

HUMAN TRAFFICKING ANALYZED AS A CRIME AGAINST HUMANITY

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Summary: The global legal landscape recognizes the seriousness of human trafficking crimes yet many cases remain unheard. Current classifications of this crime along with jurisdictional requisites for the International Criminal Courts are preventing adjudication of trafficking in persons when there is a factor of transnationality. I argue that the solution to positioning human trafficking into the jurisdiction of the International Criminal Courts is to analyze its rise to the level of a crime against humanity. Until this point, there has not been a human trafficking case well suited to make this argument to thoroughly demonstrate all the elements required to be classified as a crime against humanity. I argue that not only does the cross examination of human trafficking, under the Trafficking Protocol and the enumerated acts of Article 7(1) of the Rome Statute, meet the elements of a crime against humanity, but that the recent human trafficking situation of the Rohingya people in Myanmar further demonstrates its potential application and necessity. Classifying human trafficking as a crime against humanity would put these cases in the jurisdiction of the International Criminal Courts which would give previously domestically neglected cases an opportunity to be prosecuted and potentially deter the growing human trafficking epidemic.

Keywords: human trafficking, crimes against humanity, international criminal courts, myanmar, forced labor, rome statute, icc, icty, ictr, jurisdiction.

1 Introduction

The trafficking of human beings, like the trafficking of drugs, has grown into an extensive international criminal industry.¹ The United Nations Office on Drugs and Crime reports that the epidemic of international human trafficking has come to affect almost every country in the world to some degree.² The economic level of prosperity of countries as a whole does little to afford immunity of

1 International Labour Organization. *ILO Action Against Trafficking in Human Beings*. Geneva. [online]. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_090356.pdf Accessed: 27.03.2018

2 UN Office on Drugs and Crime. *UNODC Report on Human Trafficking Exposes Modern Form of Slavery*. [online]. Available at: <http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html> Accessed 27.03.2018

the risk of human trafficking to countries because the basis of human trafficking is the exploitation individuals in desperate situations.³ These situations are not limited to financial desperation.⁴

Although the most immediate visual associated with human trafficking is the trafficking of human beings for sexual exploitation, there are many other purposes.⁵ Human trafficking for the purpose of sexual exploitation comprises only seventy-nine percent of the reported human trafficking cases internationally each year according to reports collected by 155 countries around the world.⁶ Human trafficking for sexual exploitation includes forced prostitution, forced participation in pornography and even sex trafficking of child brides.⁷ Of these cases, the most common victims are women and young girls.⁸ The next most common form reported internationally is the trafficking of human beings for the purpose of forced labor which makes up a total of eighteen percent of reported cases.⁹ This form differs from sexual exploitation because it is less targeted towards females.¹⁰ Forced labor affects males and females of a broad age range.¹¹ The purpose of forced labor is to make the trafficked individual do manual labor in often virtually unliveable conditions for no compensation.¹² Another form of human trafficking with growing popularity is trafficking for the harvesting of organs.¹³ This typically is a situation where a wealthy or important third party needs to an organ and traffickers force the harvesting of an organ from an unwilling victim, regardless of whether or not it kills the trafficked victim, to sell it to the third party.¹⁴ Because of the uniqueness of the situation, the

3 UN Office on Drugs and Crime. *UNODC on Human Trafficking and Migrant Smuggling*. [online]. Available at: <https://www.unodc.org/unodc/en/human-trafficking/index.html> Accessed: 27.03.2018

4 *Id.*

5 UNODC, *supra* note 2.

6 *Id.*

7 City of NY. *About Human Trafficking Know It*. [online]. Available at: <http://www1.nyc.gov/site/endhumantrafficking/about/about-human-trafficking.page> Accessed at: 27.03.2018

8 UNODC, *supra* note 2.

9 UNODC, *supra* note 2.

10 International Labour Organization. *Forced Labour, Modern Slavery and Human Trafficking*. [online]. Available at: < <http://www.ilo.org/global/topics/forced-labour/lang-en/index.html> > Accessed: 27.03.2018

11 *Id.*

12 International Labour Organization. *What Is Forced Labour, Modern Slavery And Human Trafficking*. [online]. Available at: <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm> Accessed: 27.03.2018

13 Interpol. *Types of Human Trafficking*. [online]. Available at: <https://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Types-of-human-trafficking> Accessed: 27.03.2018

14 UN Office on Drugs and Crime. *Trafficking in Persons for the Purpose of Organ Removal*. [online]. Available at: https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf Accessed: 27.03.2018

targeted person being trafficked can be anyone who fits the profile of the organ needed.¹⁵

Human trafficking as a whole is growing due to a high demand for trafficked individuals.¹⁶ As a result, the traffickers have met this demand.¹⁷ It is reported that approximately 800,000 human trafficking cases are reported annually.¹⁸ This figure has been said to represent a floor of the cases actually taking place due to the fact that many trafficked individuals die or are unwilling to report their situations out of fear of further abuse as a consequence.¹⁹ The transnational nature of human trafficking also adds to the complexity of getting an accurate estimate of the global problem.²⁰ The human trafficking industry is said to gross an estimated thirty-two billion dollars annually.²¹ The human trafficking epidemic has grown to such an extent that law makers have taken notice and attempted to address the international problem.²²

Human trafficking has been addressed on a national level within states through immigration and criminal courts.²³ However, given that the nature of trafficking anything including human beings, implies that the contraband is being imported from one place to another illegally or by force; it is not just an issue that can be handled domestically.²⁴ Trafficking of human beings rarely involves trafficking the individual in the same state that the individual is originally abducted from.²⁵ This transnational complexity created an issue of jurisdiction for the state courts.²⁶ The question was who had a jurisdictional claim to try the traffickers: the state where the abductions occurred, the state where the trafficker is from, the state where the victim is from or the state where the trafficking was discovered.²⁷ The policy concerns of saving hundreds of thou-

15 *Id.*

16 UNICEF USA. *What Fuels Human Trafficking?* [online]. Available at: <https://www.unicef-usa.org/stories/what-fuels-human-trafficking/31692> Accessed: 27.03.2018

17 *Id.*

18 US Department of State. *Trafficking in Persons Report*. [online]. Available at: <https://www.state.gov/documents/organization/34158.pdf> Accessed: 27.03.2018

19 MITCHELL, Firouzeh. *Human Trafficking: A Crime Against Humanity Under The ICC?* [online]. Available at: <http://gulawreview.org/entries/international-law/human-trafficking-crime-against-humanity#_ftnref9> Accessed: 27.03.2018

20 *Id.*

21 International Labour Organization. *ILO Action Against Trafficking In Human Beings*. [online]. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_090356.pdf Accessed: 27.03.2018

22 Mitchell, *supra* note 19.

23 OBOKATA, Tom. *Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System*, 2005, vol. 54, no. 2, pp. 445–457.

24 *Id.* at 446.

25 OBOKATA, *supra* note 23, at 447.

26 *Id.*

27 UN Office on Drugs and Crime. *Human Trafficking FAQs*. [online]. Available at: <http://www.unodc.org/unodc/en/human-trafficking/faqs.html> Accessed: 27.03.2018

sands of lives per year and the international interest in justice forced law makers across the globe to take legal action to protect against human trafficking in all its forms.²⁸

Human trafficking has been referred to as modern day slavery by many scholars due to the similar nature of the exploitation of human beings shared by both crimes.²⁹ For this reason, it is important to mention that slavery was first addressed in an international context by the Slavery Convention in March of 1927.³⁰ The Slavery Convention was said to be the first legal action taken internationally 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.”³¹ This definition, unlike the definitions of slavery proposed previously, has been universally accepted and is still being used globally today.³² Classic, definitional slavery has decreased drastically since the implementation of the Slavery Convention, but the modern form of slavery known as human trafficking has continued to grow due to the inability of most human trafficking cases to reach the impossibly high threshold of proving a ‘requirement for the trading to be carried out with ‘an intent to reduce persons to slavery’.³³

For this reason, law makers have taken a more direct approach to combat human trafficking through the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which was adopted during the United Nations Convention against Transnational Organized Crime in 2000 and came into force in 2003.³⁴ This protocol ensures that states that were a party of the United Nations Convention against Transnational Organized Crime that then ratified the protocol were then required to show that within their state steps were taken to combat human trafficking.³⁵ This required that the state also create domestic laws outlawing human trafficking by criminalizing the activity associated with human trafficking, setting forth frameworks for extradition,

28 *Id.*

29 UNODC, *supra* note 2.

30 MORAN, Clare Frances. *Human Trafficking And The Rome Statute Of The International Criminal Court*, The Age of Human Rights Journal, 2014, vol. 3, pp. 32.

31 *Id.*

32 *Id.*

33 MITCHELL, *supra* note 19. *See also* Article 1(2) of the 1926 Convention on Slavery; *See also* Article 7(c) of the 1956 Convention on the Abolition of Slavery.

34 UN Office on Drugs and Crime. *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. [online]. Available at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> Accessed: 27.03.2018

35 Article 2 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 25. December, 2003, 2225 U.N.T.S. 209, (Art. 3) (entered into force 29. September 2003). (hereinafter “Protocol”).

and creating national authorities dedicated to responding to instances of human trafficking.³⁶ The protocol also required the states to domestically criminalize the actions of the human trafficker's accomplices for "attempting to commit... participating as an accomplice... and organising or directing other persons to commit human trafficking".³⁷ This protocol ensured that there was now a legally binding instrument dedicated specifically to human trafficking to prevent the loophole in the differences amongst intent between human traffickers, who intend exploitation, and slavers, who intend ownership, by creating an accepted internationally accepted definition of human trafficking.³⁸

However, though the protocol set out to promote uniformity and cooperation amongst states in prosecution of the traffickers and the protection of the trafficked victims, it has been shown to be ineffective.³⁹ Because the protocol is transnational, the protocol itself was agreed upon by states collectively; however, past the point of agreement and the development of laws to satisfy the requirements set forth in the protocol, the burden and responsibility of implementation and criminalization falls upon the states domestically.⁴⁰ The facts and figures published in the Trafficking in Persons Report published by the United States Department of State suggest that there is a disconnect between the creation of the laws in the states and the actual enforcement of said laws.⁴¹ Though the estimate of trafficking in human beings internationally is roughly 800,000, in 2006 there were only 5808 prosecutions and 3160 convictions for human trafficking internationally, "meaning that for every 800 people trafficked, only one person was convicted."⁴²

"Trafficking, however, is not an ordinary crime with transnational dimensions. It has increasingly been recognized that trafficking can rank among the ,most serious crimes of concern to the international community as a whole' or *delict juris gentium*."⁴³ Due to the lack of success of addressing the human trafficking problem through transnational laws, the most obvious solution would be to address the problem through international law.⁴⁴ International law, unlike transnational law, shifts the choice of enforcement from the states themselves to the international standard of enforcement.⁴⁵ Rather than the human rights standards being set state by states to criminalize and enforce the laws, the obligations

36 *Id.* at Art. 5(1).

37 *Id.* at Art. 5(2)(a)-(c).

38 MITCHELL, *supra* note 19.

39 *Id.*

40 Protocol, *supra* note 35, at Art. 5(2)(a)-(c).

41 UN Regional Information Centre for Western Europe. *Human Trafficking*. [online]. Available at: <https://www.unric.org/en/human-trafficking> Accessed: 27.03.2018

42 *Id.*

43 OBOKATA, *supra* note 23, at 445.

44 *Id.* at 447-48.

45 *Id.*

to avoid human trafficking behavior are placed universally on the traffickers.⁴⁶ Therefore, regardless of the nationality of the trafficker or the trafficked person, the trafficker would still be held responsible for an international crime.⁴⁷ This method of enforcement circumvents the potential for situations where the states hinder the enforcement of justice for victims of human trafficking by refusing to pass legislation preventing and suppressing acts of human trafficking.⁴⁸

A key way for the international community to gain jurisdiction over individuals is through the International Criminal Court.⁴⁹ The International Criminal Court was proposed by the United Nations and eventually the treaty was opened for ratification after a Diplomatic Conference in Rome, Italy, in the summer of 1998.⁵⁰ The International Criminal Court was established by the Rome Statute to set the foundation for “major progress for better implementation of international humanitarian law and a clear step forward in the battle against impunity.”⁵¹ The International Criminal Court is now used to prosecute international crimes.⁵² Jurisdiction is satisfied “if the State or the territory of which the act or omission occurred or the State of nationality of the suspect is Party to the Statute or has accepted the jurisdiction of the Court.”⁵³ Under Article 5 of the Rome Statute, the International Criminal Court has jurisdiction over ‘the most serious crimes of concern to the international community as a whole.’⁵⁴ These crimes are also referred to as *delict juris gentium*.⁵⁵ This jurisdiction currently extends to the crimes of genocide, crimes against humanity, crimes of aggression and war crimes.⁵⁶ This jurisdiction does have limitations in that it does not apply retroactively and is intended only to become effective when the state itself is not willing or able to prosecute the offenders of the crimes mentioned.⁵⁷ Though the responsibility to prosecute does still fall on the states themselves, this jurisdiction acts as a failsafe in case that State’s duty is breached.⁵⁸ The prosecutor also acts as another failsafe by being able to refer cases to the International Criminal

46 MITCHELL, *supra* note 19.

47 MITCHELL, *supra* note 19.

48 OBOKATA, *supra* note 23, at 454–55.

49 MORAN, *Supra* note 30, at 33.

50 International Committee of the Red Cross. *Treaties, States Parties and Commentaries*. [online]. Available at: <https://ihl-databases.icrc.org/ihl/INTRO/585?OpenDocument> Accessed: 27.03.2018

51 *Id.*

52 *Id.*

53 *Id.*

54 Rome Statute of the International Criminal Court, Art. 5, 17 July, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF. 183/9 (1998) (entered into force 1. July, 2002). (hereinafter “Rome Statute”).

55 OBOKATA, *supra* note 23.

56 Rome Statute, *supra* note 54, Art. 5 (a)–(d).

57 *Id.* at Art. 51 p. 4.

58 MITCHELL, *supra* note 19.

Court by his or her own initiative which is referred to as *proprio motu*.⁵⁹ This ensures that prosecutors are not powerless in the perceived injustice that he or she is observing.⁶⁰ The other two ways in which a case is presented to the International Criminal Court are pursuant to Art.13 of the ICC statute: (a) recommendation of a situation to the prosecutor by a state party; (b) referral of a situation to the prosecutor by the UN Security Council acting under chapter VII of the UN Charter.⁶¹

Given the human trafficking epidemic at hand and the current failure of the system in providing an effective solution to preventing the exploitation of individuals worldwide, a solution could be allowing the International Criminal Court jurisdiction over the international human trafficking cases. The Rome Statute of the International Criminal Court gives the court jurisdiction over, amongst other crimes, crimes against humanity.⁶² Article 7(1) of the Rome Statute identifies a number of acts that when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” constitute crimes against humanity.⁶³

This paper intends to analyze whether human trafficking should be treated as a crime against humanity and thereby would be under the jurisdiction of the International Criminal Court. Then it will examine the development of a definition of human trafficking under the Trafficking Protocol and determine whether that definition fits within the Rome Statute of the International Criminal Court. This paper will then analyze how human trafficking would lend itself to the jurisdiction already established under the Rome Statute. Given that the proposed categorization is persuasive, the international jurisprudence implications and effects will also be explored to determine the practicability of making human trafficking a crime against humanity by using the situation in Myanmar as an example.

2. Definition of human trafficking

The first definitional look at human trafficking as opposed to slavery begins with the definition adopted in the Trafficking Protocol.⁶⁴ The Trafficking Protocol was the first piece of international legislation that defined human trafficking as an individual standalone crime.⁶⁵ Trafficking in persons is specifically defined in Article 3 of the Trafficking Protocol as

⁵⁹ Rome Statute, *supra* note 54, Art. 15 p. 1.

⁶⁰ *Id.*

⁶¹ *Id.* at Art. 13.

⁶² *Id.* at Article 15(b).

⁶³ Rome Statute, *supra* note 54, Art. 7 (1).

⁶⁴ Protocol, *supra* note 35.

⁶⁵ UN Office on Drugs and Crime. *Human Trafficking*. [online]. Available at: <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> Accessed: 27.03.2018

Trafficking in persons' shall mean the recruitment, transportation, transfer, harboring, or receipt of persons, by means of 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 the minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or removal of organs.⁶⁶

Human smuggling is a practice entirely separate from human trafficking. At the same Organized Crime Convention that led to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the United Nations also adopted the Protocol Against the Smuggling of Migrants by Land, Sea and Air.⁶⁷ These two protocols were specifically adopted to illustrate that the crime of smuggling human beings and the crime of trafficking human beings are not synonymous.⁶⁸ There are different factors to each crime though the similarities can make it hard to differentiate between the two.⁶⁹ This is why up until this particular Convention, no distinction was made and the categorizations were used interchangeably.⁷⁰ Unlike trafficking of humans, the smuggling of humans is defined by Article 3 as: the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or permanent resident.⁷¹

Comparing these two sets of definitions allows the essential elements of human trafficking to be extracted. The first element is related to voluntariness.⁷² While a person can be said to be voluntarily smuggled, a person cannot be said to be voluntarily trafficked.⁷³ This distinction is premised on fact that the crime of trafficking involves an influence by the trafficker on the trafficked carried out via coercion or deception.⁷⁴ The coercion or deception assists the trafficker in the recruiting and transportation of the trafficked individuals.⁷⁵ A person cannot be said to have voluntarily participated while under undue influence.⁷⁶ Meanwhile

⁶⁶ UNODC, *supra* note 34.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Protocol against the Smuggling of Migrants by Land, Sea and Air, Art. 3, 15 November 2000, 2241 U.N.T.S. 507 d.

⁷² OBOKATA, *supra* note 23, at 447.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Protocol, *supra* note 35, Art. 3.

⁷⁶ OBOKATA, *supra* note 23, at 447.

the same cannot be said for smuggling.⁷⁷ Smuggling can take place when a fully informed person voluntarily agrees to enter another state illegally.⁷⁸

The illegality of the transportation leads to the second distinctive factor of human trafficking.⁷⁹ Human trafficking, like other forms of trafficking, can occur within national boundaries or across international borders.⁸⁰ There is no requirement that the trafficking cross across an international border to be illegal.⁸¹ The movement itself is illegal even though the entry across the border may be legal or illegal.⁸² In some cases, the trafficker will provide the trafficked with legitimate documents that allow for legal entry into the State yet the trafficking will still be illegal based solely on the movement rather than the location.⁸³ While in the crime of smuggling, the nature of the crime requires that illegality is not based on the movement itself but rather the location of the movement.⁸⁴ Therefore, the movement must illegally transgress an international border to be defined as smuggling.⁸⁵

There was much debate about whether or not this difference could be solved by referring to trafficking in humans as “international trafficking”.⁸⁶ However, because human trafficking can occur within national borders, by redefining trafficking as “international”, victims of trafficking within national borders would no longer be protected by the Protocol and therefore would be solely susceptible to the domestic laws of that State.⁸⁷ The mere fact that the concept that including the term “international” may deprive national victims justice itself suggests that there can be domestic trafficking.⁸⁸ To be addressed by the Protocol, however, the internal domestic trafficking must be transnational in nature according to Article 4.⁸⁹ The conditions in which trafficking may meet this burden of being transnational in nature are stated in Article 3 of the Organized Crime Convention.⁹⁰

77 UN Office of Drugs and Crime. *Migrant Smuggling*. [online]. Available at: https://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html#What_is_Migrant_Smuggling Accessed: 27.03.2018

78 *Id.*

79 OBOKATA, *supra* note 23, at 447.

80 UNODC, *supra* note 65.

81 *Id.*

82 *Id.*

83 Protocol, *supra* note 35, Art. 10.

84 UNODC, *supra* note 77.

85 OBOKATA, *supra* note 23, at 447–48.

86 OBOKATA, *supra* note 23, at 447.

87 *Id.*

88 *Id.*

89 Protocol, *supra* note 35, Art. 4.

90 UN Convention against Transnational Organized Crime, Art. 3, 29 September 2003, 2225 U.N.T.S. 209.

Under Article 3 of the Organized Crime Convention, trafficking can be regarded as transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction, or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.⁹¹

The third factor to consider in the definitional difference between trafficking and smuggling is the element of exploitation involved in the trafficking of humans.⁹² This exploitation, though often sexual, is not so limited.⁹³ Trafficked individuals may be exploited through sexual acts, forced labor, organ removal or any other type of exploitation within the scope of the Protocol.⁹⁴ Conversely, smuggling does not require this exploitation.⁹⁵ As a matter of fact, in the practice of smuggling humans, the crime usually ends when the person is successfully smuggled into a new place.⁹⁶ There is no exploitation after the smuggled individual reaches the destination.⁹⁷ However, in human trafficking, the exploitation is just beginning when the trafficked individual reaches the destination.⁹⁸

Upon examination of the definitions and combining the factors discussed, a clearer view of the distinctions between trafficking in humans and smuggling of humans can be seen.⁹⁹

In conclusion, trafficking can be summarized as a migratory process in which people are transported involuntarily within or across national borders for the purpose of subsequent exploitation, while smuggling is about facilitation, for profit, of illegal entry with consent of individuals. Further, although those trafficked may be regarded as victims of human rights abuses because of the use of coercion and subsequent exploitation, smuggled people are more likely to be regarded as criminals who violate national criminal and immigration laws.¹⁰⁰

91 *Id.*

92 OBOKATA, *supra* note 23, at 447.

93 UNODC, *supra* note 65.

94 Protocol, *supra* note 35, Art. 3 (a).

95 OBOKATA, *supra* note 23, at 447.

96 UNODC, *supra* note 77.

97 OBOKATA, *supra* note 23, at 447.

98 MITCHELL, *supra* note 19.

99 OBOKATA, *supra* note 23, at 448.

100 *Id.*

3 Human trafficking as a crime against humanity under the rome statute

3.1 Is Human Trafficking an Enumerated Crime?

Given the framework definition of human trafficking taken from the Protocol, it must be determined if that definition fits into the criteria outlined in the Rome Statute in order for human trafficking to be classified as a crime against humanity. Article 7 of the Rome Statute sets forth the elements of a crime against humanity and enumerates which crimes will be included upon meeting these elements.¹⁰¹ The Rome Statute sets forth that a crime can be considered a crime against humanity: [when] any of the following acts are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (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; (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.¹⁰²

The first enumerated crime that human trafficking could be classified under in the Rome Statute is enslavement.¹⁰³ As mentioned, slavery and trafficking are not synonymous. Under Article 7(2)(c) “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”¹⁰⁴ Human trafficking centers around exploitation while the focus of slavery is ownership.¹⁰⁵ This ownership is mentioned in the Slavery Convention as what makes slavery unique.¹⁰⁶ However, the exploitation in human trafficking is often converted into a form of slavery.¹⁰⁷ The victims of human trafficking are often unable to leave and under the control of the traffickers.¹⁰⁸ In exploitation and ownership, there is a common theme of the victims lacking free will to leave and/or make their own decisions.¹⁰⁹

The sufficiency of mere control was addressed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kunarac* case.¹¹⁰ In this case,

101 Rome Statute, *supra* note 54, Art. 7.

102 *Id.* at Art. 7 (1)

103 *Id.*

104 *Id.* at Art. 2 (c).

105 MITCHELL, *supra* note 19.

106 League of Nations. Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 60 L.N.T.S. 253.

107 *Id.* at Art. 1.

108 MITCHELL, *supra* note 19.

109 *Id.*

110 *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, (Int’l Crim. Trib. for the former Yugoslavia 22 Feb. 2001).

the court expounded on the definition of enslavement as considered by international law.¹¹¹ The primary concern of the court is duration of the control.¹¹² The Trial Chamber held that a mere ability, among others, to buy, sell, or trade, an important factor to be taken into consideration, is not alone determinative of enslavement.¹¹³ This decision brought to light the need for a continual exploitation of the victim of human trafficking to be considered enslavement.¹¹⁴ For example, transporting the victim, though sufficient to show trafficking, may not be an adequate level of control needed to show ownership under the enslavement standard.¹¹⁵ However, if the exploitation is shown to be continuous, then the trafficking may rise to the level of enslavement. Therefore, if the transportation is followed by repeated and continual exploitation of the victim, this categorization is met. For example, if a trafficked individual was then continually forced into labor by the same trafficker then this standard would be met.

Continual exploitation also has other limitations.¹¹⁶ For instance, in order for the exploitation to be continuous, the control must also be continuous.¹¹⁷ If the original trafficker is not the person exploiting the victim when the destination is reached, the chain of control has been broken and the crime now is trafficking but not slavery.¹¹⁸ For this reason, the *Kunarac* court held that “the duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved.”¹¹⁹

Though this criterion would satisfy human trafficking under some circumstances, there is still an argument about a situation in which law enforcement intercepts the trafficking before it reaches the level of enslavement.¹²⁰ For instance, if law enforcement interrupted the transportation of the humans being trafficked prior to any exploitation, then there would certainly be no enslavement due to a lack of a continued exercise of power over the victim.¹²¹ There is even an argument that prior to the exploitation there would be no trafficking at all under the notion that exploitation is a required element of human trafficking.¹²² However, the Protocol that defines human trafficking negates this argument because the Protocol uses the phrase “for the purpose of exploitation.”¹²³ This implies that the

111 *Id.*

112 *Id.* at p. 543.

113 *Id.*

114 OBOKATA, *supra* note 23, at 449.

115 MITCHELL, *supra* note 19.

116 OBOKATA, *supra* note 23, at 449.

117 *Id.* at 449–50.

118 *Id.*

119 *Kunarac*, *supra* note 110, at p. 442.

120 OBOKATA, *supra* note 23, at 450

121 *Id.*

122 *Id.*

123 Protocol, *supra* note 35, Art. 3.

mens rea, not necessarily an *actus reus*, of exploitation must be met in order to prove human trafficking.¹²⁴ Therefore, human trafficking would still be present in this situation but it would not rise to the level of enslavement and therefore other categorizations must be examined for these unique circumstances.

Another act enumerated in Article 7 of the Rome Statute that may include human trafficking would be the act of forcible transfer.¹²⁵ Forcible transfer is mentioned in Article 7(1)(d) and is defined as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”¹²⁶ There is some debate over what is included in the term forcible but the Preparatory Commission under the International Criminal Court anticipated this.¹²⁷ As a result, ‘forcible’ does not only include physical force but may also include other tactics such as threat of force or coercion.¹²⁸ These tactics may strong-arm an individual into submission and compliance caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.¹²⁹

This section does not imply that the actor has to be a state actor or act with the support, approval or acquiescence of a state actor.¹³⁰ Article 7(1)(d) also does not require that the forcible transfer be made across international borders, meaning as long as they were lawfully present in the State where the trafficking began, any displaced civilian population may qualify as a victim of forcible transfer.¹³¹ The aspect of being lawfully present in the State where the victim was originally abducted is a potential issue, though it is not completely insurmountable given that most victims are abducted in their home countries or while legally traveling to other countries. However, one counter concern would be that this section alone would not protect illegal immigrants, who studies show are often the victims of human trafficking.¹³² For this reason, other acts enumerated in Article 7 must be considered.

A broader category listed in Article 7 that may include human trafficking is “other inhumane acts”.¹³³ The acts encompassed in this subsection are not enumerated specifically but are described as being similar in character to the other

124 OBOKATA, *supra* note 23, at 450.

125 Rome Statute, *supra* note 54, Art. 7(1)(d).

126 *Id.*

127 *Id.* at Art. 7 (2)(d).

128 *Id.* at Art. 7 (1)(d).

129 Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 11.

130 *Id.*

131 *Id.*

132 OBOKATA, *supra* note 23, at 450.

133 Rome Statute, *supra* note 54, Art. 7(1)(k).

acts mentioned in Article 7 and “must entail intentionally causing great suffering or serious injury to body or to mental or physical health.”¹³⁴ Upon considering the conditions which many trafficked individuals are forced to endure, it would be difficult to imagine human trafficking not being encompassed in “other inhumane acts”. “Intentionally causing great suffering” may easily be satisfied when taking into account the conditions the victims are forced to travel in. For instance, many times the victims are shipped in shipping containers with no ventilation and very limited, if any, food and water.¹³⁵ Victims have also been hidden in trucks or packed into overcrowded vehicles.¹³⁶ These conditions lead to severe dehydration, exhaustion and even death on occasion.¹³⁷ This would classify as a serious injury to physical health as well considering there is a risk of death with serious dehydration and malnutrition. Victims of human trafficking have also been known to suffer sexual violence, physical aggression and other threats that affect their mental health.¹³⁸ Though this level of inhumanity may not be present to such an extreme degree in every case, these themes are all too common in the practice of human trafficking. Even on the smallest scale, inhumanity against the civilian population is a threat to justice.

3.2 Can Human Trafficking Satisfy the Requirements?

Article 7 of the Rome Statute further sets out the foundation for what may be considered a crime against humanity in Section 1 by reiterating that the enumerated crimes listed may only be considered a crime against humanity when they meet the elements of a crime against humanity.¹³⁹ For the purpose of this Statute, “‘crime against humanity’ means any of the enumerated crimes committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”¹⁴⁰

This requirement has three elements. The crime must be 1) part of a widespread or systematic attack, 2) directed against any civilian population and 3) with the offender having knowledge of the attack.¹⁴¹ Each element should be examined individually to see if human trafficking can satisfy these requirements.

¹³⁴ *Id.*

¹³⁵ BRUNKER, Mike. *Human Smugglers Try New Tactic*, NBCNews.com. [online]. Available at: <http://www.nbcnews.com/id/3339957/t/human-smugglers-try-new-tactic/#.Wth3pd-PwaSM> Accessed: 27.03.2018

¹³⁶ COHEN, Luc. *94 Migrants Found Packed In ‘Overcrowded’ Truck Bound For Mexico-US Border*, NBCNews.com. [online]. Available at: <https://www.nbcnews.com/news/photo/94-migrants-found-packed-overcrowded-truck-bound-mexico-us-border-flna6C10729703> Accessed: 27.03.2018

¹³⁷ *Id.*

¹³⁸ OBOKATA, *supra* note 23, at 451.

¹³⁹ Rome Statute, *supra* note 54, Art. 7(1).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

The first element of a crime against humanity is that the crime must be committed as part of widespread, systematic attack.¹⁴² The aggregate test mentioned in *Prosecutor v. Kordic* suggests that widespread and systematic are disjunctive requirements.¹⁴³ The requirement can be written as widespread or systematic.¹⁴⁴ This reinforced Chamber II of the ICTY in the *Tadic* case where the court ruled that the requirement must only be met for widespread or systematic.¹⁴⁵ Though meeting both thresholds would certainly strengthen the case of satisfying the element as a whole, as written, meeting one threshold may be enough to prove this first element of a crime against humanity. With that in mind, the two must be examined separately. 'Widespread' is defined as the inhumane acts committed on a large scale meaning that the acts are directed against a multiplicity of victims.¹⁴⁶ The term 'large scale' can mean a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.¹⁴⁷

The *Kunarac* case also concurred in this holding by stating that the large scale attack and the number of victims are the factors to considering in determining whether or not an attack rises to the level of 'widespread'.¹⁴⁸ For example in the *Stanišić* case, the court found that the element of widespread was met where similar crimes were repeatedly committed in the same geographical area against a multiplicity of victims even though the bulk of the crimes were committed in the span of one year.¹⁴⁹ This speaks to how time can be factor in what is considered a large scale attack and in turn can rise to the level of widespread in certain situations. Other factors considered in this case were the geographical location and the number of victims.¹⁵⁰ The number of victims is a factor in whether or not the attack is wide spread but the number of victims is independently relevant to each case presented.¹⁵¹ The element only requires that it be a multiplicity of victims as opposed to a war crime which can be committed directly against

142 *Id.*

143 *Prosecutor v. Dario Kordic, Mario Cerkez*, Case No. IT-95-14/2-T, Judgment, p. 179 (Int'l Crim. Trib. for the former Yugoslavia 17 Dec. 2004).

144 *Id.*

145 *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment, p. 248 (Int'l Crim. Trib. for the former Yugoslavia 15 July 1999).

146 *Id.*

147 International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*. [online]. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf Accessed: 27.03.2018

148 *Kunarac*, *supra* note 110, at p. 428.

149 *Prosecutor v. Jovica Stanišić, Franko Simatović*, Case No. IT-03-69-T, Judgement, p. 971 (Int'l Crim. Trib. for the former Yugoslavia 30 May 2013).

150 *Id.*

151 HARALDSEN. *Human Trafficking as a Crime Against Humanity*. [online]. Available at: <https://www.duo.uio.no/bitstream/handle/10852/40117/LLM-PIL-THESIS-MAY-2014.pdf?sequence=1&isAllowed=y> Accessed: 27.03.2018

one individual.¹⁵² However, *Kunarac* examined the difference between a singular attack against one person without context and a singular attack against an individual with relevant context that contributes to an extraordinary magnitude rather than a series of inhumane acts.¹⁵³ For example, the *Kunarac* case emphasized this requirement by analogizing that a turning in a Jewish neighbor to the Nazi authorities in the time of widespread Jewish persecution can be a crime against humanity.¹⁵⁴ Without the widespread persecution, this would not constitute the widespread requirement of a crime against humanity.¹⁵⁵ Therefore, regarding what is widespread, the context and magnitude of the act can eliminate the need for a series of acts by a single perpetrator.

The second option to satisfy the first element is proof that a crime is 'systematic'.¹⁵⁶ In order to be classified as 'systematic', it must be proven that the attack was organized.¹⁵⁷ There is much debate on this element and what must be proven in order to show the attack is 'systematic'.¹⁵⁸ In the ICTY trial chamber in the *Stanišić* case, it was held that the threshold of being 'systematic' is met when the attack is organized in nature; though this level of organization can be evidenced through the existence of a plan and policy set forth, a plan or policy is not a requirement to meet the systematic element.¹⁵⁹ The ICTY has since continually held that it will not enforce a strict requirement of a preconceived policy or plan and will instead focus on any evidence that can be used to show the improbability of random occurrence.¹⁶⁰ The reasoning behind this standard emphasizes that non accidental repetition of crimes shows a level of regularity which is evidence of an organized system.¹⁶¹ Contrastingly, the ICTR court in *Musema*, held that a preconceived plan or policy is a requirement to meet the systematic requirement; however the plan or policy does not have to be formally adopted by the State.¹⁶²

The ICC has tended to side with the reasoning of the ICTY and has focused more on factors that can be used to show there is a systematic nature without requiring a plan or policy. For example, the ICC held in *Kenyatta* that even just the precise identification of targets is enough to show a systematic nature.¹⁶³ The

152 *Prosecutor v. DU[KO TADI]*, Case No. IT-94-1-T, Judgment), ¶ 649 (Int'l Crim. Trib. for the former Yugoslavia 7 May 1997).

153 *Kunarac*, *supra* note 110, at p. 431.

154 *Id.*

155 *Id.*

156 Rome Statute, *supra* note 54, Art. 7(1).

157 HARALDSEN, *supra* note 151.

158 *Id.*

159 *Jovica*, *supra* note 149, at p. 963.

160 *Kunarac*, *supra* note 110, at p. 429.

161 *Id.*

162 *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment), p. 206 (Int'l Crim. Trib. for Rwanda 27 Jan. 2000).

163 *Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Pretrial Chamber, p. 176 (Int'l Crim. Ct. 23 Jan. 2012).

Pretrial Chamber used the planning to show evidence of a system rather than a requirement of its own. Other factors considered were

- (i) the ferrying of attackers from other locations specifically for the purpose of the attack;
- (ii) the recruitment of new members in the Mungiki organization specifically for the purpose of participating in the attack;
- (iii) the provision of uniforms and weapons to the attackers; and
- (iv) the precise identification of the targets of the attack.

Together these pieces of evidence show that there was a systematic nature of the attack in this case and give an outline of the kinds of factors the ICC looks at when considering whether the attack is systematic.¹⁶⁴

The second element required of a crime against humanity is that the attack must be “directed towards a civilian population”.¹⁶⁵ According to section (2)(a) of Article 7 of the Rome Statute: “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”.¹⁶⁶

The statute itself states that any of the enumerated crimes would meet the attack aspect of this element.¹⁶⁷ However to define civilian population, case law must be examined. The *Jelisić* court has defined a civilian population as a group of individuals identifiable by its collective nature.¹⁶⁸ The civilian population is differentiated from the rest of society by some identifiable characteristic that every member of the population shares in common.¹⁶⁹ Examples of characteristics that have been known to constitute a civilian population include those of “persons who share a religious, national, ethnic, linguistic, or other background, often in conflict with that of the perpetrator.”¹⁷⁰ Therefore, motivation for targeting a civilian population must stem from one of the common characteristics of the group.¹⁷¹ Rarely, the motivation can be financial as long as there is still targeting of that particular population due to an increased vulnerability due to one of the characteristics mentioned.¹⁷² Indiscriminant targeting for purposes of

¹⁶⁴ *Id.* at p. 158.

¹⁶⁵ Rome Statute, *supra* note 54, Art. 7(1).

¹⁶⁶ *Id.* at Art. 7(2)(a).

¹⁶⁷ *Id.* at Art. 1.

¹⁶⁸ *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, p. 54 (Int’l Crim. Trib. for the former Yugoslavia 5 July 2001).

¹⁶⁹ HARALDSEN, *supra* note 151, at 24.

¹⁷⁰ SCHLOENHARDT, Andreas. *Transnational Organised Crime and the International Criminal Court Developments and Debates*, UQLawJl 4. [online]. Available at: <http://www.austlii.edu.au/au/journals/UQLawJl/2005/4.html#fn46> Accessed: 27.03.2018

¹⁷¹ *Id.*

¹⁷² *Id.*

financial gain alone, however, does not meet the requirement of being directed towards that population.¹⁷³

The third element of crimes against humanity which requires the perpetrator to know that his or her acts constitute part of the attack.¹⁷⁴ The element speaks to the mens rea required for a crime against humanity.¹⁷⁵ According to the *Kunarac* court, this element

- requires that there is a nexus between the acts of the accused and the attack, which
- consist of: (1) the commission of an act which, by its nature or consequences, is
- objectively part of the attack; coupled with, (2) knowledge on the part of the accused that
- there is an attack on the civilian population and that his act is part of the attack.¹⁷⁶

This definition was broadened by reasoning that the knowledge does not have to be subjective to the attacker.¹⁷⁷ There simply needs to be an objective view that the attacker knew his acts would contribute to the widespread systematic attack directed at a civilian population or that his acts could objectively be viewed as contributing to the attack.¹⁷⁸ However, the case does not go as far as to suggest that the attacker must have knowledge of the plan or system in place, only that an widespread systematic attack exists.¹⁷⁹ This mens rea determination seems to be the hardest element to meet and is in turn done on a case by case basis.

4 Applying the crimes against humanity framework to the situation in Myanmar

4.1 Prelude to the Current Situation

The Rohingya are an ethnic minority within parts of Asia including Myanmar, formally known as Burma.¹⁸⁰ Rohingyas identify themselves as an ethnic group sharing a common Muslim background, culture and history.¹⁸¹ Though the Rohingyas have been in Myanmar since the 8th century, Myanmar refuses to further recognize this group of individuals in their two classes of citizens which

173 *Id.*

174 Rome Statute, *supra* note 54, Art. 7(1).

175 HARALDSEN, *supra* note 151, at 29.

176 *Kunarac*, *supra* note 110, at p. 418.

177 *Id.*

178 *Id.*

179 *Id.*

180 Al Jazeera Media Network, *Who are the Rohingya?* [online]. Available at: <https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html>

Accessed: 27.03.2018

181 *Id.*

leaves Rohingyas stateless.¹⁸² Therefore, the Rohingya are left vulnerable to the government in the area where they reside and yet have no say in that government.¹⁸³

The Rohingyas have been subjected to much violence, often at the hands of that very government.¹⁸⁴ One of the most serious attacks, named “Operation Dragon King” was commenced by the Burmese Head of State, General Ne Win in 1977.¹⁸⁵ This operation was targeted towards a nationalization program that uses ethnic cleansing to achieve Burmese socialism.¹⁸⁶ In the course of this operation, over 200,000 Rohingyas were displaced and

subjected to vulnerabilities of such.¹⁸⁷ During this attack, the Burmese army raped and killed many Rohingya women.¹⁸⁸ This violence led to the Bangladeshi government setting in to welcome the Rohingya fleeing from the ethnic cleansing.¹⁸⁹ However, Bangladesh has very limited resources itself and as a result 10,000 Rohingya died due to illnesses and starvation.¹⁹⁰

In 1992, Bangladesh, with the support of the UN sent the Rohingya refugees back to Myanmar.¹⁹¹ The Burmese armies were unwilling to accept this and began to execute the refugees.¹⁹² Other reported acts of violence against the Rohingya include the destruction of mosques and killing of the Rohingya by the Buddhists in Arkan in 2001.¹⁹³ In 2012, a similar attack happened by the Buddhists against the Rohingya leaving the Rohingya vulnerable and susceptible to human trafficking.¹⁹⁴

Since then there has been widespread forced labor of the Rohingya men by the Burmese government in Myanmar.¹⁹⁵ Myanmar was even being formally

182 HARALDSEN, *supra* note 151, at 37–38.

183 *Id.*

184 NIAMVANICHKUL, Nodwarang, *Human Trafficking For Sexual Exploitation In Southeast Asia*. [online]. Available at: <http://stars.library.ucf.edu/cgi/viewcontent.cgi?article=3670&context=etd> Accessed: 27.03.2018

185 HARALDSEN, *supra* note 151, at 40.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.*

191 Human Rights Watch, *The Government Could Have Stopped This*. [online]. Available at: https://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf Accessed: 27.03.2018

192 HARALDSEN, *supra* note 151, at 40.

193 *Id.*

194 *Id.*

195 International Labour Organization, *Forced labour in Myanmar (Burma)*. [online]. Available at: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> Accessed: 27.03.2018

observed by the International Labor Organization.¹⁹⁶ In 1996, a formal complaint was filed against Myanmar under the International Labor Organization's Constitution due to the Myanmar's clear refusal to follow the 1930 Forced Labor convention.¹⁹⁷ In 2000, a resolution was adopted by the ILO governing body and it clearly condemned the use of the systematic forced labor of the Rohingyas.¹⁹⁸ This seemed to lead to progress until the political shift in 2004.¹⁹⁹ Three of the Rohingyas that were subjected to forced labor were executed by the government after reporting this to the International Labor Organization and the officers who received the reports began to receive death threats.²⁰⁰ The International Labor Organization recommended further action to be taken against Myanmar for violating the 1930 Convention and even considered referring this case to the International Criminal Court for consideration as a crime against humanity.²⁰¹ The situation is still being monitored but a reporting system has been put in place in the meantime to help combat the forced labor.²⁰²

4.2 Forced Labor of the Rohingya as a Crime against Humanity

The forced labor in Myanmar could be classified under Article 7(2)c of the Rome Statute as enslavement. As discussed previously, the cases have established that human trafficking in the form forced labor is enslavement. The Rohingyas are subjected to forced labor because “[t]here have been numerous and frequent reports of civilians being forced to serve as porters and guides for the military, to build and maintain roads, to construct military camps and to work on infrastructure projects” as reported by the Special Rapporteur for the Human Rights Council.²⁰³ For example, the men are forced into portering for the police or military and are forced to carry goods, supplies and equipment.²⁰⁴ Though the Rohingyas are not informed of how long they will be forced into portering, it often lasts several months with no compensation.²⁰⁵ The Rohingya men are abducted and forced to engage in labor for the Burmese military through the threat of death or in some instances the threat of the rape or execution of their family

196 *Id.*

197 *Id.*

198 Irish Centre for Human Rights, *Crimes against Humanity in Western Burma: The Situation of the Rohingyas*. [online]. Available at: <https://www.nuigalway.ie/media/intranet/Crimes-Against-Humanity-in-Western-Burma.pdf> Accessed: 27.03.2018

199 *Id.* at 38.

200 *Id.*

201 *Id.*

202 *Id.*

203 QUINTANA, Tomás Ojea. *Progress Report Of The Special Rapporteur On The Situation Of Human Rights In Myanmar*. [online]. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.48_en.pdf Accessed: 27.03.2018

204 Irish Centre for Human Rights, *supra* note 198, at 42.

205 *Id.*

members.²⁰⁶ Rohingya who work too slowly are beaten and if they become crippled are often left for dead.²⁰⁷

The attack against the Rohingya is not only wide spread but also systematic. The attack itself is multiple commissions of the forced labor. There are numerous instances of this occurring over multiple decades and therefore it rises to the level of an attack.²⁰⁸ As far as the widespread element, the Rohingya have been subjected to forced labor in the Rahkine area of Myanmar consistently for the past two decades with no real reprieve.²⁰⁹ As previously discussed, time is a factor that may meet the threshold of widespread, as is the geographical area. These two combined would likely meet this element. The attack is also systematic because the policies used by the Burmese military seem to encourage forced labor. Due to the military policies of requiring the forced labor of the Rohingyas, it has become a common practice for the Rohingyas to be required to nominate family members to be subjected to forced labor.²¹⁰ If no family members are chosen, or if not enough family members are chosen to satisfy the military, Rohingyas can be taken from their homes or public places and forced into labor.²¹¹ This is done without any warning or notice on the part of the abducted.²¹²

The Rohingya themselves classify as a civilian population at which an attack is directed towards. The Rohingya are an ethnic group who share a religion and culture.²¹³ They are identifiable to the people of Myanmar because unlike the native Buddhists, Rohingya are Muslim.²¹⁴ The Rohingya are also physically identifiable to the Burmese because unlike the other Burmese ethnic groups, the Rohingya often have darker complexions.²¹⁵ The Rohingya are all civilians because they are a stateless group.²¹⁶ The attack is directed against this population because the attackers purposefully target the Rohingya people and separate the Rohingya from the other groups of people in the that geographical area.²¹⁷ For example, Burmese Buddhists are not subjected to the same trafficking attack that the Rohingya are subjected to.²¹⁸ Therefore, this rises to the level of an attack directed towards a civilian population and this element would likely be met.

206 HARALDSEN, *supra* note 151, at 42.

207 Irish Centre for Human Rights, *supra* note 198, at 50.

208 HARALDSEN, *supra* note 151, at 41.

209 Al Jazeera Media Network, *supra* note 180.

210 Irish Centre for Human Rights, *supra* note 198, at 59.

211 *Id.*

212 *Id.*

213 HARALDSEN, *supra* note 151, at 38.

214 *Id.*

215 NIAMVANICHKUL, *supra* note 184 at 55.

216 HARALDSEN, *supra* note 151, at 38.

217 *Id.*

218 *Id.*

The Burmese military in this situation was aware of the attack on the Rohingya when its army enslaved the Rohingya into forced labor. Myanmar was put on notice of the epidemic of the forced labor within Myanmar when the International Labor Organization formally investigated the area and generated a report.²¹⁹ The investigation by the International Labor Organization itself was what led the to the Burmese government acknowledging that they would not recognize the Rohingya as citizens but would start a reporting system for forced labor.²²⁰ This awareness of the forced labor epidemic was relayed to country of Myanmar through the creation of the government's minimal efforts to address the forced labor.²²¹ The epidemic is even known internationally because this is what lead to Bangladesh setting policy to accept Rohingya refugees fleeing the violence and forced labor trafficking.²²² Objectively it would seem that the Burmese army, who is involved in border control of the very border between Myanmar and Bangladesh where the Rohingya are fleeing, would have to be aware of the attack. The army is also under the control of the government and the government is clearly aware of the widespread attack and they were confronted by a Human Rights Special Rapporteur who recommended a policy change. The government acknowledged this information by creating a reporting system in response. The army has even personally acknowledged the attack and taken measures to conceal the trafficking by limiting trafficking in areas that are heavily monitored by the International Labor Organization.²²³ Therefore, it can be reasoned that at minimum the army soldiers should know that their attacks could objectively be viewed as contributing to the attack. This would likely lead to the mens rea element being met.

5. Conclusion

Given the elements of a crime against humanity and considering the comparisons between the definitions of human trafficking under the Trafficking Protocol and the enumerated acts of Article 7(1) of the Rome Statute, it can be reasonably concluded that trafficking in humans can rise to the level of a crime against humanity and thereby could be under the jurisdiction of the International Criminal Court. Though there are specific circumstances in which an individual case of human trafficking may not rise to the level of the cases considered in this analysis and would not be a crime against humanity, some cases of human trafficking in the world do rise to this level. This is demonstrated in the analysis of the current status of the trafficked Rohingya people in Myanmar. Declaring human trafficking as a crime against humanity would give the Interna-

219 QUINTANA, *supra* note 203, at 14.

220 HARALDSEN, *supra* note 151, at 38.

221 *Id.* at 38–39.

222 *Id.* at 40.

223 Irish Centre for Human Rights, *supra* note 198, at 50.

tional Criminal Court jurisdiction to hear these cases.²²⁴ “In other words, direct control of the offence of trafficking may become possible at the international level.”²²⁵ This offers an opportunity for human trafficking cases to be prosecuted that are being ignored and neglected by States domestically. Ensuring human trafficking cases are heard internationally if they are not heard nationally would avoid corruption through intentional governmental ignorance of the trafficking situations. However, this domestic avoidance is circumvented by handing the case to the International Criminal Court where the judges are neutral and have no personal interests associated with these groups.²²⁶

This avenue is also directly beneficial to the human trafficking victims. In the International Criminal Court, during the trial stage, the International Criminal Court can allow the interests and views of victims to be presented, and measures such as proceedings in camera and others for their protection are provided.²²⁷ Therefore, the victims are able to get their facts to the prosecutor in order to help persuade the International Criminal Court’s Pre-Trial Chamber that the court has jurisdiction over the offense.²²⁸ The victims also have access to a trust fund under the Rome Statute which provides the victims with compensation when allowed by the Court.²²⁹

Another advantage of considering human trafficking a crime against humanity under the Rome Statute is that even when the situations in which the International Criminal Court can exercise jurisdiction are not present, raising human trafficking to a crime against humanity may give rise to universal jurisdiction.²³⁰ “Universal jurisdiction may be invoked when a crime constitutes a ‘joint concern of all States’ and is ‘of such a gravity and magnitude’ that it warrants universal prosecution and repression.”²³¹ Therefore, a state with no territorial or national link to the trafficker would be able to punish the offense.²³² This is how citizens of the world hold each other accountable. “Universal jurisdiction has been established over such offences as piracy, slave trade, genocide, war crimes, and crimes against humanity as a matter of customary law.”²³³ Universal jurisdiction helps to further the suppression of these egregious crimes.²³⁴

224 OBOKATA, *supra* note 23, at 453.

225 *Id.*

226 International Criminal Court, *Understanding the International Criminal Court*. [online]. Available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> Accessed: 27.03.2018

227 International Criminal Court, *Victims*. [online]. Available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> Accessed: 27.03.2018

228 *Id.*

229 *Id.*

230 OBOKATA, *supra* note 23, at 455.

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

All in all, classifying human trafficking as a crime against humanity is possible and would have a positive impact on international justice. Through this method, the practice of human trafficking can be further suppressed and eliminated. It is in the best interest of justice for the victims of human trafficking, and thereby the best interest of justice for all, to consider human trafficking a crime against humanity.

References

- Al Jazeera Media Network, *Who are the Rohingya?* [online]. Available at: <https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html> Accessed: 27.03.2018
- Article 2 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 25. December, 2003, 2225 U.N.T.S. 209, (Art. 3) (entered into force 29. September 2003).
- Article 7(c) of the 1956 Convention on the Abolition of Slavery.
- BRUNKER, Mike. *Human Smugglers Try New Tactic*, NBCNews.com. [online]. Available at: <http://www.nbcnews.com/id/3339957/t/human-smugglers-try-new-tactic/#.Wth-3pdPwaSM> Accessed: 27.03.2018
- City of NY. *About Human Trafficking Know It*. [online]. Available at: <http://www1.nyc.gov/site/endhumantrafficking/about/about-human-trafficking.page> Accessed at: 27.03.2018
- COHEN, Luc. *94 Migrants Found Packed In 'Overcrowded' Truck Bound For Mexico-US Border*, NBCNews.com. [online]. Available at: <https://www.nbcnews.com/news/photo/94-migrants-found-packed-overcrowded-truck-bound-mexico-us-border-flna6C10729703> Accessed: 27.03.2018
- HARALDSEN. *Human Trafficking as a Crime Against Humanity*. [online]. Available at: <https://www.duo.uio.no/bitstream/handle/10852/40117/LLM-PIL-THESIS-MAY-2014.pdf?sequence=1&isAllowed=y> Accessed: 27.03.2018
- Human Rights Watch, *The Government Could Have Stopped This*. [online]. Available at: https://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf Accessed: 27.03.2018
- International Committee of the Red Cross. *Treaties, States Parties and Commentaries*. [online]. Available at: <https://ihl-databases.icrc.org/ihl/INTRO/585?OpenDocument> Accessed: 27.03.2018
- International Criminal Court, *Understanding the International Criminal Court*. [online]. Available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> Accessed: 27.03.2018
- International Criminal Court, *Victims*. [online]. Available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> Accessed: 27.03.2018
- International Labour Organization, *Forced labour in Myanmar (Burma)*. [online]. Available at: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> Accessed: 27.03.2018
- International Labour Organization. *Forced Labour, Modern Slavery and Human Trafficking*. [online]. Available at: <http://www.ilo.org/global/topics/forced-labour/lang-en/index.html> Accessed: 27.03.2018

- International Labour Organization. *ILO Action Against Trafficking in Human Beings*. Geneva. [online]. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_090356.pdf Accessed: 27.03.2018
- International Labour Organization. *What Is Forced Labour, Modern Slavery And Human Trafficking*. [online]. Available at: <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm> Accessed: 27.03.2018
- International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*. [online]. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf Accessed: 27.03.2018
- Interpol. *Types of Human Trafficking*. [online]. Available at: <https://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Types-of-human-trafficking> Accessed: 27.03.2018
- Irish Centre for Human Rights, *Crimes against Humanity in Western Burma: The Situation of the Rohingyas*. [online]. Available at: <https://www.nuigalway.ie/media/intranet/Crimes-Against-Humanity-in-Western-Burma.pdf> Accessed: 27.03.2018
- League of Nations. Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 60 L.N.T.S. 253.
- MORAN, Clare Frances. *Human Trafficking And The Rome Statute Of The International Criminal Court*, The Age of Human Rights Journal, 2014, vol. 3, pp. 32.
- MITCHELL, Firouzeh. *Human Trafficking: A Crime Against Humanity Under The ICC?* [online]. Available at: http://gulawreview.org/entries/international-law/human-trafficking-crime-against-humanity#_ftnref9 Accessed: 27.03.2018
- NIAMVANICHKUL, Nodwarang. *Human Trafficking For Sexual Exploitation In Southeast Asia*. [online]. Available at: <http://stars.library.ucf.edu/cgi/viewcontent.cgi?article=3670&context=etd> Accessed: 27.03.2018
- OBOKATA, Tom. *Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System*, 2005, vol. 54, no. 2, pp. 445–457.
- Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment), p. 206 (Int'l Crim. Trib. for Rwanda 27 Jan. 2000).
- Prosecutor v. Dario Kordic, Mario Cerkez*, Case No. IT-95-14/2-T, Judgment, p. 179 (Int'l Crim. Trib. for the former Yugoslavia 17 Dec. 2004).
- Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, (Int'l Crim. Trib. for the former Yugoslavia 22 Feb. 2001).
- Prosecutor v. DU[KO TADI]*, Case No. IT-94-1-T, Judgment), p. 649 (Int'l Crim. Trib. for the former Yugoslavia 7 May 1997).
- Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment, p. 248 (Int'l Crim. Trib. for the former Yugoslavia 15 July 1999).
- Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Pretrial Chamber, p. 176 (Int'l Crim. Ct. 23 Jan. 2012).
- Prosecutor v. Goran Jelusic*, Case No. IT-95-10-A, Judgment, p. 54 (Int'l Crim. Trib. for the former Yugoslavia 5 July 2001).
- Prosecutor v. Jovica Stanišić Franko Simatović*, Case No. IT-03-69-T, Judgement, p. 971 (Int'l Crim. Trib. for the former Yugoslavia 30 May 2013).
- Protocol against the Smuggling of Migrants by Land, Sea and Air, Art. 3, 15 November 2000, 2241 U.N.T.S. 507 d.
- QUINTANA, Tomás Ojea. *Progress Report Of The Special Rapporteur On The Situation Of Human Rights In Myanmar*. [online]. Available at: <http://www2.ohchr.org/english/>

- bodies/hrcouncil/docs/13session/A.HRC.13.48_en.pdf Accessed: 27.03.2018
- Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 11.
- Rome Statute of the International Criminal Court, Art. 5, 17 July, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF. 183/9 (1998) (entered into force 1. July, 2002).
- SCHLOENHARDT, Andreas. *Transnational Organised Crime and the International Criminal Court Developments and Debates*, UQLawJl 4. [online]. Available at: <http://www.austlii.edu.au/au/journals/UQLawJl/2005/4.html#fn46> Accessed: 27.03.2018
- UN Convention against Transnational Organized Crime, Art. 3, 29 September 2003, 2225 U.N.T.S. 209.
- UN Regional Information Centre for Western Europe. *Human Trafficking*. [online]. Available at: <https://www.unric.org/en/human-trafficking> Accessed: 27.03.2018
- UN Office on Drugs and Crime. *Human Trafficking*. [online]. Available at: <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> Accessed: 27.03.2018
- UN Office on Drugs and Crime. *Human Trafficking FAQs*. [online]. Available at: <http://www.unodc.org/unodc/en/human-trafficking/faqs.html> Accessed: 27.03.2018
- UN Office of Drugs and Crime. *Migrant Smuggling*. [online]. Available at: https://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html#What_is_Migrant_Smuggling Accessed: 27.03.2018
- UN Office on Drugs and Crime. *Trafficking in Persons for the Purpose of Organ Removal*. [online]. Available at: https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf Accessed: 27.03.2018
- UN Office on Drugs and Crime. *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. [online]. Available at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> Accessed: 27.03.2018
- UN Office on Drugs and Crime. *UNODC on Human Trafficking and Migrant Smuggling*. [online]. Available at: <https://www.unodc.org/unodc/en/human-trafficking/index.html> Accessed: 27.03.2018
- UN Office on Drugs and Crime. *UNODC Report on Human Trafficking Exposes Modern Form of Slavery*. [online]. Available at: <http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html> Accessed 27.03.2018
- UNICEF USA. *What Fuels Human Trafficking?* [online]. Available at: <https://www.unicefusa.org/stories/what-fuels-human-trafficking/31692> Accessed: 27.03.2018
- US Department of State. *Trafficking in Persons Report*. [online]. Available at: <https://www.state.gov/documents/organization/34158.pdf> Accessed: 27.03.2018