

# HUMAN TRAFFICKING AND THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

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**Abstract:** The case for extending the reach of the Rome Statute to the crime of human trafficking has not yet been made in detail. The brutality which occurs when human beings are trafficked by criminal gangs is of an equally egregious nature as the other crimes covered by the Rome Statute and yet it does not fall within the remit of the International Criminal Court. Such trafficking may also fall outwith the definition of slavery as a crime against humanity, particularly given the State policy threshold set by the Statute. This paper seeks to explore the viability of the inclusion of human trafficking as a discrete international crime within the Rome Statute as a response to this loophole.

**Keywords:** Human Trafficking, Human Rights, International Criminal Law, International Criminal Court

**Summary:** I. INTRODUCTION; II. THE INTENTION TO INCLUDE HUMAN TRAFFICKING WITHIN THE STATUTE; III. INCLUDING CRIMINAL GANGS WITHIN THE ICC'S JURISDICTION – ORGANISATIONS, WIDESPREAD OR SYSTEMATIC ATTACKS AND COMPLEMENTARITY; IV. HUMAN TRAFFICKING AS A CORE CRIME: USING THE 'GENOCIDE' THRESHOLD AS A TEST; V. CONCLUSION.

## I. INTRODUCTION

The Slavery Convention, which entered into force on 9 March 1927, was the first international agreement to outlaw, without discrimination based on gender or race, the practice of exercising 'any or all of the powers attaching to the right of ownership', as held in Article 1(1), over an individual. This internationally agreed definition of slavery has endured, being referenced in preference to the previous international agreements in this area which defined slavery as being the sexual exploitation of Caucasian women and girls. Indeed, subsequent regional and international human rights and criminal law instruments affirm the prohibition, without qualification or limitation, of the practice of slavery. The age of the instruments would give the impression that the problem of slavery has been eradicated, without need for further legal intervention. However it would appear that it has simply evolved. Slavery's modern incarnation (UNODC, 2009: 6) human trafficking, is termed far more expansively than its ancestor.

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The ‘recruitment, transportation, transfer, harbour or receipt of persons’ however coercively or forcibly that may be done, financial incentives included, is considered trafficking, where the aim is for ‘a person having control over another person, for the purpose of exploitation’ (UN Convention 2000: article 3(a)). Exploitation is then defined expansively. The myriad instruments in existence which attempt to eliminate the exploitative domination of one person over another, and most recently the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, demonstrate a continual and collective effort to eradicate the bane of slavery, and the newer, more expansive definition of trafficking, from societies throughout the world. However, the current approach in this area is to treat the problem as transnational, in that countries should cooperate and deal with prosecutions on a national basis (UN Convention 2000: article 1) rather than to prosecute on an international basis. The instruments demonstrate a willingness to approach the problem collectively, but the concept of collective action through an existing single entity (Cooper, 2011) has not fully been discussed by either the relevant organisations or the literature in this area.

Human trafficking is clearly a violation of both international human rights standards which apply to States and international criminal law, but despite this seemingly obvious gap, the case for extending the reach of the Rome Statute of the International Criminal Court (hereafter, the ‘Rome Statute’) in the particularly critical area of human trafficking does not seem to have been made in any great detail as of yet. The International Criminal Court (hereafter, ‘ICC’), under article five of the Rome Statute, has jurisdiction over ‘the most serious crimes of concern to the international community as a whole’ (Rome Statute: article 5) and the same article creates a degree of priority for the prosecution of such violations. However it is arguable that the brutality which occurs when human beings are trafficked for the purposes of sexual exploitation by criminal gangs is of an equally egregious nature as those covered by the Rome Statute and yet does not fall within the remit of the ICC. The scale of the problem is equally earth-shattering: the number of actual victims is thought to far outweigh the number of identified victims and globally, figures range from 800,000 (Wylter and Syskin, 2010: 3) to 2.5million (Belsler, 2005: 3) people who suffer as a result of being trafficked each year. The purpose of this work, therefore, is to determine the potential of extending the reach of the Rome Statute in this way. As part of the general prohibition on slavery in international law, (Rome Statute: article 7(1)(c), note) the Rome Statute has already characterised slavery as a crime against humanity, inclusive of human trafficking. However, this is only where slavery is conducted as part of a State policy (Rome Statute: article 7(2)(a)), effectively as a ‘widespread or systematic attack’ (Rome Statute: article 7(1)). Gangs which operate human trafficking rings may not be tried before the ICC. This limitation prevents the organisational policies of criminal gangs which conduct human trafficking from being the subject of prosecution at the ICC.

This paper will therefore seek to argue that human trafficking should be included within the jurisdiction of the ICC as a core international crime rather than a crime against humanity, using the threshold requirements of the crime of genocide as a theoretical legal model, without hinging prosecution on the requirement that the crime

be ‘committed as part of a widespread or systematic attack.’ This does not imply that there is any analogy between the crimes, rather that the threshold test may also be useful in the context of human trafficking. The study is one of theory, exploring the black letter law in the Rome Statute and other relevant international instruments and uncovering the theory at the heart of these laws. This work will firstly explore the intention to include human trafficking as a crime within the jurisdiction of the court, examining the limitations incumbent on addressing the issue via the framework of crimes against humanity. The second issue will be to understand whether the idea of an ‘organizational policy’ within the Rome Statute should extend to the conduct of organised criminal gangs. The last part will explore the argued suitability of establishing human trafficking as a core crime, within the jurisdiction of the ICC under article five and will use the theoretical model of genocide to determine the viability of this proposition. The aim is not to compare genocide and human trafficking, but rather to apply the court’s approach to determining jurisdiction over a charge of genocide to the idea of human trafficking. As a matter of limitation, the subject matter of this paper will comprise only acts of human trafficking which are unrelated to internal or international conflict, the main motivation in those cases being that of profit.

## **II. THE INTENTION TO INCLUDE HUMAN TRAFFICKING WITHIN THE STATUTE**

The focus of this part to the work is to examine the argued intention to include human trafficking as part of the Rome Statute, viewing it as a form of modern slavery. Slavery has been characterised as a crime against humanity within the Rome Statute (Rome Statute: article 7(1)(c)), and human trafficking has been included as part of the definition of enslavement (Rome Statute: article 7(2)(c)). The potential of this effort will be examined, and the issues which arise in classifying human trafficking as a crime against humanity will be also explored.

The ICC under the Rome Statute has jurisdiction over ‘the most serious crimes of concern to the international community as a whole,’ (Rome Statute: preamble) giving it authority to try the individual accused of the crime (Rome Statute: article 1). The caveats to such jurisdiction include that the individual should be a national of a State Party to the treaty (Rome Statute: Article 12(2)(b)) or that the territory, including vessels and aircraft in which the crime was committed was that of a State Party (Rome Statute: Article 12(2)(a)) to the Rome Statute, or that the State in which the crime was committed permits the ICC to exercise jurisdiction over the proceedings (Rome Statute: Article 12(3)). The crimes themselves are specified in article five of the Rome Statute, which states that the ICC shall have jurisdiction over acts of genocide, crimes against humanity, war crimes and aggression (Rome Statute: Article 5(1)). At present, the definition of enslavement within the Rome Statute makes explicit reference to the crime of human trafficking (Rome Statute: Article 7(2)(c)) but there is no further definition offered by either the Statute itself or the Elements of Crimes (hereafter, ‘Elements’). Enslavement under the Rome Statute is defined as in the Slavery Convention under article 1, noting the importance of the idea of ‘ownership’(Rome Statute: article 7(2)(c)).

However, this definition and the Rome Statute itself came into being prior to the Trafficking Protocol, which defines trafficking as, effectively, all practices in connection with and for the purposes of slavery, under article 3(a), criminalising:

*“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.”*

The idea of ownership is replaced by that of ‘control over another person, for the purposes of exploitation,’ arguably a more stringent standard than that of ownership or property rights. Therefore the threshold adopted by the Rome Statute is automatically higher and would require a demonstration of the attributes of ownership before an individual could be tried on a charge of enslavement at the ICC. The reliance on the prior definition of slavery does not necessarily reflect an intention to exclude trafficking as a discrete crime. Rather the specific inclusion of the word ‘trafficking’ in the definition of enslavement arguably demonstrates that there was a clear intention to include the crime as it existed in international law at that time. The clear intention to include human trafficking can be seen in other crimes against humanity, which reflect different parts of the current definition.

Within article seven of the Rome Statute, there are two other crimes against humanity which reflect aspects of the United Nations (hereafter, ‘UN’) definition of human trafficking: ‘deportation and forcible transfer of population,’ (Rome Statute: article 7(1)(d)) which encompasses the ‘recruitment, transportation, transfer, harbouring or receipt or persons, by means of threat or the use of force or other forms of coercion’ (UN Convention 2000: Protocol, article 3(a)) and ‘rape, sexual slavery and enforced prostitution’ (Rome Statute: article 7(1)(g)) which includes the exploitation (UN Convention 2000: Protocol, article 3(a)) aspect to current human trafficking definition. Deportation and forcible transfer is defined as being ‘the displacement of persons by expulsion’ (Rome Statute: article 7(1)(d)) from the area in which they are legally entitled to be, and with the inclusion of the phrase ‘other coercive acts’ (Rome Statute: article 7(1)(d)) the definition expands to fit the concept of human trafficking, in which victims have no free choice to comply with the demands of the traffickers. This is particularly relevant when human trafficking is viewed as ‘a particularly abusive form of migration’ (UNHCHR 2002: Introduction) but it does require that the victims were lawfully present in the territory from which they were trafficked. Given that the process has to begin somewhere, and that individuals are generally trafficked from their home countries, this requirement does not represent an insurmountable obstacle, but nonetheless may preclude the trafficking of some victims such as those who are stateless, or illegally working within another country. (Obokata, 2005: 450)

The inclusion of rape and sexual slavery as a crime against humanity also creates provision for instances in which the exploitation of the individual was for sexual

purposes or where the ‘ownership’ threshold was reached. Reflecting briefly, it is clear that the Rome Statute has intended to include human trafficking within the jurisdiction of the ICC. However its inclusion as a crime against humanity creates a limitation, rather than a threshold, of an underpinning policy element. This limitation is problematic for a diffuse problem such as human trafficking. Equally, its attachment to the idea of ownership may hamper the incorporation of human trafficking offences into the framework of crimes against humanity, regardless of the direct relationship both have to the same fundamental requirement: ‘use’ of a person in the way that an object would typically be ‘used.’

Be that as it may, the purposive interpretation of the Rome Statute is undermined when confronted with the requirement that a crime against humanity can only be termed as such ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’ (Rome Statute: Article 7(1)) There are therefore three parts to this requirement which ought to receive attention. First, the idea of a ‘widespread or systematic attack,’ second, the concept of a ‘civilian population’ and third, ‘knowledge of the attack’ as part of the plan or policy. The ‘widespread or systematic’ aspect does not necessarily preclude human trafficking offences, particularly as committed by organised criminal gangs. The aim of prosecuting at the ICC would be to remove those at the helm of such gangs and therefore the most organised are likely to have a system in place, which would then reflect the ‘systematic’ approach to the commission of the crime. As stated by Jane Kim, ‘it is unlikely that each trafficker traffics one North Korean refugee woman and then ends their operation, never to traffic again’ (Kim, 2011:24). Similarly, the individual working within such a gang would be aware of the ‘organizational policy’ which he is carrying out. It appears something of a baseless argument for an accused to claim that he or she considered him or herself the only trafficker within a criminal gang, particularly where the heads of the gangs are being targeted for prosecution. Thus the threshold that there ought to be ‘knowledge of the attack’ is not one which bears particular relevance to this type of crime. The lack of knowledge that an individual was trafficking individuals is difficult to understand: those in charge of criminal operations would most likely be aware of the consequences of their actions and thus the ‘knowledge’ element of the crime does not require further discussion for the purposes of this particular argument.

The inclusion of the words ‘civilian population’ indicates from the outset that the target of the Rome Statute is those who act on behalf of a State. This is clarified by the Elements of Crimes, which note on page 5 that the attack must be carried out ‘pursuant to or in furtherance of a State or organizational policy to commit such attack ... (which) requires that the State or organization actively promote or encourage such an attack against a civilian population.’ It has been noted that there was a perceived fear regarding the removal of the State or organizational policy requirement (Halling, 2010) on the grounds that this would cover events which were both criminal and widespread, but did not necessarily reach the ‘most serious crimes of international concern’ threshold set by the Rome Statute. The inclusion of this threshold for crimes against humanity is relevant in the context of other crimes against humanity, and therefore it is

not argued that the ‘State or organizational policy’ requirement should be removed. Unless it could be shown that this could extend to the work of organised criminal gangs, it would not be, at present, ‘pragmatic’ to create a distinct crime against humanity of human trafficking (Cooper, 2011: 24) as the current requirement for State policy to be implemented would create a barrier for the prosecution of human trafficking offences. At this stage, it is apparent that human trafficking, as both a subspecies of slavery and in its own right, is a sufficiently grievous offence to merit inclusion in the Rome Statute, and therefore should not require the establishment of its own, separate court to try such offences (Cooper, 2011: 13). However, the ICC would only have jurisdiction where it could be proved that the commission of the offence occurred in relation to a ‘State or organizational’ policy. The freedom that would be gained from the release of such a requirement is shown in the International Criminal Tribunal for the former Yugoslavia case of *Prosecutor v Kunarac*, in which the convicted individuals were held to have enslaved women for the purposes of servitude and sexual exploitation. The conditions and treatment suffered by the women was the focus of the prosecution and in particular, the duration of the enslavement was not held to be a relevant factor (Kunarac, judgment: 121). However, working within the confines of the Rome Statute at present, what will be explored next is what is meant by an ‘organization’ or ‘organizational policy.’

At present, the problem with human trafficking relates to its commission by organised transnational criminal gangs, who fall outwith the ambit of human rights law, by not having any responsibilities in this area. The conflict here is therefore between the inclusion of trafficking and slavery offences within the Rome Statute, but with the added requirement that such crimes are committed on behalf of the State or a State-like entity. The next section therefore proposes to examine the possibility of an organised criminal gang being considered an ‘organization’ for the purposes of the Rome Statute, this being the only way in which human trafficking, as currently defined within the Rome Statute, could be tried at the ICC.

### **III. INCLUDING CRIMINAL GANGS WITHIN THE ICC’S JURISDICTION – ORGANISATIONS AND COMPLEMENTARITY**

At present, slavery can be considered a crime against humanity. However this presents an additional problem, given that the crime is most often committed by organised criminal gangs, rather than States. Organised criminals, human traffickers specifically, are generally acting in an illicit fashion and therefore cannot be held to account in the same way as those acting on behalf of political or commercial organizations, or nation States might, as the consideration of the position of non-state actors is generally held to view these ‘participants’ (Alston, 2000) in the international legal system as lawful, at least at inception. There is potential for the gangs themselves to be considered organisations, as such as the Elements would require an organisational policy to be in place, which would also satisfy the ‘widespread or systematic’ criterion, the systematic element being of the greatest relevance. The viability of this argument would not be challenged by the bounds of the jurisdiction of the ICC provided the individuals accused were natural persons (Rome Statute: article 25) and providing that either the crime occurred on the territory of a State party (Rome Statute: article

12(2)(a)) or concerned one of their nationals (Rome Statute: article 12(2)(b)). Furthermore, there has been an assumption on the part of previous international criminal tribunals, in that these have assumed a 'legal ability to enter into relations with non-state actors, not just through the conclusion of international agreements, but also by assuming the authority to request material and co-operation in general' (d'Aspremont, 2011: 198) Furthermore, non-state actors are arguably bound by customary law, such as common article three of the Geneva Convention 1949 (Milanovic, 2011: 40). It is submitted that the illicit nature of these organisations does not necessarily bar them from being considered organisations for the purposes of human trafficking offences as defined by the Rome Statute, and accordingly from satisfying the requirement of the existence of an 'organizational policy.' Indeed, the ICC represents the fruition of efforts to 'implement the Draft Code of Crimes against the Peace and Security of Mankind' (Graefrath, 1990: 67) The Code itself envisaged exercising jurisdiction over 'any organization or group' (Draft code: article 18) in respect of crimes against humanity, and the Rome Statute fails to define what an organization might be, other than to require an organisation which is accused of an enforced disappearance be 'political' (Rome Statute: article 7(1)(i)) arguably creating a gap which the ICC may wish to fill through determining its own competence (Rome Statute: article 19(1)) over organised criminal gangs.

Arguably, the recognition of such organisations would be sufficient to establish their 'participation' in the international legal order. Under international law, there are a number of ways in which legal personality can be attributed. In this context, the recognition theory of legal personality (Portmann, 2010: 81) is relevant; the example of the Order of Malta (Portmann, 2010: 119) being considered a participant in the international legal order because other States recognise it as such. The current theories in the area are those of formalism and individualism (Portmann, 2010: 248), the latter theory being of the greatest relevance to this argument. As organised criminal gangs must have human participants in order to carry out their activities, the recognition of their existence can be determined by examining their constituent parts. As their constituent parts participate in the international legal order, through violating international criminal law, the gangs themselves must participate and thereby the 'organizational policy' is evidenced. The idea behind this is to stretch the definition of such crimes and requirements excessively, but rather because there is much to support the idea that human trafficking should be considered a crime against humanity. In particular, 'the crime may be excluded from statutes of limitations which forbid prosecution after a certain period of time, the perpetrators can be denied refugee status or asylum, there will be added obligations on states to cooperate, and in some jurisdictions the crime may come within a state's national criminal jurisdiction whereas without the label 'crime against humanity' it might not' (Clapham, 2006: 106) This supports the contention that it may be useful to retain human trafficking as a crime against humanity.

The inclusion of the requirement of a State or organizational policy, however construed, presents problems. This approach differs from that of the International Criminal Tribunal for the former Yugoslavia, the Statute of which had no reference to a

‘State or organizational policy’ in its definition of crimes against humanity (Rome Statute: article 5) Indeed the prosecution undertaken in *Kunarac* would have been undermined by such a requirement, in which the convicted individuals were held to have enslaved women for the purposes of servitude and sexual exploitation. The conditions and treatment suffered by the women was the focus of the prosecution and in particular, the duration of the enslavement was not held to be a relevant factor (*Kunarac* judgment: 121). It is relevant that the odiousness of the crime was held in this case to be important, rather than measuring the severity of the crime through cataloguing the number who had been subjected to such treatment. This may indicate that the inclusion of human trafficking as part of a crime against humanity is not appropriate for this particular crime. Regardless of how it can be fitted in to the current scope of the Rome Statute, it may simply be that the most suitable place for the crime of human trafficking is as a discrete international crime.

Considering the difficulties that stretching the current definition of human trafficking, organizational policies and the jurisdiction of the ICC in general pose, it must be asked as to why national governments cannot deal with the issue of human trafficking as a violation of domestic criminal law. Clearly, the existence of the complementarity principle demonstrates that national level prosecutions must be exhausted prior to the jurisdiction of the ICC being triggered, unless in circumstances where the State is unwilling or unable to prosecute. Indeed, this concept is seen as one of the guiding principles of the ICC, in that it does not have primary jurisdiction and indeed should only be used where the proceedings undertaken by States fail’ (Sheng, 2006-2007: 415). One of the main issues with giving the ICC jurisdiction in the area of human trafficking, and effectively in other areas, is that it ‘could be seen as a form of colonisation or establishing power’ (Ryngaert, 2008: 226). However, this argument can be neutered by brief reference to the seriousness of the crime itself, which indicates that it is appropriate that the ICC have jurisdiction over it. A secondary argument is that of effective prosecution; frequently, it cannot be, and is not, always dealt with in an effective manner at State level. The existence of State-based controls to combat a transnational network is something which contributes to the lack of prosecutions in this area (Shelley, 2011: 138) and where States are unable or unwilling to prosecute, the ICC ought to assume jurisdiction for this crime. At present, this is difficult given the inclusion of a limited definition of the crime as a crime against humanity, which creates certain thresholds for the commission of a crime. This does not necessarily end impunity, as it might, in terms of prosecuting an individual accused of human trafficking under the ICC at present.

The comparison has naturally been made between human trafficking and piracy (Cohen, 2010) both as forms of transnational criminal activity which require collective action by a number of jurisdictions through the application of universal jurisdiction. Indeed, pirates were generally considered ‘enemies of all mankind’ on account of a lack of citizenship and centrally due to the enforcement difficulties of prosecuting a crime committed on the high seas (Ryngaert, 2008: 109). Reflecting on the Rome Statute, the crime of piracy is something of a deliberate omission and clearly did not fit into the

framework of crimes against humanity. It is generally not considered to be a core international crime (Ryngaert, 2008: 109).

Similarly, it may further prevent impunity to acknowledge that this problem is such that each and every State has a right and a duty to exercise jurisdiction over this crime. It has been argued that, ‘if human trafficking is treated as a crime of universal concern, it will become part of a category of serious crimes viewed with such abhorrence that they warrant universal condemnation.’ (Cohen, 2010: 234). Universal jurisdiction is another, separate issue, but could be useful in preventing impunity through affording jurisdiction to any States which prosecute. The inclusion of human trafficking as a core international crime in the Rome Statute may hasten the adoption of universal jurisdiction over such a crime by indicating a consensus on the seriousness of such conduct.

It would also afford human trafficking the necessary footing as one of the ‘most serious crimes of international concern.’ This would not necessarily require that every act of human trafficking would be covered, as the admissibility threshold would need to be reached by the acts themselves. Thus complementarity would remain the ‘gatekeeper’ (Sheng 2006-2007: 452) for ICC prosecutions and investigations.

#### **IV. HUMAN TRAFFICKING AS A CORE CRIME: USING THE ‘GENOCIDE’ THRESHOLD AS A TEST**

The proposal herein is to address the gap created by the Rome Statute in the area of human trafficking by explicitly including it in the Statute as a core international crime, in the form defined by the United Nations. This would place human trafficking in Article five, alongside genocide, aggression, war crimes and crimes against humanity in terms of the offences over which the court has jurisdiction. The way in which it is proposed that this ought to be done is to use the conceptual threshold requirements of the crime of genocide within the Rome Statute as a theoretical model. The current treatment of human trafficking is via the use of mutual criminal assistance agreements based on traditional jurisdictional principles, and thus these lack the quality of ‘core international crimes’, which create individual responsibility independently of domestic law. In the absence of domestic provisions, and will, there can be no trial for such crimes, unless provision is made to transform human trafficking into a core international crime, under article five of the Rome Statute. The inclusion of human trafficking in article five would avoid this issue. Human trafficking would therefore be defined separately from enslavement in order to fully prosecute the commission of the crime at higher levels within the criminal organisations, as ‘an evolution of the scope of (the) notion (of crimes covered by the ICC) is not impossible’ (Coracini, 2008: 701-702).

Genocide within the Rome Statute may involve torture, killing, confinement in inhuman conditions, birth control or forcible transfer or deportation of a population. It does not necessarily mean that any of these crimes, in isolation, will be considered genocide, but rather that they must be committed with ‘specific intent.’ This is defined by the Rome Statute as being ‘intent to destroy, in whole or in part, a national, ethnical,

racial or religious group,' using any of the crimes specified above. This idea is usually known as 'special' or 'specific' intent, in that the individual accused is concerned with the eradication of the targeted group and uses one of the methods above to achieve this aim. The reach of the crime of genocide, in respect of the 'groups' which are protected by the provision, will not be discussed here, as it is the idea of specific intent which is of most value to the discussion here.

This idea of specific intent means that act of genocide does not need to be committed in pursuance of a 'State or organizational policy' but rather simply needs to be in pursuance of the ideology of eradicating that specific group. This means that there is no need to attribute responsibility to a specific State or organisation, nor does the attack need to be qualified as widespread or systematic (Prosecutor v Jelusic, 1995). As such, the concept of a 'lone genocidaire' has already been tackled by the Jelusic case in international law, in that an individual may commit one of the crimes specified in article 6 and be convicted of genocide where the intent was present. The Elements of Crimes require the acts to take place as part of a 'manifest pattern of similar conduct,' specifically an 'emerging pattern.' Effectively this means that the conduct should take place as part in a way that it can be identified as more than one incident in isolation, which creates a lower threshold than that of a 'widespread and systematic attack.' Critically, it is the egregiousness of the underlying rationale for the attack which qualifies the crime for inclusion within the Rome Statute, without regard to the underlying policy for which it was committed nor to the number of victims claimed by the actors in questions. As such, this specific or special intent provides a useful theoretical model on which to base a proposed crime of human trafficking within the Rome Statute. The threshold which must be reached by the actor when committing a crime of genocide relates directly to the intent, rather than to the extent of the criminal behaviour. It is not considered that there should be any parallel drawn between the crime of genocide and human trafficking; rather the way in which genocide falls within the jurisdiction of the ICC is relevant. It is therefore proposed that the inclusion of human trafficking within the Rome Statute should attract a similar threshold requirement as part of crimes which are committed by criminal gangs. Trafficking by criminal gangs, the most likely perpetrators of such a crime, would necessarily fall outwith the definition of human trafficking as a crime against humanity, unless such gangs were acknowledged as State-like entities. One would hope this is unlikely, given the incongruous nature of such a conclusion with human rights responsibilities of other State and State-like entities.

The possibility of including human trafficking as a core international exists as it has been acknowledged that, although 'the International Criminal Court does not have jurisdiction over all international crimes and it is understood that definitions or lists of crimes that are within the jurisdiction of the ICC are not meant to be exclusive or to limit in any way the customary definitions of crimes against humanity and war crimes or the reach more generally of customary international law (Paust, 2010: 712). It is argued that human trafficking, as a branch of slavery, ought to be explicitly included as a core crime in international law, having regard to its heinousness and the difficulty of transnational and domestic mechanisms of prosecution. However it is not argued that

every act of human trafficking ought to fall within the jurisdiction of the Rome Statute. In viewing crimes against humanity as ‘widespread and systematic attacks’ based on State policy and genocide as a crime requiring the specific intent to eradicate a certain group of individuals, human trafficking should be considered a crime within the Rome Statute as defined within the Trafficking Protocol, but with the additional threshold that the accused intends to gain a *profit in some way from obtaining or maintaining control over the victim of trafficking*. This form of special intent may appear, initially, to be a low threshold for a core international crime but may assist in preventing impunity for such crimes. Generally, the concept of profiting is at the heart of human trafficking as a crime, in that the individuals concerned are transferred or maintained in slavery to pay their ‘owners’ or ‘employers’ a certain amount of money. The most serious human trafficking crimes involve organised operations spanning across countries in a dense network, the extent of which the authorities are not able to properly track, a fact evident in the lack of precise statistics in this area. The desire of the ICC not to tackle ‘low-hanging fruit’ and attribute responsibility to leaders and commanders, coupled with the requirement that the individuals would profit from such an undertaking, may provide the relevant threshold for human trafficking being considered a core international crime. It would also target criminal gangs without recognising such gangs as organisations proper, but rather disaggregate them into the individual criminals that they are. In doing so, the heads of the organisation could be prosecuted in the way that war criminals have been publicly indicted and exposed at the ICC in recent years. Such an inclusion within the Rome Statute would create the required bridge between international and transnational operations, elevating the crime itself to a level of seriousness which it does merit, being a modern form of slavery, but without requiring that the attack was widespread or systematic, or that it was undertaken by an organisation or State. Rather it distinguishes the crime as something separate and deserving of unique attention in the Statute, given the consequences that it has for both individual dignity and global stability.

## V. CONCLUSION

Human trafficking, as a modern form of slavery, is undoubtedly an issue for international criminal justice. As the ‘centrepiece’ for a ‘fair and effective system’ of international criminal justice (Sunga, 1998: 399) the Rome Statute should extend its jurisdiction to the crime of human trafficking as a crime against humanity. The existence of a ‘silent war’ (Kim, 2011: 32) in which traffickers and victims are difficult to trace leads to the conclusion that the exposure which elevation to the jurisdiction of the ICC would offer should be undertaken to promote the idea that the offence is as serious as any of the serious crimes noted in the Rome Statute. However as a crime it should not be tucked away with the other crimes against humanity, given the current constraints of the definition, which may be appropriate in terms of other named offences, such as torture. Rather it is proposed that the ICC declare jurisdiction over human trafficking as a discrete crime under the Rome Statute, following the idea of placing individual restrictions on the prosecution of the crime at the ICC, in the same way as the crime of genocide has been uniquely defined.

Including human trafficking as a crime against humanity would entail the satisfaction of the ‘widespread and systematic attack’ requirement, as well as the commission of the attack as part of a ‘State or organizational policy.’ The justification for the inclusion of the first requirement, which would prevent a future Kunarac *et al.* being tried under the Rome Statute, is that the ICC has been created to prevent future ‘unimaginable atrocities’ (Schabas, 2012: 29) and such a function would be undermined by the application of the law therein to ‘ordinary’ attacks, even where these took place on a large scale. However, the problem with retaining this requirement is that human trafficking, in the context of organised crime, cannot presently be prosecuted at the ICC as the crimes committed by organised criminal gangs are not done in pursuance of a ‘State or organizational policy.’ Coupled with the fact that the international treaties on trafficking are simply ‘mutual criminal assistance agreements based on traditional jurisdictional principles’ (Tavakoli, 2002: 79), it is clear that the ICC is not even being considered as a useful way in which to limit the powers of highly organised criminal gangs who are committing unimaginable atrocities in an industrialised fashion.

The second requirement, that of an organisational or State policy being the underlying rationale for the attack, may create issues in that criminal gangs, the main perpetrators of human trafficking offences, would need to be considered ‘organizations’ for the purposes of the Statute. It is not disputed that the policies may be organizational, but it is rejected that they should receive acceptance in the international legal order. The criminal gangs should be considered as separate criminal individuals, with those at the helm of the organisations being prosecuted for deriving profit from the human suffering they orchestrate through trafficking individuals.

‘The ICC is not and should not be regarded as a panacea’ (Ronen, 2010: 27) but it should recognise the crime of human trafficking as one which is of ‘serious concern to the international community as a whole’, in the same vein as the other crimes within its jurisdiction. The most pragmatic way of achieving this recognition would be to include human trafficking as a discrete crime within the Rome Statute within article five.

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