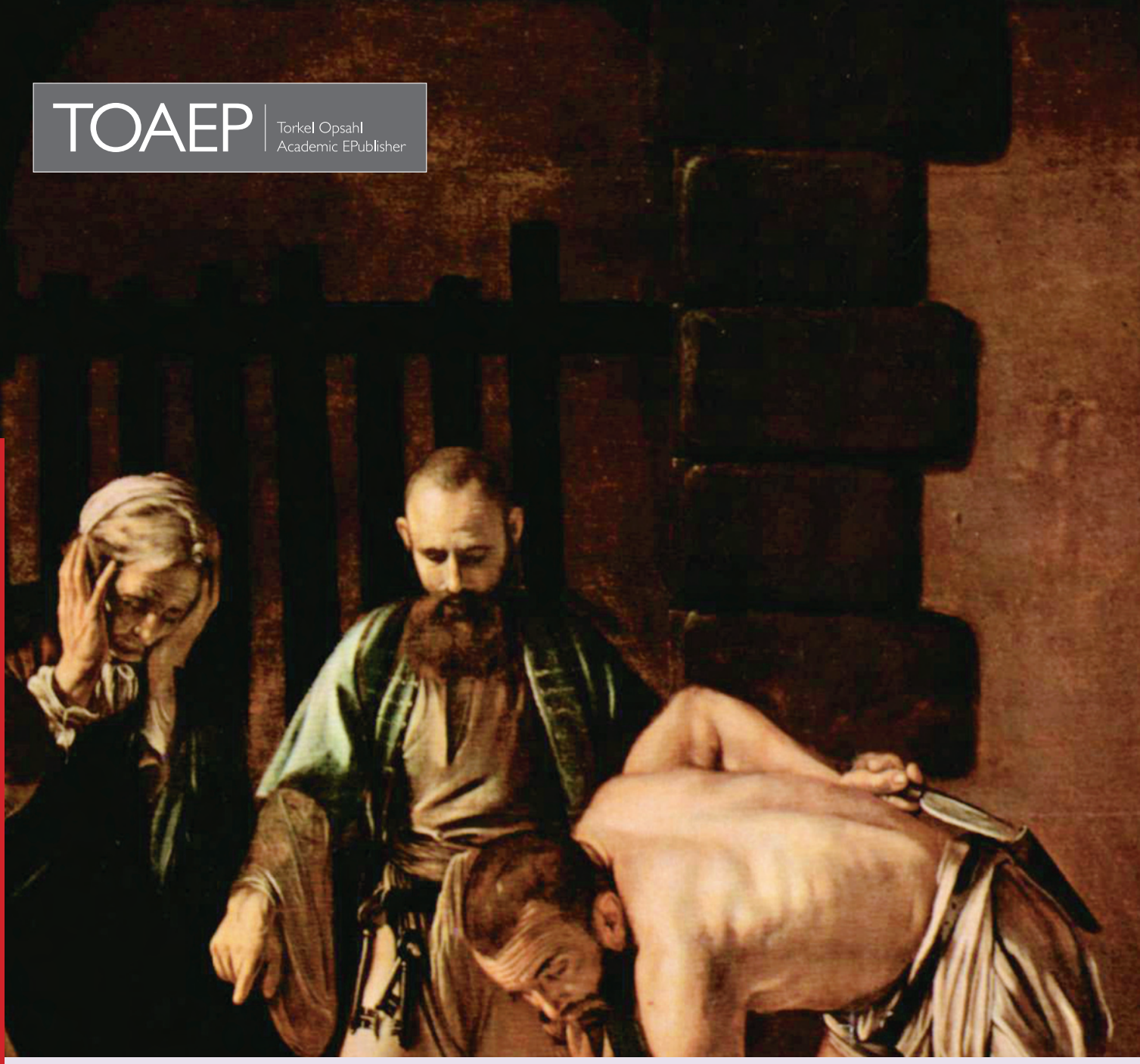
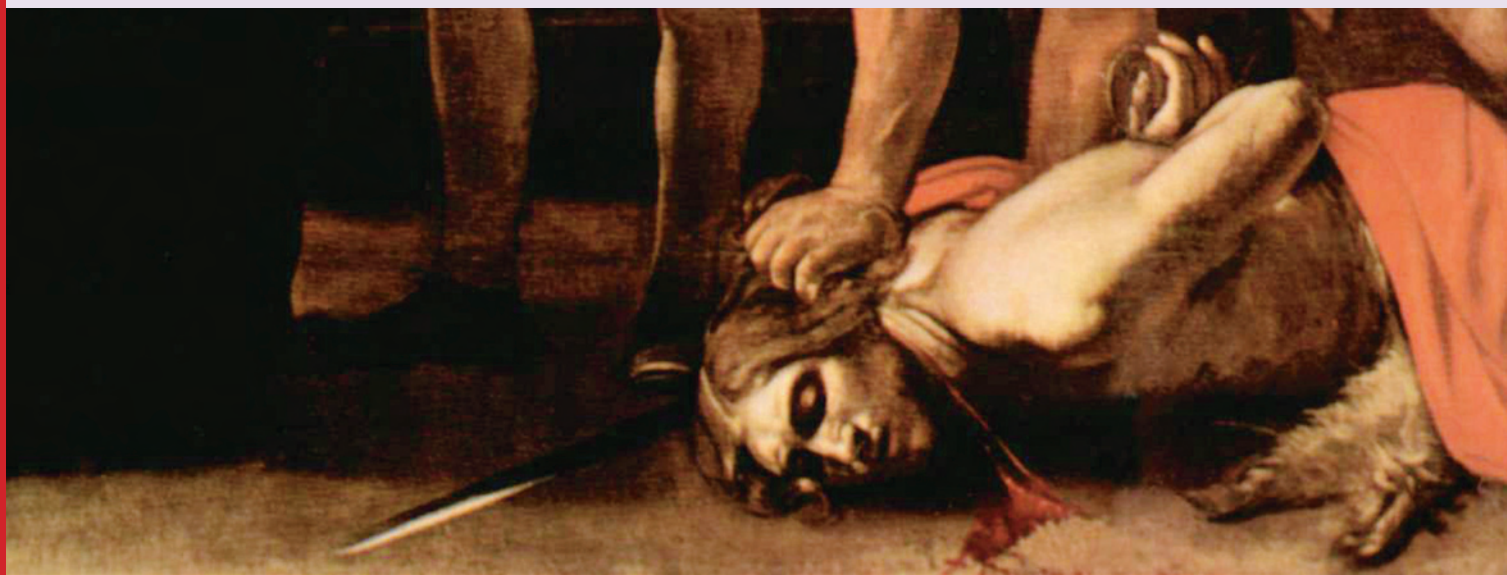
TOAEP | Torkel Opsahl Academic EPublisher



On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)



E-Offprint:

Christen Price, "The Proposed Convention on Crimes Against Humanity and Human Trafficking", in Morten Bergsmo and SONG Tianying (editors), *On the Proposed Crimes Against Humanity Convention*, FICHL Publication Series No. 18 (2014), Torkel Opsahl Academic EPublisher, Brussels, ISBN 978-82-93081-96-8. First published on 12 December 2014.

This publication and other TOAEP publications may be openly accessed and downloaded through the website www.fichl.org. This site uses Persistent URLs (PURL) for all publications it makes available. The URLs of these publications will not be changed. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

9

The Proposed Convention on Crimes Against Humanity and Human Trafficking

Christen Price*

> Before atrocities are recognized as such, they are authoritatively regarded as either too extraordinary to be believed or too ordinary to be atrocious.[1]

9.1. Introduction

There are two reasons that human trafficking deserves legal attention: (1) it is a gross human rights abuse, and (2) it occurs on a massive, transnational scale. Sexual slavery exemplifies this, as a form of human trafficking "distinct from its composite crimes which include rape, torture and unlawful detention because it represents the culmination of all these acts through the complete deprivation of personal autonomy".[2] This deprivation of the victim's autonomy occurs thus:

> The method by which a trafficker reduces a woman to submission also secures maximum profits […] crowded, unsanitary working conditions and sleep deprivation from working up to twenty hours day are important tools for "breaking the psychological stability of the women", and they accrue massive income for the trafficker […]. The effect of this process is to completely dehumanize trafficked women in the eyes of traffickers, clients, and the woman herself.[3]

Additionally, victims are often invisible and unable to seek help:

---

* **Christen Price** received his J.D. in 2012 from Georgetown University Law Center, with a Certificate in Transnational Legal Studies. He currently practices primarily in the areas of employment law, international trade, and commercial litigation. All Internet references were last accessed on 2 September 2014.

1 Catherine MacKinnon, *Are Women Human? And Other International Dialogues*, The Belknap Press of Harvard University, Cambridge, MA, 2006, p. 3.

2 Alison Cole, "Reconceptualizing Female Trafficking: The Inhuman Trade in Women", in *Women's Rights Law Reporter*, 2005, vol. 26, no. 97, pp. 97−98.

3 *Ibid*., p. 105.

> The controlled environment of violence, exhaustion, and isolation induces a state of personal emergency. The conditions under which a trafficked woman is detained cause her to believe her life is constantly in danger.[4]
>
> [Victims (often, but not necessarily, women)] are trafficked into a foreign country, with their traffickers having taken their official documents. A woman is deterred from seeking help by her status as an illegal immigrant and prostitute. She may also have a distrust of public authority or knowledge of organized crime's power to bribe corrupt officials. Brainwashing by the traffickers in an isolated and confined environment reinforces these fears, her family may be threatened and she may be in debt to the trafficker as well.[5]

Fully aware of the limitations of researching in a relatively new field whose subject is illegal activity, slavery scholar Kevin Bales estimates that there are 27 million slaves in the world today (in contrast to much higher estimates by other human rights groups).[6] If this estimate is correct, then "[t]here are more slaves alive today than all the people stolen from Africa in the time of the transatlantic slave trade".[7] Much of that slavery is concentrated: "The biggest part of that 27 million, perhaps 15−20 million, is represented by 'bonded labour' in India, Pakistan, Bangladesh, and Nepal".[8] No country, however, is free of it; for example, there are an estimated 3,000 household slaves in Paris alone.[9] Slavery generates an estimated $13 billion in profits yearly.[10]

This chapter argues that human trafficking is often a form of slavery and is in any case a serious human rights violation. It will further examine the extent to which human trafficking is covered by the Proposed International Convention on the Prevention and Punishment of Crimes

---

4 *Ibid*.

5 *Ibid*.

6 Kevin Bales, *Disposable People: New Slavery in the Global Economy*, University of California Press, Berkeley and Los Angeles, CA, 2004, pp. 8−9. See also the 2013 United States Department of State, Trafficking in Persons Report, p. 7, available at http://www.state.gov/j/tip/rls/tiprpt/index.htm.

7 Bales, 2004, p. 9, *ibid*.

8 *Ibid*.

9 *Ibid*., p. 3.

10 *Ibid*., p. 23.

Against Humanity ('Proposed Convention', see Annex 1).[11] Finally, it argues that there is both a legal and a practical case for broadening the Proposed Convention's definition of crimes against humanity to include certain forms of human trafficking that the Proposed Convention currently seems to exclude, regardless of whether the abuses are committed by private actors, in peace time, or for profit.

The focus of this chapter will be on human trafficking as it relates to slavery; however, human trafficking also encompasses, to varying degrees, other acts[12] that may constitute crimes against humanity: torture, rape, and sexual slavery particularly. Thus, the analysis of crimes against humanity also applies to these other crimes, in addition to slavery. Furthermore, for the sake of conciseness, the legal arguments will mostly focus on international tribunals and treaties rather than on customary international law. Finally, this chapter will not engage the debate on whether 'human trafficking' or 'trafficking in persons' is the more appropriate term, and will use the two interchangeably.

9.2. Trafficking in Persons as a Serious Human Rights Violation

This section will demonstrate that trafficking in persons can be slavery, and is in any case a serious human rights violation, whether it amounts to slavery, torture, sexual violence, or another crime.

9.2.1. Trafficking in Persons as Slavery

9.2.1.1. Definitions of Trafficking in Persons

The following definitions of 'human trafficking' are from an international treaty and a national jurisdiction's anti-trafficking law. Both definitions focus on the coercion and control aspects of human trafficking, treating them as central to slavery, suggesting that slavery need not involve legal ownership, in contrast to the chattel slavery of the transatlantic slave trade.[13]

---

[11] Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, Washington University School of Law, Whitney R. Harris World Law Institute, Crimes Against Humanity Initiative, August 2010, see Annex 1.

[12] See, *e.g.*, Article 7(1), Rome Statute of the International Criminal Court, A/CONF.183/9, 1 July 2002 ('ICC Statute').

[13] Bales, 2004, pp. 14−15, see *supra* note 6.

The Palermo Protocol is an agreement supplementing the U.N. Convention against Transnational Organized Crime, and defines trafficking in persons as:

> 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 […].[14]

The victim's consent to exploitation is irrelevant if any of the above means are used, and a lower threshold is set for exploitation of children:

> The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons even if this does not involve any of the means set forth in subparagraph (a) of this article.[15]

Another definition of human trafficking comes from the United States' Trafficking Victims Protection Act. Under the U.S. federal anti-trafficking statutes, severe forms of trafficking in persons is defined as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age", or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery".[16]

---

[14] Article 3(b)−(c), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime ('Palermo Protocol'), 25 December 2003, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx.

[15] Article 3(a), Palermo Protocol, *ibid*.

[16] The Trafficking Victims Protection Act of 2000, Sec. 103(8) ('TVPA'); The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Sec. 222 ('TVPRA'); Trafficking Victims Protection Reauthorization Act of 2013, available at http://www.state.gov/j/tip/laws/index.htm.

Commercial sex acts and involuntary servitude fall under the statutes, and are defined respectively, as "any sex act on account of which anything of value is given to or received by any person", and "a condition of servitude induced" through "any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint", or "the abuse or threatened abuse of the legal process".[17]

This chapter will rely on the above two definitions, particularly with respect to their commonalities; their differences are not relevant to the question of whether human trafficking is slavery and a serious human rights abuse and when it should be considered a crime against humanity.

9.2.1.2. Two Clarifications

Reluctance to classify human trafficking as slavery may be due to the conflation of human trafficking with human smuggling and slavery with legal ownership. First, trafficking people is distinct from smuggling them; human smuggling, while illegal, may or may not involve exploitation. These two terms were used interchangeably in the past, but are now recognized as different acts. This is illustrated by the adoption of the Protocol Against the Smuggling of Migrants by Land, Sea and Air ('Smuggling Protocol') supplementing the Organized Crime Convention, which does not include exploitation in its definition of smuggling.[18] Thus, the relevant international instruments distinguish between human trafficking and human smuggling, reinforcing that they are separate crimes.

Second, the legal understanding of slavery is becoming increasingly consistent with Bales' definition, "the total control of one person by another for the purpose of economic exploitation".[19] Slavery, while more severe than substandard and illegal labour practices such as child labour or sharecropping, is not necessarily ownership in the traditional sense; it

17 *Ibid*.

18 Tom Obokata, "Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System", in *International and Comparative Law Quarterly*, 2005, vol. 54, no. 2, p. 446. Article 3(a), Smuggling Protocol, 28 January 2004, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202241/v2241.pdf.

19 Bales, 2004, p. 9, see *supra* note 6.

is instead defined by control: "Slaveholders have all the benefits of ownership without the legalities".[20]

Modern slavery is distinct from traditional chattel slavery not only because it is based on coercion rather than ownership, but slaves today are more disposable. The world population has more than tripled since World War II and the greatest population increases have been in those areas where there are currently the greatest numbers of slaves; life becomes cheaper.[21] The laws of supply and demand mean that when there is a massive increase in the number of potential slaves, they are cheap:

> Buying a slave is no longer a major investment, like buying a car or a house (as it was in the old slavery); it is more like buying an inexpensive bicycle or a cheap computer. Slaveholders get all the work they can out of their slaves, and then throw them away.[22]

In the antebellum American South, a field slave would cost around $40,000 to $80,000 in today's U.S. dollars, yet "[s]laves generated, on average, profits of only about 5 per cent per year".[23] In contrast, modern slaves are so cheap that free workers must compete with them (which was not the case in the American South), and slaves are responsible for their own maintenance.[24] This is compounded by the fact that, for example, debt slaves in India generate profits of over 50 per cent per year and a child sex slave in Thailand can generate profits of as much as "800 per cent a year".[25]

Thus, modern slavery's victims are even more vulnerable in relation to the perpetrators: "When slaves cost a great deal of money, that investment had to be safeguarded through clear and legally documented ownership. Slaves of the past were worth stealing and were worth chasing down if they escaped", but now they are disposable, with little incentive to keep them alive for very long, as there was in the American South.[26] These realities of modern slavery show how antebellum slavery in the American South is an inappropriate model for understanding modern slavery, and

[20] *Ibid*., p. 5.

[21] *Ibid*., p. 12.

[22] *Ibid*., p. 14.

[23] *Ibid*., p. 16.

[24] *Ibid*., pp. 16−17.

[25] *Ibid*., pp. 17−18.

[26] *Ibid*., pp. 14−15.

also how current legal definitions of human trafficking clearly target modern slavery.

9.2.1.3. Recent Jurisprudence

Recent court decisions as well as scholarship make a similar connection between human trafficking and slavery. In *Rantsev v. Cyprus and Russia*, the European Court of Human Rights ('ECtHR') shifted its approach to slavery by "recognizing human trafficking as slavery and articulating distinct duties of when a state must act to combat this crime generally and in individual cases".[27] The complainant in the case alleged that Cyprus and Russia had failed to protect Ms. Rantseva from human trafficking and to adequately investigate her death.[28] The ECtHR "referred to its previous case law defining the concepts of slavery, servitude, and forced and compulsory labor", even though Article 4 (which articulates the right to be free from slavery and forced labor) does not mention the term 'human trafficking'.[29]

The ECtHR referenced its own *Siliadin v. France* decision, where it had "concluded that the victim's treatment in a human trafficking context had amounted to servitude and forced and compulsory labour, but it had fallen short of slavery".[30] In contrast, the ECtHR in *Rantsev* looked to the ICTY's jurisprudence on slavery, "which concluded that the traditional concept of slavery, closely linked to the right of ownership, had now evolved to include a range of contemporary forms of slavery", and "delineated specific characteristics of a situation similar to slavery, such as the lack of free movement of a person, control over such movement to deter escape, confinement to a place or physical environment, presence of elements of psychological control, control of sexuality, and forced labor".[31]

---

[27] Roza Pati, "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus and Russia*", in *Boston University International Law Journal*, 2011, vol. 29, no. 79, pp. 82−83.

[28] European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment, 7 January 2010, para. 2.

[29] Pati, 2011, p. 93, see *supra* note 27. See also *Rantsev v. Cyprus and Russia*, 2010, *op. cit.*, paras. 275−276.

[30] Pati, 2011, pp. 93−94 (citing ECtHR, *Siliadin v. France*, Application No. 73316/01, Chamber Judgment, 26 July 2005, paras. 120, 129), see *supra* note 27.

[31] *Ibid*., p. 94; *Rantsev v. Cyprus and Russia*, 2010, paras. 279−281, see *supra* note 28.

Thus, the ECtHR recognized that human trafficking "by its very nature and aim of exploitation, is an exercise of powers attached to ownership", and is the "modern form of the old worldwide slave trade".[32] The ECtHR decided that human trafficking's abuses were obvious enough that further discussion of whether it was slavery was unnecessary: "It concluded that human trafficking as defined in article 3(a) of the Palermo Protocol falls within the scope of article 4, and it dismissed Russia's objection on the grounds of lack of jurisdiction *ratione materiae*".[33]

9.2.2. Slavery as a Serious Violation of Human Rights

Having argued for a strong connection between slavery and its modern form, human trafficking, this section will now turn to the status of slavery as an international crime and human rights violation, by looking at its status under international law. First, slavery violates *jus cogens* norms under international law. *Jus cogens* norms are the fundamental, non-optional norms that the international community has adopted regarding severe human rights abuses such as genocide, slavery, and torture; crimes with *jus cogens* status are always prohibited, the prohibitions may not be derogated from, and no treaty or custom may override them.[34] This means that slavery is

> prohibited at all times, in all places […] peremptory norms supersede any treaty or custom to the contrary. *Jus cogens* norms constitute principles of international public policy, and serve as rules "so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system […]".[35]

This does not mean that *jus cogens* norms are completely uncontroversial or that there is no disagreement about which crimes meet the criteria; however, *jus cogens* status is a concept that has 'symbolic value',

---

[32] *Rantsev v. Cyprus and Russia*, 2010, para. 280, see *supra* note 28.

[33] Pati, 2011, p. 94, see *supra* note 27; *Rantsev v. Cyprus and Russia*, 2010, *op. cit.*, para. 281.

[34] See, *e.g.*, Special Rapporteur Gay J. McDougall's Final Report of 22 June 1998, "Systematic Rape, Sexual Slavery and Slavery-like Practices During Wartime", E/CN.4/Sub.2/1998/13, p. 4; Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", in *Berkeley Journal of International Law*, 2003, vol. 21, no. 288, p. 293.

[35] Askin, 2003, *op. cit.*, p. 293.

even if it is problematic.[36] Petsche argues that *jus cogens* is "of limited relevance for the actual practice of international law […]. Rather, its usefulness lies in the way it envisions the international legal order. Such vision, as we have seen, consists of a normative system based on fundamental values, characterized by a hierarchy of norms, and not entirely dependent on the consent of the subjects of international law".[37]

In any case, whether *jus cogens* is practically useful or only symbolically valuable, there seems to be little dispute that slavery is on the list. So at best, the prohibition against slavery is an international imperative of the highest order; at a minimum, its condemnation is symbolically significant, because *jus cogens* status is reserved for the worst abuses of human rights.

Although *jus cogens* status may only be of limited help in establishing slavery's human rights legal status, other forms of international law clearly prohibit it. As will be discussed below, slavery can be a crime against humanity under certain circumstances[38] and the right to be free from slavery is guaranteed under numerous human rights instruments, including the Universal Declaration of Human Rights,[39] the International Convention on Civil and Political Rights,[40] the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,[41] and the European Convention on Human Rights.[42] Additionally, criminal law instruments such as the Palermo Protocol and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others prohibit slavery as well.[43]

---

36 Markus Petsche, "*Jus Cogens* as a Vision of the International Order", in *Penn State International Law Review*, 2010, vol. 29., no. 233, p. 237.

37 *Ibid*., p. 273.

38 See, *e.g*., Article 7(1), ICC Statute, see *supra* note 12.

39 Article 4, Universal Declaration of Human Rights, 1948.

40 Article 8, International Covenant on Civil and Political Rights, entered into force on 23 March 1976.

41 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, entered into force on 30 April 1957.

42 Article 4, European Convention on Human Rights, entered into force on 3 September 1953.

43 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, entered into force on 25 July 1951.

For the above reasons, trafficking in persons is a serious human rights violation that often constitutes outright slavery, which is a *jus cogens* violation and an international crime by treaty.

9.3. Trafficking in Persons as a Crime Against Humanity

This section examines the status of trafficking in persons as a crime against humanity by listing several definitions of crimes against humanity, and comparing the definition of trafficking in persons to that of crimes against humanity in the Proposed Convention.

9.3.1. Defining 'Crimes Against Humanity'

This section considers how crimes against humanity have been defined both in the statutes of international criminal tribunals, the Proposed Convention, and the jurisprudence of the international tribunals. Recent international criminal tribunals have employed definitions of crimes against humanity that are similar to the International Law Commission's ('ILC') definition in the Draft Code of Crimes against the Peace and Security of Mankind. The following chart compares the largely similar acts covered by crimes against humanity in different statutes, and demonstrates some of the ways that the ICC Statute follows the ILC's Draft Code definitions.

ILC Draft Code[49]	**SCSL Statute**[48]	**Law on ECCC**[47]	**ICTR Statute**[46]	**ICTY Statute**[45]	**ICC Statute**[44]
Murder	Murder	Murder	Murder	Murder	Murder
Extermination	Extermination	Extermination	Extermination	Extermination	Extermination
Enslavement	Enslavement	Enslavement	Enslavement	Enslavement	Enslavement
Arbitrary deportation or forcible transfer of population	Deportation	Deportation	Deportation	Deportation	Deportation or forcible transfer of population

44 Article 7(1), ICC Statute, see *supra* note 12.

45 Article 5, Statute of the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), adopted on 25 May 1993, as amended on 7 July 2009.

46 Article 3, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ('ICTR'), adopted on 8 November 1994, as amended on 14 August 2002.

47 Article 5, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ('ECCC'), with inclusion of amendments as promulgated on 27 October 2004.

48 Article 2, Statute of the Special Court for Sierra Leone ('SCSL'), signed on 16 January 2002.

49 Article 18, Draft Code of Crimes against the Peace and Security of Mankind ('ILC Draft Code'), 1996.

ILC Draft Code	Arbitrary imprisonment	Torture	Rape, enforced prostitution and other forms of sexual abuse	Forced disappearance of persons
SCSL Statute	Imprisonment	Torture	Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence	
Law on ECCC	Imprisonment	Torture	Rape	
ICTR Statute	Imprisonment	Torture	Rape	
ICTY Statute	Imprisonment	Torture	Rape	
ICC Statute	Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law	Torture	Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity	Enforced disappearance of persons

ILC Draft Code	Persecution on political, racial, religious or ethnic grounds	Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm	Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population
SCSL Statute	Persecution on political, racial, ethnic or religious grounds	Other inhumane acts	
Law on ECCC	Persecutions on political, racial, and religious grounds	Other inhumane acts	
ICTR Statute	Persecutions on political, racial, and religious grounds	Other inhumane acts	
ICTY Statute	Persecutions on political, racial, and religious grounds	Other inhumane acts	
ICC Statute	Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court[50]	Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health	The crime of apartheid

[50] Article 7(3) of the ICC Statute provides: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above".

The following chart looks at the chapeau elements for crimes against humanity in the foregoing statutes:

SCSL Statute[51]	[…] the following crimes as part of a widespread or systematic attack against any civilian population
Law on ECCC[52]	[…] any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds
ILC Draft Code[53]	[…] any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group
ICTY Statute[54]	[…] the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population
ICTR Statute[55]	[…] the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds
ICC Statute[56]	[…] the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. '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".

The SCSL Statute, Law on ECCC, ICTR Statute, and ICC Statute all include the concept of 'widespread or systematic attack'; only the ICTY Statute's definition requires a nexus to an armed conflict.[57] The ILC Draft Code definition requires that the crimes be committed in a "widespread or systematic" fashion, but is the only definition that leaves out the concept of 'attack' as an element. The ICC Statute follows the ILC Draft Code definition except for the 'attack' requirement. The Proposed Convention employs definitions very similar to the ones in the foregoing charts, particularly the ILC and the ICC Statute, defining crimes against

51 Article 2, SCSL Statute, see *supra* note 48.

52 Article 5, Law on ECCC, see *supra* note 47.

53 Article 18, ILC Draft Code, see *supra* note 49.

54 Article 5, ICTY Statute, see *supra* note 45.

55 Article 3, ICTR Statute, see *supra* note 46.

56 Article 7(1), 7(2)(a), ICC Statute, see *supra* note 12.

57 Article 5, ICTY Statute, see *supra* note 45.

humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", where the acts include:

a) Murder;
b) Extermination;
c) Enslavement;
d) Deportation or forcible transfer of population;
e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
f) Torture;
g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes;
i) Enforced disappearance of persons;
j) The crime of apartheid;
k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[58]

Two definitions that are particularly relevant to this chapter are enslavement, which is defined 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 trafficking in persons, in particular women and children", [59] and "attack directed against any civilian population" which 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

[58] Article 3(1), Proposed Convention, see *supra* note 11.

[59] *Ibid*., Article 3(2)(c).

[…]".[60] Additionally, torture is defined as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions",[61] removing it from the domain of exclusively State-perpetrated abuses.[62]

Thus, it appears that slavery, and by extension, human trafficking, is an international crime and a predicate crime for crimes against humanity; the next section will examine how human trafficking does and does not fall under the definition of crimes against humanity proposed in the Proposed Convention.

9.3.2. Comparing Trafficking in Persons to the Definition of Crimes Against Humanity in the Proposed Convention

9.3.2.1. Acts Covered

When the above definitions of enslavement, torture and rape are compared to the realities of human trafficking, it is clear that at least those acts and occasionally murder are committed in the course of human trafficking and fall into the categories of acts that the Proposed Convention intends to prohibit. The difficulty is in establishing when those acts, committed in the course of human trafficking, meet the other criteria for crimes against humanity, as defined in the Proposed Convention.

9.3.2.2. Widespread or Systematic

Under one interpretation of the phrase 'widespread or systematic', given the high number of estimated trafficking victims[63] and the fact that organized crime groups (whether a full organization or an informal association of pimps) are heavily involved in human trafficking,[64] such conduct is often both widespread and systematic. Cole, for example, concludes:

---

60 *Ibid*., Article 3(2)(a).

61 *Ibid*., Article 3(2)(e).

62 These definitions of "attack directed against any civilian population", "enslavement", and "torture" all follow the definitions of the same terms in Article 7 of the ICC Statute.

63 Bales, 2004, pp. 8–9, see *supra* note 6.

64 See, *e.g*., Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime, DCI Exceptional Intelli-*

> This is evident in the initial element of the crime, which is drafted in the disjunctive form of 'widespread or systematic attack', demonstrating that the 'attack' requires 'a large-scale action involving a substantial number of victims […] or that it was conducted with a high degree of orchestration and methodical planning.' In specific cases, this requirement would turn on the facts. In conceptual terms, the estimates placing trafficked women in the millions suggest that at least the first clause of this requirement is satisfied.[65]

In contrast, the ICTR in *Akayesu* defined 'widespread' as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims", and systematic as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".[66]

This definition is narrower than Cole's, as it requires that the conduct in question be either collective or based on a common policy. However, it is important to note that neither the ICTR Statute nor the ICTY Statute contains an explicit policy requirement.[67] Moreover, both the ICTR and the ICTY have subsequently stated that while the existence of a plan or policy is "evidentially relevant", it is no longer legally necessary for defining crimes against humanity.[68] I will argue below that 'widespread or systematic' should follow the ILC Draft Code, ICTR, and ICTY definitions and exclude the policy requirement.

9.3.2.3. "Attack Directed Against Any Civilian Population"

While victims of trafficking are almost invariably part of a civilian population, it is not clear whether the "attack" is fulfilled by forms of trafficking unconnected to armed conflict, terrorism, political uprising, or State

gence Analyst Program: An Intelligence Monograph, Central Intelligence Agency, 1999, p. 3.

65 Cole, 2005, p. 115, see *supra* note 2. I disagree, as will be noted, that Cole's understanding of human trafficking as widespread and systematic meets the Convention's requirement of an *attack* that is widespread and systematic.

66 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 580.

67 ICTY Statute; see *supra* note 47; ICTR Statute, see *supra* note 48.

68 See, *e.g.*, ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23/IT-96-23/1-A, Judgment, 12 June 2002, para. 98; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR- 95-1B-T, Judgment, 28 April 2005, para. 527.

action. While the definition of "attack directed against any civilian population" as a "course of conduct"[69] may technically cover human trafficking, given the historical (though no longer necessary) connection between crimes against humanity and armed conflict, the term may make lawyers and judges less likely to interpret human trafficking as a Proposed Convention violation when it is committed by private actors and unconnected to any armed conflict, genocide, or other uprising, notwithstanding Article 1's clarification that crimes against humanity may be committed in peacetime.[70]

The phrase is defined by the Convention as "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 […]".[71] This is similar to the ICC Statute definition.[72] The term "pursuant to or in furtherance of an organizational policy", which, taken together with "attack", seems to indicate State action, or at least an entity trying to act like a State (for example, rebel groups recruiting soldiers); it is not clear that traffickers could be characterized as having a policy of enslaving people. They enslave people because it is a business (which is quite distinct from the reasons that States and State-like private entities usually commit crimes against humanity), and they may or may not operate as part of an organization.

Cole thinks that trafficking of women fulfils the ICC Statute definition of "attack directed against any civilian population" (which is virtually identical to the Proposed Convention's), considering:

> The Elements of Crimes, adopted by the Preparatory Commission in accordance with Article 9 of the ICC Statute, provides in the introduction to the explanation of Article 7 that 'acts need not constitute a military attack'. This confirms that the notion of CAHs has evolved from the Nuremberg precedent and can be perpetrated in peacetime. Furthermore, by choosing to explain the phrase, rather than focusing on individual words, it is submitted that 'attack' is to be construed in the broader context of the sentence. The apparent militancy of the word 'attack' is removed by the

69 *Ibid*., Article 3(2).

70 *Ibid*., Article 1.

71 *Ibid*., Article 3(2)(a), (c).

72 Article 7, ICC Statute, see *supra* note 12.

explanation in Article 7(2) referring to 'a course of conduct'.[73]

While an attack, strictly speaking, can be a course of conduct, if one wanted to remove the militancy of a word historically associated with militancy, one would probably do away with the word "attack" altogether, or at least make its meaning unambiguous. In any case, Cole's interpretation does not account for the limitations imposed or implied by the reference to State and organizational policy.

9.3.2.4. Knowledge of the Attack

This element is fact-bound; presumably, given the need for transnational criminal networks to facilitate cross-border human trafficking, traffickers are often aware of one another. "Knowledge of the attack" would have to be determined on a case-by-case basis, but would likely be met in many cases under a broad definition of "attack". That said, "knowledge of the attack" turns on how "attack" is defined. Because of the current ambiguities in defining both "attack against any civilian population" and "widespread or systematic", the Proposed Convention probably does not cover trafficking in persons when the crime is not committed by State or State-like actors.

9.4. Certain Forms of Trafficking in Persons Should be More Clearly Covered by the Proposed Convention on Crimes Against Humanity

This section examines several conceptual hurdles to expanding the Proposed Convention's definition in light of feminist critiques and international jurisprudential shifts, and responds to several practical objections.

9.4.1. Conceptual Hurdles

There are three major conceptual hurdles that are important to the traditional understanding of international law and make it difficult for human trafficking to be classed as a *per se* crime against humanity, assuming that it is widespread or systematic, including the distinction between: (1) public and private spheres, (2) State and non-State actors, and (3) war and peacetime. The war and peacetime distinction has been completely dis-

[73] Cole, 2005, p. 115−116, see *supra* note 2.

mantled in the definitions of crimes against humanity, and the State/non-State actor emphasis has been largely dismantled as well, although the language of "State or organizational policy" may imply private individuals behaving like States (such as rebel armies' actions).[74] However, the public/private distinction remains, exemplified by Cassese's definition of an international crime. Feminist critiques have emerged in response to this distinction, and human rights jurisprudence is slowly shifting in their direction.

9.4.1.1. Transnational but not International Crimes

Cassese argues that trafficking in persons is not an international crime. On the contrary,

> […] it is characteristic of such crimes that when perpetrated by private individuals, they are somehow connected with a state policy or at any rate with "system criminality". On this score international crimes are thus different from criminal offences committed for personal purposes (private gain, satisfaction of personal greed, desire for revenge, etc.) as is the case with ordinary criminal offences […] or such other crimes that have a transnational dimension but pursue private goals, such as piracy, slave trade, trade in women and children, counterfeiting currency, drug dealing, etc.[75]

Similarly, Bassiouni argues that crimes against humanity should not be defined to include any internationalized domestic crime:

> Crimes against humanity should be defined in a way that focuses on the organizational policy of the harmful conduct aimed at civilians. This excludes collateral harmful conduct to civilians occurring as a collateral consequence of organized crime activities whose purpose is unjust enrichment.[76]

---

74 See, *e.g.*, the definition of torture under both the ICC Statute and the Proposed Convention.

75 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2008, p. 54.

76 M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*. Cambridge University Press, 2011, p. 13. The risk that crimes against humanity might be used to prosecute organized crime indiscriminately is tempered by the requirement that the crimes be "widespread or systematic", and the ICC would not necessarily be required to prosecute, due to the principle of complementarity. Moreover, slavery, unlike some of the other crimes committed by organized criminal networks, such as theft

Bassiouni argues that the perpetrators of crimes against humanity must at least be acting more like State actors (rather than private actors) and seems sceptical about including non-State actors in the definition of crimes against humanity.[77]

Bassiouni and Cassese's analyses rest on a series of questionable assumptions about the distinctions discussed earlier; distinctions which manage to hide the human rights violations more often experienced by women and children. In addition to the feminist critiques below, there are at least three problems with Cassese and Bassiouni's position.

First, it is not clear that it is appropriate to characterize the violence suffered by human trafficking victims as a "collateral consequence" of organized criminal activity. Human trafficking, for one thing, is different from other forms of organized crime, because human beings are the commodity, rather than illicit drugs or weapons. Thus, sex trafficking is not like a murder committed by a gang member in the course of a drug deal gone bad. The "collateral consequence", as Bassiouni would phrase it, of abuse that sex trafficking victims experience is not criminal conduct incidental to the central criminal moneymaking activity; it *is* the central criminal moneymaking activity – perpetrators of sex trafficking profit from sexual violence directly.

Second, the very concerns that drove international law to seek to hold State actors accountable – the egregiousness of the crimes, the abuse of power used to commit them, and the impunity with which they were committed – are all present in private actors' perpetration of severe forms of trafficking in persons. The distinguishing factor for both Bassiouni and Cassese appears to be not severity or scale, but action in concert with State or State-like organizational policy. Particularly given the similarities between the acts committed in human trafficking (as detailed in section 9.1.) and torture (which the Proposed Convention does not define in terms of State action), it seems problematic to argue that severe human rights abuses should not be criminalized at the highest international level as long as they are committed for profit.[78] One can argue, when evaluating such

or extortion, is distinguishable as one of the very few crimes that already has *jus cogens* status.

77 *Ibid*., pp. 10−13, and 40−42.

78 Whether severe forms of trafficking in persons can meet the current 'widespread or systematic' criteria (regardless of how these terms are defined) is a separate, and completely valid, question. This argument is directed only at the assumption that the private goals of

abuses, that the State's abuse of power is an aggravating factor without insinuating that the profit motive is a mitigating factor.

Third, the line between State and non-State actors is often blurry, particularly in jurisdictions with dysfunctional criminal justice systems. In some legal systems, where there is effectively no rule-of-law protection for the average person, the investigative, protective, and prosecutorial functions of the criminal justice system are privatized.[79] This means that only those who can afford to pay private persons can meaningfully access that system, and it is often those with money who additionally control and corrupt the public justice system as well.[80] Some traffickers even receive police protection.[81] While a powerful trafficker manipulating a criminal justice system for his own ends is a far cry from a State doing so as a matter of official policy, the trafficker still acts with impunity and his victims are similarly without recourse.

9.4.1.2. Feminist Critiques

In addition to not accounting for the realities of dysfunctional public justice systems and powerful people confining themselves to private criminal goals, the bias toward State or State-like action also fails to account for the dynamic of gender. The classic feminist critique by Catherine MacKinnon argues that the public/private distinction is often evidence of gender bias:

> The state is only one instrumentality of sex inequality. To fail to see this is pure gender bias. Often this bias flies under the flag of privacy, so that those areas that are defined as inappropriate for state involvement, where the discourse of human rights is made irrelevant, are those "areas in which the majority of the world's women live out their days".[82]

For example, Dillon notes that,

> […] violations of women's rights tend to take place in the 'private' sphere. Domestic violence, honor killings, female

certain criminal activity are sufficient to exclude that activity from crimes against humanity even if the 'widespread or systematic' criteria are met.

79 Gary Haugen and Victor Boutros, *The Locust Effect*, Oxford University Press, Oxford, 2014, pp. xiv−xv.

80 *Ibid*., pp. xiv−xv, and 1−28.

81 *Ibid*., pp.73−74, 82−83, and 135.

82 MacKinnon, 2006, p. 23, see *supra* note 1.

> genital mutilation, child marriage, and similar forms of 'invisible' suffering are implicitly separated from the more 'serious' public world of unlawful detentions and forced confessions.[83]

Thus, "violence experienced most often by women, no matter how systematic or obvious to officials in the states in which the women reside, is treated as a criminal (as opposed to a human rights) matter, to be dealt with by the respective state's law enforcement".[84]

MacKinnon specifically discusses torture as an example, but her analysis easily applies to slavery, especially sex trafficking: "Internationally, torture has a recognized profile. It usually begins with abduction, detention, imprisonment, and enforced isolation, progresses through extreme physical and mental abuse, and may end in death. The torturer has absolute power […]. Life and death turn on his whim. Victims are beaten, raped, shocked with electricity, nearly drowned, tied, hung, burned, deprived of sleep, food, and human contact".[85]

To define torture only in terms of State abuse of power (or even private individuals imitating a State) is to enforce a double standard that excludes much of gendered violence: "Why isn't this political? The abuse is neither random nor individual. The fact that you know your assailant does not mean that your membership in a group chosen for violation is irrelevant to your abuse. It is still systematic and group-based".[86]

Dillon echoes the feminist critique, but also applies it to private crimes against children, particularly the commercial sexual exploitation of children, saying that it is not seen for the human rights violation that it is, because

> […] the international human rights community seems for the most part caught in a conceptual warp that focuses overwhelmingly on state violence against largely male political prisoners or, in the alternative, on victims of abuses suffered in the course of armed conflict.[87]

---

83 Sara Dillon, "What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children", in *UCLA Women's Law Journal*, vol. 17, no. 121, 2008, p. 123.

84 *Ibid*., p.133.

85 MacKinnon, 2006, p. 17, see *supra* note 1.

86 *Ibid*., p. 22.

87 Dillon, 2008, p. 123, see *supra* note 83.

The abuses child victims suffer are analogous to both torture and slavery:

> [Many children are victimized] often ending up with their health destroyed, victims of HIV/AIDS and other sexually transmitted diseases. Younger and younger children are sought with the expectation that clients will not be exposed to HIV. Prostituted children can be raped, beaten, sodomized, emotionally abused, tortured, and even killed by pimps, brothel owners, and customers.[88]

Unless we condition ourselves to think of victims of human rights abuses to be either harmed in war or male political prisoners, it is impossible not to see child sex slavery as a gross human rights abuse.[89]

A definition of crimes against humanity that excludes human trafficking, even if it is 'widespread or systematic', from consideration if it is done for private gain is a definition unjustifiably biased toward the ways that men experience the abuse of power, because

> the state is not all there is to power. To act as if it is produces an exceptionally inadequate definition for human rights when so much of the second-class status of women, from sexual objectification to murder, is done by men to women without express or immediate or overt state involvement.[90]

9.4.1.3. Recent Jurisprudence

Slowly, international criminal and human rights jurisprudence is shifting towards an understanding of women's human rights that is more responsive to some of these feminist concerns. For example, although gender-based violence against women has been illegal under certain laws for over hundreds of years, enforcement was extremely minimal until recently.[91] In the *Akayesu* case the ICTR explicitly compared rape to torture:

> […] analogized aspects of the crimes of rape and torture, noting that rape "is a form of aggression" and the elements of the crime "cannot be captured in a mechanical description of objects and body parts". The Chamber noted that "[l]ike torture, rape is used for such purposes as intimidation,

88 *Ibid*., p.128.

89 *Ibid*., pp.122−124.

90 MacKinnon, 2006, p. 23, see *supra* note 1.

91 Askin, 2003, pp. 299−300, see *supra* note 34.

> degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture" when all of the elements of torture are satisfied.[92]

The ECtHR has also found domestic and sexual violence constituted torture under the European Convention on Human Rights. In *Aydin v. Turkey*, the European Court ruled that the accumulation of acts of physical and mental violence and the especially cruel act of rape to which the applicant was subjected amounted to torture in breach of Article 3 of the ECHR. In *M.C. v. Bulgaria*, the ECtHR found the State in breach of Article 3 for failure to investigate the applicant's case of rape, and for failure to meet the requirements inherent in the State's positive obligations to "establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse".[93] In *A. v. the United Kingdom*, the ECtHR found that the State's failure to protect a child from violence in a domestic context amounted to a violation of Article 3, the prohibition of torture; the Court explicitly said that the State's responsibility included protecting private individuals from other private individuals.[94] Thus, in at least some human rights and/or international criminal law courts (including one that has jurisdiction over crimes against humanity), there has been some undermining of the public/private distinction as a way of determining an international crime or human rights abuse, particularly as torture was also once defined in terms of State action.

9.4.2. Practical Objections

In addition to theoretical objections to classifying certain forms of human trafficking as international crimes, potential practical objections could be raised to this proposal; namely, that the appropriate treaty already exists in the form of the Palermo Protocol, or that universal jurisdiction is a better solution than the Proposed Convention for combatting slavery.

---

92 *Ibid*., pp. 319−320 (citing *Prosecutor v. Akayesu*, 1998, para. 687).

93 Iveta Cherneva, "Recognizing Rape as Torture: The Evolution of Women's Rights Legal Protective Techniques", in *Intercultural Human Rights Law Review*, 2011, vol. 6, no. 325, pp. 329−330, citing ECtHR, *Aydin v. Turkey*, Application No. 23178/94, Judgment, 25 September 1997, p. 86; ECtHR, *M.C. v. Bulgaria*, Application No. 39272/98, Judgment, 4 December 2003, pp. 182−185.

94 ECtHR, *A. v. U.K.*, Judgment, Application No. 3455/05, 19 February 2009, pp. 22 and 24.

Although the Palermo Protocol regarding human trafficking is already in force, it is insufficient as a response to deal with human trafficking for at least three reasons. First, as a criminal law, it does not cover all of the actors involved in the abuse; only those involved in the actual transport and facilitators, not, to use the example of sex trafficking, the customers. Thus, it does nothing directly to address the demand.[95]

Second, as a form of law, it has no real enforcement mechanism.[96] If the Proposed Convention clearly covered human trafficking and became international law, then the classification would create a jurisdictional basis for enforcement and at least raise the priority of national government efforts to combat trafficking. No one expects another member to eradicate ordinary crime, but genocide and crimes against humanity are another matter, carrying greater expectations for enforcement. The lack of enforcement is evidenced in the absence of an 'extradite or prosecute clause' such as those for international crimes and the fact that this is an optional protocol to an organized crime treaty.

Third, international crimes have broader modes of liability, which is particularly helpful for addressing a crime that is also a business, because it allows prosecutors to better target all of the relevant actors, including those who may be more removed from the day-to-day trafficking activities, but who profit from them. These modes of liability, set forth in the Proposed Convention in Articles 4 and 5, include individual liability, joint perpetration ("with or through another"), ordering, soliciting, or inducing perpetrators (even if the crime is only attempted), aiding, abetting and other assistance to perpetrators, and intentional contributions to "to the

[95] To be clear, this does not mean that buyers should ordinarily be prosecuted for crimes against humanity (any more than most ordinary crimes should be so prosecuted), but it is important that they not be *de facto* excluded from potential liability by definition. Increasingly, human rights advocates and legal practitioners are recognizing buyers' participation in commercial sexual exploitation offenses against children as human trafficking offenses, rather than prostitution-related criminal offenses. See, *e.g.*, Shared Hope International, "Demanding Justice Benchmark Assessment," 2013, pp. 5−13. One example of this trend at the domestic level is the U.S. federal court decision which held that the U.S. sex trafficking statute (18 U.S.C. §1591) covered buyers of trafficked victims. Eighth Circuit, *United States v. Jungers*, 7 January 2013, 702 F.3d 1066. See also *supra* section 9.4.1.2. regarding human rights violations against women and children.

[96] The Proposed Convention does not create independent ICC jurisdiction, but Article 2(c) provides that a State Party that is already a party to the ICC Statute must co-operate with the ICC. Also, both the Palermo Protocol Articles 5−7, and the Proposed Convention in Article 2 rely primarily on States Parties to enforce the treaty requirements domestically.

commission or attempted commission of such a crime by a group of persons acting with a common purpose", to further a criminal purpose involving crimes against humanity or simply with the knowledge that such is the group's purpose.[97] It is not clear that perpetrators of human trafficking ought to be spared additional modes of liability largely because they are committing abuses for money.

Cohen argues that slavery is a *per se* international crime warranting universal jurisdiction; both because of its gravity and because of the impunity that surrounds it in much of the world.[98] This proposal is not inconsistent with universal jurisdiction, and if States decide that universal jurisdiction over slavery is a better and more workable solution than ICC prosecution, it will be easier to justify universal jurisdiction if slavery is clearly considered a crime against humanity, even when committed by private actors, in peacetime, and for profit.

When governments fail to prosecute atrocities, the issue is either one of capacity or political will (or both). If the issue is capacity, then identifying widespread and systematic human trafficking as a crime against humanity will justify either prioritization of resources to prosecute or international involvement. If the issue is political will, then this will also justify international involvement. Governments like Mauritania, for example, which currently turn a blind eye to slavery and then declare that it does not exist,[99] might be forced to change.

In light of the above theoretical and practical justifications for including severe forms of human trafficking as a crime against humanity *per se*, the Proposed Convention should be amended to remove or redefine the "attack against any civilian population" phrase to reflect the ILC Draft Code definition, making the only criteria enslavement (as defined by the Palermo Protocol and the TVPRA) that is either widespread or systematic (without being an organizational policy) and committed against civilians.

---

97 Article 4, Proposed Convention, see *supra* note 11.

98 Miriam Cohen, "The Analogy Between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction", in *Buffalo Human Rights Law Review*, 2010, vol. 16, no. 201, p. 206.

99 Bales, 2004, pp. 81, 108−112, see *supra* note 6.

9.5. Conclusion

Many forms of human trafficking are sufficiently abusive to constitute slavery (and possibly torture as well), yet are effectively excluded from the Proposed Convention on Crimes Against Humanity because they do not clearly satisfy the "widespread or systematic" and "attack directed against a civilian population" elements as currently defined by the Proposed Convention. Although crimes against humanity once were defined in relation to armed conflict and government actors, this is no longer the case, as the international community already recognizes that such abuses may be committed by private actors and in peacetime.

This chapter simply argues that the abuses may also be committed by private actors, in peacetime, for profit, and that these facts neither diminish the abuse nor present a valid distinction in light of modern human rights law, international criminal law, and human rights jurisprudence. The definitions of "widespread and systematic" and "attack directed against a civilian population" in the Proposed Convention should be expanded accordingly or interpreted in a way to reflect that private persons can commit crimes against humanity while pursuing private goals.[100]

The implications of expanding the definition of crimes against humanity in the Proposed Convention are: (1) a symbolic recognition of a human rights violation that disproportionately affects women and children and is often incorrectly viewed as a crime that ranks below crimes against humanity; (2) affirmation that the international community's responsibility to prevent it is greater than the responsibility to prevent transnational organized crime generally; and (3) practical legal tools (through the modes of liability) to combat it more effectively. Moreover, as both national and international jurisdictions seek to prevent and punish international crimes, placing human trafficking in that category will provide a powerful impetus to consistently enforce the laws against what is already almost universally criminalized and acknowledged as a great moral wrong.

[100] This is not to argue that the definition of crimes against humanity should be expanded to include every human trafficking offense, but that scale, severity, and impunity should be the operative factors, not whether the crime was committed as part of State or organizational policy (though of course such a State policy would be *per se* impunity).

FICHL Publication Series No. 18 (2014):

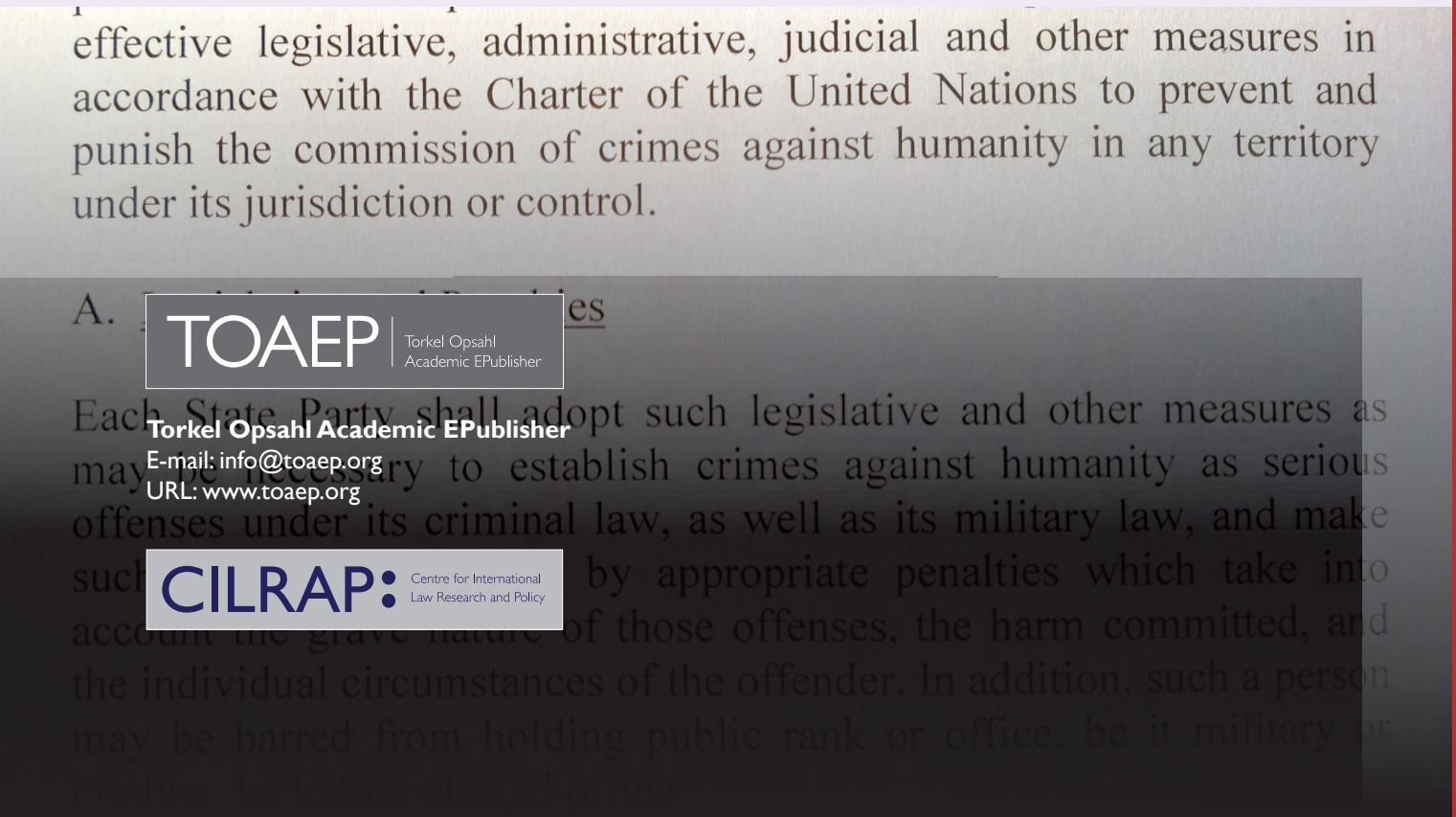
On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)

This anthology is about the need for and nature of a convention on crimes against humanity. It uses the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity as an important reference point. 16 authors discuss how such a convention may consolidate the definition of crimes against humanity, and develop measures for their prevention and punishment, decades after the conclusion of the Genocide Convention and Geneva Conventions. The authors include Leila N. Sadat, Eleni Chaitidou, Darryl Robinson, María Luisa Piqué, Travis Weber, Julie Pasch, Rhea Brathwaite, Christen Price, Rita Maxwell, Mary Kate Whalen, Ian Kennedy, SHANG Weiwei, ZHANG Yueyao and Tessa Bolton. It contains a preface by late Judge Hans-Peter Kaul and a foreword by Hans Corell.

The book is inspired by the rationale of crimes against humanity to protect against the most serious violations of fundamental individual rights, and its realization especially through domestic mechanisms. Such consciousness calls upon appropriate definition and use of contexual elements of the crime, effective jurisdiction for prevention and prosecution, and robust inter-State co-operation. The book considers individual State experiences in combating crimes against humanity. It underlines the importance of avoiding that the process to develop a new convention waters down the law of crimes against humanity or causes further polarisation between States in the area of international criminal law. It suggests that the scope of the obligation to prevent crimes against humanity will become a decisive question.

ISBN 978-82-93081-96-8



TOAEP Torkel Opsahl Academic EPublisher
Torkel Opsahl Academic EPublisher
E-mail: info@toaep.org
URL: www.toaep.org
CILRAP: Centre for International Law Research and Policy