

**POLICY BRIEF: INTERNATIONAL CRIMINAL ACCOUNTABILITY FOR TRAFFICKING  
IN PERSONS**

**HUMAN TRAFFICKING LAW | WORKING PAPER SERIES**

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*International Criminal Accountability for Trafficking in Persons*

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## I. Introduction

On 15 November 2000, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“Palermo Protocol”) turned 20 years old.<sup>1</sup> After years of negotiations, particularly around the definition of trafficking, the final agreed Palermo Protocol defined trafficking in persons as follows:

“[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.”<sup>2</sup>

While many countries have appropriate legal frameworks for combatting trafficking, according to the United Nations, the large discrepancy between the number of detected victims and convicted offenders indicates that many trafficking crimes still go unpunished.<sup>3</sup> This Policy Paper seeks to recall that trafficking in persons remains a serious crime of international concern. In particular, the trafficking of people for forced labour and sexual exploitation is believed to be one of the fastest-growing areas of international criminality and of increasing concern to the international community.<sup>4</sup> The crime of trafficking in persons is so serious that the drafters of the Rome Statute<sup>5</sup> deemed it necessary to expressly state that trafficking can amount to an international crime in the form of enslavement<sup>6</sup> and sexual slavery<sup>7</sup> as crimes against humanity,

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<sup>1</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 55/25 of 15 November 2000 (Hereafter, “Palermo Protocol”).

<sup>2</sup> *Id.*, article 3(a).

<sup>3</sup> United Nations Office of Drugs and Crime, *Global Report on Trafficking in Persons* (2016), p.12.

<sup>4</sup> Elżbieta Goździak & Kathleen Vogel, ‘Palermo at 20: A Retrospective and Prospective’, *Journal of Human Trafficking*, Vol. 6, Issue 2 (2020) 109-118 at 111.

<sup>5</sup> Rome Statute of the International Criminal Court, adopted and opened for signature, ratification and accession 17 July 1998, entered into force 1 July 2002 (“Hereafter, “Rome Statute”).

<sup>6</sup> *Id.*, article 7(1)(c).

<sup>7</sup> *Id.*, article 7(1)(g).

and/or sexual slavery as a war crime.<sup>8</sup> Despite this codification, trafficking in persons has to date received little attention before international criminal fora. While it is regularly prosecuted at the domestic level, trafficking in persons has yet to be specifically pleaded before an international court.

This Policy Paper proceeds as follows. In part II below, the link between armed conflict and trafficking is highlighted, as well as recent investigative developments at the International Criminal Court (“ICC”) in relation to trafficking-related crimes. In part III, the legal basis for classifying trafficking in persons as an international crime is analyzed. In part IV, it is argued there are innovative ways available to prosecute trafficking in persons domestically, to fully reflect its impact on victims and society, and to ensure accountability for its commission. To demonstrate this, the examples of Uganda and Kenya are used to show how domestic structures can be utilised to prosecute trafficking as an international crime. The final part considers the principal legal obstacles to domestic prosecutions, and how these might be overcome in the short-term.

## **II. Armed Conflict and Trafficking**

The link between armed conflict and trafficking in persons has been underscored by the United Nations Special Rapporteur on trafficking in persons, especially women and children. In her 2018 report, Maria Grazia Giammarinaro noted that trafficking is extremely common in the midst of armed conflict, and that “the general breakdown of the rule of law and political, economic and social structures, including community protection systems, higher levels of violence and increased militarism, as well as the lack of access to safe and legal migratory routes, foster conditions in which trafficking flourishes, including after hostilities have ceased.”<sup>9</sup> The President of the UN Security

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<sup>8</sup> *Id.*, articles 8 (2)(b)(xxii) and 8(2)(e)(vi).

<sup>9</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. A/73/171, 17 July 2018, para.5.

Council has also noted how trafficking in armed conflict contexts is linked to other forms of exploitation, such as sexual violence and forced criminality.<sup>10</sup>

As to the international criminal nature of trafficking in persons, the United Nations Security Council (“UNSC”) has recognized “that certain acts or offences associated with trafficking in persons in the context of armed conflict may constitute war crimes” and recalled the need for states to adopt appropriate measures within their national legal systems to investigate and prosecute such crimes.<sup>11</sup> In particular, the UNSC has condemned “trafficking in persons and violations and other abuses committed by Boko Haram, Al-Shabaab, the Lord’s Resistance Army, and other terrorist or armed groups for the purpose of sexual slavery, sexual exploitation, and forced labour.”<sup>12</sup> The UNSC has also highlighted the vulnerability of children and unaccompanied minors to abduction and trafficking during armed conflict, calling on states to hold perpetrators accountable for violations of international law.<sup>13</sup>

In this regard, a report on trafficking in persons in armed conflict by the United Nations Secretary-General in 2018 referred to the establishment of the Special Investigative Team to support accountability for crimes committed by ISIL (UNITAD).<sup>14</sup> Its fourth report from May 2020 confirmed that human trafficking networks are currently being investigated by the Team.<sup>15</sup> Yet, despite the adoption by the UN General Assembly of the Global Plan of Action to Combat Trafficking in Persons in 2010, which calls on states to ensure the liability of all categories of perpetrators of trafficking in persons “in line with relevant international

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<sup>10</sup> Statement by the President of the Security Council, UN Doc. S/PRST/2015/25, 16 December 2015, p.1.

<sup>11</sup> UNSC Resolution 2388, UN Doc. S/RES/2388, 21 November 2017, p.2.

<sup>12</sup> UNSC Resolution 2331, UN Doc. S/RES/2331, 20 December 2016, para.11.

<sup>13</sup> UNSC Resolution 2388 (note 11), para.19.

<sup>14</sup> Report of the Secretary General on trafficking in persons in armed conflict pursuant to Security Council resolution 2388, UN Doc. S/2018/1042, 21 November 2018, para.10.

<sup>15</sup> Fourth report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant, UN Doc. S/2020/386, 11 May 2020, para.48.

instruments”,<sup>16</sup> the prosecution of trafficking in persons as an *international* (as opposed to merely domestic or transnational) crime has not been actively considered by most domestic prosecuting authorities.

### III. Trafficking, Enslavement and the ICC

In this section, it will be recalled how trafficking in persons can amount to certain international crimes, as codified in the Rome Statute. In the context of an attack on a civilian population, or an armed conflict, the Rome Statute expressly permits and foresees the prosecution of trafficking in persons. The Statute itself does not define every crime, but article 7(2)(c) does states that “[E]nslavement 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.”<sup>17</sup> In the ICC’s Elements of Crimes, where every crime is comprehensively defined, the crime against humanity of enslavement is stated to comprise the following three elements:

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 conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. 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.<sup>18</sup>

Footnoted to paragraph 1 is the following:

“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*

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<sup>16</sup> UN General Assembly Resolution 64/293, United Nations Global Plan of Action to Combat Trafficking in Persons, UN Doc. A/RES/64/293, 12 August 2010, paras.43-44.

<sup>17</sup> Rome Statute (note 5), article 7(2)(c).

<sup>18</sup> Elements of Crimes, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11), p.6.

*also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”*<sup>19</sup> (emphasis added)

The same explanatory footnote is appended to the elements of the crimes of sexual slavery as a crime against humanity<sup>20</sup> and sexual slavery as a war crime both in international armed conflict<sup>21</sup> and non-international armed conflict.<sup>22</sup> In cases that have alleged charges of enslavement and sexual slavery to date, when viewed against the Elements of Crimes, the conduct under examination legally amounted to trafficking in persons for the purposes of military and sexual exploitation. However, the conduct *was not legally framed as trafficking in persons at trial*. Rather, it was framed simply as enslavement and sexual slavery.

For example, in *Katanga* a number of women were held captive and sexually exploited following a rebel attack in Bogoro, eastern DRC in 2003.<sup>23</sup> This conduct was determined by the Trial Chamber to amount to sexual slavery, but for evidentiary reasons the accused was held not to be individually responsible for these particular crimes.<sup>24</sup> In *Ntaganda*, the accused’s subordinates in his rebel group, the UPC/FPLC, sexually enslaved both civilians<sup>25</sup> and female members of his own armed group,<sup>26</sup> an important judicial precedent as intra-group crimes have typically not been understood to amount to violations of international humanitarian law.<sup>27</sup> While in the *Ongwen* case, the accused was found guilty of enslaving civilians to carry pillaged

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<sup>19</sup> *Id.*, fn.11.

<sup>20</sup> *Id.*, p.8, fn.18.

<sup>21</sup> *Id.*, p.28, fn.53.

<sup>22</sup> *Id.*, p.37, fn.66.

<sup>23</sup> ICC, *Prosecutor v Katanga*, Trial Judgement, 14 March 2014, para.1023.

<sup>24</sup> *Id.*, para.1664.

<sup>25</sup> ICC, *Prosecutor v Ntaganda*, Trial Judgement, 8 July 2019, paras.954-961.

<sup>26</sup> *Id.*, paras.975-985.

<sup>27</sup> See further Tilman Rodenhäuser, ‘Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their ‘Own Forces’’, *Journal of International Criminal Justice*, Vol 14, Issue 1 (2016) 171–193.

goods,<sup>28</sup> and of sexually enslaving women and girls both personally<sup>29</sup> and through his subordinates<sup>30</sup> in the Sinia Brigade of the Lord's Resistance Army ("LRA").

The distinction between enslavement and human trafficking is not readily apparent in law – at least in the Rome Statute or the Palermo Protocol. This has led to some scholars questioning whether they can, in both practical and legal terms, be properly distinguished.<sup>31</sup> For example, where a child is used to carry pillaged goods after an attack, the prosecutorial instinct may be to simply frame this conduct as enslavement. Yet the Palermo Protocol also states that the mere "recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons" as well.<sup>32</sup> This question of legal framing is important, because where evidence indicates that criminal conduct occurs, that conduct should be accurately characterized and accounted for. A more appropriate legal characterization reflects the true nature and gravity of the crime, the harm incurred, and the impact on the victim.

Perhaps the lack of focus on trafficking is because it is assumed to typically require a commercial aspect, for example the coercive exploitation of vulnerable women for prostitution. Requirements of commerciality are sometimes written into domestic law when regulating sex trafficking.<sup>33</sup> However, the circumstances under which trafficking occurs, the persons involved, the means of trafficking and the factors that contribute to the vulnerability of potential victims are many and varied.<sup>34</sup> Importantly, as the Elements of Crimes and Palermo Protocol make clear, no monetary requirement is necessary for the offence of enslavement to be committed. Early

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<sup>28</sup> ICC, *Prosecutor v Ongwen*, Trial Judgement, 4 February 2021, paras.2894-2896.

<sup>29</sup> *Id.*, paras.3044-3055.

<sup>30</sup> *Id.*, paras.3081-3087.

<sup>31</sup> See Nicole Siller, 'Modern Slavery': Does International Law Distinguish between Slavery, Enslavement and Trafficking?', *Journal of International Criminal Justice*, Vol. 14, Issue 2 (2016) 405–427.

<sup>32</sup> Palermo Protocol (note 1), article 3(c).

<sup>33</sup> For example, in the United States, the Trafficking Victims Protection Act of 2000 defines "severe forms of trafficking in persons" in 22 U.S.C. 7102 (11) as: "A. Sex trafficking in which a **commercial** sex act is induced by force, fraud, or coercion, or in which a person induced to perform such act has not attained 18 years of age." (emphasis added)

<sup>34</sup> Nancy Sidun & Deborah Hume (Eds.), *A feminist perspective on human trafficking of women and girls: Characteristics, commonalities and complexities* (Routledge, 2019), p.7.

jurisprudence from the International Criminal Tribunal for the former Yugoslavia also confirms this, with the *Kunarac* Trial Chamber stating that the “acquisition” or “disposal” of someone for monetary or other compensation is not a requirement for enslavement.<sup>35</sup>

### *Investigative Developments at the ICC*

There are indications that trafficking in persons may soon become a prosecutorial reality at the ICC, specifically in the Situation in Libya, over which the court can exercise jurisdiction by virtue of UNSC Resolution 1970.<sup>36</sup> Scholars and commentators have for a number of years argued that the Prosecutor should exercise jurisdiction over trafficking and migrant-related crimes both within Libya<sup>37</sup> and in the context of coercive migration across the Mediterranean to mainland Europe.<sup>38</sup> The Prosecutor, Fatou Bensouda, has stated that she continues to investigate migrant-related crimes that have an identified nexus to the armed conflict in Libya. In her 2017 report to the UNSC, the Prosecutor stated that Libya was a “marketplace for the trafficking of human beings.”<sup>39</sup> In her last report to the UNSC in May 2020, the Prosecutor stated that the Office of the Prosecutor (“OTP”) has collected evidence that migrants and refugees are “routinely subjected to arbitrary detention, unlawful killing, enforced disappearance, torture, sexual and gender-based violence, abduction for ransom, extortion, and forced labour.”<sup>40</sup> The OTP continues to assess whether “the necessary evidentiary and legal requirements are satisfied with a view to potentially

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<sup>35</sup> ICTY, *Prosecutor v Kunarac*, Trial Judgement, 22 February 2001, para.542.

<sup>36</sup> UNSC Resolution 1970, UN Doc. S/RES/1970, 26 February 2011.

<sup>37</sup> Alessandro Pizzuti, ‘ICC Situation on Libya: The ICC Prosecutor Should Look into Libyan Criminal Proceedings Concerning Crimes Committed Against Migrants,’ *Opinio Juris*, 20 November 2020.

<sup>38</sup> Itamar Mann, Violeta Moreno-Lax & Omer Shatz, ‘Time to Investigate European Agents for Crimes against Migrants in Libya’, *EJIL Talk!*, 29 March 2018; Ioannis Kalpouzos, ‘International Criminal Law and the Violence against Migrants’, *German Law Journal*, Vol. 21, Issue 3 (2020) 571.

<sup>39</sup> 13<sup>th</sup> Report of the Prosecutor to the UN Security Council on the Situation in Libya, New York, 8 May 2017, para.27.

<sup>40</sup> 19<sup>th</sup> Report of the Prosecutor to the UN Security Council on the Situation in Libya, New York, 5 May 2020, para.28.

bringing a case before the ICC.”<sup>41</sup> The trafficking in persons and their arbitrary detention has been widely documented in Libya, for example by the US State Department,<sup>42</sup> Human Rights Watch,<sup>43</sup> and the UN Panel of Experts on Libya.<sup>44</sup> It remains to be seen if these investigative efforts will lead to concrete charges in the form of an arrest warrant, in addition to the three existing warrants in the Situation.<sup>45</sup>

Yet, trafficking in persons may be more readily prosecuted as an international crime domestically, in states that have the legal machinery to do so. Two such states are Uganda and Kenya – states that have been at the forefront of complementarity initiatives. Both Kenya and Uganda have domesticated the Rome Statute, with Uganda creating a specialized International Crimes Division of the High Court. As explained further below, it is argued that trafficking in persons – as the *internationally labelled* crime of enslavement – may be prosecuted in Uganda and Kenyan courts using existing judicial structures. The following section explains how those same structures might be utilized to prosecute human trafficking cases, particularly those which may be the result of armed conflict.

#### **IV. Prosecuting Trafficking as an “International Crime” in Domestic Courts**

As highlighted above, the crime of trafficking in persons as a serious crime of international concern remains under-utilized and under-charged, at least within the Rome Statute framework and existing international caselaw. However, in the era of universal jurisdiction<sup>46</sup> and the goal of positive complementarity,<sup>47</sup> states are

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<sup>41</sup> *Id.*, para.31.

<sup>42</sup> United States Department of State, *Trafficking in Persons Report* (2020) ‘Special Case: Libya’, p.539.

<sup>43</sup> Human Rights Watch, ‘No Escape from Hell, EU Policies Contribute to Abuse of Migrants in Libya’, 21 January 2019.

<sup>44</sup> Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), UN Doc. S/2017/466, 1 June 2017, p.63.

<sup>45</sup> There are currently three unexecuted warrants of arrest for Saif Gadaffi, Mahmoud Al-Werfalli and Al-Tuhamy Mohamed Khaled. The case against Abdullah Al-Senussi was deemed inadmissible before the ICC in 2014.

<sup>46</sup> Report of the United Nations Secretary-General, The scope and application of the principle of universal jurisdiction, UN Doc. A/74/144, 11 July 2019.

<sup>47</sup> Justine Tillier, ‘The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?’, *International Criminal Law Review*, Vol. 13, Issue 3 (2013) 507-591.

encouraged to domestically investigate and prosecute crimes that have international character, or that might otherwise attract the jurisdiction of international courts. In this respect, states are increasingly passing legislation to permit the prosecution of international crimes in domestic settings, including by setting up specialized tribunals or court divisions with the existing judicial structure of a state. Recent notable examples include the Extraordinary African Chambers in Senegal set up to prosecute Hissène Habré,<sup>48</sup> and the Special Criminal Court in the Central African Republic, set up to prosecute crimes in the aftermath of its recent civil war.<sup>49</sup>

### *Uganda*

In Uganda, the domestic offence of trafficking in persons was codified in the *Prevention of Trafficking in Persons Act 2009*.<sup>50</sup> The *Penal Code Act 1950* may also capture similar conduct within the related offences of kidnapping,<sup>51</sup> abduction<sup>52</sup> and slavery.<sup>53</sup> To date, there have been a limited number of prosecutions of trafficking offences in the regular High Court. According to the US Department of State, Ugandan authorities prosecuted 50 suspected trafficking cases for trafficking-related crimes in 2019, compared with 63 cases in 2018. Of these 50 cases, only 15 traffickers were convicted in 2019, an increase on 2018 when only six traffickers were convicted.<sup>54</sup>

In 2011, the International Crimes Division (“ICD”) of the Ugandan High Court was created to prosecute serious crimes, namely war crimes, crimes against humanity and

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<sup>48</sup> Sharon Weill, Kim Thuy Seelinger & Kerstin Bree Carlson (Eds), *The President on Trial: Prosecuting Hissène Habré* (Oxford University Press, 2020).

<sup>49</sup> Patryk Labuda, ‘The Special Criminal Court in the Central African Republic’, *ASIL Insights*, Vol. 22, Issue 2 (2018).

<sup>50</sup> *Prevention of Trafficking in Persons Act 2009*, Section 3: “Offence of trafficking in persons. (1) A person who—(a) recruits, transports, transfers, harbours or receives a person, 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; (b) recruits, hires, maintains, confines, transports, transfers, harbours or receives a person or facilitates the aforementioned acts through force or other forms of coercion for the purpose of engaging that person in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, death bondage, forced or arranged marriage; commits an offence and is liable to imprisonment for fifteen years.”

<sup>51</sup> *Penal Code Act 1950*, s.239.

<sup>52</sup> *Id.*, s.241.

<sup>53</sup> *Id.*, s.245.

<sup>54</sup> *Trafficking in Persons Report 2020* (note 42), p.502.

genocide.<sup>55</sup> Notably, specifically included within its internationalized jurisdiction are the crimes of terrorism and human trafficking.<sup>56</sup> In its first decade, the ICD has heard a significant number of trials, including complex terrorism cases.<sup>57</sup> However, it has yet to complete its first dedicated war crimes trial, with the case against former LRA commander, Thomas Kwoyelo, held up for years over the issue of amnesty<sup>58</sup> and slow trial proceedings.<sup>59</sup>

There is only one officially reported conviction of trafficking occurring in the ICD – the 2014 case of *Uganda v Umutoni*.<sup>60</sup> In that case, the accused was convicted of child trafficking offences under the 2009 Act, but the judgement does not explain why the ICD exercised jurisdiction over this particular case, as opposed to the regular High Court. On the facts, the transnational nature of the trafficking at issue – from Rwanda to Uganda – was perhaps the likely reason for the ICD being the chosen forum to try the case. But, the prosecuted offence was still domestic in nature, and it was not internationally characterized by the prosecution or the court.

However, there exists a further avenue for the crime of trafficking in persons to be prosecuted as an international crime in the ICD. In 2010, parliament passed the *International Criminal Court Act* (“ICC Act”) which domesticated the Rome Statute and enables the prosecution of war crimes, crimes against humanity and genocide in Ugandan courts.<sup>61</sup> In particular, sections 8-9 of the ICC Act allow for war crimes and crimes against humanity to be prosecuted and a sentence of up to life imprisonment

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<sup>55</sup> Human Rights Watch, *Justice for Serious Crimes Before National Courts, Uganda’s International Crimes Division* (January 2012).

<sup>56</sup> Republic of Uganda, The High Court (International Crimes Division), Practice Directions, Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV (31 May 2011).

<sup>57</sup> *Uganda v Hussein Hassan Agade & 12 Ors* (Criminal Session Case No. 0001 OF 2010) [2016] UGHICD 1 (26 May 2016). The defendants were charged with offences under the *Anti-Terrorism Act 2002*, and the *Penal Code Act*.

<sup>58</sup> Paul Bradfield, ‘Reshaping Amnesty in Uganda, The Case of Thomas Kwoyelo’, *Journal of International Criminal Justice*, Vol. 15, Issue 4 (2017) 827-855.

<sup>59</sup> International Centre for Transitional Justice, ‘Victims in the Thomas Kwoyelo Case Forced to Wait Longer for Justice’ (July 2018).

<sup>60</sup> *Uganda v Umutoni* (HCT-00-ICD-CR-SC-2014/3) [2014] UGHICD 1 (16 October 2014).

<sup>61</sup> *International Criminal Court Act 2010*, s.2(c): “The purpose of this Act is—[...] (c) to make further provision in Uganda’s law for the punishment of the international crimes of genocide, crimes against humanity and war crimes.”

upon conviction. As explained in part III, the crimes against humanity of enslavement and sexual slavery, and the war crime of sexual slavery, expressly encompass conduct that amounts to trafficking in persons. Provided that both the elements of the individual crime, and the broader contextual elements are present, then such conduct could be prosecuted in the ICD so as to fully reflect the international criminal nature of trafficking in persons. To demonstrate this possibility, let us look at two potential scenarios: trafficking of refugees and victims of recent conflict.

### *Refugee Populations*

Uganda currently has among the largest refugee populations in the world, with over 1 million refugees living in settlements primarily in the north west of the country.<sup>62</sup> Most of these refugees are fleeing recurring armed conflict in the DRC<sup>63</sup> and civil war in South Sudan.<sup>64</sup> The circumstances of these refugee populations seem likely to make them particularly vulnerable to trafficking, exploitation and conflict-related sexual violence.<sup>65</sup> Should any of these be trafficked within (or indeed, outside of) Uganda, such conduct may be classified as either the crime against humanity of enslavement or sexual slavery and/or the war crime of sexual slavery.

The argument runs as follows: The basic elements of the crime of enslavement being identified and fulfilled – *i.e.* the factual exercise of ownership and/or the deprivation of liberty – the contextual elements would also need to be present as well as the nexus requirement: namely that the conduct was “associated” with an armed conflict (for war crimes)<sup>66</sup> or that the crime was committed “as part of” a widespread or systematic attack on the civilian population (for crimes against humanity).<sup>67</sup> That

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<sup>62</sup> United Nations High Commissioner for Refugees (“UNHCR”), ‘South Sudanese refugees in Uganda now exceed 1 million’ (August 2017).

<sup>63</sup> UNHCR, ‘Uganda opens border to thousands fleeing Congo violence’ (July 2020).

<sup>64</sup> UNHCR, ‘Defying screams and gunfire, South Sudanese family flees to safety’ (October 2017).

<sup>65</sup> Chris Dolan, Maria Eriksson Baaz & Maria Stern, ‘What is sexual about conflict-related sexual violence? Stories from men and women survivors,’ *International Affairs*, Vol. 96, Issue 5 (2020) 1151–1168.

<sup>66</sup> Element 3 of the war crime of crime sexual slavery under article 8(2)(b)(xxii) reads: “The conduct took place in the context of and **was associated with** an international armed conflict.” Elements of Crimes (note 18), p.28.

<sup>67</sup> Element 2 of the crime against humanity of enslavement under article 7(1)(c) reads: “The conduct was committed **as part of** a widespread or systematic attack directed against a civilian population.” Elements of Crimes (note 18), p.6.

such a conflict or attack might occur in a neighbouring state would not necessarily deprive the state of Uganda of criminal jurisdiction. The jurisdictional rulings in the Situations in Afghanistan confirming jurisdiction over crimes occurring in a separate state from where the armed conflict actually occurred,<sup>68</sup> and in Myanmar/Bangladesh confirming jurisdiction where at least one element of a crime occurs on the territory of a state party,<sup>69</sup> would support the extra-territorial application of jurisdiction by the ICD. Moreover, section 18 of the ICC Act grants jurisdiction over offences committed outside of Ugandan territory where the victim or perpetrator is Ugandan, or whether the perpetrator is present in the state.<sup>70</sup>

In addition, crimes against humanity must also be committed “pursuant to a state or organizational policy”.<sup>71</sup> In the context of the present argument, this would appear to confine trafficking prosecutions to, at a minimum, members of criminal groups acting in concert, not individuals acting alone. In *Muthaura et al*, Pre-Trial Chamber II held that criminal gangs – in that case, the *Mungiki* in Kenya – were capable of committing crimes against humanity:

“Further, as concerns the proper interpretation of the term “organization”, this Chamber has held previously that “the formal nature of a group and the level of its organization should not be the defining criterion. Instead, [...] a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values”. In addition, the Chamber recalls its previous finding that “had the drafters intended to exclude non-State actors from the term ‘organization’, they would not have included this term in article 7(2)(a) of the Statute.”<sup>72</sup>

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<sup>68</sup> ICC, Situation in the Islamic Republic of Afghanistan, ‘Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan’, 5 March 2020, para.76.

<sup>69</sup> ICC, Situation in Myanmar/Bangladesh, ‘Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”’, 6 September 2018, para.73.

<sup>70</sup> ICC Act 2010, s.18(a)-(d).

<sup>71</sup> Rome Statute, article 7(2)(a): “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

<sup>72</sup> ICC, *Prosecutor v Muthaura et al.*, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 29 January 2012, para.112.

However, for war crimes, no such organizational policy is required as a matter of law, only crimes committed as part of a “plan or policy”,<sup>73</sup> thus permitting the prosecution of individuals acting alone. The last hurdle would be intent – depending on which crime is invoked, the perpetrator needs to be aware the conduct was “part of” an attack on the civilian population or “associated” with an armed conflict.<sup>74</sup> However, while this might seem difficult to prove in the context of trafficking, awareness on the part of the perpetrator that they were knowingly trafficking a person who was fleeing conflict, or an attack, would arguably satisfy this element. Indeed, the Elements of Crimes appears to set the bar low in this regard, stating that this mental element “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”<sup>75</sup>

### *Conflict Legacy Trafficking*

This second scenario, regarding the trafficking of victims of recent conflict, is less straightforward, but is legally tenable. In the course of the prolonged conflict between the LRA and the Ugandan armed forces, hundreds of thousands of civilians were displaced into IDP camps.<sup>76</sup> While these were mostly disbanded by 2008, many people were unable to move back to their home villages, with disputes over land ownership and boundaries becoming a primary conflict driver across northern Uganda.<sup>77</sup> This has resulted in widespread forced migration of young people now

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<sup>73</sup> Article 8(1) of the Rome Statute reads: “The Court shall have jurisdiction in respect of war crimes in particular when committed **as part of a plan or policy** or as part of a large-scale commission of such crime.” (emphasis added)

<sup>74</sup> Element 4 of the crime of sexual slavery under article 8 article 8(2)(e)(vi) reads: “The perpetrator was aware of factual circumstances that established the existence of an armed conflict.” Elements of Crimes (note 18), p.37.

<sup>75</sup> Elements of Crimes (note 18), p.5.

<sup>76</sup> Chris Dolan, *Social Torture, The case of northern Uganda 1986-2006* (Berghahn, 2009).

<sup>77</sup> Matt Kandel, ‘Struggling over land in post-conflict Uganda’, *African Affairs*, Vol. 115, Issue 459 (2016) 274–295.

deprived of access to land.<sup>78</sup> Consequently, it is arguable that where a person has been previously displaced or victimised as a result of the conflict between the LRA and the government, and has latterly been trafficked for exploitative purposes such as labour or sexual exploitation, then the *international* crime of enslavement and/or sexual slavery has occurred.

For example, take a female LRA abductee who has recently returned home and is preyed upon by a trafficker, brought to the capital and forced into prostitution. Or a young man who has been displaced since the end of armed conflict in 2006, unable to access his family land as a direct result of the conflict and is trafficked into informal labour from which he cannot break free. In both instances, there is a factual and causative nexus to the armed conflict and/or an attack. Their victimisation flows from it. And, if the perpetrator who later traffics them is aware of their status, then (international) criminal responsibility should also follow.

### *Kenya*

In Kenya, the *International Crimes Act of 2008* domesticated the Rome Statute into Kenyan law.<sup>79</sup> Like its Ugandan legislative counterpart, the 2008 Act permits the Kenyan courts to prosecute any of the crimes listed in the Rome Statute, namely war crimes, crimes against humanity and genocide.<sup>80</sup> In 2007-08, post-election violence erupted across Kenya and displaced thousands into refugee camps.<sup>81</sup> Pre-Trial Chamber II concluded that crimes against humanity had occurred and authorised an investigation by the Prosecutor.<sup>82</sup> Charges were initially brought against six suspects,<sup>83</sup>

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<sup>78</sup> Sandra Joireman, 'Intergenerational land conflict in northern Uganda: children, customary law and return migration', *Africa*, Vol. 88, Issue 1 (2018) 81-98.

<sup>79</sup> *International Crimes Act 2008*, s.5.

<sup>80</sup> *Id.*, s.6.

<sup>81</sup> See generally Commission of Inquiry into the Post-Election Violence (CIPEV), Final Report (October 2008).

<sup>82</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', 31 March 2010.

<sup>83</sup> ICC, *Prosecutor v Muthaura et al.*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', 29 January 2012; *Prosecutor v Ruto et al.*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', 29 January 2012.

although the cases did not ultimately proceed due to insufficient evidence and witness intimidation.<sup>84</sup> However, in a similar vein to the previous Ugandan example, it is argued that any trafficking of victims subsequent to displacement during the post-election violence could be prosecuted as a crime against humanity, because there is a factual nexus between the attack, the displacement, and the trafficking that later occurs. The passage of time would not necessarily be a bar to such prosecutions. As explained further below, in the Libyan situation, the Prosecutor is currently investigating the trafficking of persons both within and from Libya, conduct which persists to the present day, and which has a nexus to the conflict which began almost ten years ago in 2011.

## V. Establishing a Nexus

This section considers the main legal obstacle to domestic prosecutions of trafficking as an international crime: establishing a nexus. For the war crime of sexual slavery, there must be a nexus to the armed conflict (for war crimes) or to a widespread or systematic attack on the civilian population (for crimes against humanity).<sup>85</sup>

### *A timely and reasonable “nexus”?*

Some might argue that the passage of time may be too much to establish a credible nexus to the armed conflict or attack, as required. Two points can be made in response to this potential obstacle. First, as described above, the OTP is currently investigating migrant-related crimes in Libya, including trafficking in persons, now almost 10 years after the armed conflict began – a similar time frame to the Uganda and Kenyan examples, above. Indeed, when issuing an arrest warrant against Libyan rebel Mohamed Al-Werfalli, Pre-Trial Chamber I considered that while the alleged

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<sup>84</sup> ICC, *Prosecutor v Ruto & Sang*, ‘Decision on Defence Applications for Judgements of Acquittal,’ 5 April 2016.

<sup>85</sup> The nexus need not be a causal link, but the armed conflict must have played a substantial part in the perpetrator’s ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. ICC, *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, para. 287

crimes occurred six years after UNSC Resolution 1970 that triggered the court's jurisdiction, the crimes were nevertheless associated with the armed conflict which underly the referral and which had continued to subsist.<sup>86</sup>

Secondly, an important piece of ICC jurisprudence went somewhat unnoticed in 2016. In the *Ongwen* case, young girls and women were abducted by the accused in Uganda, sexually enslaved, and later brought to the DRC where their victimization continued for a number of years afterwards. However, the Prosecutor charged only the conduct in Uganda, not the conduct that occurred in the DRC, because it considered the latter to "post-date the upper limit of the charged period, 31 December 2005, which was selected because the evidence does not support the existence of a non-international armed conflict between the UPDF and the LRA or a widespread and systematic attack against a civilian population after that date."<sup>87</sup> However, the Pre-Trial Chamber admonished the Prosecution for this conservative approach, deeming it to be "manifestly incorrect", and stated that:

"[c]rimes against humanity must be committed "as part of" a widespread and systematic attack directed against any civilian population, and war crimes "in the context of" and "associated with" an armed conflict. **It is not required that the crimes against humanity are committed during the attack, or war crimes in the midst of the armed conflict, as the required nexus can be established otherwise.** This is true irrespective of whether the crimes at issue are continuous crimes or not. In this sense, the Prosecutor's choice of the cut-off date of 31 December 2005 cannot be attributed to the operation of the nexus requirements of articles 7 and 8 of the Statute or any other provision of the Statute or the Rules."<sup>88</sup> (emphasis added)

This jurisprudence offers support for the position advanced above, *i.e.*, that the present-day trafficking of victims, who are also victims of recent conflict, could amount to the international crimes of enslavement and/or sexual slavery. By extension, this argument could apply to a number of other post-conflict settings, such

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<sup>86</sup> ICC, *Prosecutor v Al-Werfalli*, Warrant of Arrest, 17 August 2017, para.23.

<sup>87</sup> ICC, *Prosecutor v Ongwen*, 'Decision on the confirmation of charges against Dominic Ongwen', 23 March 2016, para.105.

<sup>88</sup> *Id.*, para.107.

as Uganda, Kenya and Libya, thus offering a firm jurisdictional basis to prosecute trafficking as the international crimes of enslavement or sexual slavery.

### *Utilizing and Enhancing Existing Legal Frameworks*

Many states – including both states party to the Rome Statute and those who are not – will not have the appropriate legal framework to prosecute trafficking as international crimes within existing domestic laws. The Rome Statute may not have been domesticated and there may be no alternative universal jurisdiction legislation. To address this gap, some scholars have called for trafficking, including that which sexually exploits victims, to be treated as a form of “sexual terrorism”, thus permitting the prosecuting of trafficking within the existing rubric of terrorism legislation, which is commonly found on domestic statute books.<sup>89</sup> As de Brouwer *et al* note:

“Ultimately, it is about the human dignity violated by such atrocities. Only full accountability for the actual crimes committed, rather than for vague charges such as armed insurrection or membership of/affiliation with a terrorist organization, will do justice to the victims/survivors and be a first, cautious step towards reconciliation and lasting peace. Victims/survivors are entitled to have the crimes committed against them recognized.”

Moreover, investigating and prosecuting authorities may not always be aware of how these international crimes can be identified and legally classified. In this regard, prosecuting authorities would benefit from capacity-building so that they can recognize “the different forms of criminality and their interconnectivity and must understand that victims/survivors of these crimes are frequently also victims of other crimes (like forced labour, torture).”<sup>90</sup>

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<sup>89</sup> Anne-Marie de Brouwer, Eefje de Volder & Christophe Paulussen, ‘Prosecuting the Nexus between Terrorism, Conflict-related Sexual Violence and Trafficking in Human Beings before National Legal Mechanisms: Case Studies of Boko Haram and Al-Shabaab’, *Journal of International Criminal Justice*, Vol. 18, Issue 2 (2020) 499–516 at 514.

<sup>90</sup> *Id* at 515-516.

## VI. Conclusion

Trafficking in persons remains a serious crime of international concern. Depending on the context, it can be classified as a war crime or crime against humanity in the form of enslavement or sexual slavery. While policy and lawmakers are increasing efforts to draw attention to the crime, and to advocate for appropriate accountability and protection responses, its prosecution as an *international* crime remains absent both at the ICC and in domestic settings. States like Uganda, Kenya and others that have domesticated the Rome Statute, can lead the way in this regard, to push the envelope and fully capture the international criminal nature of trafficking in persons. If they do, national courts will actually prosecute trafficking as an international crime before the ICC does. That would be positive complementarity in its truest form.