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Trafficking in Persons and the International Criminal Court: Amending the Rome Statute to Include a Fifth Core Crime

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I. INTRODUCTION

Human trafficking (also known as “trafficking in persons”) is one of the most alarming violations of human rights that affects the entire world. It represents the world’s third largest and most profitable crime industry.¹ In 2014, the International Labour Organization (“ILO”) estimated that human trafficking generates annual profits as high as \$150 billion.² A 2017 study from the ILO also estimated that, on any given day in 2016, there were 24.9 million victims of human trafficking around the world.³ Of the 24.9 million victims, the ILO estimated that 20.1 million victims were victims of labor trafficking—10.9 million victims were women, 9.2 million victims were men, and 3.3 million were children.⁴ The ILO lastly estimated that the remaining 4.8 million victims were victims of commercial sexual exploitation (or sex trafficking)—3.8 million victims were adults, and 1 million were children.⁵ Globally, women and girls made up 99% of victims of sex trafficking.⁶ Despite the severity and gravity of this crime, creating domestic criminal systems capable of prosecuting human trafficking has been the primary legal response.⁷ However, the statistics show that the current international human rights framework is not enough to truly combat this crime. This presents a crucial opportunity for the International Criminal Court (“ICC”) to be

¹ Romina Morello & Frederika Schweighoferova, *Taking Down One of the World’s Largest and More Profitable Criminal Industries: Trafficking in Persons (Part I)*, HARV. INT’L L. J., <https://harvardilj.org/2021/05/taking-down-one-of-the-worlds-largest-and-more-profitable-criminal-industries-trafficking-in-persons-part-i/>.

² *ILO says forced labour generates annual profits of US\$ 150 billion*, INTERNATIONAL LABOUR ORGANIZATION (May 20, 2014), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang--en/index.htm.

³ Emma Ecker, *Breaking Down Global Estimates of Human Trafficking*, HUMAN TRAFFICKING INSTITUTE (Jan. 12, 2022), <https://traffickinginstitute.org/breaking-down-global-estimates-of-human-trafficking-human-trafficking-awareness-month-2022/>). This figure includes both commercial sexual exploitation and forced labor exploitation, both in the private sector and state imposed.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter U.N. Trafficking Protocol or Protocol].

the only permanent international judicial body helping end the impunity so frequently enjoyed by individuals committing the crime of human trafficking.

The ICC is the first permanent, treaty-based international criminal court.⁸ On July 17, 1998, the international community reached an incredible milestone when 120 countries adopted the Rome Statute—the legal basis for establishing and governing the ICC.⁹ Then, on July 1, 2002, after being ratified by 60 countries, the Rome Statute went into force and created the ICC.¹⁰ Currently, 123 countries are State Parties to the Rome Statute.¹¹ The significance of the ICC is that it is an international criminal court to prosecute individuals, whereas many other international courts only handle disputes between States.¹² Since individual responsibility for international crimes could easily go unpunished, the international community needed a forum to enforce justice against individuals who commit egregious crimes.¹³ Additionally, individuals cannot circumvent prosecution by the ICC through immunity—acting in “an official capacity as a head of state, member of government or parliament or as an elected representative or public official in no way exempts a person from prosecution.”¹⁴ Military commanders may also be held responsible for criminal offences committed by individuals under their effective command, control, or authority.¹⁵

The ICC’s jurisdiction covers “the most serious crimes of concern to the international community as a whole.”¹⁶ The four core crimes within the ICC’s jurisdiction include the crime of

⁸ The ICC at a Glance, INT’L CRIM. CT., <https://www.icc-cpi.int/sites/default/files/Publications/ICCAatAGlanceENG.pdf> (last visited May 10, 2023).

⁹ *Id.*

¹⁰ *Id.*

¹¹ The States Parties to the Rome Statute, INT’L CRIM. CT., <https://asp.icc-cpi.int/states-parties> (last visited May 10, 2023).

¹² ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, <https://legal.un.org/icc/general/overview.htm> (last visited Mar. 29, 2023).

¹³ *Id.*

¹⁴ The ICC at a Glance, *supra* note 8.

¹⁵ *Id.*

¹⁶ Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁷ At the heart of the Rome Statute is the idea that national criminal justice systems should handle these types of cases first and foremost.¹⁸ The role of the ICC, then, is to be “complementary to national criminal jurisdictions.”¹⁹ Since the Court is not meant to replace national courts, the ICC prosecutes cases only if “national justice systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely.”²⁰ In the context of human trafficking, the ICC would not replace the responsibility that national criminal jurisdictions hold to address this crime. Rather, it would serve as a complementary forum to prosecute individuals when national forums do not carry out proceedings or when they are unwilling or unable to carry out such proceedings genuinely. Therefore, this paper will first analyze how the ICC could prosecute human trafficking under the current framework of the Rome Statute and highlight how this framework—with the situation in Libya as an example—does not lead to successful prosecutions of traffickers. The paper will then analyze whether “trafficking in persons” should be added as an underlying act of crimes against humanity, noting that certain threshold requirements for crimes against humanity would also make this alternative ineffective. Lastly, the paper will explain why trafficking in persons can be considered an international crime already within the ICC’s jurisdiction and how an international treaty from the United Nations provides a useful guide for an amendment to the Rome Statute. Consequently, the most effective route for the ICC is to amend the Rome Statute to include the crime of trafficking in persons as the fifth core crime within its jurisdiction.

¹⁷ *Id.*

¹⁸ Paul Seils, *What is Complementarity?*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/sites/default/files/subsites/complementarity-icc/>.

¹⁹ Rome Statute, *supra* note 16, art. 1.

²⁰ The ICC at a Glance, *supra* note 8.

II. PRELIMINARY STATEMENT OF THE ISSUE

The Rome Statute currently does not explicitly include the crime of trafficking in persons as one of its core crimes. In theory, individuals responsible for human trafficking could be charged under crimes against humanity given the inclusion of “enslavement,” “sexual slavery,” and “other inhumane acts” as underlying acts of crimes against humanity.²¹ In addition to satisfying the definitions of these crimes, the threshold requirements implemented for all crimes against humanity would have to be satisfied for traffickers to successfully be prosecuted under the Rome Statute’s current framework. To date, however, the ICC has not prosecuted an individual for human trafficking, in part, because “the laws are not fully equipped to help the victims.”²² Given the widespread impact of human trafficking around the world, an international criminal court could play a significant role in holding traffickers responsible, deterring others from committing the crime, and advancing justice for victims of human trafficking. The ICC ideally could carry this role, but lack of a precise and accurate definition of “trafficking in persons” is a significant impediment for the Court. The Rome Statute must have comprehensive provisions for trafficking in persons for the ICC to complement domestic criminal justice systems well and prosecute perpetrators in an effective manner. This can only be accomplished if the Rome Statute is amended to include trafficking in persons as an independent core crime under Article 5.

III. DESCRIPTION OF THE PROBLEM

Even though 181 countries have become parties to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (“U.N. Trafficking Protocol”)—which requires countries that ratify the treaty to criminalize human trafficking and develop anti-trafficking laws

²¹ Molly Ma et al., *Modernizing the International Criminal Court*, PARLIAMENTARIANS FOR GLOB. ACTION, at 39, ¶ 97.

²² Julia Crawford, *Could the ICC Address Human Trafficking as an International Crime?*, JUSTICEINFO.NET (June 17, 2019), <https://www.justiceinfo.net/en/41684-could-icc-address-human-trafficking-international-crime.html>.

in line with the Protocol’s legal provisions²³—the number of victims of human trafficking around the world demonstrates the insufficiency of the existing legal frameworks in domestic and international jurisdictions. The capacity to adjudicate trafficking cases has deteriorated in recent years, especially during the COVID-19 pandemic.²⁴ Studies have also shown that weak domestic criminal justice responses to human trafficking may be “incentivizing traffickers to operate nationally and transnationally” from, for example, countries in South Asia and in Sub-Saharan Africa.²⁵ Furthermore, the Russia-Ukraine War raises concern because conflicts increase vulnerability to trafficking both inside and outside the areas of conflict.²⁶ Displaced populations—forced to flee and often in economic need—are easily targeted by traffickers.²⁷

Within the international human rights framework, States assume obligations and duties under international law to respect, protect, and fulfill human rights.²⁸ International criminal prosecutions at the ICC could strengthen this framework. The international human rights movement became more significant when the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948.²⁹ The Declaration was the first instrument to explicitly state basic civil, economic, political, cultural, and social rights that all humans should enjoy.³⁰ Since then, the international human rights framework was further developed by a series of international human rights treaties and other instruments such as declarations, guidelines, and

²³ The Protocol, UNODC, <https://www.unodc.org/unodc/en/human-trafficking/protocol.html> (last visited Mar. 29, 2023).

²⁴ *Global Report on Trafficking in Persons 2022*, UNITED NATIONS, at 18, https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf (last visited May 8, 2023).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ International Human Rights Law, UNITED NATIONS, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> (last visited May 10, 2023).

²⁹ *Id.*

³⁰ *Id.*

principles.³¹ Ultimately, the protection of human rights depends upon the establishment of both national and international human rights laws. At the national level, States that become parties to international treaties are expected to respect, protect, and fulfill human rights.³² That is, governments must implement domestic measures and legislation consistent with their treaty obligations.³³ To respect human rights means States “must refrain from interfering with or curtailing the enjoyment of human rights.”³⁴ To protect human rights means States are required “to protect individuals and groups against human rights abuses.”³⁵ Lastly, the obligation to fulfill means States “must take positive action to facilitate the enjoyment of basic human rights.”³⁶ Consequently, many domestic jurisdictions have comprehensive and efficient mechanisms to respect, protect, and fulfill human rights. Nonetheless, an international forum for criminal prosecutions could strengthen this framework because—through complementarity—it could fill in the gaps that exist for some domestic enforcement mechanisms. While it is beneficial to primarily rely upon domestic jurisdictions to enforce human rights laws, the international human rights framework is insufficient without international criminal prosecutions because some domestic forums do not have human rights laws in place or are unable or unwilling to enforce their human rights laws.

If an international forum is going to provide complementary enforcement of laws criminalizing human trafficking, this forum must be able to enforce these laws effectively to curtail this widespread crime. The world has changed drastically since the creation of the ICC. Perpetrators of serious crimes of concern to the international community are enjoying impunity

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

because the legal framework of the Rome Statute has crucial gaps. As it stands, the legal framework to prosecute the crime of trafficking in persons under the Rome Statute does not fully encompass how this crime is committed. The narrow definition of trafficking in persons under crimes against humanity severely misses key elements of the crime. As such, regardless of how much the Office of the Prosecutor (“OTP”) may wish to prosecute individuals for this crime, the likelihood of successfully doing so with the ICC’s current limitations is low. The lines must be redrawn if the ICC is truly going to help end impunity and advance justice in the world.

IV. STATEMENT OF THE THESIS

For the ICC to effectively prosecute individuals for human trafficking, the Rome Statute should be amended to include a comprehensive definition of trafficking in persons, thus adding a fifth crime to the core crimes within the ICC’s jurisdiction. The Rome Statute’s current legal framework mentions that trafficking in persons is covered by underlying acts of crimes against humanity such as enslavement and sexual slavery. Nonetheless, the ICC has never prosecuted a trafficker because the definition of human trafficking under this framework is too narrow and imprecise. Amending the Rome Statute to include a comprehensive definition of trafficking in persons as an underlying act of crimes against humanity would improve the legal framework. This approach, however, still would not result in the ICC prosecuting traffickers in an effective manner because the threshold elements that must be established for all crimes against humanity would inhibit prosecution of many forms of human trafficking. Therefore, the Rome Statute should be amended to establish trafficking in persons as the fifth core crime within the ICC’s jurisdiction. Using the U.N. Trafficking Protocol as a guide for the definition of human trafficking, the ICC could become a vital international forum where traffickers are held accountable and victims receive the justice they are owed.

V. ANALYSIS

A. Current Prosecution of Human Trafficking under the Rome Statute

Although it is unclear why human trafficking was not explicitly included in the Rome Statute, some scholars argue that the ICC can prosecute the crime under the existing framework of the Rome Statute.³⁷ Specifically, one perspective is that crimes against humanity encompasses human trafficking under one of its underlying acts: enslavement, sexual slavery, or “other inhuman acts.”³⁸ Enslavement 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.”³⁹ Sexual slavery is included with underlying acts like rape, enforced prostitution, forced pregnancy, enforced sterilization, or “any other form of sexual violence of comparable gravity.”⁴⁰ Lastly, crimes against humanity has a catch-all provision specifying that “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” may also qualify as an underlying act. Thus, it seems like human trafficking (both labor and sex trafficking) falls under crimes against humanity.⁴¹ Textually, there is a valid argument that the ICC should be able to prosecute human trafficking with one or multiple of these underlying acts. The disconnect, however, between the ICC’s ability to prosecute the crime and the complete lack of cases brought demonstrates that there are problems with the Rome Statute’s current legal framework.

The first problem is that the requirement to demonstrate ownership under the definitions of “enslavement” and “sexual slavery” is not fully encompassing of the crime of human trafficking.

³⁷ Ma et al., *supra* note 21, at 39, ¶ 97.

³⁸ *Id.*; Crawford, *supra* note 22.

³⁹ Rome Statute, *supra* note 16, art. 7(2)(c).

⁴⁰ *Id.* at art. 7(1)(g).

⁴¹ Nadia Alhadi, Note, *Increasing Case Traffic: Expanding International Criminal Court’s Focus on Human Trafficking Cases*, 41 MICH. J. INT’L L. 541, 554-55 (2020).

The fact that trafficking in persons is categorized as “slavery” under the Rome Statute (or as a crime with slavery-like features) implies that the ICC will not address the crime unless it exhibits “[an] abuse of power attaching to the ownership of a person.”⁴² This is not fully encompassing of how the crime can occur because “many instances of trafficking occur through exploitative or coercive practices without actual ownership.”⁴³ Both enslavement and sexual slavery require that the perpetrator “exercised any or all of the powers attaching to the right of *ownership* over one or more persons.”⁴⁴ This concept of ownership is further emphasized by defining the powers attaching to ownership as “purchasing, selling, lending or bartering such a person or persons.”⁴⁵ Slavery is indeed one form of human trafficking, but the Rome Statute’s requirement to show ownership of a person under enslavement and sexual slavery severely limits the scope of trafficking cases the ICC realistically could prosecute. Scholars disagree on exactly what must be established to find the crime of trafficking in persons under the Rome Statute, but other legal definitions of human trafficking—such as the U.N. Trafficking Protocol’s definition—show that exploitation, rather than ownership, is the crucial element of the crime.⁴⁶

The second problem is the threshold elements in place for all underlying acts of crimes against humanity. Specifically, to prosecute an individual, such individual must have committed the crime as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴⁷ An attack directed against any civilian population means it was done “pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁴⁸

⁴² *Id.* at 557.

⁴³ *Id.*

⁴⁴ Elements of Crimes, INT’L CRIM. CT., at 4, art. 7(1)(c), ¶ 1 (emphasis added); *Id.* at 6, art. 7(1)(g)-4, ¶ 1 (emphasis added).

⁴⁵ *Id.*

⁴⁶ Alhadi, *supra* note 33, at 558.

⁴⁷ Rome Statute, *supra* note 16, art. 7(1).

⁴⁸ *Id.* at art. 7(2)(a).

These requirements can be distinguished into five categories: (1) an attack directed against any civilian population, (2) the widespread or systematic nature of the attack, (3) a State or organizational policy, (4) a nexus between the individual act and the attack, and (5) knowledge of the attack.⁴⁹ Three of these categories are relevant when analyzing whether human trafficking can be prosecuted under the current framework of the Rome Statute. First, regarding an attack directed against any civilian population, the meaning of “attack” is not limited to military attacks.⁵⁰ Instead, the term “attack” refers to “a campaign or operation carried out against the civilian population.”⁵¹ An attack does, however, need to be directed against a civilian population as a whole and not against a “limited and randomly selected group of individuals.”⁵²

The entire civilian population of the geographical area in question does not need to be targeted, but the civilian population “must be the primary object of the attack in question and cannot merely be an incidental victim.”⁵³ Moreover, the term “civilian population” does not refer to members of armed forces and other legitimate combatants; it refers to persons who are civilians.⁵⁴ When prosecuting traffickers, it would not be difficult to establish that the victims are part of the civilian population. However, it may be difficult to meet the definition of “attack.” There are situations—such as those involving migrants or refugees—where it could be feasible to establish that the traffickers are carrying out an operation against a civilian population. Nonetheless, the fact that an attack cannot be against a limited and randomly selected group of individuals limits the type of traffickers that the ICC could prosecute.

⁴⁹ Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, March 31, 2010, ¶ 79.

⁵⁰ Elements of Crimes, *supra* note 36, at 3, art. 7, ¶ 3.

⁵¹ Situation in the Republic of Kenya, *supra* note 50, at ¶ 80.

⁵² Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 77.

⁵³ Situation in the Republic of Kenya, *supra* note 50, at ¶ 82.

⁵⁴ *Id.*

Next, the requirement for a widespread or systematic nature of an attack applies disjunctively—the attack must be either widespread or systematic.⁵⁵ This requirement exists because crimes against humanity are not meant to cover isolated or random acts.⁵⁶ Furthermore, the alleged individual acts are not obligated to be “widespread” or “systematic;” this requirement is imposed only on the attack itself.⁵⁷ The term “widespread” addresses “the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”⁵⁸ The analysis is neither “exclusively quantitative nor geographical.”⁵⁹ Rather, it refers to “both the large-scale nature of the attack and the number of resultant victims.”⁶⁰ Accordingly, a widespread attack may result either by the cumulation of a series of inhumane acts or one inhumane act of extraordinary magnitude.⁶¹

Contrastingly, the term “systematic” is concerned with the “organized nature” of the violent acts and “the improbability of their random occurrence.”⁶² It is important to analyze whether there are patterns of crimes, demonstrating that the repetition of similar criminal conduct on a regular basis was not accidental.⁶³ The International Criminal Tribunal for Rwanda (“ICTR”) defined four elements for “systematic” as (1) being thoroughly organized, (2) following a regular pattern, (3) on the basis of a common policy, and (4) involving substantial public or private resources.⁶⁴ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) similarly defined the four elements for “systematic” as (1) a political objective or plan, (2) large-scale or

⁵⁵ *Id.* at ¶ 94.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at ¶ 95.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ma et al., *supra* note 21, at 40, ¶ 99.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Situation in the Republic of Kenya, *supra* note 50, at ¶ 96.

continuous commission of crimes which are linked, (3) use of significant public or private resources, and (4) the implication of high-level political or military authorities.⁶⁵ Given the high standard encompassed by “widespread,” it is more likely that traffickers could be charged for a “systematic” attack. Human trafficking often is well-organized, whether on the local level or within a moderate or large trafficking ring. Regardless, this requirement could still limit the efficiency of prosecuting traffickers because it is a standard that does not account for the various ways that human trafficking occurs.

Third, the greatest obstacle for prosecuting human trafficking under the Rome Statute’s current legal framework is likely the requirement that an attack be committed pursuant to or in furtherance of a “State or organizational policy.” The phrase “policy to commit such attack” requires that the “State or organization actively promote or encourage such an attack against a civilian population.”⁶⁶ This requirement implies that the attack follows a regular pattern, but the policy does not need to be formalized.⁶⁷ Such a policy may be made by “groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population.”⁶⁸ An attack which is “planned, directed, or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.”⁶⁹ Regarding the term “State,” a policy adopted by regional or even local State governments could satisfy the requirement because the policy does not need to be conceived at the highest level of the State.⁷⁰

⁶⁵ *Id.*

⁶⁶ Elements of Crimes, *supra* note 36, at 3, art. 7, ¶ 3.

⁶⁷ Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 81.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Situation in the Republic of Kenya, *supra* note 50, at ¶ 89.

The term “organizational” does not have clear, defining criteria.⁷¹ Some scholars argue that only State-like organizations should qualify, but others claim the defining criterion should not be “the formal nature of a group and the level of its organization.”⁷² Rather, these scholars draw a distinction on “whether a group has the capability to perform acts which infringe on basic human values.”⁷³ Despite the arguments to exclude non-State actors from the term “organization,” organizations not linked to a State may in fact elaborate and carry out a policy to commit an attack against a civilian population.⁷⁴ Factors that may be considered when determining if an entity qualifies as an organization under the Rome Statute include:

(1) whether the group is under a responsible command, or has an established hierarchy; (2) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (3) whether the group exercises control over part of the territory of a State; (4) whether the group has criminal activities against the civilian population as a primary purpose; (5) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (6) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.⁷⁵

These factors are not a rigid legal definition and do not need to be exhaustively fulfilled.⁷⁶ Ultimately, whether a given group qualifies as an organization must be made on a case-by-case basis.⁷⁷

This requirement restricts the prosecution of human trafficking because it is not clear whether traffickers meet the definition of “organization” developed by the ICC’s jurisprudence. The structure and level of organization that traffickers utilize differ profoundly.⁷⁸ Recent studies estimate that 46% of traffickers employ a “business-like” model as organized criminal groups.⁷⁹

⁷¹ *Id.* at ¶ 90.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 92.

⁷⁵ *Id.* at ¶ 93.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Global Report on Trafficking in Persons, UNODC, Finding 10, xiii, (2022).

⁷⁹ *Id.*

These business-like type organized criminal groups involve “three or more traffickers systematically working together to traffic persons as a core component of their criminal activities.”⁸⁰ The remaining 54% is comprised of the governance type of organized criminal groups (23%), individual traffickers (10%), and opportunistic associations of traffickers (21%).⁸¹ The governance type of organized criminal groups are those “who wield security governance in a community or territory by means of fear and violence and may be involved in multiple illicit markets.”⁸² Individual traffickers typically operate on their own, and opportunistic associations of traffickers occur where two traffickers operate together (or where more than two traffickers do not systematically work together beyond a single criminal act).⁸³ Organized criminal groups account for the most detected victims and convicted offenders, but individual traffickers may still account for a significant number of victims around the world.⁸⁴ Therefore, while some organized criminal groups may satisfy the “organizational policy” requirement, it is unlikely that this would constitute an effective way to reduce human trafficking given that only a portion of traffickers may meet this requirement. Considering the limited definitions of enslavement, sexual slavery, and other underlying acts and the numerous threshold elements for crimes against humanity, the ICC cannot effectively prosecute traffickers under the current legal framework of the Rome Statute.

i. The Situation in Libya

One prominent example of how the Rome Statute’s legal framework does not allow the ICC to prosecute trafficking in persons is the Situation in Libya. In February of 2011, the U.N. Security Council referred to the ICC the situation in Libya, and the ICC opened investigations in

⁸⁰ *Id.* at 48.

⁸¹ *Id.* at xiii.

⁸² *Id.* at 48.

⁸³ *Id.*

⁸⁴ *Id.*

March of 2011.⁸⁵ The U.N. Security Council referred this situation to the ICC out of concern that the Libyan government (then under the leadership of Muammar Mohammed Abu Minyar Gaddafi) was committing crimes against humanity (such as murder, imprisonment, torture, persecution, and other inhumane acts) and war crimes (such as murder, torture, cruel treatment, and outrages upon person dignity) during the First Libyan Civil War.⁸⁶ Three cases arose out of these initial investigations.⁸⁷ Then, in a 2016 policy paper, ICC Prosecutor Fatou Bensouda shared that human trafficking was one crime she wished to focus on more.⁸⁸ She later expressed to the U.N. Security Council in 2017 that she was considering opening an investigation into migrant-related crimes in Libya—highlighting concerns about human trafficking into, through, and from Libya.⁸⁹ In 2019, the Prosecutor informed the U.N. Security Council that she was continuing to “assess the feasibility of bringing cases before the ICC in relation to crimes against migrants.”⁹⁰ She also shared that the ICC was working with a number of States and organizations “to support national investigations and prosecutions that relate to human smuggling and trafficking through Libya.”⁹¹

In the 2019 report to the U.N. Security Council, Prosecutor Bensouda noted that her Office had collected evidence indicating that crimes such as torture, unlawful imprisonment, rape, and enslavement were committed against migrants in Libya.⁹² This evidence also implicated “individuals, militias, and State actors in the migrant smuggling and trafficking business in many parts of Libya.”⁹³ Years later, in 2022, Prosecutor Karim A.A. Khan KC released a statement that

⁸⁵ Situation in Libya, INT’L CRIM. CT., <https://www.icc-cpi.int/libya> (last visited May 10, 2023).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Office of the Prosecutor, Policy paper on case selection and prioritization, INT’L CRIM. CT., Sept. 15, 2016, ¶ 7.

⁸⁹ Office of the Prosecutor, Statement of ICC Prosecutor to the UNSC on the Situation in Libya, INT’L CRIM. CT., May 9, 2017, ¶¶ 27, 29.

⁹⁰ Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), INT’L CRIM. CT., May 8, 2019, ¶ 23.

⁹¹ *Id.*

⁹² *Id.* at ¶ 22.

⁹³ *Id.*

two key suspects of crimes against victims of human trafficking and human smuggling in Libya were arrested.⁹⁴ He also expressed that the Situation in Libya remained a priority for his Office.⁹⁵ If there were a time for the ICC to offer international accountability for a grave situation of human trafficking, it would be the epidemic of trafficking in Libya.⁹⁶ Despite the Libyan government's position that it was willing to prosecute trafficking, "the lack of resources and institutional capacity to prosecute, regulate, and enforce made this difficult."⁹⁷ With a clear indication that Libya was unable to genuinely carry out investigations and prosecutions, this would have been the prime opportunity for the ICC to complement Libya's national criminal jurisdiction and prosecute traffickers. Nonetheless, the current legal framework of the Rome Statute makes actual prosecution of the crime of human trafficking unlikely, thus preventing the ICC from bringing justice to victims in dire need.⁹⁸

B. Amending Crimes Against Humanity to Include "Trafficking in Persons"

One solution proposed by scholars is to amend the underlying acts of crimes against humanity to explicitly include trafficking in persons. Seeing that the definition of enslavement includes "the exercise of such power in the course of trafficking in persons,"⁹⁹ it could be feasible for the Rome Statute to be amended to include an independent, comprehensive definition of trafficking in persons under crimes against humanity. The biggest downside of this solution, however, is that the threshold elements of crimes against humanity would still interfere with prosecuting human trafficking. In practice, the ICC would not be in much of a different position

⁹⁴ Office of the Prosecutor, Statement of ICC Prosecutor Karim A.A. Khan KC on arrest and extradition of suspects in relation to crimes against victims of trafficking in Libya, INT'L CRIM. CT., Oct. 21, 2022.

⁹⁵ *Id.*

⁹⁶ Rebecca Vasilas & Sabrina Warwick-Smith, *The International Criminal Court and Targeting Human Trafficking*, GLOBAL LAW STUDENTS ASSOCIATION (Aug. 31, 2021), <https://www.glsa.org.au/sixteen-human-trafficking>.

⁹⁷ *Id.*

⁹⁸ Crawford, *supra* note 22; *The International Criminal Court and Targeting Human Trafficking*, *supra* note 99.

⁹⁹ Rome Statute, *supra* note 16, art. 7(2)(b).

than it currently is because the threshold elements of crimes against humanity would prevent the ICC from charging many perpetrators. For example, a few organized criminal groups may satisfy the “organizational policy” requirement, but it could be difficult for the ICC to meet the high standard for “organizational policy” when the structure and the level of organization that traffickers use around the world differ greatly. This amendment could result in some prosecutions, but the narrowing impact of the threshold elements for crimes against humanity would result in continued impunity for many traffickers. Thus, while it is feasible that this type of amendment could succeed, it ultimately would not substantially alter the ICC’s ability to effectively prosecute individuals for human trafficking.

C. Adding “Trafficking in Persons” as a Core Crime under the Rome Statute

The ICC could become a crucial international forum for prosecuting traffickers if the Rome Statute is amended to include trafficking in persons as the fifth core crime within the ICC’s jurisdiction. Human trafficking has primarily been considered a transnational crime, but it is also explicitly included as a crime against humanity through the underlying acts of enslavement and sexual slavery. Although these provisions are ineffective currently, the inclusion of human trafficking under the Rome Statute demonstrates that the crime is an international crime that warrants an international response. Should the ICC follow the legal provisions for trafficking in persons under the U.N. Trafficking Protocol, the Court could be much more effective in prosecuting a crime already within its jurisdiction. Countries that have adopted the U.N. Trafficking Protocol’s framework, such as the United Kingdom, exemplify how this legal framework is more comprehensive and effective than the current state of the Rome Statute. Despite possible challenges to amending the Rome Statute, this amendment could be a pivotal step forward in the fight to combat an injustice as serious and worldwide as human trafficking.

i. Human trafficking as an international crime

Trafficking in persons is an appropriate addition to the core crimes under the Rome Statute because it is a grave and serious international crime that severely violates human rights. Under the international human rights framework, human trafficking has primarily been treated as a transnational crime. The distinction between international criminal law and transnational criminal law is often not clear. International criminal law typically refers to international public law that covers the core crimes articulated in the Rome Statute: genocide, war crimes, crimes against humanity, and the crime of aggression.¹⁰⁰ Transnational criminal law typically covers “crimes of international concern,” or treaty crimes.¹⁰¹ Transnational crimes are usually set out in treaties as crimes to be punished through domestic criminal justice systems.¹⁰² Many treaties exist that establish human trafficking as a transnational crime—the U.N. Trafficking Protocol is particularly important. Nonetheless, human trafficking also qualifies as an international crime because it is identified as such under the Rome Statute as an Article 7 crime against humanity.¹⁰³ Although the definition is too narrow and imprecise under “enslavement” and “sexual slavery,” the Elements of Crimes explicitly state that “[i]t is [] understood that the conduct described in [enslavement and sexual slavery] includes trafficking in persons.”¹⁰⁴

The classification of trafficking in persons as both a transnational and international crime is sound because this widespread and serious crime necessitates both a domestic and international response. The U.N. Trafficking Protocol (demonstrating that human trafficking is a transnational crime) is a pivotal treaty that pushes countries toward building comprehensive criminal justice

¹⁰⁰ International Legal Framework on Firearms, UNODC, <https://www.unodc.org/e4j/en/firearms/module-5/key-issues/international-public-law-and-transnational-law.html> (last visited May 10, 2023).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Rome Statute, *supra* note 16, art. 7(2)(c).

¹⁰⁴ Elements of Crimes, *supra* note 36, at 4 (n. 11), 6 (n.18).

systems capable of prosecuting traffickers. Moreover, the Rome Statute recognizes the most serious crimes of concern to the international community as a whole,¹⁰⁵ and it includes trafficking in persons as one of those crimes by placing it within underlying acts (enslavement and sexual slavery) of crimes against humanity. As a transnational crime, there are comprehensive and precise laws in place for domestic criminal justice systems to prosecute in an effective manner. As an international crime, the Rome Statute's inclusion of trafficking in persons is imprecise and narrow, resulting in nonexistent prosecution of the crime. Human trafficking is already within the ICC's subject-matter jurisdiction as an international crime,¹⁰⁶ but the Rome Statute lacks the precision and comprehensiveness needed, as seen in transnational criminal law, for the ICC to prosecute perpetrators successfully. This insufficiency must be remedied by making human trafficking an independent crime from crimes against humanity; this would provide an essential complementary connection between international and transnational operations. Moreover, amending the Rome Statute is possible since trafficking in persons is within the Court's existing subject-matter jurisdiction as an international crime.¹⁰⁷

Including trafficking in persons as an independent crime under Article 5 could accomplish the ICC's purpose of prosecuting the most serious crimes of concern to the international community while also operating within the restraints of complementarity. Given the magnitude of human trafficking around the world, domestic jurisdictions are more well-equipped to efficiently prosecute traffickers than the ICC. They have more resources than the ICC, and most domestic jurisdictions already have legislation criminalizing trafficking in persons. Human trafficking,

¹⁰⁵ Rome Statute, *supra* note 16, art. 5.

¹⁰⁶ Elena Macomber, *Broadening the Subject-Matter Jurisdiction of the International Criminal Court to Better Prosecute Twenty-First Century Harms*, MINN. J. OF INT'L L., https://minnjil.org/2023/01/25/broadening-the-subject-matter-jurisdiction-of-the-international-criminal-court-to-better-prosecute-twenty-first-century-harms/#_ftnref6.

¹⁰⁷ *Id.*

therefore, should primarily be handled by domestic forums. There is a crucial gap, however, because some domestic jurisdictions are unable or unwilling to genuinely carry out investigations and prosecutions—such as Libya. When that occurs, a heinous crime goes unpunished, perpetrators continue to pose a threat to the international community, and victims never receive justice. It would be significant, then, if the ICC could intercede and carry out what the domestic forum could not. Nevertheless, the ICC would not and could not replace domestic prosecutions of traffickers. In addition to limited resources, the Court would still have to meet the gravity threshold to prosecute a trafficker because cases are inadmissible—even if they are within the Court’s jurisdiction—if they are not “of sufficient gravity to justify further action by the Court.”¹⁰⁸ Thus, if equipped with the proper legal framework, the ICC could play a critical role in combatting a serious crime of international concern—while also adhering to complementarity—by intervening only where domestic forums cannot or will not genuinely carry out prosecutions for grave commissions of human trafficking.

ii. The U.N. Trafficking Protocol as a guide for the ICC

The U.N. Trafficking Protocol is the “first legally binding instrument with an internationally recognized definition of human trafficking.”¹⁰⁹ As of February 23, 2023, 181 countries are parties to the treaty.¹¹⁰ As such, it is an important tool for understanding how to define human trafficking and how the Rome Statute could be amended to make the ICC more effective in its prosecution on the matter. The United Nations adopted the Protocol in November of 2000.¹¹¹ The significance of this treaty is that countries that ratify it must “criminalize human

¹⁰⁸ Rome Statute, *supra* note 16, art. 17(1)(d).

¹⁰⁹ The Protocol, *supra* note 23.

¹¹⁰ *Id.*

¹¹¹ *Id.*

trafficking and develop anti-trafficking laws in line with the Protocol’s legal provisions.”¹¹² The treaty defines “trafficking in persons” as:

the recruitment, transportation, transfer, harboring 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 or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.¹¹³

The treaty also explains that the consent of a victim of human trafficking to the exploitation laid out in the definition is irrelevant.¹¹⁴ Finally, the treaty establishes that the “recruitment, transportation, transfer, harboring 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 the definition of trafficking in persons.¹¹⁵

Under the U.N. Trafficking Protocol, the crime of human trafficking consists of three core elements: act, means, and purpose.¹¹⁶ The act element is satisfied if a trafficker does one of the following to people: recruit, transport, transfer, harbor, or receive them.¹¹⁷ The means element is satisfied if a trafficker uses one or more of these methods: threat or use of force, coercion, fraud, deception, abuse of a position of vulnerability, giving payments or benefits, or abduction.¹¹⁸ Lastly, the purpose element is satisfied if the trafficker commits the act and the means for exploitation.¹¹⁹ Sexual exploitation and forced labor are two well-known forms of human trafficking, but the Protocol demonstrates that human trafficking can also be committed through debt bondage,

¹¹² *Id.*

¹¹³ U.N. Trafficking Protocol, *supra* note 7, art. 3(a).

¹¹⁴ *Id.* at art. 3(b).

¹¹⁵ *Id.* at art. 3(c).

¹¹⁶ The Crime, UNODC, <https://www.unodc.org/unodc/en/human-trafficking/crime.html> (last visited May 10, 2023).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

domestic servitude, organ removal, forced begging, forced military service (such as child soldiers), and forced marriage.¹²⁰ In light of these definitions and provisions in the U.N. Trafficking Protocols, it is clear that the Rome Statute's definition of trafficking in persons is too narrow. Enslavement and sexual slavery under the Rome Statute attach prosecution of human trafficking exclusively to situations where the perpetrators have ownership over a person,¹²¹ and this definition is drastically narrow when compared to the wide range of acts covered by the U.N. Trafficking Protocol.

Not only is the Protocol's definition precise and comprehensive, but it also has immense global support. The Trafficking Protocol is "the culmination of a global effort to harmonize the concept of trafficking in order to better combat the crime at the international level."¹²² At least 181 countries have ratified the treaty and transposed the legal standards into their domestic criminal legislation, showing almost universal acceptance for this definition of trafficking in persons and the core elements that comprise it.¹²³ The ICC has even recognized that the U.N. Trafficking Protocol is useful when interpreting enslavement in Article 7(1)(c) of the Rome Statute.¹²⁴ The U.N. Trafficking Protocol could therefore serve as the basis for an amendment to the Rome Statute. Moreover, bringing the Protocol's comprehensive definition to an international statute would be significant because the Protocol "does not create its own prosecution office or provide any means to initiate investigation and prosecution of individual perpetrators."¹²⁵ Rather, the Protocol relies on countries to conduct their own domestic prosecutions in line with the Protocol's legal provisions, but these domestic prosecutions have varying degrees of success since these anti-

¹²⁰ *Id.*

¹²¹ Rome Statute, *supra* note 16, art. 7(2)(c).

¹²² Alhadi, *supra* note 33, at 550.

¹²³ Morello, *supra* note 1.

¹²⁴ Office of the Prosecutor, Policy on Children, INT'L CRIM. CT., November 2016, 22 (n.58).

¹²⁵ Alhadi, *supra* note 33, at 553.

trafficking laws are relatively new in many countries.¹²⁶ The ICC, then, could be a valuable complementary international forum to prosecute individual perpetrators in addition to the domestic prosecutions being implemented around the world.

iii. Legislation in the United Kingdom based on the U.N. Trafficking Protocol

Recent legislation in the United Kingdom is one example of how the U.N. Trafficking Protocol is an effective guide for creating comprehensive legal provisions criminalizing human trafficking. Prior to 2015, the United Kingdom lacked consolidated legislation for human trafficking and slavery. The Modern Slavery Act 2015 (“2015 Act”), thus, is a momentous piece of legislation for the United Kingdom as it “consolidates existing offences of human trafficking and slavery and encompasses trafficking for all forms of exploitation.”¹²⁷ The 2015 Act came into effect on July 31, 2015, and it does not apply to offences committed before then.¹²⁸ The Crown Prosecution Service (“CPS”)—when giving legal guidance to prosecutors dealing with cases of modern slavery, human trafficking, and smuggling—explicitly cites to the U.N. Trafficking Protocol and states the Protocol’s definition of human trafficking.¹²⁹ Therefore, the definition of human trafficking under the 2015 Act closely resembles the definition of human trafficking from the U.N. Trafficking Protocol.

Considering this comprehensive legislation that the United Kingdom now has, the CPS prosecuted 267 defendants on trafficking charges in 2020 and 466 defendants in 2021.¹³⁰ In June

¹²⁶ *Id.*

¹²⁷ Modern Slavery, Human Trafficking and Smuggling, THE CROWN PROSECUTION SERVICE, <https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling> (last visited May 8, 2023).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 2022 Trafficking in Persons Report: United Kingdom, U.S. DEPARTMENT OF STATE, [https://www.state.gov/reports/2022-trafficking-in-persons-report/united-kingdom/#:~:text=The%20Crown%20Prosecution%20Service%20\(CPS,from%20197%20convictions%20in%202020](https://www.state.gov/reports/2022-trafficking-in-persons-report/united-kingdom/#:~:text=The%20Crown%20Prosecution%20Service%20(CPS,from%20197%20convictions%20in%202020) (last visited May 8, 2023).

of 2020, there were at least 1,845 active law enforcement investigations of suspected trafficking crimes in the United Kingdom.¹³¹ In August of 2021, there were at least 3,335 active law enforcement investigations.¹³² The biggest success for the CPS since the 2015 Act was enacted occurred in 2021. In September 2021, the media reported that three members of a gang linked to the largest human trafficking ring ever exposed in the United Kingdom were convicted.¹³³ These three defendants exploited up to 400 victims—which is the United Kingdom’s largest human trafficking prosecution to date.¹³⁴ With proper legislation to carry out successful prosecutions of traffickers, the United Kingdom has made significant progress since 2015. The United Kingdom is only one example of how the U.N. Trafficking Protocol’s legal provisions are useful and effective when carried out by domestic jurisdictions. While implementing a new legal framework can be tedious and difficult, the ICC would have a greater chance of successfully prosecuting traffickers if it had comprehensive legislation based on the legal provisions of the U.N. Trafficking Protocol, as seen in the United Kingdom.

iv. Challenges to amending the Rome Statute

Although the ICC could become an important international forum for the prosecution of traffickers, there are potential challenges that could hinder an amendment to the Rome Statute. One challenge is the amendment process laid out under the Rome Statute. Under Article 121, a State Party must propose an amendment.¹³⁵ The amendment must be submitted to the Secretary-General of the United Nations, and the Secretary-General will circulate the amendment to all States Parties.¹³⁶ Then, no sooner than three months from the date of notification, the Assembly of States

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Rome Statute, *supra* note 16, art. 121(1).

¹³⁶ *Id.*

Parties decides whether to look at the proposal.¹³⁷ This requires a majority of those present and voting.¹³⁸ If a proposal is taken up, then adoption of an amendment requires a two-thirds majority of the States Parties.¹³⁹ If this process is successful, there are also specific rules for amendments to Articles 5, 6, 7, and 8 of the Rome Statute. Any amendments to those articles “shall enter into force for those States Parties which have accepted the amendment one year after” their ratification or acceptance.¹⁴⁰ If a State Party does not accept an amendment to these articles, then the Court “shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.”¹⁴¹

The first challenge within this amendment process is that a State Party must propose the amendment. If States Parties are not particularly interested in evolving the international criminal law framework for human trafficking, then it could be difficult to put an amendment in motion. States Parties could argue that the amendment process should not be wasted on a crime that is extensively addressed through transnational criminal law, or they could argue that it would be better for the ICC to have jurisdiction over a different crime. For instance, drug trafficking is a more profitable criminal industry than human trafficking. However, the need to amend the Rome Statute to include human trafficking as an independent crime is more pressing than amending it for other crimes because human trafficking is such a severe and horrific violation of human rights. The second challenge is that amending the Rome Statute to include trafficking in persons as a core crime would require an amendment, at a minimum, to Article 5.¹⁴² This means that States Parties could avoid enforcement of the amendment simply by not accepting it because of the special rules

¹³⁷ *Id.* at art. 121(2).

¹³⁸ *Id.*

¹³⁹ *Id.* at art. 121(3).

¹⁴⁰ *Id.* at art. 121(5).

¹⁴¹ *Id.*

¹⁴² Article 5 of the Rome Statute states that the Court has jurisdiction in accordance with this Statute with respect to the following crimes: the crime of genocide; crimes against humanity; war crimes; the crime of aggression.

that apply for amendments to Articles 5, 6, 7, and 8. Since one of the primary principles guiding the operation of the ICC is complementarity, it is not surprising that amendments impacting the Court’s jurisdiction require explicit acceptance from States Parties in order to be enforceable against them. The most recent amendment to the core crimes under the Rome Statute—the crime of aggression—demonstrates the difficulties that can arise with this type of amendment.

While the crime of aggression was one of the four crimes listed in the Rome Statute when the treaty was adopted in 1998, the definition and conditions of activation and jurisdiction for the crime were not adopted until 2010 (and were updated in 2017).¹⁴³ On December 15, 2017, the Assembly of States Parties adopted a resolution to activate the ICC’s jurisdiction over the crime of aggression as of July 17, 2018.¹⁴⁴ Even though the Rome Statute has been amended, prosecution of the crime of aggression is practically impossible because the Court cannot exercise its jurisdiction if the crime is committed “by a national or on the territory of a State Party that has not ratified or accepted these amendments.”¹⁴⁵ The ICC could open an investigation for the crime of aggression if the U.N. Security Council referred a situation to the Court irrespective as to whether it involves States Parties or non-States Parties,¹⁴⁶ but this is unlikely to occur. What distinguishes the crime of human trafficking from aggression is that the crime of aggression does not have almost universal acceptance like human trafficking. An amendment for human trafficking—especially one based on the legal framework of the U.N. Trafficking Protocol—is more likely to be successful and accepted by States Parties than the controversial crime of aggression because most countries have adopted the U.N. Trafficking Protocol. It is also more likely, therefore, that the ICC could

¹⁴³ The Crime of Aggression, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression> (last visited May 10, 2023).

¹⁴⁴ Understanding the International Criminal Court, INT’L CRIM. CT., at 26, <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> (last visited May 10, 2023).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

receive a referral from the U.N. Security Council to investigate incidents of human trafficking even if some States Parties do not accept the amendment. Nevertheless, an amendment for human trafficking could effectively become inoperable (like the crime of aggression) because of the additional jurisdictional restraints for amendments made to Articles 5, 6, 7, and 8.

Beyond the amendment process itself, another challenge to amending the Rome Statute is budgetary concerns. This concern plays into the overall concern for adequate resources. The Assembly of States Parties for 2023 adopted a budget of €169,649,200, a 20.6 percent increase from last year.¹⁴⁷ While this is a substantial budget, the Court is facing an unprecedented workload this year in terms of both volume and complexity.¹⁴⁸ Perhaps the reason for this budgetary increase is due to the “[c]alls for renewed support for the ICC and enhanced cooperation to back strong international justice institutions.”¹⁴⁹ It is uncertain, however, if this level of support will continue for years to come and allow the ICC to have an increased budget. Despite the increased budget that the Court has for this year, the Court may not prioritize prosecuting traffickers because of limited resources. This year, the Court has operations in “16 situations, three simultaneous trials in three courtrooms, six cases in trial and pre-trial, ongoing reparations proceedings in five cases, and at least 10 ongoing investigations.”¹⁵⁰ Furthermore, States Parties could argue that the Court’s resources should be devoted to prosecuting other crimes. Assuming the Rome Statute could be amended successfully, the Court could face substantial resistance from States Parties if they disagree with how the Court expends its resources. Thus, even if a separate provision for

¹⁴⁷ Janet Sankale, *Larger budget reflects increased ICC workload in 2023*, JOURNALISTS FOR JUSTICE (Dec. 15, 2022), <https://jfjustice.net/larger-budget-reflects-increased-icc-workload-in-2023/>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

trafficking in persons existed under the Rome Statute, realistic constraints on budget and resources may inhibit meaningful prosecutions of traffickers.

VI. CONCLUSION

Despite concerns about the amendment process and the allocation of budget and resources, the ICC cannot play a critical role in the prosecution human trafficking unless the Rome Statute is amended to include an independent and comprehensive provision for the crime of trafficking in persons. Although this crime is already within the ICC's jurisdiction as a crime against humanity because of underlying acts such as enslavement and sexual slavery, those definitions of human trafficking are too narrow and imprecise. Furthermore, threshold elements of crimes against humanity would inhibit prosecutions of many forms of human trafficking even if the crime were added as an explicit underlying act of crimes against humanity. Therefore, the Rome Statute should be amended to include trafficking in persons as the fifth core crime within the ICC's jurisdiction. This amendment would equip the ICC to be a key international forum that can complement the fight to end the impunity so frequently enjoyed by traffickers and bring justice to victims around the world.