretary General is urging the international community to increase its awareness of the various forms of sexual violence that could occur during armed conflict. Within a more precise legal discussion, one would understand specifically which crimes – sexual violence, slavery, trafficking or rape – are being committed. Such crimes could be charged in one manner on the national level and in a different manner at the international level.

3. Can you give some examples of situations or cases where people were victims/survivors of both human trafficking and sexual violence in conflict?

Recently, two guilty pleas for war crimes were handed down by the Colombian criminal trial courts. The crimes – rape, torture and trafficking – occurred in the province of Sucre, in a small town named Libertad that was mostly inhabited by Afro-Colombians. Paramilitary forces had occupied the town. The head of the paramilitary force, "El Oso" or "the Bear" had previously pleaded guilty to crimes of sexual violence. A subordinate of El Oso and a town official of Libertad entered into these two guilty pleas. Both men acted in concert with El Oso. The guilty pleas specifically cover rape, trafficking, and torture as enumerated under Colombian criminal law. High school girls were raped. These teenagers were frequently taken from their homes and driven to the military

headquarter and raped by the commander. At times, the rapes were perpetrated for punishment and at other times for intimidation. The context of the sexual violence was a means to effectuate the occupation and exercise control over the inhabitants of Libertad. So yes, here are two national cases that entail both trafficking and forms of sexual violence – rape and torture – in the context of armed conflict.

4. How have international and national legal mechanisms dealt with the prosecution of human trafficking and/or sexual violence in conflict?

In the cases just cited in Colombia, the crime of trafficking in persons resulted in a guilty plea. However, there could remain some confusion. Trafficking requires that one be reduced to a form of exploitation. Rape and torture might not be considered "forms" of exploitation. Slavery is a form of exploitation. Interestingly, the court found that the teenage girls were reduced to sexual slavery by the act of trafficking, even though the sexual slavery was not the basis of the guilty plea.

In national settings, recourse must be to national criminal codes that might penalize trafficking as well as sexual violence and other sexual crimes. The national settings also might recognize international crimes, such as war crimes or crimes against humanity, possibly through legislation that enabled provisions of the Rome Statute to become domesticated. For example, in the Colombian cases, one of the defendants pleaded guilty to war crimes and the transnational crime of trafficking as incorporated into the national penal code.

At the international level there are various forms of sexual violence that are criminalized. At the International Criminal Tribunal for the former Yugoslavia (ICTY), there was a very interesting discussion in the Kvocka case concerning sexual violence and its definition. It was not an enumerated provision within the ICTY Statute. Now, it is an enumerated provision within the Rome Statute. However, the International Criminal Court has not upheld convictions based upon the sexual violence provisions under crimes against humanity nor under war crimes. Deliberation upon the conduct that could comprise sexual violence under the Rome Statute remains to be articulated in the jurisprudence. Certainly, it is a specific crime that also lends itself to being an umbrella term for multiple forms of sexual conduct. A layperson's connotation of sexual violence, thus, could be that the provision entails several different sets of conduct.

The Special Court for Sierra Leone (SCSL) used provisions of the Rome Statute, but did not charge trafficking. Trafficking is not an enumerated crime under the SCSL Statute. Convictions for sexually violent acts related to war crimes and crimes against humanity, including rape and sexual slavery, however, were rendered. The Statute for the International Criminal Tribunal for Rwanda (ICTR), which predates the Rome Statute, pronounced convictions relating to sexually violent conduct as part of genocide and as rape under crimes against

humanity, including in Akayesu and in Karemera. However, neither sexual violence nor trafficking was an express crime under the ICTR Statute.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) sanctioned sexually violent conduct including rapes within the context of genocide and as crimes against humanity. Genocide was perpetrated against the minority of Vietnamese and the Muslim populations. Female members of these populations were raped prior to execution. Cambodian males and females as victims of forced marriages were constrained to consummate the illicit "marriages" or in other words, forced to sexually assault each other. Such conduct was characterized as crimes against humanity. The ECCC did not enumerated trafficking as a crime. Hence, there are several national and international courts that examine sexually violent conduct. I am unaware of any international process that is adjudicating the express crime of trafficking. The International Criminal Court, in its definition of enslavement, seems to characterize trafficking as an expression of enslavement whenever there is the exercise of powers of ownership over someone while they are being trafficked.

5. Do you see any investigatory and prosecutorial challenges in establishing the nexus between human trafficking and sexual violence in conflict?

Trafficking is a transnational crime; I am less familiar with its applicable liability modes in national courts. Nevertheless, the nexus between sexual violence and trafficking can occur depending upon what was the exploitation into which the survivor or the victim was reduced. There is no difficulty in relating trafficking result to a form of exploitation that comprises sexual violence. However, here is a small warning: one can prove trafficking by showing that the destined exploitation displayed forms other than sexual violence. On the other hand, the crime of sexual violence could be proved without necessarily criminalizing how a person came to be in the situation where they were subjected to sexual violence by a perpetrator. The preceding conduct might have entailed trafficking, or, other criminal conduct such as imprisonment, or possibly it did not entail criminal conduct.

The two crimes of trafficking and sexual violence are not legally dependent upon each other. In trafficking cases you must prove the means and method a person was reduced to exploitation and then prove that there existed an exploitative situation. However, proving trafficking is not a synonymous charge to proving the substantive underlying criminal exploitation. The underlying exploitation is usually due to the acts of another perpetrator.

6. In your experience, does it make a difference for victims/survivors of both human trafficking and sexual violence in conflict under which definition the crimes are prosecuted?

From the victim or survivor's point of view, and certainly from the prosecutor's viewpoint, it is rather unseemly to select the criminal charge based upon whether its name is appeasing. Firstly, interviews with witnesses concern the description of criminal conduct – facts that have happened and must be proved beyond a reasonable doubt. Secondly, interviews with witnesses try to ascertain the mental state or the intent, the *mens rea* of the accused. These factors put together result in the characterization of the criminal conduct.

Whether in a national or international system, victims usually do not select the crime under which the criminal acts will be prosecuted. For example, survivors might understand that a death could result in a charge of murder. Nonetheless they would not decide on whether manslaughter, negligent homicide or murder in the first degree ultimately will be charged. Survivors of international crimes usually do not request that an act be charged as persecution rather than as torture.

I imagine the reason why you ask this question is to determine whether there is value in giving victims a preference in characterizing the crime to which they have been subjected. That leads to the question whether there are crimes that are more significant than other or that carry more stigma than other crimes. What does it mean for crimes to bring a stigma to survivors when the criminalisation of conduct should mean that the accused bears the stigma.

7. You just mentioned that trafficking is a transnational crime, and that its inclusion in the Rome Statute is unfortunate because it is different than an international crime. Do you think that, even though it is in the Rome Statute, trafficking is not suitable for international prosecution?

The enslavement provision under the Rome Statute uses the basic elements from the definition in the 1926 Slavery Convention, 'the exercise of power of ownership over someone'. At the Rome Statute drafting conference, many States were alert to the trafficking in persons that accompanies armed conflict or periods when crimes against humanity are committed. Possibly, in order to address this phenomenon, the term trafficking, was inserted into the enslavement explanation without any requisite, in-depth legal consideration. The placement of the word trafficking in the Rome Statute was misguided for several reasons.

Firstly, the explanatory paragraph to the enslavement provision under crimes against humanity states that 'Enslavement' means 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. However, in the Elements of the Crimes document of

the Rome Statute, no elements are given in regard to (the transnational crime of) trafficking. Therefore, trafficking is not a crime under the Rome Statute, or else, the elements of trafficking, meaning its *actus reus* and the *mens rea* would be delineated in the Elements of the Crime Document. As such, the crime of trafficking must be a description of conduct, not a crime that need be proven in order to find an accused guilty of enslavement.

Secondly, from my point of view, enslavement entails exercising powers of ownership over a person, irrespective of how that exercises of power of ownership manifests. When considering trafficking as set forth under the Palermo Protocol the trafficker is not legally required to exercise powers of ownership over the victim. The exercise of such powers is not an element of the crime of trafficking. The trafficker is condemned whenever he or she reduces the victim to a form of exploitation, such as enslavement. Therefore, a person might have the status of a slave because the person was reduced to slavery as a result of being trafficked. The enslavement provision in the Rome Statute, essentially, confounds trafficking. Whenever anyone, including the trafficker exercises powers of ownership over a person that is an act of enslavement and no longer should be termed trafficking.

Thirdly, I say that the crime of the slave trade is what is missing from the Rome Statute. Because of its absence, conduct described as trafficking is more misunderstood. Under the 1926 Slavery Convention slavery and the slave trade are condemned. The 1926 Slavery Convention defines the slave trade as including 'all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.'

The slave trade, as a crime, resembles the transnational crime of trafficking to the extent that a person who is not enslaved, subsequently, is reduced to the status of a slave. However, the slave trade is a distinctive crime. The slave trader, like the trafficker is not legally required to exercise powers of ownership over a person prior to their being reduced into slavery. However different from trafficking, slave trading is never dependent upon the absence or presence of coercive circumstances. Slave trading, unlike trafficking, does not legally recognize the consent of an adult victim as a defence to the crime. In slave trading, the age of the victim is irrelevant. The crime can continue beyond the initial reduction of someone into slavery. Slave trading can be perpetrated upon someone who is already enslaved, by facilitating the transfer of ownership to another person, by trade, exchange or transport. Slavery and the slave trade work in tandem. This probably explains their sequential placement in the 1926 Slavery Convention and why they are reiterated, almost verbatim, in the 1956 Supplemental Slavery Convention.

Fourthly, the Rome Statute leaves an almost imperceptible impunity gap by omitting the slave trade as a crime. According to the explanatory paragraph of

enslavement, only persons who exercise the powers of ownership are sanctioned. Thus, slave traders who transport or engage in any of the acts described in the definition of the slave trade, but who do not exercise powers of ownership over the persons are not proscribed under the enslavement provision of the Rome Statute.

The Rome Statute should have explained that the provision of enslavement entails slavery and the slave trade. As such, the statute would have had jurisdiction over all conduct wherein powers of ownership over a person had been exercise and all conduct that reduces a person to slavery or that further enslaves a person by transfer to a a subsequent owner. As currently drafted, the Rome Statute provision of enslavement conflates, confounds and muddles the crimes of trafficking and slavery and omits the crime of slave trade. The omissions are, in my opinion, even more glaring under Article 8 of the Rome Statute. Astoundingly, none of the extensive war crimes provisions incorporate slavery or the slave trade, even though both are recognized customary prohibitions under international humanitarian law.

To advance one step further, sexual slavery, as enumerated, should be reconsidered and removed from the Rome Statute. Why? The definition of enslavement countenances the exercises of powers over sexual integrity, sexual autonomy or sexual access. In essence the crime of enslavement prohibits sexualized enslavement. As currently constructed, to prove sexual slavery requires the same elements as enslavement, *plus* proof of being held out for an act of a sexual nature, according to the Elements of the Crime Document. What most likely comes to the forefront when thinking about acts of a sexual nature is holding females out for rapes or forced marriages. However, acts of a sexual nature as actually practiced in historic episodes of slavery are more nuanced. For example, during the 19th century Arab slave trade, males were frequently gelded or castrated. Enslaved males were intentionally mutilated so that they could work within the harems of their masters, yet, not pose a sexual threat to the females in the harem. Castration, as an act defies "just" being held for an act of a sexual nature. It is a multi-layered attack on the sexual integrity of a person, physically, psychologically, in terms of reproductive capacity, et cetera. In North and South America, after trans-Atlantic slave trade was banned during the 19th century, slave owners increased their breeding of slaves to sell internally. Male and female slaves were made to copulate. Male slaves did not own their semen nor did female slaves own their wombs. Neither could claim parental rights over any child born of their relations. Such breaches of sexual integrity or autonomy evince the exercise of powers of ownership, yet are inappropriate characterized as being held out for an act of a sexual nature. Likewise, when enslaved females are examined to check their menstrual cycles or are forced to breastfeed children of the master's choosing, such evidence of ownership is unbefitting to be deemed an act of a sexual nature.

As currently enumerated, sexual slavery doesn't seem posed to account for how enslavement is sexualized through the exercise of powers of ownership.

It's not a distinct enslavement but often an integral component of the existing slavery. Anyone who is sexually enslaved is also otherwise enslaved. The jurisprudence of the Special Court of Sierra Leone, and specifically the Charles Taylor case, divided the sexual acts that comprised sexual slavery, and from all other acts, such as performing house work, that comprised under enslavement. The division is quite artificial. Preferably any and all acts wherein powers of ownership are exercised should be expressed as enslavement. It all should be enslavement, understanding that the evidence of exercising powers of ownership can be presented in multiple sexualized ways.

8. At the national level, victims/survivors of human trafficking often have more access to support based on their legal status than victims/survivors of sexual violence in conflict. What do you think is needed to address this legal protection gap?

That is a difficult question. The situation would have to be examined state by state and at each tribunal or court. I am not familiar with all the domestic prosecutions in terms of protective measures at domestic level. In the international judicial mechanisms there are best practice guidelines. However, effective execution of practices depends on human and monetary resources. That is probably true at the state level as well. At the International Criminal Court, a lot of the attention concerning protection is integrated into the investigation procedure by the Office of the Prosecutor and undertaken by the Registry during the court proceedings.

As of now, there is provision of services *via* the Trust Fund even though there have been no successful adjudications of sexual violence. As a result, there is an inability to know how reparations would be allocated and whom they would serve in terms of a sexual violence adjudication. The international community's approach to protection, redress, recognition, and servicing, should be further along than it is after 25 years. Still, this area of international criminal law needs more concerted attention. One task that could be done is to more fully engage the experiences of survivor communities, starting with Yugoslavia and Rwanda. It is important to understanding from their perspective which support measures were positive or negative and which were most valuable, in hindsight. In essence, what could have been done better, differently and what worked? How should it be done? What means and methods are necessary to assist current cases – whether be it the Rohingya or child soldiers? There is a body of knowledge to be obtained from actual long-term survivors of international crimes.

9. What should be the way forward in addressing human trafficking and sexual violence in conflict in concert, if at all?

Fortunately, serious attention is now given to the intersection of trafficking and sexual violence, and the intersection of slavery, war crimes, and crimes

against humanity. This enables us to consider – and this is a long-term goal – who is susceptible to such crimes and how should potential victims be adequately protected, at both the national and international level. It need not be a trade-off to use all available crimes to ensure that persons who reduce others to enslavement – by slave trading or trafficking – can be prosecuted. Together, national, transnational, and international crimes should provide a complete security blanket for everyone from multiple such harms.

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From 1994-2007, Patricia was the Legal Advisor for Gender Related Crimes and Senior Acting Trial Attorney in the Office of the Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. In that capacity, she advised teams of investigators and trial attorneys on the prosecution of sex-based crimes under the tribunals' statutes and in accordance with pertinent doctrines of humanitarian law. She has litigated and advised on the leading international criminal law cases regarding wartime sexual violence, sexual violence and genocide and sexual violence and enslavement as a crime against humanity, including the Prosecutor v. Furundzija, the Prosecutor v. Akayesu and the Prosecutor v. Kunarac. In 2000, she was the Co-Prosecutor at the International Women's Tribunal that conducted a symbolic trial to redress the sexual slavery committed against the Comfort Women during II World War.

She has lectured widely, testified as an expert witness at international courts and authored numerous articles on international criminal law.

She is the recipient of the American Society of International Law's Prominent Women in International Law Award. She was named an Honorary Fellow by the University of Pennsylvania Law School in 2006 and received an Honorary Doctorate of Law from the Law School of City University of New York in 2001. She has been awarded the Martin Luther King Award bestowed by the Black Law Student Association of Rutgers University Law School, the Ron Brown International Lawyer award presented by the National Bar Association.

IV. Case studies of CRSV and THB for sexual exploitation in times of conflict

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North Korean Women and Girls Trafficked into China's Sex Trade

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Abstract

Up to 200,000 North Koreans have fled their country to live in hiding across mainland China. The vast majority are female and have a precarious life as undocumented refugees without basic legal protection or means to travel to third-countries. The Government of China seeks to arrest and deport them. The Government of North Korea incarcerates, tortures, interrogates, and even executes repatriated citizens. Forced into the shadows of Chinese society, female North Korean refugees become exposed to human trafficking and a sex trade is built upon their exploitation. This article is based on long-term engagement with North Korean women and girls in China and survivors living in exile and documents just some the pathways of North Korean women and girls into prostitution and forced marriage in China.

1. Introduction

If the Korean War (1950-1953) is the world's *Forgotten War*, North Korea is our *forgotten human rights crisis*. Sandwiched between World War Two (1939-1945) and the Vietnam War (1955-1975), the conflict in Korea quickly faded from a war-weary international public consciousness. The same can be said of the human rights crisis that has plagued North Korea for the past seven decades. In spite of thousands of testimonies, committed activism, and a 2014 United Nations Commission of Inquiry which established that the human rights violations in North Korea are without 'parallel in the contemporary world',[1] global awareness remains limited.

Faced with global inaction and myriad human rights violations in their homeland – including extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds, the forcible transfer of populations, the enforced disappearance of persons, and the inhumane act of knowingly causing

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[1] See UN Human Rights Council, 'North Korea: UN Commission documents wide-ranging and ongoing crimes against humanity, urges referral to ICC', 17 February 2014.

prolonged starvation – up to 200,000 North Koreans have fled to their country to live in hiding across mainland China.[2]

The vast majority of North Koreans in China are female and have a precarious life as undocumented refugees who lack basic legal protections and are denied the means to travel to third-countries. Trapped between the Government of China who seek their arrest and repatriation and the Government of North Korea who torture, interrogate, incarcerate, and even execute repatriated citizens, North Korean refugees are uniquely vulnerable to abuse and exploitation.[3] Against this backdrop, an estimated 60% of female North Korean refugees in China are trafficked into sex trade.[4] Of that number, almost 50% are forced into prostitution, over 30% sold into forced marriage, and 15% pressed into cybersex.[5]

In its truest sense, conflict-related sexual violence is fundamental to the trafficking of North Korean women and girls in China. North and South Korea have remained at war since 1953, with varying degrees of militarism on both sides of the border. In North Korea, an extreme form of hereditary-authoritarianism emerged from this militarism which has physically and psychologically dominated its people to such an extent that many have been forced to yield, perish, or escape via the only route out of the country: China.

First detected in the mid-1980s, the sex trafficking of North Korean women in China remained small-scale, opportunistic, and localised until two events a decade later connected *supply* with *demand* and transformed the crime into what is today a multi-million-dollar illegal industry.[6] Firstly, the *supply* of potential

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2 Estimates on the number of North Koreans in China vary between 50,000-200,000 and include North Korean nationals and their children, many of whom are born in China but do not receive Chinese citizenship. See UN Human Rights Council, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea* (A/HRC/25/63), 7 February 2014, 111.

3 In breach of its obligations under the United Nations Refugee Convention and aspects of the Convention on the Rights of the Child, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Discrimination against Women, China does not allow the Office of the UN High Commissioner for Refugees unimpeded access to aid, screen, or determine the status of North Koreans on its territory.

4 Sex trade refers to the trafficking of victims into any act for the purpose of sexual exploitation. This figure covers the period of 2015-2018 and reflects the opinions of rescuers who have been based in China. Unless otherwise stated or cited, all figures in this article are based on interviews with survivors and victims and discussions with rescuers.

5 North Korean victims are not alone in China's sex trade. See *The Guardian*, 'Weddings from hell: the Cambodian brides trafficked to China', 1 February 2016; J. Vu, 'Thousands of Vietnamese women and children sold as "sex slaves"', *Asia News,* 3 November 2010; 'Chinese Marriage Proposals Become Prostitution Nightmares for Some Lao Girls', *Radio Free Asia*, 13 February 2017; 'Myanmar Woman, Trafficked to China to Marry, Hopes to Save Others From Same Fate', *Voice of America*, 23 August 2017.

6 In the mid-1980s, some female North Korean traders crossed into China to purchase goods for North Korea's nascent black markets and were coerced into forced marriages and prostitution, sometimes in illicit sex shops that sold pay-per-view pornographic videotapes.

sex slaves in China swelled as tens of thousands of North Koreans flowed across the border between 1994-1999 to escape the famine in their country of origin.[7] Largely overlooked by the international community, at least 7000-10,000 North Korean men, women, and children are estimated to have become victims of human trafficking in China by the turn of the century.[8] Men and boys were forced to labour on construction sites and farms under threats of violence and repatriation, while women and girls were sold into domestic labour, manual labour, and an evolving sex trade.

Secondly, as the *supply* of North Koreans in China increased, so did *demand*. In rural townships and villages, out-migrations of marriageable Chinese women had created a buyer's market for foreign brides. And in bigger towns and cities, higher wages led to a greater demand for prostitution among Chinese male migrants.[9] Victims from Vietnam, Laos, and Cambodia fulfilled demand in China's southern provinces.[10] In north-eastern provinces, men turned to female North Korean refugees.

Connecting *supply* with *demand* have been a tapestry of ethnic Korean and ethnic Chinese brokers, human traffickers, and criminal organisations. Overseeing the prostitution of North Korean victims for as little as ¥30 Chinese Yuan ($4 United States Dollars) and their sale as *wives* for just ¥1000 Chinese Yuan ($146 United States Dollars), it can be conservatively estimated that the collective sexual exploitation of female North Korean refugees in China generates annual profits of at least $105,000,000 United States Dollars (USD).

This article documents just two of multiple pathways into China's sex trade. Bought, sold, and exploited until their bodies are depleted, numerous testimonies spoke of North Korean victims who had perished in China from sexually transmitted diseases and sexual and physical abuse. This author has been fortunate to speak to lucky victims who managed to escape and sadly to others who remain.

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7 North Korea's famine is estimated to have killed between 450,000-2,000,000 people. See UN Human Rights Council, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, 39.

8 Estimate provided by a rescuer of North Koreans.

9 See G. Tianming, A. Ivolga & V. Erokhin, 'Sustainable Rural Development in Northern China: Caught in a Vice between Poverty, Urban Attractions, and Migration', *Sustainability* 10.5 (2018): 1-20; Y. Huang et al., 'HIV/AIDS Risk Among Brothel-Based Female Sex Workers in China: Assessing the Terms, Content, and Knowledge of Sex Work', *Sexually Transmitted Diseases* 31 (2004): 695-700; X. Jin et al., '"Bare Branches" and the Marriage Market in Rural China: Preliminary Evidence from a Village-Level Survey', *Chinese Sociological Review* 46.1 (2013): 83-104.

10 Q. Jiang & J. Sánchez-Barricarte, 'Trafficking in Women in China', *Asian Women* 27.3 (2011): 83-111; Y. Liu et al.,'Interprovincial Migration, Regional Development and State Policy in China, 1985–2010', *Applied Spatial Analysis and Policy* 7.1 (2014): 47-70.

2. Methodology

Research and interviews conducted over a period of two years connected the experiences of over 45 survivors and victims of sexual violence into clear patterns of sex trafficking and exploitation. In the process of telling their stories, constancies and new details of China's sex trade were exposed to reveal a complex and interconnected illicit industry that accrues vast profits from trafficked women and girls. Unless otherwise stated, all figures in this paper stem from the aforesaid interviews.

The courageousness of survivors, victims, the families and friends of victims, and rescuers and their organisations cannot be overstated. Engaging with victims in China and survivors in South Korea was a fraught process riddled with ethical, security, and political difficulties.[11] Unconventional methods of outreach and research were required.

Throughout this article, and abiding by the wishes of many survivors, the terms *prostitute* and *prostitution*, rather than *sex worker* and *sex work* , are consciously used. Such terminology moves beyond descriptive functions to contest the normalisation of male-dominated standards that govern the commodification of the female body.[12] In this context, understandings of prostitution and forced marriage as *transactional sex*, *survival sex*, or *sex as work* are rejected.[13] *Victim* is used to describe a person forced into sexual slavery and *survivor* to describe a person who has escaped sexual slavery.[14] In accordance with the Law of the People's Republic of China on the Protection of Minors, and aligned to the territories in which most documented crimes are committed, this article defines girls as under 18 years of age.[15]

When describing North Koreans in China, this article avoids use of the term *defector*. The term carries a negative connotation of a person who has abandoned or deserted their country and does not accurately describe the experiences of

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11 See: The People's Republic of China, *Exit and Entry Administration Law of the People's Republic of China* (2013); The People's Republic of China, *Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas* (1986); UN Human Rights Council, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*.

12 This author adopts the view that a distinction between forced and voluntary prostitution cannot exist. The prostitution of North Korean women and girls is a coercive and gendered practice grounded in patriarchal social structures and is reliant on physical force and other harmful contexts, such as poverty, absent legal aid, and hunger – all of which specifically disadvantage women and girls.

13 Survival and transactional sex are said to involve the exchange of sex for services, such as food or shelter. See: B. Ozler, 'What Do People Mean When They Talk About "Transactional Sex"?', *World Bank Blog*, 23 February 2012.

14 In this article, the term 'sexual slavery' refers to all practices that place women and girls in actual or imminent danger of sexual violence.

15 This is used in place of Article 295 of the North Korean Criminal Law, which defines a child as being under the age of 15.

North Koreans who have been forced into exile by their government's imposition of poverty, hardship, and human rights violations. The terms *exile* and *escapee* are used where appropriate.

Human trafficking and exploitation are defined in accordance with the United Nations Convention Against Transnational Organised Crime:[16]

'[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

To define sexual violence, this article uses the World Health Organisation's (WHO) description:[17]

Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the survivor, in any setting, including but not limited to home and work.

Where appropriate, interviews conformed to the WHO Ethical and Safety Recommendations for Interviewing Trafficked Women and WHO best practices in researching violence against women.[18] Pseudonyms are used to protect the identities and safety of all victims, families of victims, and survivors in China and elsewhere.

3. Pathways into China's Sex Trade

All North Koreans must cross the border with China to escape.[19] Traversing the Yalu or Tumen rivers, most swim or cross on-foot at narrow gullies in summer and edge across the frozen rivers in winter, avoiding thin-ice that has proved fatal for many. Scrambling into mountains and scrubland to survive, North Koreans in China do not enjoy protection under the 1951

16 United Nations Office on Drugs and Crime, *United Nations Convention Against Transnational Organized Crime and The Protocols Thereto* (Vienna: 2004).

17 World Health Organization (WHO), *Violence Against Women – Intimate Partner and Sexual Violence Against Women* (Geneva, 2011).

18 C. Zimmerman & C. Watts, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women* (Geneva, 2003); M. Ellsberg & L. Heise, *Researching Violence Against Women: A Practical Guide for Researchers and Activists* (Washington DC: 2005).

19 The Korean Demilitarised Zone at the 38th Parallel divides North and South Korea and prevents all but a handful of escapes across this border. North Korea also shares a small border with Russia, but few escapes occur.

Refugee Convention, to which China is a party, owing to Beijing's policy of non-enforcement.[20] Driven by hunger, desperation, and fear, they seek to evade authorities and tentatively make their way toward settlements in China's 2,000,000-strong ethnic Korean communities. Some join relatives or look for employment in factories, farms, or restaurants. Others find occasional work as maids in hotels or the homes of ethnic Korean or South Korean families. Homeless girls, known as *kotjebi*, scavenge for food and money, while others venture further afield into China. Evading the gaze of Chinese authorities, all exist and subsist in the shadows of society – which is where the sex trade awaits.

3.1. Coercion, Abduction, and Sale in China

Eighty-four percent of North Korean women and girls trafficked into China's sex trade are victims of coercion, abduction, or sale.[21]

Travelling as individuals or in small groups, North Korean refugees are often conspicuous by their clothing, which can be peculiar to current Chinese fashions, their physical appearance, which can exhibit visible malnourishment, and their inability to speak or understand Mandarin. Sought and preyed upon by human traffickers, strategies of coercion include offers of food, clothing, support, or the chance of onward journeys to South Korea. One victim explained how she was approached by multiple and competing traffickers in a period of just four days after crossing into China. Driven by desperation and fear of arrest, and unable to differentiate between friend and foe, many unwittingly accept the dishonest offers of traffickers.

In cases where coercion fails, human traffickers can resort to abduction. A practice that was once confined to border-towns and rural areas, 18% of interviewees had experienced either abductions or attempted abductions in China. In the majority of cases, contact between the abductor and victims had typically occurred before a kidnapping, which suggests the practice may be used as a last resort if coercion fails. Crude means of abduction are common and many testimonies involved captors using force or the means of surprise. Recent testimonies situated abductions and attempted abductions in cities, towns, places of employment, and public transport.

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[20] North Koreans in China are refugees owing to their inability to return to North Korea without being persecuted and their inability to claim the protection or citizenship of the Government of South Korea while in China. Details of escapes are not included for reasons of safety.

[21] Almost 50% become victims of the sex trade within twelve months of their entry into China and 25% in under one month.

Beside coercion and abduction, one quarter of North Korean victims in China's sex trade have been sold by Chinese nationals, police officers in China's Ministry of Public Security, and sub-brokers.[22]

Sales by Chinese nationals – namely relatives of escapees, employers, opportunistic citizens, and persons masquerading as missionaries or rescuers – have been commonplace since the mid-1990s and have long, and erroneously[23] been attributed to the economically disadvantaged communities of northeast China where victims are groomed and targeted.[24] Known to be prevalent in the border regions of Liaoning and Heilongjiang provinces, the sale of a single young North Korean woman for ¥7500-¥11,600 Chinese Yuan ($1095-$1694 USD) is considerable when compared to a minimum monthly wage of just ¥1000 Chinese Yuan ($147 USD).[25]

The motive for direct sales brokered by lowly-paid police officers in China's Ministry of Public Security appears to be monetary. Throughout summer, police officers in Jilin, Liaoning, and Heilongjiang provinces come into monthly, if not weekly, contact with escaping North Koreans through, for instance, routine checks of family *hukou* registration in townships or raids of brothels in urban centres.[26] Once arrested, Chinese legislation provides that North Koreans should be questioned, identified, and repatriated. Yet in documented cases, notably in sub-bureaus near Shenyang and Yanji, police officers have instead sold arrested female North Koreans to human traffickers.[27]

The sale of North Korean escapees *en route* to freedom in third-countries by sub-brokers is a lesser, but perhaps more insidious practice that has emerged

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22 The designation 'sub-brokers' refers to brokers, sometimes called secondary brokers, who operate under the employment of a primary private broker. Private brokers and sub-brokers are paid to lead North Korean refugees to safety in foreign countries.

23 According to one rescuer who experienced direct sales of North Koreans, some Chinese citizens who sell refugees may have recently become unemployed or require a large sum of money for the schooling of their children or for hospital bills. However, no body of evidence on the reasons behind these sales exists.

24 Growth of just 2.1% in Liaoning Province, 6.3% in Heilongjiang Province, and 6.5% in Jilin Province are slower than the national rate of 6.9%, leading to mass layoffs from industries and declining incomes. See 'Liaoning Worst Performer as China's Northeast Lags Behind Country's Economic Growth', *South China Morning Post*, 21 June 2018.

25 M. Melnicoe, 'China: Wage Increases Level Off with Economy', *Bureau of National Affairs*, 5 May 2017.

26 Towns (urban) and townships (rural) are designated within China's administrative divisions. See The People's Republic of China (State Council), 'Administrative Division', http://english.gov.cn/archive/china_abc/2014/08/27/content_281474983873401.htm, accessed 26 August 2014.

27 There is no evidence to suggest systemic links between Chinese police officers and human traffickers, but links between low-paid local police officers and criminal organisations in China are well-established. See the Economist, 'A Policeman's Lot in a Police State: Not Happy', 13 October 2016; P. Wang, 'The rise of the Red Mafia in China: A Case Study of Organised Crime and Corruption in Chongqing', *Trends in Organized Crime* 16.1 (2013): 49-73; X. Chuanjiao, 'Top cops in NE China city protected gangsters', *China Daily*, 17 July 2017.

in recent years. Escape from China is a dangerous undertaking for every North Korean.[28] Each year an estimated 6000 North Korean refugees are arrested and repatriated to fates that include interrogation, torture, starvation, incarceration, sexual violence, physical assault, and even execution.[29] To stand a chance of evading authorities and reaching the relative safety of southeast Asia, North Koreans turn to private brokers who, with the aid of networks of sub-brokers across east and southeast Asia, are experienced in guiding escapees to freedom.[30]

Once a thriving business, the brokering of escapes has been hindered by a host of factors over the past seven years, namely the increased surveillance of citizens in North Korea, arrests of brokers and North Korean refugees by Chinese police, and North Korean agents active in Chinese territory. As these risks have increased, so too have the costs. Many sub-brokers now require advance-payments and higher fees to offset their greater risks. Unable to afford the costs of escape, the number of North Koreans who have reached safety in South Korea has decreased from 2706 in 2011 to just 1127 in 2017.[31] To recoup lost and declining earnings, an unknown, but likely small number of unscrupulous sub-brokers have resorted to the exploitation and extortion of escapees' exiled families and the direct sale of escapees into the sex trade. Although many details cannot be shared, testimonies of sales by sub-brokers have been documented in three provinces and one directly-administered municipality.

Ms. Kwon from Chongjin City, North Korea

I cleaned and cooked food to earn money [in Longjing, China]. An ethnic Korean man allowed me to live in his apartment. I was not his wife. He was divorced. His wife had run away to South Korea to marry [another man], so I cooked for him instead of paying him rent (...) When he lost his job in a factory he tried to convince me to marry his friend. He told me that I would be safer. I refused many times (...) He became very angry and sold me.

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28 Only 32,000 North Koreans have safely reached South Korea, with fewer arriving in 2017 than in any year since 2001. Between January and June 2018, just 488 North Koreans entered South Korea, 87% of whom were female. See: Ministry of Unification, 'Number of North Korean Defectors Entering South Korea', www.unikorea.go.kr/eng_unikorea/relations/statistics/defectors/, accessed on 24 August 2018.

29 S. Scholte, 'United States Congressional-Executive Commission on China Hearing', http://www.cecc.gov/sites/chinacommission.house.gov/files/documents/hearings/2012/CECC%20Hearing%20Testimony%20-%20Suzanne%20Scholte%20-%203.5.12.pdf, accessed on 22 November 2018.

30 A journey may cost between $5000-$14,000 USD per-person. Private brokers undertake this dangerous work for profit, but this is not necessarily a mercenary endeavour. Exiled North Korean brokers living in South Korea rarely possess college, university, or higher education and face social discrimination and unemployment. Utilising their knowledge and experiences of escaping North Korea and China, brokering is an important means of survival.

31 Ministry of Unification, 'Number of North Korean Defectors Entering South Korea'.

Ms. Paek from Chagang Province, North Korea

When the [Chinese] police asked for my documentation, I cried and told them I was North Korean. I begged them to allow me to travel to Thailand [where North Koreans can claim asylum]. They arrested me and took me to the [security bureau]. I was there for ten hours and no one asked me any questions. They put me in their car and drove me to the countryside (...) I was sold to a marriage broker.

Ms. Hwang from Musan, North Korea

I was 14 years old [and] my mother's cousin [in China] arranged for me to work in a garment factory in Yanbian [China] (...) I crossed the river at night [with a broker] and was driven to a house (...) I realised that everything had been a lie when I arrived (...) A 36-year-old man bought me for ¥24,000 Chinese Yuan ($3500 USD) (...) I escaped before his mother wanted me to have a child.

Ms. Ha from Hoeryong City, North Korea

Our mother [who had already escaped to South Korea] arranged for my sister and I to escape (...) We were driven to Changchun [China], then a new broker drove us to Shenyang [China]. He stopped outside an apartment and told us we would resume our journey in the night. I may sound ignorant, but I had no idea that I was being sold (...) We were forced to become prostitutes in a building behind a factory.

Ms. Seo from Yonsa County, North Korea

I met a woman whose sister was sold [by sub-brokers] (...) Her family [in South Korea] had sold many possessions, such as a car and televisions, to raise money to pay the brokers, but [the brokers] kept demanding more [money]. When the family said they had no more money, the brokers threatened to sell the sister to a brothel in Chengdu (...) The family never heard from the brokers again.

3.2. Human Trafficking from North Korea

Driven by the demand for young North Korean women and girls, a growing number of Chinese brokers have established trafficking networks that stretch into North Korean territory.[32] Created to identify and target high-value young women and girls at source, specialist brokers are now able to sell victims directly from North Korea in a matter of days or weeks.

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[32] Demand is driven by a voracious appetite for prostitution in China, a high-turnover of prostitutes owing to arrest, death, and even abduction by rival criminal organisations, and the low-price of North Korean women and girls.

Instead of crossing borders, Chinese-based brokers employ trusted sub-brokers or relatives in North Korea to fulfil orders from Chinese pimps, madams, and other buyers. Travelling to markets, remote villages, and transport hubs in the northern provinces of North Korea, sub-brokers search for girls and women under the ages of 25-27 who appear destitute and 'suitable' for the sex trade in China. Approached with false offers of employment, either in a neighbouring province or in China, victims are trafficked to the border by service cars and trains before being taken into China on foot. Passed to new brokers, victims are escorted directly to safe-houses, brothels, or to further buyers.[33] Physical and sexual violence is commonplace during these journeys, in particular drug rape, penetrative rape, and groping.

Victims who are not sold immediately are confined to safe houses where they can be locked in rooms and subjected to rape and gang-rape – a process referred to by one survivor as *'training'*. Supplementary violence designed to induce compliance is delivered in the forms of starvation, physical beatings, and verbal threats of repatriation. Testimonies have placed the direct trafficking of victims, many of whom are sold to secondary brokers, pimps, and madams, to specific satellite-towns in Jilin and Heilongjiang provinces. Few women are thought to be sold as *wives* through this form of trafficking.

Ms. Song from [hometown redacted], North Korea

There is a house where women are taken before they are sold. When I arrived, there were many [North Korean] women, but also girls ... One girl had her vagina and anus ripped apart. A woman told me there was nothing left: no skin, just a large hole. I was so shocked when I watched the girl crawl around the room and try to stand and lean on the wall. I could see where she had leaked fluids and there was blood on the floor. She was crying.

Ms. Lee from [hometown redacted], North Korea

I came [to China] three years ago to work in a clothing factory. My father is ill and I needed money to help my family pay for his medical care [in North Korea] ... After five months the factory official sold me into marriage ... I have a son now, so I cannot escape and leave him. I do not know what will happen to him if I escape.

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33 Testimonies indicated that sub-brokers can coerce women with the use of photographs of modern workplaces and comparatively luxurious apartments where North Korean workers are said to live – all of which are used to deceive victims. According to one survivor now living in South Korea, the photographs may simply have been found online: *"I have thought about this [issue] and the factory I was shown was probably not even in China... I was ignorant and just assumed the man had been to the factory."* For an explanation of human trafficking inside North Korea, see J. Burt, *Us Too: Sexual Violence Against North Korean Women andGirls* (Korea Future Initiative: London, 2018).

Ms. Chang from Musan, North Korea

A broker offered me work in China at a restaurant. My husband told me to work for one-year and then send for him and our daughter with the money ... The broker lied. I stayed in a house in a village for five days, then I was sold [as a prostitute] to a bathhouse.

Ms. Ko from [hometown redacted], North Korea

We were told [the men] would take us to [a] factory (...) [The men] stopped [the van] and asked us for money. We had no money so they asked whether we had family in South Korea. No one said anything and [the men] became very angry. There was an argument and [the men] started to drag us out of the van. I was trying to stop the first man when the second man punched me in the back of my head twice. He took me into the forest and raped me (...) I was motionless and I closed my eyes and cried.

Ms. Kwon from Kimchaek City

There is a detention centre in Tumen [China] (...) Many [North Koreans] who are arrested end up there (...) I will not forget two (...) sisters aged 12 and 14. The oldest had blood stains on her trousers. I could see other women looking at that. I was told [the sisters] were both raped by a man in China who had pretended to help them. [The Chinese police] had not even given [the elder sister] new clothes.

4. Prostitution

The trafficking of North Korean women and girls into mainland China's sex trade is, demonstrably, neither unstructured nor opportunistic in nature. It is a highly lucrative illicit industry that is defined by transnational networks and layers of organisation that that involve brokers, human traffickers, public officials, and the clients who pay to buy, rape, and sexually assault women and girls. At its very core, it is an industry with just one purpose: the trade in female bodies for profit.

Criminal organisations have a central role in the prostitution of women and girls. Re-emerging in China after the death of Mao Zedong in 1976, criminal organisations grew by capitalising on the country's economic reforms, especially the decentralisation of decision-making to cities, towns, and villages. Exploiting local environments and populations with the support of corrupt local public officials – known as the 'Red Mafia' – criminal organisations gradually became

involved in a range of localised illicit activities, from drug smuggling and protection racketeering to human trafficking and prostitution.[34]

Today, over 30,000,000 members of criminal organisations operate in mainland China. From small groups of less than twenty to large organisations of over 200, they are most heavily concentrated in southern provinces and regions where ethnic minorities are subject to social and economic discrimination.[35] Reliant upon the *guanxi* system and highly local networks of political and public officials, criminal organisations are largely confined to small areas in cities, towns, and townships. In the case of ethnic Korean criminal organisations, these geographic and political boundaries have pushed and incentivised the exploitation of resources at-hand: namely, female North Korean refugees.[36]

Despite being criminalised under Chinese law, prostitution remains a significant and visible component of daily life.[37] Over 10,000,000 prostitutes are believed to operate in China, while brothels – some of which explicitly advertise young North Korean prostitutes on street walls and posters – are clearly visible in cities, urban towns, and rural townships across the northeast provinces. Visited by more than 10% of Chinese men aged 20-24 and 17% of Chinese men aged 18-61,[38] prostitution is estimated to contribute 6% of China's gross-domestic-product.[39]

Termed '*xiaojie*', North Korean victims are forced to work in brothels that masquerade as *entertainment* or *service* venues, namely bathhouses, saunas, karaoke bars, cafes, massage parlours, beauty parlours, barbershops, hair salons, small hotels, and restaurants.[40]

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34 *Guanxi* refers to the interpersonal networks that have come to involve reciprocal favours between criminal organisations and public officials in China. See: S. Lo, *The Politics of Controlling Organized Crime in Greater China* (Oxford: Routledge: 2016); P. Wang, *The Chinese Mafia: Organized Crime, Corruption, and Extra-Legal Protection* (Oxford: Oxford University Press: 2017); R. Han, 'Discussion on Relationship between Guanxi and Corruption in China', *British Journal of Economics, Management & Trade* 14.3 (2011):1-8.

35 See: Lo, *The Politics of Controlling Organized Crime in Greater China*; 'Organised Crime in China', *Stratfor Worldview*, 19 August 2008.

36 On the governance of minorities in China, see: G. Tuttle, 'China's Race Problem', *Foreign Affairs* (2015):39-46; C. Larson, 'China's Minority Problem – And Ours', *Foreign Policy*, 30 September 2009; 'Organised Crime in China', *Stratfor Worldview*.

37 See: J. Kaufman, 'HIV, Sex Work, and Civil Society in China', *The Journal of Infectious Diseases* 204.5 (2011): S1218-S1222; US Department of State, *Trafficking in Persons Report* (Washington DC, 2017), 134.

38 S. Liao, J. Schensul & I. Wolffers, 'Sex-Related Health Risks and Implications for Interventions with Hospitality Women in Hainan, China', *AIDS Education and Prevention* 15.2 (2003): 109-121; P. Suiming, 'The Realistic Response to China's Prostitution Problem', *Sixth Tone*, 30 November 2017.

39 L. Zhang, 'How China's Market Economy has Fuelled a Prostitution Boom', *South China Morning Post*, 12 January 2018.

40 '*Xiaojie*' is a Mandarin Chinese expression signifying a prostitute. The term is also used in ethnic Korean communities

Victims enslaved in *entertainment* venues such as karaoke bars are typically aged between 15-25 and are confined inside or close to a venue. Remaining in the service of a pimp or madam, rather than a venue's owner, victims may engage 2-4 men every night and be subjected to penetrative vaginal rape, groping, forced masturbation, and gang-rape. In *service* venues, such as barbershops, victims are typically aged between 17-39 and are confined on or off-site. Victims may engage 1-9 men every day and suffer penetrative vaginal rape, oral rape, and forced masturbation.[41]

Brothels identified as exploiting North Korean women and girls were mainly located in satellite towns and townships surrounding larger cities in northeast China. Between 25-75 minute travel from a city or a larger urban area, they existed in districts with large floating populations of male migrants and in rural townships populated by male agricultural labourers and farmers. Though the population of any one town or township in northeast China may vary between 5000 and in excess of 60,000 citizens, it should be seen as indicative that a total of sixteen brothels enslaving North Korean prostitutes were identified in just one town close to a sub-provincial city in Jilin province.

Where organised prostitution of North Koreans exists, it is principally dominated by pimps or madams, who may be associated with criminal organisations and are responsible for the recruitment of prostitutes, their 'marketing', and the collection of fees paid by clients.[42] Provision of food, shelter, cigarettes, and occasionally drugs are intended to keep victims in a state of dependency. Enforcers and corrupt police officers attempt to ensure that prostitutes do not escape, while in Shanghai, survivors explained how North Korean prostitutes are branded with tattoos, such as lions and butterflies, to signify ownership and dissuade abductions from rivals.

Though the prostitution of North Korean women and girls in China is predominantly controlled by ethnic Korean pimps, madams, and criminal organisations, it is a diversifying and evolving illicit industry.[43] For example, one ethnic Korean criminal organisation operating in Shenyang has 'rented' North Korean victims to an ethnic Chinese prostitution-ring in Panjin. A survivor detailed how she taken from a brothel in Shenyang and passed to men in Panjin who

41 Earnings are typically retained by a pimp, madam, or venue manager. Few survivors were provided regular payment, although some were able to use smartphones, both for business and personal use.

42 In some hotels and restaurants, prostitution can be controlled by the venue's manager.

43 Valued for its ability to generate large profits in a market driven by strong male demand, prostitution in China has been subject to lax policing, despite sporadic crackdowns. For example: Z. Caixiong, 'Guangdong Plans Special Force to Tackle Online Prostitution', *China Daily*, 4 December 2015; BBC, 'China Executes Female Gangland Prostitution Ringleader', 7 December 2011; Walk Free Foundation, The Global Slavery Index, 'China', https://www.globalslaveryindex.org/2018/findings/country-studies/china/, accessed on 29 August 2018; Suiming, 'The Realistic Response to China's Prostitution Problem'.

drove her to accommodation used by migrant workers and forced her to have sex with multiple workers every day for one week. At the end of the week, she was exchanged for another North Korean victim on the outskirts of the city before being returned to Shenyang.

Ms. Woon from [hometown redacted], North Korea

There are four [North Korean] women working here (...) I have been in China for nine months. It is my second time. The first time I could not find work and returned [to North Korea] (...) I am fortunate because I just cook and I am good at that. The other women do lots of jobs and are also made to have sex with men who come to the restaurant (...) It is terrible for them.

Ms. Choi from Hyesan, North Korea

Our madam came into the room and told us when a client had arrived. We were sometimes told to reapply our makeup or to look happier (...) The prettiest woman would have to welcome the [client] to the bathhouse and, in turn, we would introduce ourselves by our fake names and state our prices (...) The [clients] could tell we were North Korean by our accents and some would even ask me about my life in North Korea.

Ms. Pyon from Chongjin, North Korea

I was sold [to a brothel] with six other North Korean women at a hotel. We were not given much food and were treated badly (...) After eight months, half of us were sold again. The broker did bad things to me. When I arrived [at the new brothel] I had bruises on my body. [The broker] was beaten then stabbed in the legs by some members of the gang.

Ms. Shin from Anju City, North Korea

[North Korean] women who [are prostituted] in Shenyang, Yanji, Zhuhai, and Dalian [have sex] with more South Koreans that ethnic Korean or ethnic Chinese men (...) Although the South Korean men can already be married and have children, they lie to North Korean women that they are single. A South Korean man even promised a friend that he would take care of her as a wife in South Korea. She believed him and found him when she escaped to South Korea, but he was already married with three children. There are a few North Korean women I know that experienced this.

4.1. Forced Marriage

Forced marriage, namely the sale of women into cohabitation with men, is illegal but commonplace in rural China. Most prevalent in low-socioeconomic regions with skewed sex-ratios and high female out-migration, *wives* can be bought for as little as ¥1000-¥50,000 Chinese Yuan ($146-$7330 USD). Considerably less expensive than a conventional marriage, which may

cost up to twenty-times an annual household income,[44] the act of buying a North Korean *wife* is tolerated and often defended by local populations in China's so-called 'bachelor villages' who perceive the crime as a legitimate function to maintain the viability of a village or township. One survivor described the role of forced marriages to that of 'power-generators': *'Without North Korean women, the village [I was sold to] would have died many years before I was there'*.

Held in safe houses in the countryside and mountains of Jilin, Liaoning, and Heilongjiang provinces, North Korean victims are sold to prospective *husbands* by marriage brokers.[45] Often well known in their local and neighbouring villages and townships, and linked, either financially or by family, to local public officials, they are commonly ethnic Korean men aged between 24-55. Some marriage brokers will operate alone, but many work alongside family members, in particular their wives, who assume different roles.

Once the price of a *wife* has been agreed between a marriage broker and prospective *husband*, a victim is collected or delivered to her *husband's* household. Fearful of escape, a *husband's* family will confine a newly purchased *wife* to their home for weeks or months and rarely grant her access to mobile phones and computers or allow her to move without an escort. From the outset, North Korean *wives* are expected to undertake multiple unpaid duties: domestic labour in the mornings and evenings, agricultural and other forms of manual labour during the days, and sexual intercourse with their *husband* and, on occasion, his male relatives, at night.[46] Less than 10% of survivors recalled their *husbands* using any form of contraception, meaning that over half of survivors became pregnant within two years of being sold.[47]

The introduction of a North Korean *wife* to a township or village is almost always known to the local community and, despite its illegality, rarely reported to authorities. In situations where North Korean *wives* are arrested, bribes can be paid to secure their release. In a village in Heilongjiang province, one *husband* who lacked the money for a bribe that would release his *wife* from arrest consented to her prostitution to public officials, after which she was released.

Although some survivors recalled their Chinese *husbands* as benign, North Korean *wives* are trafficking victims who are sold, raped, exploited, and en-

44 X. Jin et al., '"Bare Branches" and the Marriage Market in Rural China: Preliminary Evidence from a Village-Level Survey', *Chinese Sociological Review* 46.1 (2013):83-104.

45 While marriage brokers once travelled from town-to-town to advertise victims, they increasingly advertise online and through social media with photographs and details of victims.

46 Manual and agricultural labour is often imposed so that *wives* 'earn back' the fees spent on their purchase.

47 Unlike some cases of trafficked Vietnamese brides in China, where 'dates' and sham marriages can occur, none of the North Korean survivors interviewed for this article had experienced a wedding ceremony or legal marriage. See: T. Hancock, 'Rural Chinese Men Are Buying Vietnamese Brides For $3,200', *Agence France Press*, 18 August 2014.

slaved.[48] Their Chinese *husbands* are enablers of human trafficking, perpetrators of sexual violence, and supporters of an illicit industry that profits from female bodies. Studies indicate that forced marriages in China inspire the perpetration of further sexual crimes, such as rape and enslavement, and encourage environments where female security is continually diminished.[49, 50]

Ms. Park from Musan, North Korea

One of my nieces went to China when she was aged 24. She was sold into a forced marriage and found herself in the early stages of pregnancy only after she had escaped to South Korea (...) After giving birth, she sent the baby to an orphanage but took the baby back. She was traumatised from the experience and still suffers.

Ms. Ahn from Sinuiju, North Korea

When [my friend] first escaped to China, she [was married into] a family of three men: a father and his two sons. She was forced to have sex with the men alternately. And she could not run away. I cannot even imagine what it was like.

Ms. Kang from Hamhung, North Korea

My aunt escaped [North Korea] in 2004 (...) She was sold to a disabled Chinese man so she escaped to Harbin and found work in a factory. The owner told her he would help her, but he sold her to a man in the countryside (...) Her second Chinese husband is so poor. We are saving money to bring her [to South Korea].

Ms. Byeon from [hometown redacted], North Korea

I do not know how much he paid [for me] (...) I plant crops and harvest them, usually on my own (...) He drinks alcohol every day and sometimes he will leave for 2-3 days (...) Everyone here watches me so I cannot escape.

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48 A common perception that North Korean *wives* sold to ethnic Korean, rather than Chinese, *husbands* will experience better lives based on their ability to communicate was rejected by interviewees. No correlations between a shared-language and lesser experiences of sexual and physical violence were found.

49 J. Banister, 'Shortage of Girls in China Today', *Journal of Population Research* 21.1 (2004): 19-45.

50 Spilling across borders, the sale of North Korean women as *wives* is not confined to China. South Korean men, notably those in the country's southern provinces, have long purchased foreign brides, including North Korean women from brokers in China. Understood to be increasingly common, victims are trafficked and smuggled from China to South Korea on commercial flights and ferries. Once in South Korea, victims are known to endure further exploitation, sexual violence, and other human rights violations at the hands of South Korean *husbands*. On the prevalence of legal and illegally brokered marriages in South Korea, see The Economist, 'Farmed Out: South Korea's Foreign Brides', 24 May 2014; J. Scobey-Thal, 'Decoder: Asia's Bride Market', *Foreign Policy*, 26 March 2015.

Ms. Cho from Sinpo, North Korea

When I escaped in the late 1990s, most women were sold into forced marriage. Today, women are sold into prostitution. My friend's mother escaped from Heilongjiang Province and when she reached Yanji she saw North Korean girls forced into prostitution. Girls who cross these days are put in accommodation in Yanji, are fed, and then forced to have sex with men every night.

Ms. Paek from Hamhung, North Korea

I met a [North Korean] woman who had been sold twice to the same man [in South Korea]. The first passport she was given was not of a good quality (...) The broker made the man pay more money for a better passport. On the second journey she arrived in South Korea (...) Because she was unable to have children her husband told her he wasted a lot of money and beat her. She lived in three countries and had three bad lives.

5. Conclusion

This article shed a light on the systematic rape, gang-rape, sex trafficking, sexual slavery, prostitution, forced marriage, and forced pregnancy of North Korean women and girls in China. Pushed from their homeland by a regime that survives through tyranny and oppression, women and girls are passed through the hands of brokers, traffickers, and criminal organisations and sold into a brutal sex trade. Exploited by men until their bodies are depleted, many victims never escape the drug addictions, HIV/AIDS and other sexually transmitted infections, physical violence, and long-term consequences of sexual violence they are forced to endure.

At a time when significant global capital is invested in China and, more recently, political capital expended on the rulers of North Korea, rather than its people, it is a damning indictment that North Korean women and girls are left languishing in the sex trade. Condemnation is insufficient. Only tangible acts can dismantle China's sex trade, confront a North Korean regime that abhors women, and rescue sex slaves scattered across brothels, remote townships, and cybersex dens in mainland China. With knowledge of great wrongs comes responsibilities. The question remains of who will champion North Korean human rights?

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The Neglected Boys of War: Trapped in a Vicious Cycle of Slavery and Sexual Abuse

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Abstract

Sexual exploitation of children is one of the most pervasive human rights violations in the world. Sex trafficking has become one of the most profitable international crimes. The victims of sex trafficking are often induced into slavery under false pretenses, sold by family members or guardians, kidnapping and abductions, or debt bondage.

At international level, more attention has been paid to conflict-related sexual violence against women and girls than to the issue of sexual violence against men and boys. The 2018 Global Slavery Index ranks Afghanistan among the top 10 countries in the world with the highest prevalence of modern slavery[1]*. This paper examines the phenomenon, a form of sex slavery of young, vulnerable boys in Afghanistan. Bacha Bazi is a grossly underreported and the least prosecuted crime in Afghanistan. This article shows how the protracted armed conflict in Afghanistan has increased the vulnerability of adolescent boys to sex trafficking in the form of Bacha Bazi. The analysis will include the evolution of Bacha Bazi into a systematic war tactic by both parties in the conflict.*

1. Introduction

The myriad forms of sexual violence constitute gender-based human rights violations. There is no standalone international legal treaty or instrument on sexual violence. However, this phenomenon has been addressed

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1 Walk Free Foundation, *The Global Slavery Index 2018 Report* (2018).

in International Human Rights Law (IHRL),[2] International Humanitarian Law (IHL)[3] and International Criminal Law (ICL).[4] International law prohibits rape, sexual violence, and slavery in peace and wartime. Sexual violence can amount to grave breaches of IHL if it has a nexus with an armed conflict. Similarly, it can amount to crimes against humanity if committed as part of a widespread or systematic attack against civilians and genocide if committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.[5]

International attention to conflict related-sexual violence has increased over the last decade.[6] The manifestation of sexual violence arises in armed conflict, among others, because of the power structures which victimize certain groups of people. According to the most recent report of the Global Slavery Index, a majority of the countries ranked among the top ten countries with the highest prevalence of modern-day slavery are marked by conflict.[7]

Sexual violence encompasses gender inequalities and hegemonic masculinity which often results in violence against women and girls. Sexual violence against men and boys is often used to denigrate and feminize them, a maneuver that

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2 Sexual violence is prohibited in IHRL instruments and customary international law. Art. 9 of the International Covenant on Civil and Political Rights provides that: "Everyone has the right to liberty and security of person."; the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (CAT), prohibit torture under all circumstances and defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person....when such pain or suffering is inflicted by (...) a public official or other person acting in an official capacity. (Art 1)"; The Convention on the Elimination of All Forms of Discrimination against Women, Art 2(d) obligates states to ensure "without delay" that any "act or practice of discrimination against women" be stopped; The Convention on the Rights of the Child, article. 19 (1). requires states parties to protect children from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse."

3 The Geneva Conventions of 1949, Common Article 3(c) prohibits outrages upon personal dignity; the AP I, article 75(2) (b) prohibits degrading treatment, enforced prostitution and any other form of sexual assault (...); article 77(1) API obligates states to "protect children from any form of indecent assault"; finally, the AP II, article 4(2)(e) prohibits rape, enforced prostitution and any other form of indecent assault.

4 The Rome Statute of the International Criminal Court, Article 7(2)(f) defines rape, sex slavery, enforced prostitution or any other forms of sexual violence as crimes against humanity and Article 8(2)(b)(xxii) includes the crimes of rape, sexual slavery, enforced prostitution and other forms of sexual violence in the definition of war crimes.

5 Article 3, UN Security Council, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994.

6 In 2008, the Security Council adopted a groundbreaking resolution 1820, which elevates the issue of conflict-related sexual violence on the Council's agenda and changes the classic security paradigm by recognizing conflict-related sexual violence as a threat to security and an impediment to the restoration of peace. See UN Security Council Resolution 1820 (S/RES/1820 (2008), 19 June 2008.

7 The top ten countries with the highest prevalence of modern-day slavery include North Korea, Eritrea, Burundi, the Central African Republic, Afghanistan, Mauritania, South Sudan, Pakistan, Cambodia, and Iran.

is ultimately aimed at further denigrating women.[8] Sexual violence is used as a weapon of war against women, men, and children around the world. The data on conflict-related sexual violence suggests that women and girls are disproportionately affected by conflict-related sexual violence.[9] That is not the case, however. Conflict-related sexual violence cases against males are severely underreported. One major reason of the under-reporting of male sexual violence cases is the destructive cultural stereotypes where men are viewed as dominant and stronger sex and women as submissive and fragile. Victims of sexual violence face stigma everywhere, however, in misogynistic and patriarchal culture, male victims face a risk of being labeled as "less manly". A second major cause of under-reporting of male sexual violence cases is the inability of the investigators of the criminal justice system and aid workers to identify male victims. Similarly, a majority of protection or sexual violence response programs are designed to cater to the needs of female victims. In emergencies, shelters for victims of sexual violence are created for women and children only. Finally, there are gaps in the institutional mechanisms designed to address conflict-related sexual violence. For example, the UN Resolution 1888 requires the deployment of women protection advisors in peacekeeping missions to address the issue of sexual violence against women and girls.[10] Such measures narrow down the focus of the UN and other humanitarian organizations on female victims of sexual violence only and create unintended barriers for male victims of sexual violence to seek help.[11] Consequently, the issue of sexual violence against women and girls has received more attention than the issue of sexual violence against men and boys.

Due to the global insecurity, the nexus between conflict-related sexual violence and sex trafficking has emerged as a contemporary issue within the realm of human rights and IHL. Conflict exacerbates vulnerability of marginalized groups to sexual violence and exploitation for manifold reasons: 1) conflict can completely erode the existing prevention and protection mechanisms; 2) it can result in a state collapse, a degraded effectiveness of rule of law, a culture of impunity; 3) it causes massive displacement of civilians; 4) and, it can provide an enabling environment to criminal networks and terrorists to thrive and gain easy access to civilians. For these reasons, the Security Council has strongly

8 J. Leatherman, *Sexual Violence and Armed Conflict* (Cambridge: Polity Press, 2011), 17.

9 S. Holen & L. Vermeij, 'Combating Conflict-Related Sexual Violence', *NATO Review*, 26 October 2017.

10 UN Security Council Resolution 1888 (S/RES/1888), 30 September 2009.

11 According to a research on conflict-related sexual violence in the Democratic Republic of the Congo, 74.3% women and 64.5% men had reported exposure to conflict-related sexual violence. This validates the argument that conflict-related sexual violence affects both women and men, however, male victims are often overlooked. Johnson, K. et al., 'Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo', *JAMA* 304.5 (2010).

condemned terrorist groups like the Islamic State of Iraq and the Levant (ISIL), Al-Shabaab, Boko Haram, the Lord's Resistance Army, and other terrorist groups for enslaving, selling, and trading people for the purpose of sexual slavery and forced labor.[12]

In defiance of the normative de jure proscription against rape and sexual violence in conflict, it continues to be the main characteristic of armed conflict throughout the world – Afghanistan is no exception. Afghanistan is a party to all four Geneva Conventions and Additional Protocols (AP) I and II, as well as key human rights treaties like the Convention on the Rights of the Child (CRC), Optional Protocol to the CRC on the involvement of children in armed conflict, Optional Protocol to the CRC on the sale of children child prostitution and child pornography, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Despite all its international commitments, the gross violation of fundamental human rights remains a major issue.

This article examines how the protracted armed conflict in Afghanistan has amplified the vulnerability of adolescent boys to become victims of sex trafficking in the form of *Bacha Bazi*.[13] The ultimate focus will be on the evolution of *Bacha Bazi* into a systematic tactic of war by both parties to the conflict. The existing news coverage and reports generate a picture of systematic, widespread, and continuous sexual abuse of young boys in the forms of *Bacha Bazi* and child soldiers by powerful Afghan men, including government officials, security forces, as well as terrorist groups.

This article provides a brief overview and history of the phenomenon of *Bacha Bazi* with an analysis of the nexus between conflict-related sexual violence and *Bacha Bazi*. It attempts to identify major drivers of *Bacha Bazi* and the manifold barriers victims face in their pursuit of justice and rehabilitation. It considers the context of the deep-rooted Afghan traditions, extreme sex-segregation, oppression of women, and hypermasculinity. It critically examines the role of the United States (US) led international military intervention in the rise of *Bacha Bazi*. Finally, it provides an overview of Afghanistan's international legal obligations regarding the protection of children to identify the minimum standards Afghanistan must adhere to.

2. Bacha Bazi

Neither international law nor Afghanistan's criminal law includes a definition of *Bacha Bazi*. However, the recently revised Afghan Criminal

12 UNSC Res. 1820.

13 *Bacha Bazi* is a form of sex slavery of adolescent boys.

Penal Code includes an entire chapter dedicated to the crime of *Bacha Bazi*. Even if the *Bacha Bazi* chapter in the penal code does not provide a legal definition of the phenomenon, it out rightly criminalizes it.[14] *Bacha Bazi* can also be prosecuted as a criminal offence under the Afghan Trafficking in Persons (TIP) Law which criminalizes the use of threat or force or other types of coercion or deceit for the purpose of exploitation.

For the purpose of this article, *Bacha Bazi* is defined as a form of sex slavery and child prostitution — where powerful men, including Afghan warlords, government officials, and security forces personnel sexually exploit adolescent boys between the age of 10-18. Once enslaved, the victims are forced to dress up in female attire to entertain older men through sexual dance performances in men's tearooms, at weddings and private parties. *Bacha Bazi* literally means 'boy play' or 'playing with boys'.[15]

Bacha Bazi is a grossly under-reported and one of the least prosecuted crimes in Afghanistan. While perpetrators enjoy complete impunity, victims face social stigma, shame, and fear of prosecution for the crimes of adultery, homosexuality, and prostitution. *Bacha Bazi* is a criminal offence in Afghanistan, but the prosecution and conviction of perpetrators are almost non-existent. *Bacha Bazi* is seen as a shameful cultural practice rather than a crime in Afghanistan. Extreme sex segregation in Afghan society and the lack of contact with females is a major contributing factor to *bacha bazi*, which explains why the enslaved boys are forced to be dressed in female attire. Most Afghans do not approve of the practice but prefer to turn a blind eye to it because *Bacha Bazi* is not the most pressing human rights violation for them. For instance, in a public statement about *Bacha Bazi*, the former President of Afghanistan, Hamid Karzai, said '*Let us win the warfirst. Then we will deal with such matters (Bacha Bazi)*'.[16]

14 Afghanistan Penal Code 2017, Chapter 5, Articles 677 to 691.

15 The words *Bacha Bazi* are derived from two Persian words. *Bacha* means 'male child' and *Bazi* means 'playing'.

16 M. Yerman, 'The Dancing Boys of Afghanistan—Examining Sexual Abuse', Daily Kos, 14 February 2012.

Kamal's Story[17]

Kamal was fourteen years old when he lost his father. He was placed under the care of a family friend and his wife. 'He was someone I knew and trusted' says Kamal. 'I was his little prince. He used to hold my hand in the street. He told people I was his adopted son'. Kamal had never heard of the word *Bacha Bazi* before his adopted father enslaved him as his *Bacha*. 'He never hurt me', Kamal insists. 'He was always tender. He never traded me around with his friends as some did'. His master's wife accepted the arrangement and allowed Kamal to continue to live in the family house like a family member. Kamal's master was forced to leave Afghanistan in 1992 when the Taliban took control of the country. Kamal was left behind with nowhere to turn and no skills or education to make a living except for dancing and prostitution. Kamal now in his 40s still dances at weddings and private parties and tries to help abused boys. 'It breaks your heart' Kamal says. 'You look into their eyes, and they already look old. Something inside them has died'. Does he think *Bacha Bazi* will end soon? 'It should. It needs to. But it will not'.

2.1. The History and Evolution of *Bacha Bazi*

Bacha Bazi is often misconceived as a side effect of the armed conflict in Afghanistan. In reality, *Bacha Bazi* has been prevalent in Central Asia and other parts of the World since antiquity.[18] For instance, a 1878 painting by a French artist Jean-Léon Gérôme, known as 'The Snake Charmer', portrays European notions of oriental exoticism by depicting a nude boy dancing before tribal elders.[19] Some anthropologists consider *Bacha Bazi* a legacy of colonialism that was introduced by the Macedonian army to Central Asia during Alexander the Great's time.[20] Old poems, tales, and songs about *Bacha Bazi* in Afghanistan predate the pre-Islamic era (Eighth Century).

Interestingly, it was a key factor in the rise of the Taliban in Afghanistan. By some accounts, in 1994, two warlords ended up in a violent dispute over possession of a *bacha*.[21] Mullah Omar, an Afghan *Mujahedeen*[22] commander and the then leader of the Taliban, interfered by taking control of the city and freeing

17 This story has been edited and summarized. It was originally published as A. Shay, 'The Male Dancer in the Middle East and Central Asia', *Dance Research Journal* 38.1-2 (2006): 137-162.

18 Ibid, 21.

19 B. Turner, *Orientalism, Postmodernism, and Globalism* (London: Routledge, 1994), 98.

20 R. González & D. Price, 'The Use and Abuse of Culture (and Children): The Human Terrain System's Rationalization of Pedophilia in Afghanistan', *Counterpunch*, 9 October 2015.

21 Victims of Bacha Bazi.

22 Mujahedeen were the Islamist guerrilla fighters who battled the communist government of Afghanistan and the Soviet force in 1979.

the young boy.[23] Soon local Afghans in the area started to approach Omar for protection and dispute resolution giving momentum to the Taliban movement. Under the Taliban regime, *Bacha Bazi* became a serious criminal offence carrying a death penalty.[24]

There is a lack of empirical evidence to assert that the Taliban's tough stance on *Bacha Bazi* resulted in its reduction or prevention. On the contrary, anecdotal evidence and media reports indicate that *Bacha Bazi* continued but with more discretion.[25] Some reports even claim that the Taliban themselves discreetly indulged in *Bacha Bazi* and used *madrassas*[26] to access young boys for sexual exploitation, as they punished others for sodomy.[27]

The most recent human rights and media reports unflinchingly identify a rise in the terrorist groups' use of adolescent boys as a tactic of war to target the Afghan police, military, and government forces. Since 2016, there have been several reports of the Taliban recruiting underaged boys to disguise as *bachas* on Afghan military bases and police checkpoints to launch insider attacks. They are trained to operate as undercover spies and suicide bombers. There is no official data about the total number of such attacks. However, just in the province of Uruzgan, between January and April 2016, hundreds of policemen were killed in six different attacks by *bachas*.[28]

Child labor and the use of child soldiers are strictly prohibited under Afghan laws. Despite the normative de jure proscription of child labor, the de facto situation attests to an utter disregard of the law. The situation of children directly affected by conflict remain deplorable —exploitation of children in the form of child labor and *Bacha Bazi* continue to be rampant throughout the country.

In a media interview, General Ghulam Sakhi Rogh Lewani, former police chief of the Uruzgan province admitted that all the 370 police checkpoints in the province recruit adolescent boys for *Bacha Bazi* and combat.[29] According to Lewani, recruitment of underage boys is done off the record. A majority of them never get paid and face constant abuse by their commanders.[30] This situation makes them a discernible prey for the Taliban who lure them into killing their abusers to seek revenge and attain freedom. 'The Taliban are sending boys – beautiful boys, handsome boys – to penetrate checkpoints and

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23 C. Mondloch, '*Bacha Bazi*: An Afghan Tragedy', *Foreign Policy*, 28 October 2013.
24 'Kandahar Men Return to Original Love: Teenage Boys', *Fox News*, 27 January 2002.
25 Ibid.
26 Madrassas are Islamic seminaries for primary and secondary school students where they learn to memorize the Islamic holy book Qur'an and prepare to become Islamic scholars.
27 S. Shajjan, 'The Revised Afghanistan Criminal code: An End for *Bacha Bazi*?', *The London School of Economics and Political Science Blogs*, 24 January 2018.
28 A. Chopra, 'Taliban Use 'Honey Trap' Boys to Kill Afghan Police', *Agence France Presse*, 16 June 2016.
29 Ibid.
30 Ibid.

kill, drug, and poison policemen, they have figured out the biggest weakness of police forces – *Bacha Bazi*' said Lewani.[31]

The high profile of the perpetrators has made *Bacha Bazi* a power symbol. Now ordinary Afghans have begun to engage in *Bacha Bazi*. A national study by the Afghanistan Independent Human Rights Commission (AIHRC) reveals that 46 percent of the perpetrators are ordinary citizens.[32] Similarly, a common reason for engaging in *Bacha Bazi* was reported as prevalence and competition.[33] As one perpetrator reported, 'Everyone tries to have the best, most handsome and good-looking boy. Sometimes we gather and make our boys dance and whoever wins, his boy will be the best boy. Having a boy has become a custom for us. Whoever wants to show off should have a boy'.[34] The evolution of *Bacha Bazi* into a tactic of war is very alarming from a human rights perspective. The next section provides a detailed analysis of the nexus between the decades-long armed conflict in Afghanistan and *Bacha Bazi*.

2.2. Conflict-Related Sexual Violence and *Bacha Bazi* Nexus

According to the UN, the term conflict-related sexual violence encompasses trafficking for the purpose of sexual exploitation.[35] It recognizes human trafficking for the purpose of sexual exploitation as a form of sexual violence.[36] Likewise, the Palermo Protocol provides a comprehensive legal definition of TIP which includes contemporary forms of sexual violence, sex trafficking, and slavery.[37] Afghanistan ratified the Palermo Protocol in 2014 which ob-

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31 Ibid.

32 Afghanistan Independent Human Rights Commission (AIHRC), *National Inquiry Report on the Causes and Consequences of Bacha Bazi* (Kabul, 2014), 46.

33 Ibid., 52.

34 N. Quraishi, 'The Dancing Boys of Afghanistan', *PBS documentary*, 20 April 2010.

35 UN defines 'conflict-related sexual violence' as rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that are directly or indirectly linked to a conflict. The term also encompasses TIP when committed in situations of conflict for the purpose of sexual violence or exploitation. See, UN Security Council, *Report of the Secretary-General on Conflict-Related Sexual Violence* (S/2017/249), 15 April 2017, 3.

36 UN Security Council Resolution 2331 is the strongest legal instrument to highlight the relationship between sexual violence and trafficking in armed conflict. See UN Security Council Resolution 2331 (S/RES/233), 20 December 2016.

37 The Palermo Protocol defines human trafficking as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.

ligates countries to criminalize and take action to prevent all forms of human trafficking.

In 2017, the United Nations Assistance Mission in Afghanistan (UNAMA) documented 50 cases of sexual violence against women and girls and 3 cases of conflict-related sexual violence committed by illegal armed groups and the Afghan police.[38] UNAMA also verified 4 cases of sexual violence against boys, 3 by members of the Afghan National Defense and Security Forces and one by members of the Taliban.[39] Furthermore, UNAMA received 78 credible allegations of *Bacha Bazi* that could not be verified due to the sensitivities involved.[40]

Despite the high prevalence of conflict-related sexual violence in Afghanistan, it continues to be a severely under-reported crime. The number of official reports merely capture the tip of the iceberg. Amongst the major reasons of under-reporting are a lack of access to justice in unstable areas; inadequate response and protection services for victims; social stigma and shame associated with rape; and a climate of impunity which shields perpetrators from accountability.[41]

The most recent cases of human trafficking documented by the International Organization of Migration (IOM) reveal that Afghan victims of trafficking have generally experienced sexual exploitation and/or forced labor. Correspondingly, a report based on interviews with victims of human trafficking in Afghanistan found that one in ten of the interviewed boys had experienced trafficking of which 50 percent reported to have experienced sexual violence and exploitation including *Bacha Bazi*.[42] There is no formal mechanism or database in Afghanistan to track the cases of *Bacha Bazi* or human trafficking in the country. In 2018, the government of Afghanistan reported the investigation of 132 cases of human trafficking in 2017,[43] however, the government does not report on details of human trafficking cases so the total number of *Bacha Bazi* cases remains unknown.

2.3. Drivers of Sexual Violence and *Bacha Bazi* in Afghanistan

This section attempts to unfold the complex relationship between conflict-related sexual violence and *Bacha Bazi* and traces the three major drivers of *Bacha Bazi*. The most critical intersection hereof is the overlap between the risk factors that make Afghan boys vulnerable to conflict-related sexual violence and *Bacha Bazi*.

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38 UNSC, *Report of the SC on CRSV* (2018), para. 8.
39 Ibid.
40 Ibid.
41 Ibid.
42 J. Thorson & B. Sadeq, *Forgotten No More: Male Child Trafficking in Afghanistan Report*', (Hagar International, 2013), 2.
43 US Department of State, *2018 Trafficking in Persons Report* (Washington DC, 2018), 64.

2.3.1. Poverty

One of the major drivers of *Bacha Bazi* in Afghanistan is entrenched poverty and scarcity of livelihood opportunities. With a mere 0.479 human development index value, Afghanistan ranks 169 out of 188 countries in the low human development category.[44] The security and political transition since 2012 have resulted in extreme poverty — increasing from 36 percent in 2011-2012 to 39 percent in 2013-2014.[45]

Armed conflict and instability are the main contributing factors to poverty in the country. The current poverty and economic data show a discernible difference between poverty levels in the conflict-affected areas versus somewhat stable areas. For instance, 55 to 75 percent of the population in conflict-affected areas live in poverty whereas relatively stable regions enjoy a lower poverty rate (36 percent).[46]

The deplorable state of the economy is allowing criminal networks and pedophiles to exploit desperate civilians. Poverty strikes families and they willingly handover their boys to traffickers to make ends meet. AIHRC's national study corroborates the correlation between poverty and *Bacha Bazi*. Twenty-nine percent of the perpetrators interviewed by AIHRC said to have acquired the boys by paying money and exploiting their poverty, and 68 percent of the victims admitted receiving some form of monetary compensation.[47] The current guardianship law in Afghanistan does not provide enough State oversight to abstain guardians from selling children under their care.

A recent IOM report about the patterns and drivers of TIP in Afghanistan found chronic poverty and debt as the major drivers of TIP.[48] Under both of these situations, families are forced to either give away their daughters in exchange for bride money or hand-off their sons to traffickers in exchange for an income. The US Department of State's 2013 TIP report noted several cases of *Bacha Bazi* where adolescent boys were internally trafficked under the false pretense of employment.

2.3.2. The Migration and *Bacha Bazi* Nexus

Migration is the second major driver of TIP (including *Bacha Bazi*) in Afghanistan. In major humanitarian operations, such as the complex humanitarian crises in Afghanistan, the issue of human trafficking is often

44 UNDP, '*Human Development Report* (2016), 2.
45 World Bank, *Report 2017* (Washington, 2017).
46 Ibid.
47 AIHRC, *The Causes and Consequences of Bacha Bazi*, 2.
48 Samuel Hall, *Old Practices, New Chains: Modern slavery in Afghanistan. A study of Human Trafficking from 2003-2013* (Commissioned by IOM, 2013), 18-20.

overlooked by humanitarian actors because it is not considered an immediate threat to the life of the displaced people. For displaced people, however, prevention and protection from human trafficking are a matter of life and personal liberty.

The security situation in Afghanistan has unremittingly deteriorated since the reduction of international military presence in 2012. As of 30 April 2018, 56.3 percent of the country is under the government influence, 14.5 percent under the insurgents' influence, and 29.2 percent remains contested.[49] The recent surge in the number of returnees and internally displaced persons (IDPs) is placing an added burden on the already stretched resources and economic opportunities. With an 8.5 percent unemployment rate,[50] it is highly unlikely for Afghanistan to absorb an additional 1.8 million displaced persons and thousands of returnees.[51]

According to the United Nations Refugees Agency (UNHCR) recent report, the number of IDPs hit a record high in 2018 at 1.8 million.[52] Just during the month of May 2018, 1,449 people were killed and 1,550 wounded in 205 attacks across the country. The World Bank's 2017 Development Update reports that 'the number of IDPs (in Afghanistan) has increased at an alarming pace (...) This has affected the vast majority of provinces, with people in 30 of Afghanistan's 34 provinces fleeing their homes due to violence and conflict'.[53]

The situation will further deteriorate if the current flow of returnees from Pakistan, Iran, and Europe does not stop. Amongst the challenges facing returnees, a lack of livelihood opportunities and poor security are the gravest. The returnees and IDPs cannot count on a sustainable State support to find conventional means of income generation. IOM's recent data on TIP in Afghanistan illustrates the correlation between displacement/migration and trafficking. Of the 85 victims of trafficking interviewed by IOM, 42 were displaced because of the armed conflict.[54] The displaced populations reported a lack of social support from their host communities and an inadequate welfare system as the major problems.[55] Given the limited legal pathways available to Afghans for economic migration, they turn to human traffickers and smugglers to find alternative means to survive.

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49 Special Inspector General for Afghanistan Reconstruction (SIGAR), *Quarterly Report to the United States Congress* (Kabul, 2018).

50 The Global Economy, 'Afghanistan Unemployment Rate', https://www.theglobaleconomy.com/Afghanistan/Unemployment_rate/, accessed on 22 November 2018.

51 As of 4 August 2018, the number of returnees in 2018 was 78,340. See UNHCR Operational Portal, 'Afghanistan', https://data2.unhcr.org/en/country/afg, accessed on 4 August 2018.

52 SIGAR, *Quarterly Report to the United States Congress*.

53 Haque T. et al., *Afghanistan Development Update* (The World Bank, 2018), 1.

54 Samuel Hall, *IOM 2017 National Report on Trafficking in Persons in Afghanistan* (Commissioned by Afghanistan, 2018), 25.

55 Ibid.

War widows and orphans are the most vulnerable groups for sex trafficking among the displaced people. The physical insecurity, lack of documentation, unequal access to resources, and food shortage make them an easy prey for human traffickers. Traffickers lure them into sexual exploitation and often relocate them to other provinces in Afghanistan. A study by Hagar International found that one in ten boys in Afghanistan is vulnerable to trafficking for sexual exploitation, forced labor, and recruitment as a child soldier. Recent studies identify unaccompanied minors (IDPs and returnees) as a major feature of at-risk children.[56]

2.3.3. Gender Binarism and *Bacha Bazi*

The third and most critical driver of *Bacha Bazi* is the complicated gender dynamics and sex-based oppression in Afghanistan. Afghanistan has been historically a patriarchal society and it continues to use obsolete definitions of masculinity and femininity. An old but famous saying in Afghanistan is 'women are for children, boys are for pleasure'.[57]

The strict culture of misogyny and male-dominance, coupled with deeply ingrained Islamic values in Afghanistan have contributed to significant gender gaps. For example, the restrictions of *pardah*[58] and sex-segregation limit women's and girls' access to education, employment, and public services which result in women's economic dependence on men. Women are generally perceived as second-class citizens. Their sole purpose is perceived as household fixtures and child-bearers.[59]

Homosexuality is illegal in Afghanistan. Sexual minorities (lesbians, gays, bisexual and transgender) face high rates of abuse, exploitation, and violence. Transgender and intersex individuals are at a higher risk because they are often abandoned by their families at a very young age and it is difficult for them to conceal their sexual identity.

Marriage in Afghanistan, like most other countries, is an expensive matter. Due to the traditional gender roles and social constructs, men are expected to be the breadwinners of the family. Therefore, a man or his family has to demonstrate that they have the means and resources to financially support a

56 Ibid.
57 A. Cardinalli, *Pashtun Sexuality* (The Human Terrain Team AF-6: Research Update and Findings, 2009), 9.
58 Pardah is an Islamic practice of female seclusion aimed at keeping women from being seen by men they are not related to.
59 Mondloch, '*Bacha Bazi*: An Afghan Tragedy', 23.

wife. Afghan customs require the groom to pay a 'bride price'[60] to the male guardian of the bride. Despite earning a few hundred dollars per month on average, Afghan men are expected to pay tens of thousands of dollars on wedding traditions.[61] Poverty, unemployment and ever-increasing bride price have caused Afghan men to turn to young boys for sexual companionship.

Interestingly, despite the strong resistance and disapproval of homosexuality, Afghanistan has a history of a culture where men often engage in sex with other men regardless of their sexual orientation.[62] Thursday nights are famous for men engaging in sexual relations with other men in Afghanistan.[63] A Human Terrain Team (HTT)[64] report, '*Pashtun* Sexuality' brought the ancient practice of 'man-love Thursday' to light. Since then, several foreign military officials have written articles and blogs condemning *Bacha Bazi*. Most reports indicate that adult Afghan men engage in *Bacha Bazi*' more often than consensual sex.[65]

Considering the lack of social acceptance of homosexuality and adultery in Afghanistan, the existence of such practices is quite ironic. Part of the reason for this discrepancy is the different connotation given to homosexuality and disagreement about its definition and application. Man-love Thursday or *Bacha Bazi* is not considered an act of homosexuality by most Afghans. A documentary on *Bacha Bazi* explains that Afghans interpret the prohibition on homosexuality in Islam as a prohibition of 'men having feelings for other men' or 'men loving men' – not a prohibition of men using men for sexual gratification.[66] The HTT's research validates this notion by explaining that the *Pashtun* social norm justifies *Bacha Bazi* on the basis of the following:

1. If a man does not love the boy, the sexual act is not reprehensible, un-Islamic or homosexual;
2. Adultery and rape are considered defaming and dishonorable for women but it does not have the same social drawback for men; hence, *Bacha Bazi* is a more ethical choice than defiling a woman.[67]

When a father of a victim of *Bacha Bazi* was asked if he knew about the sexual violence his son goes through as a bacha, he merely shrugged and said

60 Bride price or bride token is a widely practiced custom in Afghanistan where the groom or his family make payment in the form of money, gold, or property to the family of the women he intends to marry.
61 A. Faisal, 'The Price of Marriage', *Afghanistan Today*, 24 March 2013.
62 K. Vlahos, 'The Rape of Afghan Boys', *Daily Kos*, 13 April 2010.
63 T. Steward, 'Man Love Thursdays in Afghanistan', *Fox News*, 13 April 2010.
64 The HTT was a team of anthropologists hired by the US to provide military commanders with an understanding of the Afghan population, culture, and customs.
65 Quoted in articles and blogs by NATO officials who have served in Afghanistan including D. Pugliese, 'Man-Love Thursdays Returns', *Ottawa Citizen*, 6 October 2008.
66 Quraishi, 'The Dancing Boys of Afghanistan'.
67 Cardinalli, *Pashtun Sexuality*, 29.

that 'he know[s] what happens to [his] son – but he is a boy – whatever happens[s], will pass.'[68]

A Los Angeles Times interview with a young Afghan man Mohammad Daud is a great example of how an ordinary Afghan man deals with sexuality. At age 29, Daud had seen the faces of no more than 200 women in his entire life. Daud is unmarried because he cannot afford to get married. He has sex with only men and boys, but he does not consider himself homosexual. 'I like boys, but I like girls better. How can you fall in love with a girl if you cannot see her face?' He asks.

2.4. Rehabilitation and Reintegration of Survivors

Protection lies at the core of a victim-centered response to sexual violence and human trafficking. A protection mechanism should include forthwith identification and referral of victims to critical services like health care, shelter, legal aid, psychosocial counseling and economic rehabilitation. Protection and rehabilitation of survivors of sexual violence are extremely challenging in Afghanistan but the complications multiply for survivors of *Bacha Bazi*.

First, the Government of Afghanistan does not have a protection mechanism in place for victims of *Bacha Bazi*. There is no formal referral system in Afghanistan for victims of sexual violence and human trafficking including *Bacha Bazi*. Theoretically, the Afghan Ministry of Women Affairs (MoWA) and the Ministry of Labour, Social Affairs, Martyrs, and Disabled (MoLSADM) are supposed to provide protection services to victims of sexual violence and human trafficking. MoWA's protection programs only cater to the needs of female survivors. MoLASMD is responsible for providing protection services to children. Though, in reality, MoLSAMD relies on the UN and non-government organizations to provide protection services to children in distress.[69]

There is only one shelter for boys in Kabul which is not accessible to victims in far-flung and remote areas. There is no system of victim identification process in public health facilities and schools. Even if the schools or public health facilities somehow manage to identify victims, there is no referral mechanism for them to refer cases of *Bacha Bazi*. Likewise, trauma counseling is an integral part of a victim's healing process. Some shelters for women are providing

68 Quraishi, 'The Dancing Boys of Afghanistan'.

69 McAneney L. & Rasheed H., Evaluation of Afghanistan's *Child Protection Action Network Afghanistan* (Commissioned by UNICEF, Kabul, 2017).

psychosocial counseling but there is no formal mechanism to provide such services to the victims and survivors of *Bacha Bazi*.

Second, sexual violence in Afghanistan carries stigma and rejection by families and communities. As explained in section 2.3.3 of this article, human sexuality is considered a taboo in Afghan society. Even in the cases of rape and sexual violence, people refrain from disclosing or reporting the crimes because it is considered a damage to the family's or tribe's honor and prestige. A recent case study by IOM reported stigma and lack of family and community support as the main reason for victims to not report sexual violence. One survivor who was deceived and raped reported "They [the neighbors] made my name bad, and now my name and that of my family have become bad. We cannot live among the people".[70] Similarly, a survivor of *Bacha Bazi* abandoned by his family reported "Family honour is like a glass of water. One speck of dirt ruins it."[71] The culture of silence surrounding sexual violence makes it difficult for aid workers to identify and support victims of sexual violence.

Furthermore, victims of *Bacha Bazi* are considered less desirable by their masters once they reach adulthood (usually past the age of 18),[72] once released, they have no family support or social services to turn to. Survivors of *Bacha Bazi* face a higher risk of social isolation and stigma because most perpetrators publically show-off their enslaved boys during parties and dance performances. Without a comprehensive rehabilitation program, survivors of *Bacha Bazi* are left on their own with no social acceptance and little or no skill to pursue a meaningful life. Under these conditions, the survivors of *Bacha Bazi* end up falling prey to a new cycle of abuse – prostitution.[73] Dancing and prostitution are the only skills most of the boys caught up in *Bacha Bazi* will have for the rest of their lives.

Finally, there is the issue of criminal justice. Afghanistan's national laws are only applicable in the formal justice system. Very few Afghans have confidence in the formal justice system. The formal justice sector is notoriously famous for widespread corruption, lack of access, and overall inefficiency of the system. Consequently, a majority of Afghans prefer using the informal justice system which is more efficient and accessible but deeply flawed from a

70 Samuel Hall, *IOM 2017 National Report on Trafficking in Persons in Afghanistan* (Commissioned by Afghanistan, 2018), 12.
71 'Stolen boys: Life after Sexual Slavery in Afghanistan', *Agence France Presse*, 1 July 2017.
72 E. Erdogdu et al., *Breaking the Stigma against Child Sex Trafficking and Bacha Bazi in Afghanistan* (self-published, April 2016), 4.
73 Ibid.

human rights viewpoint.[74] The informal justice system in Afghanistan tends to ignore individual rights over community/tribal rights or interests. On the one hand, the social pressure from families and communities prevents victims of Bacha Bazi from seeking justice through the informal sector. On the other hand, victims do not trust the formal justice system because of the generally close-connections of the powerful perpetrators with the police, prosecutors, and judges. Despite billions of dollars being poured into Afghanistan by the international community, there is still no mechanism to provide protection, justice, and rehabilitation to male victims of sexual violence.

3. Has the International Community Failed *Bacha Bazi* Victims?

The 2001 international intervention in Afghanistan has put the US and its North Atlantic Treaty Organization (NATO) allies in an extremely complicated position. Their local allies were mostly warlords and powerful men – most of whom were sexual predators.[75] Their relationship as allies of the US War on Terror has enabled them to gain key positions in the government of Afghanistan, military, police, as well as parliament.

Abdul Rashid Dostum, a notorious warlord, allegedly responsible for thousands of murders, and accused of committing war crimes,[76] now serves as the First Vice-President of Afghanistan. In November 2016, Vice President Dostum was accused of abducting and raping a political opponent, Ahmad Ishchi. Instead of facing criminal charges, Dostum sought exile in Turkey. After more than a year in exile, Dostum has resumed his role as First Vice-President without facing a criminal prosecution. By empowering warlords, criminal and sexual predators, the West unconsciously ended up promoting a 'lesser evil' alternative of governance in lieu of the terrorists.[77]

As warlords were responsible for general order, corruption, lawlessness, and human rights violations, including *Bacha Bazi*, it became a normalized and structured practice.[78] These men and their actions are now perceived as a symbol of power and success in Afghanistan. According to AIHRC and the

74 N. Coburn, *Informal Justice and the International Community in Afghanistan* (United States Institute for Peace, 2013), 4.

75 J. Braithwaite & A. Wardak, 'Crime and War in Afghanistan', *British Journal of Criminology*, 53.2 (2012): 185.

76 'Who is Who in Afghanistan', a database with biographies of influential Afghans that provides a detailed account of mass murder and corruption accusations against Dostum, See Afghan Bios, 'Who is Who in Afghanistan', http://www.afghan-bios.info/database.html, accessed on 22 November 2018.

77 Mondloch, '*Bacha Bazi*: An Afghan Tragedy'.

78 Ibid.

Human Terrain Team research on *Bacha Bazi*, many Afghan parents willingly – with full knowledge of the sexual ramifications – give their sons to influential men in order to establish connections with powerful people.[79]

The Afghan police and security forces have emerged as the biggest culprit of *Bacha Bazi*. The State Department TIP Reports, as well as the US Special Inspector General for Afghanistan's report about *Bacha Bazi*, have sharply criticized the Afghan Government for not preventing *Bacha Bazi* and underage recruitment within the security forces.[80]

Since 2015, owing to the pressure of rights groups, the Afghan government has made several attempts to end *Bacha Bazi* within its ranks and security institutions. In 2015, the current Afghan President, Ashraf Ghani publicly condemned the practice of *Bacha Bazi* and vowed to crack down on the sexual abuse of children.[81] Since then, the Attorney General in Kabul has sent two letters to the Ministries of Interior and Defense to investigate all allegations of *Bacha Bazi* and recruitment of children by the security forces.[82] However, no efforts have been made to investigate, prosecute or prevent *Bacha Bazi*.

A major obstacle to accountability and justice is the high profile of the perpetrators and their strategic value in the war on terror. Afghanistan is a fundamentally unjust society where law operates in a prejudicial manner to protect and preserve the interests of the powerful elites. There are credible reports of Afghan army and ally militia enslaving underage boys for *Bacha Bazi* on military bases.[83] Yet, the perpetrators remain above the law.

In 2015, Colonel Brian Tribus, the spokesman for the American Command in Afghanistan told the New York Times, 'Generally, allegations of child sexual abuse by Afghan military or police personnel would be a matter of domestic Afghan criminal law. There would be no express requirement that US military personnel in Afghanistan report it. For international forces the bigger picture was fighting the Taliban, not to stop molestation'.[84]

This approach has started receiving criticism since the news and blogs related to *Bacha Bazi* started to surface on mainstream and social media. A 2015 New York Times article[85] sparked an international outrage. Today, the international

79 AIHRC, 'Causes and Consequences of *Bacha Bazi*', 57.

80 Special Inspector General for Afghanistan Reconstruction, *Child Sexual Assault in Afghanistan: Implementation of the Leahy and Reports of Sexual Assault by Afghan Security Forces* ((U) SIGAR 17-47-IP) 18 January 2018, 19.

81 M. Rosenberg, 'Ashraf Ghani, Afghan President, Vows to Crack Down on Abuse of Boys', *The New York Times*, 23 September 2015.

82 Chopra, 'Taliban use 'honey trap' boys to kill Afghan police'.

83 J. Goldstien, 'US Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies', *The New York Times*, 20 September 2015.

84 Ibid.

85 Ibid.

community's approach towards *Bacha Bazi* is gradually shifting from a hands-off approach to a more responsible approach.

From the international community's perspective, a major debate has been about applicability and relevance of the international laws in tacking the issue of *Bacha Bazi*. There has been confusion and debates about which laws apply to the conflict in Afghanistan. The following section provides an analysis of the international legal regime to address this confusion.

3.1. Has the Armed Conflict caused a Legal Black Hole?

UNAMA and the International Committee of the Red Cross (ICRC) have classified the armed conflict in Afghanistan as a non-international armed conflict.[86] Using the UNAMA and ICRC classification of the armed conflict in Afghanistan, this article will analyze Common Article 3 of the four Geneva Conventions and AP II to identify minimum standards regarding protection of children in an armed conflict for Afghanistan.

First, Common Article 3 of the 1949 Geneva Conventions states that '[p]ersons taking no active part in the hostilities (...) shall in all circumstances be treated humanely'. While Article 3 does not explicitly prohibit rape and sexual violence, it prohibits violence and inhumane treatment, torture, cruel treatment, and outrages upon human dignity – all of the prohibitions can be applied to *Bacha Bazi*.

The *Prosecutor v Ntaganda's* trial at the International Criminal Court (ICC)[87] is very relevant to *Bacha Bazi* because Afghan security officials and armed forces are frequently accused of engaging in *Bacha Bazi*.[88] This case presented the ICC with an important legal question, that is, whether Common Article 3 of the Geneva Conventions provides protection to the members of armed forces from abuses by their own party. This legal question is particularly important because Afghan security forces often recruit *bachas* as tea boys or child soldiers. Defense, in this case, argued that crimes committed by the members of armed forces against their fellow members do not fall within the jurisdiction of IHL or ICL.[89] 'International humanitarian law is not intended to protect combatants from crimes committed by combatants within the same group. Such crimes come under [the] national law and [international] human rights law.'[90]

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86 Afghanistan Independent Human Rights Commission (AIHRC), *An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan* (Kabul, 2008), 7.

87 *Prosecutor v. Bosco Ntaganda, 'Second Decision on the Defense's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9'*, ICC- 01/04-02/06, Appeal Chamber, 4 January 2017.

88 AIHRC's Report on *Bacha Bazi* as well as media reports suggest that a large majority of the perpetrators are members of the Afghan military and police.

89 *Prosecutor v. Bosco Ntaganda*, paras. 27, 13.

90 Ibid.

The Chamber, in this case, used international customary law in addition to the Rome Statute. Referring to the ICRC's Commentary to the First Geneva Convention, the Chamber noted that the issue of protection of armed forces from their own armed forces is not a gray area.[91] '(t)he fact that (...) the abuse (is) committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This is supported by the fundamental character of common Article 3 which has been recognized as a "minimum yardstick" in all armed conflicts and as a reflection of 'elementary considerations of humanity'.[92]

The Chamber provided that the Rome Statute's definition of enslavement[93] is identical to that of the Slavery Convention's definition of slavery which enjoys a *jus cogens* status under international law.[94] It further noted that rape can constitute torture or genocide which is also prohibited under international law as *jus cogen*.[95] To establish that the scope of protection from sexual violence in armed conflict is not limited to certain categories of people or groups,[96] the Chamber established that 'the prohibition against rape and sexual slavery being peremptory norms, such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status'.

Second, Additional Protocol (AP) II provides more comprehensive guidance regarding protection from sexual violence by reinforcing the prohibition on 'outrages upon human dignity' which lists: violence to the life, health, and physical well-being of persons; cruel treatment; rape; enforced prostitution; slavery and slave trade.[97] However, AP II limits the protection to persons who are *hors de combat* and does not seek to further categorize the victim's allegiance.[98] Customary IHL, on the other hand, prohibits rape and other forms of sexual violence in armed conflict without limiting it to a specifically protected group.[99]

Thus, it can be argued that the armed conflict in Afghanistan might have caused confusion in the application of international law but it has not caused

91 Ibid., paras. 37, 18.
92 Ibid, para 50.
93 Article 7(2)(c) of the ICC Statute defines enslavement as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of TIP, in particular women and children.'
94 *Prosecutor v. Bosco Ntaganda*, paras. 51, 28.
95 Ibid.
96 As it pertains to article 8(2)(b) and (e) of the ICC Statute.
97 Article 4.
98 International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).
99 International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law Vol 1* (2005), Rules No. 93.

a legal black hole. Prohibition on child sexual exploitation has a strong normative foundation in IHRL, IHL, ICL and international customary law as an obligation *erga omnes*. Despite the armed conflict and political instability in the country, Afghanistan has an obligation to build a comprehensive domestic legal framework and take concrete measures to prevent children from violence and exploitation, and ensure an effective criminal justice process which prosecutes criminals and protects the rights of victims.

3.2. Afghanistan's Obligations Towards Children's Rights

As established in this article, *Bacha Bazi* constitutes a violation of international law. As a dualist State, Afghanistan is required to translate its obligations under international law into its domestic laws. Afghanistan is bound to act in accordance with international human rights treaties it has signed and it can be held liable for its negligence and laxity on *Bacha Bazi*. Specifically, under IHRL, Afghanistan is obligated to prevent exploitation and abuse of children. In accordance with the Convention on the Rights of the Child (CRC) obligations, Afghanistan should provide a comprehensive response by taking preventive measures against the exploitation of children.[100] As a party to the Palermo Protocol, Afghanistan is responsible for building a comprehensive domestic legal framework, taking concrete measures to prevent people from becoming victims of human trafficking, ensuring an effective criminal justice process which prosecutes criminals and protects the rights of victims.

Similarly, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography requires Afghanistan to 'take all necessary steps (...) for the prevention, detection, investigation, prosecution, and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography, and child sex tourism'.[101] As a party to this Protocol, Afghanistan's Criminal Law should prohibit 'offering, delivering or receiving of children, for the purpose of sexual exploitation' and investigate and prosecute cases of *Bacha Bazi*.

Thus, Afghanistan has an obligation to implement its national criminal and TIP laws to abrogate *Bacha Bazi* and defy any exploitation of children in the name of culture and traditions.

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[100] Based on the interpretation of Article 34.
[101] Article 2.

4. Concluding Observations

Bacha Bazi has existed in Afghanistan for centuries but the protracted armed conflict has exacerbated the situation. The prolonged war in the country has resulted in a rule of power and patronage.

Bacha Bazi undermines, impairs, and deprives the victims of the ability to exercise their fundamental rights which are deemed inalienable under IHRL. From a human rights perspective, *Bacha Bazi* deserves substantial attention due to its long-term detrimental effect on the victims. Afghanistan has made perfunctory progress by strengthening the legal framework, but it is yet to show any serious commitment towards enforcement of the laws.

The major obstacles to justice for victims of *Bacha Bazi* are the unfairness and the overall ineffectiveness of the formal justice system. It is imperative to recognize that Afghanistan's criminal law is only applied to its formal justice system. Whereas, about 80 percent of the criminal and civil cases in Afghanistan are dealt with by the informal justice system[102] which is not bound to take into account Afghanistan's domestic laws or international legal obligations.

Robust poverty and a surge in conflict-related migration are facilitating traffickers and smugglers access to vulnerable women, men, and children for exploitation. The recent upsurge in violent extremism, the rise of ISIL, consistent proliferation of arms and weapons, and a weak rule of law system have caused a rise in sexual violence and human trafficking in Afghanistan. These conditions are directly contributing to the drivers of sexual violence and trafficking.

The drivers of *Bacha Bazi* are intertwined with the protracted armed conflict and deeply ingrained with the Afghan cultural and gender norms. It is impossible to address the issue of *Bacha Bazi* without tackling the issue of gender inequality and bringing about sustainable livelihood. Instead of dismissing *Bacha Bazi* as a cultural issue, there is a need to shift attitudes towards sexual violence and victims of *Bacha Bazi*. Afghanistan has taken the first step by recognizing *Bacha Bazi* as a punishable crime. The government of Afghanistan has also enacted a policy for the Afghan National Army which prohibits the use of child soldiers and establishes procedures for the demobilization and care of children involved in armed conflict. As a result of this new policy, the government of Afghanistan reported having prevented the recruitment of 79 children in the national army between April and June 2017.[103] Nonetheless, the government of Afghanistan has failed to prosecute or convict any government or security officials complicit in *Bacha Bazi* and other forms of human trafficking.[104]

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102 N. Coburn, & J. Dempsey, *Informal Dispute Resolution in Afghanistan* (The United States Institute of Peace, 2010), 3.

103 US Department of State, *2018 Trafficking in Persons Report* (Washington DC, 2018).

104 Ibid, 2.

Abolishing *Bacha Bazi* will require more than just condemnation from the Government of Afghanistan and the international community. The investigation, prosecution, and adjudication of *Bacha Bazi* cases can assess, if not measure, the government of Afghanistan's commitment towards eradication of *Bacha Bazi*. Equally important will be to ensure a humanitarian response which takes into account the various drivers of *Bacha Bazi*, and is fully equipped to identify at-risk children, and provide them adequate protection to stop it from happening in the first place. At the same time, a comprehensive rehabilitation and reintegration system must be put in place to support the survivors in rebuilding their lives. A prevention and response approach to *Bacha Bazi* in Afghanistan should take into consideration the cultural and social stigma associated with the victims of sexual violence and include a behavioral change/outreach program to create an enabling environment for the victims to seek help.

Finally, this article concludes that while the international legal regimes do not specifically address the phenomenal issue of *Bacha Bazi*, the various elements of *Bacha Bazi* are prohibited under IHRL, ICL, and IHL. Although it can be argued that the international legal regimes were predominantly designed to address the issue of sexual violence against women and girls, akin to the contemporary interpretation, international law also provides protection to men, boys and sexual minorities from sexual violence. Some IHRL treaties allow States to derogate from certain rights in times of crises or public emergency. However, the right to life, freedom from torture, cruel, inhuman treatment, and freedom from slavery can never be derogated. Thus: 1) IHRL as *jus cogen* of international law continues to apply in Afghanistan; 2) even in just applying IHL to govern *jus in bello*, *Bacha Bazi* will constitute a violation of the protections guaranteed to civilians.

As Afghanistan attempts to transit from a protracted armed conflict towards peacebuilding and stability, it must find ways to address the issue of systematic and widespread sexual exploitation and abuse of children.

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