

# Missing in Action

## The International Crime of the Slave Trade

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### Abstract

*The slave trade prohibition is among the first recognized and least prosecuted international crimes. Deftly codified in, inter alia, the 1926 Slavery Convention, the 1956 Supplementary Convention, Additional Protocol II to the Geneva Conventions (AP II), the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the norm against the slave trade — the precursor to slavery — stands as a peremptory norm, a crime under customary international law, a humanitarian law prohibition and a non-derogable human right. Acts of the slave trade remain prevalent in armed conflicts, including those committed under the Islamic State of Iraq and al-Shām (ISIS) Caliphate. Despite the slave trade's continued perpetration and the prohibition's peremptory status, the crime of the slave trade has fallen into desuetude as an international crime. Precursory conduct to slavery crimes tends to elude legal characterization; therefore, the slave trade fails to be prosecuted and punished as such. Several other factors, including the omission from statutes of modern international judicial mechanisms, may contribute to the slave trade crime's underutilization. Also, the denomination of human trafficking and sexual slavery as 'modern slavery' has lessened its visibility. This article examines potential factual evidence of slave trading and analyses the suggested legal framework that prohibits the slave trade as an international crime. The authors offer that the crime of the slave trade fills an impunity gap, especially in light of recent ISIS-perpetrated harms against the Yazidi in Iraq. Therefore, its revitalization might ensure greater enforcement of one of the oldest core international crimes.*

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## 1. Introduction

The slave trade prohibition is among the first recognized international offences that seized the global community. In the 19th century, states teetered until they abolished the Trans-Atlantic Slave Trade and East African Slave Trade by unilateral declarations and bilateral or multilateral treaties.<sup>1</sup> The internal, or domestic, legal trade in slaves, however, ceased only with slavery's slow abolishment in North and South America.<sup>2</sup> In the early 20th century, states ended the East African, or Arab, Slave Trades, abolishing simultaneously the international and domestic slave trades and institutions of slavery.<sup>3</sup> The 1926 Convention for the Suppression of Slavery and the Slave Trade and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery outlaw slavery as well as the international and domestic slave trades.<sup>4</sup> Today, the proscription of the slave

- 1 See e.g. Declaration Relative to the Universal Abolition of the Slave Trade ('Congress of Vienna, Act XV') 2 Martens 432 (8 February 1815), reprinted in 63 Parry's 473; Treaty for the Suppression of the African Slave Trade ('Treaty of London') 10 Martens 392 (20 December 1841), reprinted in 92 Parry's 437; Declaration Respecting the Abolition of the Slave Trade ('Congress of Verona') 16 Martens 139 (1822), reprinted in 772 Parry's 32; General Act of the Conference Respecting the Congo ('General Act of Berlin') 10 Martens (2d) 414 (26 February 1885), reprinted in 3 ASIL 7 (1909); Treaty between her Majesty and the Sultan of Zanzibar, Suppression of the Slave Trade (5 June 1873), available online at <https://www.pdavis.nl/FrereTreaty.htm>; Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors ('General Act of Brussels') 17 Martens (2d) 345, 27 Stat. 886, T.S. No. 383 (2 July 1890), reprinted in 173 Parry's 293; Treaty between Great Britain and Spain for the Suppression of the African Slave Trade, 18 Martens (2d) 168 (1890), reprinted in Parliamentary Papers, 1892, vol. XCV, 735, T.S. No. 3 (1892); 1919 Convention Revising the General Act of Berlin, 26 February 1885, and the General Act of the Declaration of Brussels ('Treaty of Saint-Germain-en-Laye') 8 L.N.T.S. 25, 49 Stat. 3027, T.S. 877 (10 September 1919), reprinted in 14 Martens (3d) 12. See also J.S. Martinez, *The Slave Trade and the Origins of International Human Rights* (Oxford University Press, 2012); J. Allain, 'Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade', in *British Yearbook of International Law 2007* (Oxford University Press, 2008) 342–388; M.C. Bassiouni, 'Enslavement as an International Crime', 23 *NYU Journal of International Law and Policy* (1991) 445–517, at 454 ('In making the trade an international crime, treaties allowed states to search and detain vessels if the ships were thought to be carrying slaves.').
- 2 See e.g. H.S. Klein, *The Atlantic Slave Trade: New Approaches to the Americas* (Cambridge University Press, 1999), at 2, 163; J.E. Inikori and S.L. Engerman (eds), *The Atlantic Slave Trade: Effects on Economies, Societies, and Peoples in Africa, the Americas, and Europe* (Duke University Press, 1992).
- 3 See generally S. Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (AltaMira Press, 2003).
- 4 Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 1926 (hereafter, '1926 Slavery Convention'). Art. 1(1) defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. *Ibid.* Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery, 266 UNTS 40 (1956) (hereafter '1956 Supplementary Slavery Convention'). The preamble of the Supplementary Slavery Convention reiterates the objectives of the United Nation Charter and the United Nations common standard of achievement that for all nations and peoples that slavery and the slave trade be prohibited in all their forms. *Ibid.*

trade exists as a peremptory norm,<sup>5</sup> a crime under customary international law,<sup>6</sup> a prohibition under international humanitarian law,<sup>7</sup> and a non-derogable human right.<sup>8</sup> Nonetheless, specific condemnation of the slave trade has fallen into desuetude.

This article explores the underutilization of the international crime of the slave trade in pursuing accountability, given the prevalence of slavery and apparent slave trading in the context of armed conflicts and mass atrocity. Accordingly, Section 2 identifies precursory conduct to slavery that the authors suggest is tantamount to slave trading but has been left unaddressed in recent international criminal law jurisprudence. Identification then extends to the exacerbated, albeit non-adjudicated, conduct integral to Islamic State of Iraq and al-Shām (ISIS) Caliphate policies that oversaw the enslavement of Yazidi women, girls and boys.<sup>9</sup> Section 3 examines the slave trade's proscription under the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention and assesses whether and how the crime comes under the jurisdiction of modern international courts and tribunals. Section 4 furthers the legal analysis by untangling the slave trade and slavery, as international crimes, from human trafficking, a transnational crime. Section 5 probes how the prohibition of the slave trade might redress ISIS-perpetrated crimes against the Yazidis in Iraqi domestic courts or other judicial forums. Finally, the authors conclude with a call to revive the international crime of the slave trade, whose core functions are to eradicate and to prevent slavery.

- 5 See Restatement (Third) of Foreign Relations of the United States, § 702 cmts. d–i, § 102 cmt. k (1987); see also E.J. Criddle and E. Fox-Decent, 'A Fiduciary Theory of *Jus Cogens*', 34 *Yale Journal of International Law* (YJIL) (2009) 331–387, at 331, available online at <http://digitalcommons.law.yale.edu/yjil/vol34/iss2/3> (visited 27 September 2019); M.C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', 59 *Law and Contemporary Problems* (1996) 63–74, at 70 and 71, available online at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp> (visited 27 September 2019).
- 6 Many of the 19th-century anti-slave trade treaties recognized the imposition of penal sanction for slave trading, such as the Congress of Vienna Act, The Treaty of London, The General Act of Berlin, The Act of Brussels, The 1890 Treaty Between Great Britain and Spain for the Suppression of the African Slave Trade, and the Treaty of Saint-Germain-en-Laye. See, e.g. Bassiouni, *supra* note 1, at 447–448 and 456. Compare C. Krefß, 'International Criminal Law', *Max Planck Encyclopedia of Public International Law* (MPEPIL), available online at <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1423?prd=EPII> (visited 5 February 2020). Nonetheless, the *stricto sensu* conditions for international crimes appear to be met for the slave trade: (1) provisions provide for international individual criminal liability; (2) the norm against the slave trade has *jus cogens* status and, thus, proscription exists in all forms, under any circumstances, and bars immunities; and (3) the slave trade prohibition could be enforced directly under international criminal jurisdiction, or indirectly by a national court through international *ius puniendi*, exercised under universal jurisdiction. See, e.g. Section 5, *infra* notes 151–153 (concerning the Iraqi Constitution's Art. 37, Third Section prohibition and the Iraqi Penal Code's § 4, Art. 13 criminalization of the trade in slaves under a universal jurisdiction provision).
- 7 See Section 3, *infra*, and accompanying citations.
- 8 Art. 4 UDHR; Art. 8 ICCPR.
- 9 See Section 4, *infra*.

## 2. Precursory Conduct to Slavery

International tribunals have opined upon enslavement and sexual slavery under crimes against humanity or war crimes provisions of their respective statutes.<sup>10</sup> The jurisprudence in the *Kunarac*<sup>11</sup> judgment, followed by the *Sesay*<sup>12</sup> and *Taylor*<sup>13</sup> judgments, and, more recently, the *Ntaganda*<sup>14</sup> judgment rendered key legal holdings and factual insights into conflict-related slavery crimes. In *Krnjelac*<sup>15</sup> (the companion case to *Kunarac*), *Brima*<sup>16</sup> (a related case to *Sesay*) and *Katanga*,<sup>17</sup> trial chambers similarly examined evidence of enslavement and sexual slavery. The resulting jurisprudence consistently holds the critical determinate of enslavement or sexual slavery is proof that the accused exercised any or all powers attaching to the right of ownership over a victim. This legal element derives from the slavery definition in the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention.<sup>18</sup> Pinpointing under customary international law who exercised such powers and, under the Rome Statute, who and whether exercising such powers amounted to a deprivation of liberty<sup>19</sup> have been the focus of judicial scrutiny.

Legal characterizations of facts *preceding* enslavement — i.e. the precursory conduct to exercising powers attaching to ownership rights — have not been the focus. They merit more rigorous judicial examination. Precursory conduct, such as abductions, captures, kidnappings or exchanges, entails how victims are reduced to — and maintained in — slavery. Although described in the

10 See 'enslavement', Art. 7(c) ICCSt.; 'sexual slavery', Arts 7(g), 8(2)(b)(xxii) and 8(2)(e)(vii) ICCSt.; 'enslavement', Art. 2(c) SCSLSt.; 'sexual slavery', Art. 2(g) SCSLSt.; 'enslavement', Art. 3(c) ICTRSt.; 'enslavement', Art. 5(c) ICTYSt. The authors' references to slavery, enslavement or sexualized enslavement presuppose that these crimes could encompass control over victims' sexual autonomy or sexual integrity. The authors advance that provisions for sexual slavery codified protections already granted under slavery. See P. Viseur Sellers and J. Getgen Kestenbaum, 'Sexual Slavery and Customary International Law', in S. Weill et al. (eds), *Prosecuting the President: The Trial of Hissène Habré* (Oxford University Press, forthcoming), available online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3516905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516905) (visited 16 March 2020); J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff, 2013), at 270.

11 Judgment, *Kunarac, Kovač and Vuković* (IT-96-23-T and IT-96-23/1-T), Trial Chamber, 22 February 2001; Judgment, *Kunarac, Kovač and Vuković* (IT-96-23 and IT-96-23/1-A), Appeals Chamber, 12 June 2002.

12 Judgment, *Sesay, Kallon and Gbao* (RUF) (SCSL-04-15-T), Trial Chamber, 2 March 2009; Judgment, *Sesay, Kallon and Gbao* (SCSL-04-15-A), Appeals Chamber, 26 October 2009.

13 Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012.

14 Judgment, *Ntaganda* (ICC-01/04-02/06), Trial Chamber, 8 July 2019.

15 Judgment, *Krnjelac* (IT-97-25-T), Trial Chamber, 15 March 2002.

16 Judgment, *Brima, Kamara and Kanu* (AFRC) (SCSL-04-16-T), Trial Chamber, 20 June 2007; Judgment, *Brima, Kamara and Kanu* (AFRC) (SCSL-04-16-A), Appeals Chamber, 3 March 2008.

17 Judgment, *Katanga and Chui* (ICC-01/04-01/07), Trial Chamber, 30 September 2008.

18 1926 Slavery Convention and 1956 Supplementary Slavery Convention, *supra* note 4, at Art. 1(1).

19 Art. 7(1)(c) enslavement under the Rome Statute requires that, 'the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'. Art. 7(1)(c), Elements of Crimes.

judgments, such precursory evidence generally has not been charged separately. As illustrated *infra*, the jurisprudence is tentative and imprecise as to the legal significance of acts leading to slavery.

The *Ntaganda* trial chamber examined sexual slavery under the crimes against humanity provision of the Rome Statute, finding that an unnamed 11-year-old girl was captured by Commander Simba in a ‘mop-up’ operation in Kobu, then taken to Bunia where ‘she was forced to have “sexual relationships” with Simba to save her life’.<sup>20</sup> The trial chamber held that Simba committed sexual slavery as he ‘exercised powers attached to the right of ownership over the girl’,<sup>21</sup> starting with her capture and deprivation of liberty. The capture ostensibly demonstrated Simba’s initial exercise of powers attaching to the rights of ownership over a person.

Regarding victim P-0018, the *Ntaganda* trial chamber found that the Union of Congolese Patriots (UPC) or Patriotic Forces for the Liberation of Congo (FPLC) soldiers captured her in Jitchu and forced her to transport items to Buli, where the soldiers raped her and other captured women.<sup>22</sup> The chamber, however, did not find that sexual slavery was committed because no evidence demonstrated that the soldiers exercised powers attaching to the rights of ownership over P-0018.<sup>23</sup> Unlike Commander Simba’s capture of the 11-year-old girl, P-0018’s capture was not a deprivation of liberty tantamount to exercising powers attaching to the rights of ownership. Notably, the trial chamber observed that, ‘although her capture and having been made to carry items were not lawful, this conduct is not separately charged’.<sup>24</sup> Thus, the capture or transport — i.e. the precursory conduct — did not constitute evidence of an element of sexual slavery. Although the chamber found the precursory conduct unlawful, it did not elaborate on how the conduct might be redressed legally.

Similarly, the chamber examined a UPC/FPL commander’s capture of P-0019 in Sangui; the commander forced her to transport goods to Wadza and then raped her.<sup>25</sup> The acts of capture and forced transport were deemed not to constitute sexual slavery because they did not establish the exercise of powers attaching to the rights of ownership.<sup>26</sup> Nonetheless, the Court again opined that, ‘while P-0019’s capture and her having been made to carry items were not lawful, this conduct is not separately charged as such’.<sup>27</sup> The *Ntaganda* chamber did not expound on how the precursory illicit acts should be legally characterized, but readily signalled an impunity gap for such criminal conduct.

20 *Ntaganda*, *supra* note 14, at § 961.

21 *Ibid.*

22 *Ibid.*, at § 957. Nevertheless, the trial chamber noted their previous finding on the crimes of rape and attempted murder of P-0018. *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*, at § 958.

26 *Ibid.*

27 *Ibid.*

The *Ntaganda* chamber further held that the UPC/FPLC soldiers ‘collectively exerted powers’ over 12-year-old P-0883, a child soldier who was deprived of her liberty at Camp Bule.<sup>28</sup> The specific precursory conduct to sexual slavery as a war crime was P-0833’s prior induction into the militia force, then, her transfer to the camp.<sup>29</sup> These acts were charged under the war crime of conscription and enlistment of children under age of 15 years.<sup>30</sup> If, however, evidence had been elicited that P-0883’s transfer to Camp Bule was accompanied by the UPC/FPLC’s intent to enslave her, such acts might be characterized otherwise.

The *Katanga* trial chamber acquitted the accused of sexual slavery; however, it established its commission<sup>31</sup> and pronounced upon its precursory conduct. With regard to witnesses P-132, P-249 and P-353, the chamber found that P-132 was ‘compelled’ to marry a militia member,<sup>32</sup> while two combatants collectively exercised ownership over P-249<sup>33</sup> and P-353.<sup>34</sup> Also, the chamber concluded that the combatants who brought them to their camps as wives ‘harboured the intention to treat the victims as if they owned them and obtain sexual favours from them’.<sup>35</sup> Although not separately charged, the precursory conduct consisted of the females’ transport with the intention to sexually enslave them. Here, even when the resulting slavery does not materialize, the chamber seems to recognize that unlawful precursory conduct occurred. In *Kunarac*, Bosnian Serb soldiers enslaved Bosnian Muslim females as a crime against humanity.<sup>36</sup> The *Kunarac* trial chamber distilled precursory conduct evincing an intent to enslave and commit sexual violence against victims. For example, *Kunarac* facts elicited evidence that Bosnian Serb soldiers, Dragan Zelenović, and unindicted accused DP 1 and DP 6, ‘handed over’ FWS-75, 15-year-old FWS-87, A.S. and 12-year-old A.B. to Radomir Kovač who kept them in an apartment.<sup>37</sup> A few days later, Kovač ‘allowed’ unindicted accused Vojkan Jadiz to take FWS-75 and A.B. to another apartment.<sup>38</sup> In both locations, Bosnian Serb soldiers incessantly raped the victim-witnesses for several weeks.<sup>39</sup> Vojkan Jadiz ‘returned’ FWS-74 and A.B. to Kovač.<sup>40</sup> Subsequently, Kovač sold A.B. to a man called ‘Dragec’, for 200 Deutschmarks, while FWS-75 was ‘handed over’ to unindicted accused DP 1 and Dragan Želja

28 *Ibid.*, at § 978.

29 *Ibid.*, at § 409. The chamber did not rely upon evidence of P-0883’s abduction and capture.  
*Ibid.*

30 *Ibid.*, at §§ 977–978.

31 *Katanga*, *supra* note 17, at § 1023.

32 *Ibid.*, at § 1004.

33 *Ibid.*, at § 1012.

34 *Ibid.*, at § 1014.

35 *Ibid.*, at § 1001.

36 *Kunarac*, *supra* note 11, at §§ 745 and 782.

37 *Ibid.*, at § 747.

38 *Ibid.*

39 *Ibid.*, at §§ 84, 749, 754, and 760–762.

40 *Ibid.*

Zelenović.<sup>41</sup> Four months after Kovač acquired FWS-87 and A.S., he sold them for 500 Deutschmarks to two Montenegrin soldiers.<sup>42</sup> The *Kunarac* chamber held that monetary exchanges are not a requirement for slavery, although they might be prime *indicia* of exercising powers attaching to the rights of ownership.<sup>43</sup> Moreover, the chamber opined that the mere ability to buy, sell, trade or inherit would be insufficient to establish slavery.<sup>44</sup> The chamber referred to Kovač's sale of A.B. and FWS-75 as 'particularly degrading attack[s] on their dignity'.<sup>45</sup> Hence, Kovač's disposal<sup>46</sup> of the females might evince the exercise of powers attaching to ownership; it also might be separate criminal conduct. In another instance, the chamber found that accused *Kunarac* and formerly accused (deceased) Gaga drove FWS-191 and FWS-186 from the Kalinovik School to Trnavača where they were sexually enslaved for six months.<sup>47</sup> Precursory evidence of the women's transfer to Trnavača, however, was not characterized as a basis of enslavement,<sup>48</sup> nor as separate criminal conduct. While prosecutors could have better formulated the *Kunarac* charges, the chamber also could have pronounced *obiter dicta* on the legal characterization of the antecedent acts — the handing over, transferring and transporting of the females — to the resulting enslavement.

*Sesay* repeatedly identifies the capture, abduction and transfer of females to military camps, prior to — and with the intent to reduce them to — sexual slavery.<sup>49</sup> Moreover, in *Sesay* and *Taylor*, evidence shows the capture of male and females with the intent to have them perform forced labour or undergo military training that was characterized as enslavement.<sup>50</sup> Similar to *Ntaganda*, the *Sesay* and *Taylor* chambers conflate abductions with the deprivation of liberty that suffices as exercising powers attaching to rights of ownership.<sup>51</sup> The *Brima* case, however, distinguishes precursory abductions from the resulting enslavement. It ruled on multiple occasions that 'evidence of abductions alone is insufficient to prove enslavement'.<sup>52</sup> Kidnapping and abductions, accordingly, are not per se evidence of enslavement. Notwithstanding these observations, the *Sesay*, *Taylor* or *Brima* jurisprudence, unlike *Ntaganda*, does not characterize outrightly such distinct conduct as illicit unless the prosecution proves enslavement or sexual slavery occurred.

This brief jurisprudential review of facts that precede the commission of enslavement and sexual slavery demonstrates an uneven and unsatisfactory juridical approach. There appears to be a hesitant acknowledgement of the

41 *Ibid.*, at § 756.

42 *Ibid.*, at § 779.

43 *Ibid.*, at § 542.

44 *Ibid.*, at § 543.

45 *Ibid.*, at § 756.

46 *Ibid.*, at § 781.

47 *Ibid.*, at § 724.

48 *Ibid.*, at § 742.

49 *RUF*, *supra* note 12, at §§ 1465–1466, 1579–1580 and 1622.

50 *Ibid.*, at §§ 1478 and 1591; *Taylor*, *supra* note 13, at §§ 1681 and 1694.

51 *Ibid.*, at §§ 1581 and 1591.

52 *AFRC*, *supra* note 16, at §§ 1329 and 1393.

conduct's criminality and an unfamiliarity with a responsive legal framework. The lack of legally framing evidence of abduction, capture, kidnapping, transport, transfer, exchange or sale of persons with intent to enslave them resides first with the prosecution and second with the judiciary. While it might suffice to charge such conduct under other inhumane acts provisions as crimes against humanity or under cruel treatment provisions as war crimes, the authors advance that a more accurate legal framework exists. To underscore the need to explicitly charge such precursory conduct, we now consider analogous conflict-related conduct concerning the Yazidis and ISIS fighters.

It is undisputed that ISIS fighters enslaved Yazidi women, girls and boys.<sup>53</sup> Buttressed by a political ideology of gender inequality and religious superiority, ISIS arranged for its fighters to 'buy, sell, or give as a gift female captives' who were 'war spoils',<sup>54</sup> The policy intentionally reduced into slavery 'non-believing' women and children<sup>55</sup> and deemed them Caliphate<sup>56</sup> property. The female slaves were called '*sabaya*'.<sup>57</sup> ISIS often presented Yazidi women and girls 'as a package' until girls reached the age of nine years and, thereafter, sold them separately.<sup>58</sup>

The Caliphate institutionalized the precursory conduct to slavery. The Committee for the Buying and Selling of Slaves carried out the Caliphate's distribution of Yazidi females at organized slave markets.<sup>59</sup> ISIS required fighters to pre-register for their slave purchases of females priced and sold according to their ages.<sup>60</sup> Yazidis reported that, prior to their enslavement, they were registered by officials at holding centres in Syria, loaded onto trucks and moved to holding sites in Iraq.<sup>61</sup> ISIS fighters documented names, ages and marital statuses and photographed the Yazidis at these holding sites.<sup>62</sup> At times, ISIS

53 Global Justice Center, *Letter to the ICC OTP*, 17 December 2015.

54 See Middle E. Media Res. Inst., 'Islamic State (ISIS) Releases Pamphlet on Female Slaves', 4 December 2014, available online at <http://www.memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html> (visited 27 September 2019).

55 *The Revival of Slavery Before the Hour*, 4 DABIQ 15.

56 ISIS created the Islamic Caliphate and considered it a state ruled by Islamic Sharia law. G. Wood, 'What ISIS Really Wants', *The Atlantic*, March 2015, available online at <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (visited 7 January 2020); 'ISIS Fast Facts', CNN (4 December 2019), available online at <https://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html> (visited 7 January 2020).

57 IS. D.013, IS D.014; UN Human Rights Council, '*They Came to Destroy: ISIS Crimes Against the Yazidis*', UN Doc. A/HRC/32/CRP.2, 15 June 2016, § 55 (hereafter '*They Came to Destroy*').

58 *They Came to Destroy*, *supra* note 57, at §§ 81 and 82.

59 Notice on buying sex slaves, Homs province, translated by Aymenn Jawad Al-Tamimi, available online at <http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1> (visited 27 September 2019) (hereafter 'Homs Notice'); *They Came to Destroy*, *supra* note 57, at § 58; UNAMI/OHCHR Report, 'A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by ISIL', August 2016, available online at [http://www.ohchr.org/Documents/Countries/IQ/UNAMIRreport12Aug2016\\_en.pdf](http://www.ohchr.org/Documents/Countries/IQ/UNAMIRreport12Aug2016_en.pdf) (visited 27 September 2019) (hereafter 'UNAMI/OHCHR Report').

60 Homs Notice, *Ibid*; *They Came to Destroy*, *supra* note 57, at § 58, UNAMI/OHCHR Report, *Ibid*.

61 *They Came to Destroy*, *supra* note 57, at § 43.

62 *Ibid.*, at §§ 40 and 82.



auctioned Yazidi women and children online, replete with registration information, photos and minimum purchase prices.<sup>63</sup>

The captives humiliatingly were forced to strip naked for inspection<sup>64</sup> and forced to take drugs to hasten physical maturation and increase their market value.<sup>65</sup> Officially designated slave vendors and ISIS fighters transported the captive women and girls between slave markets or detention centres within Iraq and Syria.<sup>66</sup> Yazidi females were gifted and regifted, or sold and resold. Eventually, they endured sexualized enslavement<sup>67</sup> as individual ISIS fighters exerted various forms of ownership over their sexual autonomy.<sup>68</sup>

The Caliphate's enslavement policies also applied gender distinctions.<sup>69</sup> ISIS fighters captured Yazidi boys, subsequently forcing them to convert to Islam, to perform forced labour, and to train and fight with ISIS in military camps in Iraq and Syria.<sup>70</sup> The boys, undeniably, were reduced into slavery.

ISIS's actions parallel the conflict-related abductions, captures, forced conscriptions and other forms of enslavement adjudicated in *Ntaganda*, *RUF* and *Kunarac*. ISIS policies, however, detailed more precisely the intentional organizational steps directly preceding the enslavement of Yazidis. The next section posits that the slave trade, as defined in the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention, offers a legal framework with which to address the myriad manifestations of precursory conduct to slavery.

### 3. International Crime of the Slave Trade

After the 19th century's successful efforts to abolish and penalize the slave trade through unilateral, bilateral and multilateral acts, the League of Nations undertook the drafting of an international convention addressing jointly the slave trade and slavery. The uncontested proposal by the 1925 Draft Slavery Convention<sup>71</sup>

63 *Ibid.*, at § 57.

64 See Amnesty International, *Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq* (2014), available online at <https://www.amnesty.org/download/Documents/MDE140212014ENGLISH.pdf> (visited 27 September 2019), at 13; N. Murad, 'I Was an ISIS Sex Slave. I Tell My Story Because It Is the Best Weapon I Have', *The Guardian*, October 2018, available online at <https://www.theguardian.com/commentisfree/2018/oct/06/nadia-murad-isis-sex-slave-nobel-peace-prize> (visited 27 September 2019).

65 F. Strasser, United States Institute of Peace, *ISIS Makes Sex Slavery Key Tactic of Terrorism Action Against Violent Extremism Must Address Abuse of Women*, U.N. Official Says, 6 October 2016, available online at <https://www.usip.org/publications/2016/10/isis-makes-sex-slavery-key-tactic-terrorism> (visited 27 September 2019).

66 DABIQ, *supra* note 55; UNAMI/OHCHR Report, *supra* note 59.

67 See Viseur Sellers and Getgen Kestenbaum, *supra* note 10 and accompanying text.

68 Office of the Special Representative of the UN Secretary General on Sexual Violence in Conflict, *Escaping from ISIL, a Yazidi Sexual Violence Survivor Rebuilds Her Life*, 10 July 2018, available online at <https://www.un.org/sexualviolenceinconflict/escaping-from-isil-a-yazidi-sexual-violence-survivor-rebuilds-her-life/> (visited 27 September 2019).

69 *They Came to Destroy*, *supra* note 57, at §§ 76, 119 and 154.

70 *Ibid.*, at §§ 40, 82 and 93.

71 Allain suggests that the international community's previous outlawing of the slave trade might have lessened any contentious debates about the definition. See J. Allain, *The Slavery Conventions:*

inserted into Article (1)(2) of the 1926 Slavery Convention defined the slave trade as:

... all acts involved in the capture, acquisition or disposal of a person with intent to reduce him [or her] to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him [or her]; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.<sup>72</sup>

Article 3 of the 1956 Supplementary Slavery Convention<sup>73</sup> updated the slave trade's definition, adding:

1. The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory ...
2.
  - a. The States Parties shall take all effective measures to prevent ships and *aircraft* ... from conveying slaves
  - b. The States Parties shall take all effective measures to ensure that their *ports, airfields and coasts* are not used for the conveyance of slaves.<sup>74</sup>

These treaty definitions prohibit reducing individuals into slavery regardless of the transport deployed, denying slave traders and their accomplices' safe haven and secure port. Furthermore, the 1926 Slavery Convention's Article 2(a) states that High Contracting Parties' responsibilities are 'to prevent and suppress the slave trade',<sup>75</sup> while the 1956 Supplementary Slavery Convention's Article 3(1) criminalizes the slave trade, obligating that:

[t]he act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.<sup>76</sup>

Penalization of the slave trade condemns perpetrators who acquire and intend to reduce males or females, into slavery, or, as importantly, who further exchange or transport a person already enslaved to other slavery situations.

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*The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (2008), at 78. Bassiouni observes that 'a number of countries criminalized' the slave trade prior to 1926. M.C. Bassiouni, *Crimes Against Humanity in International Law* (Martinus Nijhoff Publishers, 1992), at 293; V.P. Nanda and M.C. Bassiouni, 'Slavery and Slave Trade: Steps Toward Eradication', 12 *Santa Clara Review (SCR)* (1972) 424–442, at 426–427.

72 1926 Slavery Convention, *supra* note 4, at Art. 1(2).

73 1956 Supplementary Slavery Convention, *supra* note 4.

74 *Ibid.*, at Art. 3 (emphasis added).

75 1926 Slavery Convention, *supra* note 4, at Art. 2(a).

76 1956 Supplementary Slavery Convention, *supra* note 4, at Art. 3(1). The duty to penalize the slave trade also carried international obligations. Under Art. 8, states are required to cooperate with the United Nations and to communicate with the Secretary-General about implementation and enforcement. Art. 8(1)(2). The authors agree with Prof. Kreß that the absence of a treaty provision concerning international criminal jurisdiction is not dispositive of whether a norm constitutes an international crime.

Most notably, the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention critically seize the interplay between the slave trade and slavery. Slavery defines who is a slave and who is a slaveowner. The slave trade defines how one is reduced to slavery, transported as a slave or maintained in slavery<sup>77</sup> and by whom. The drafters foresaw that these crimes occur in tandem,<sup>78</sup> as interlinked institutions,<sup>79</sup> yet distinguishable crimes, able to be pursued separately.

Slave trading usually precedes acts of slavery. Persons might transit through a 'supply chain' of slave traders before actually being reduced into slavery.<sup>80</sup> A slave trader need not be a slaveowner; however, a slaveowner also might trade in slaves. Slave trading, unlike slavery, does not require the exercise of any or all of the powers attaching to the rights of ownership over persons. In contrast, slavery *does* involve such exercise of powers attaching to the rights of ownership.

The slave trade's prohibition also had precedents in humanitarian law. Wars, historically, provided captives to trade as slaves.<sup>81</sup> The renowned Lieber Code of 1863, importantly, prohibited the slave trade.<sup>82</sup> Article 58 declares: 'if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation . . . The United States cannot retaliate by enslavement . . . [.] this crime against the law of nations.'<sup>83</sup> The Lieber Code forbade Union troops and enemy fighters from owning or trading in slaves.<sup>84</sup> While reflective of the divisive US political

77 H. van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts', 13 *Chinese Journal of International Law* (2014) 297–334, at 303.

78 Sellers and Kestenbaum, *supra* note 10.

79 P.M. Muhammad, 'The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law', 19 *American University International Law Review* (2003) 883–947, at 933–936.

80 See Allain, *supra* note 71, at 65.

81 O. Paterson, *Slavery and Social Death* (Harvard University Press, 1982, 2018), at 108–115; O. Patterson, *Freedom in the Making of Western Culture* (Basic Books, 1991), at 50–51 (noting that, circa 700 BCE, the Greek city-states would capture enemy females to replenish the overwhelmingly female slave population); O. Paterson, 'Trafficking, Gender and Slavery: Past and Present', in J. Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (1st edn., Oxford University Press, 2012). The Siete Partidas of King Alfonso the Wise of what is now Spain legally recognized that a man could become a slave when captured during war. H. Thomas, *The Slave Trade* (Simon & Schuster, 1997), at 40. The *kul/harem* slavery system of the Ottoman Middle East conscripted the military commanders and administrators to govern its vast empire. E.R. Toledano, *Slavery and Abolition in the Ottoman Middle East* (University of Washington Press, 1998), at 20–53.

82 General Order No. 100, at Art. 58, available online at [https://www.loc.gov/rr/frd/Military\\_Law/Lieber\\_Collection/pdf/Instructions-gov-armies.pdf?locl=bloglaw](https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf?locl=bloglaw) (visited 7 January 2020) (hereafter the 'Lieber Code').

83 *Ibid.*

84 Art. 42 of the Lieber Code further prohibited re-enslaving persons, stating, '... if a person held in bondage by that belligerent be captured ... by ... the United States such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person ... made free by the law of war is under the shield of the law of nations'. *Ibid.*, at Art. 42.

landscape, the prohibition was rooted in the forerunner to international customary law, the ‘law of nations’.<sup>85</sup>

Twentieth-century humanitarian law expressly prohibits the slave trade in the provision of the fundamental guarantees of Additional Protocol II to the Geneva Conventions.<sup>86</sup> Article 4(2)(f) prohibits subjugating persons *hors de combat* or who have laid down their arms to ‘slavery and the slave trade in all their forms’.<sup>87</sup> Article 4(2)(f)’s mandatory proscription states that slavery and the slave trade ‘shall remain prohibited in any time and in any place whatsoever’.<sup>88</sup> Evoking 1926 Slavery Convention language, Article 4(2)(f) reprises the critical conjunctive nature of slavery *and* the slave trade crimes; it also reiterates the myriad manners in which either could manifest as war crimes, prohibiting them ‘in all their forms’.<sup>89</sup>

Additional Protocol II’s prohibition that governs non-international armed conflict begs the inquiry whether the slave trade is barred in international armed conflict given the absence of an explicit prohibition in the Geneva Conventions<sup>90</sup>

85 *Ibid.* Lieber’s recognition of the slave trade’s illegality was rooted in the 19th-century legal philosophy of *ubi societas ibi jus*, whereby ‘civilized nations have come to constitute ... a commonwealth of nations, under the restraint and protection of the law of nations’. Lieber markedly views the law of nations as governing prohibitions of international humanitarian law, noting that the ‘(l)aw of nations has its sway in peace and in war.’ F. Lieber, *Fragments of Political Science on Nationalism and Inter-Nationalism* (1868), at 22 and 23, available online at [https://www.loc.gov/rr/frd/Military\\_Law/Lieber\\_Collection/pdf/Fragments-of-Political-Science.pdf](https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Fragments-of-Political-Science.pdf) (visited 4 February 2020). But see *The Antelope*, 23 US (10 Wheat.) 66 (1825), at 114, a US Supreme Court decision finding, one-quarter century earlier, that the slave trade was legal under the law of nations. The judgment, however, did not concern the laws of war. *Ibid.*

86 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 8 June 1977, available online at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AA0C5BCBAB5C4A85C12563CD002D6D09> (visited 27 September 2019) (hereafter ‘AP II’), at Art. 4.

87 *Ibid.*, at Art. 4(2)(f).

88 *Ibid.* (emphasis added).

89 The Commentary to Art. 4(2)(f) of the Additional Protocols emphasizes that the prohibition of slavery and the slave trade are ‘universally accepted’. The phrase ‘in all their forms’ in relation to slavery and the slave trade should be understood within the meaning of the 1926 Slavery Convention and the 1956 Supplemental Slavery Convention. International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 8 June 1977, Commentary of 1987, available online at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B> (visited 27 September 2019), at § 4541.

90 Geneva Conventions (I)–(IV); UN Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); UN Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces in at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); UN Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); UN Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). The Geneva Conventions do not list slavery or the slave trade as a grave breach nor as an explicit prohibition.

and Additional Protocol I.<sup>91</sup> The International Committee for the Red Cross (ICRC) Study of Customary Law's Rule 94 responds, stating that 'enslaving persons in an international armed conflict is prohibited'.<sup>92</sup> Rule 94 intones that *opinio juris* regarding the slave trade exists in the specific prohibitions of the 1926 Slavery Convention, the 1956 Supplementary Slavery Convention and several international human rights treaties and declarations.<sup>93</sup> Rule 94 of the ICRC Study cites to practice to prohibit the slave trade in national military manuals.<sup>94</sup> Accordingly, the slave trade's prohibition constitutes customary international humanitarian law applicable to international and non-international armed conflicts. The ICRC Study's Rule 94 also cites to enslavement, enumerated as a crime against humanity in the London Charter<sup>95</sup> and the Tokyo Charter<sup>96</sup> that governed the post-World War II International Military Tribunals, and in Control Council Law No. 10.<sup>97</sup>

Rule 94 refers to the London and Tokyo Charters' explicit and implicit prohibitions of the slave trade as war crimes. The Tokyo Charter's Article 5(b) provides for conventional war crimes that are 'violations of the laws and customs of war'<sup>98</sup>; thus, it governs the slave trade as a customary violation of the law of nations recognized when the Tokyo Charter was promulgated. The London Charter's Article 6(b) lists 'deportation to slave labor'<sup>99</sup> as a war crime, hence, explicitly proscribing an act that reduces persons into slavery.

The International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL) and Extraordinary Criminal Chambers of Cambodia (ECCC)

91 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereafter 'AP I'). The AP I guarantees in Art. 75 do not specify prohibitions of slavery or the slave trade as war crimes in international armed conflict. *Ibid.*

92 ICRC, *Study of Customary Law: Slavery and the Slave Trade*, 2005, available online at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule94](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94) (visited 27 September 2019) (hereafter 'ICRC Study'), at rule 94.

93 Rule 94 recognizes the prohibition of the slave trade as a human rights violation as per: Art. 4 of the Universal Declaration of Human Rights stating, 'slavery and the slave trade shall be prohibited in all their forms'; ICCPR, Art. 8, 'slavery, the slave trade in all their forms'; ACHR, Art. 6(1), 'slavery, involuntary servitude and the slave trade'; ACHPR, Art. 5, 'slavery and the slave trade'; Cairo Declaration on Human Rights in Islam, Art. 11(a), 'no one has the right to enslave'. *Ibid.* Notably, in the ICCPR and UDHR's conjoined prohibition, the placement of the phrase 'in all their forms' indicates that both slavery and the slave trade can manifest in multiple ways.

94 *Ibid.*

95 Charter of the International Military Tribunal, Annexed to the London Agreement, 8 August 1945, Art. 6, 59 Stat. 1544, 1547, 82 UNTS 279, 288 (hereafter the 'London Charter'). Art. 6(c) proscribes enslavement. *Ibid.*

96 Charter of the International Military Tribunal for the Far East, 19 January 1946 (hereafter 'Tokyo Charter'), at Art. 5(c).

97 Control Council Law No. 10, Art. II.

98 *Ibid.*, at Art. 5(b).

99 London Charter, *supra* note 95, at Art. 6(b). Defining 'war crimes' prohibited the deportation of members of the civilian population for slave labour or for any other purpose. *Ibid.*

Statutes enumerate enslavement as a crime against humanity.<sup>100</sup> These statutes do not, however, explicitly enumerate the prohibition of the slave trade under their jurisdiction over crimes against humanity. The ICTY Statute's Article 3 has jurisdiction over serious violations of humanitarian law — even prohibitions that are not enumerated, such as the slave trade — according to the *Tadić* test,<sup>101</sup> which incorporates serious violations based in custom or treaty law. Similarly, the ICTR Statute's Article 4 omits slavery and the slave trade as war crimes.<sup>102</sup> Article 4, however, states that it 'shall not be limited to' the express provisions listed, acknowledging that other prohibitions pertaining to non-international armed conflict are justiciable.<sup>103</sup>

The SCSL Statute's Articles 3 and 4,<sup>104</sup> however, do not contain slavery nor the slave trade as war crimes. These articles must be read as exclusive provisions, which disallow pursuit of unenumerated violations of the laws and customs of war.<sup>105</sup> The ECCC Statute's Article 6 narrow jurisdiction for war crimes limits redress to the grave breaches of the 1949 Geneva Conventions.<sup>106</sup> The slave trade is not contained in the grave breaches provisions and, thus, similar to slavery, ostensibly falls outside of the ECCC's jurisdiction. Consequently, the SCSL and the ECCC Statutes offer no legal avenue to pursue the prohibition of slave trade as a war crime.

In sum, the Nuremberg and Tokyo Tribunals, ICTY and ICTR statutes, reasonably could be construed as having jurisdiction over the slave trade as a war crime. The statutory construction of the jurisdiction expressed in the statutes of

100 See Art. 5(c) ICTYSt.; Art. 3(c) ICTRSt.; Art. 2(c) SCSLSt.; Art. 7(c) ICCSt.; Art. 5 ECCCSt. The authors agree with Bassiouni that international crimes, and we would assert the international crime of the slave trade, can exist as 'a common international crime' arising under general sources of international law as enumerated in Art. 38 of the Charter of the Permanent Court of International Justice. Bassiouni, *supra* note 1, at 448.

101 Art. 3 of the ICTY Statute allows for prosecution of unenumerated violations of the laws and customs of war whenever: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation is 'serious', in that it constitutes a breach of a rule protecting important values, and involves grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. Opinion and Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997, § 610; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-T), Trial Chamber II, 10 August 1995, § 61. See also Judgment, *Krnjelac*, *supra* note 15, at § 356 ('The Trial Chamber is satisfied that the offence of slavery under Article 3 of the Tribunal's Statute is the same as the offence of enslavement under Article 5.'). The authors advance that the prohibition of the slave trade meets the four *Tadić* requirements. Simultaneously, the slave trade prohibition meets criteria (i) and (iii), thereby satisfying all requirements proposed by O.A. Hathaway et al., 'What Is a War Crime?' 44 *YJIL* (2019) 53–113, at 82–92.

102 Art. 4 ICTRSt.

103 *Ibid.*

104 Arts 3 and 4 SCSLSt.

105 Art. 3 SCSLSt. Art. 3 states that the prohibitions 'shall include', while Art. 4 states that the prohibitions 'shall have the power to prosecute the following serious violations of international humanitarian law'. *Ibid.*

106 Art. 6 ECCCSt.

the ad hoc tribunals is implicit, while that of the SCSL and the ECCC apparently impedes presiding over conduct of slave trading. Thus far, prosecutors have not charged the slave trade as a war crime at the ad hoc tribunals and judges, accordingly, have not examined evidence identified in Section 2 as governed by the prohibition of the slave trade.<sup>107</sup> Nevertheless, the prohibition of the slave trade remains recognized as customary international humanitarian law.

Charging the war crime of the slave trade probably entails a *mens rea* of the intent to reduce a person into slavery or to transfer an enslaved person to another enslavement situation. Slave trading's *actus reus* potentially could be committed by various acts that would reduce a person into slavery or further enslave a slave. Arguably, like slavery, the crime can occur regardless of the existence or non-existence of coercive circumstances,<sup>108</sup> or the victim's volition or absence of volition. The focus on the intent and the acts of the perpetrator of slave trade as opposed to those of the victims mirrors the legal construction of the crime of slavery.<sup>109</sup>

Nuremberg and Tokyo Tribunals' convictions regarding enslavement as a crime against humanity and slavery as a war crime contained factual evidence of slave trading. For example, the Nuremberg Tribunal found Bormann guilty for his prominence in the wartime slave labour programme, including, *inter alia*, his supervision of a slave labour policy that included the 'transfer' of over 500,000 female domestic workers from the East to Germany. These transfers might have been characterized as the *actus reus* evincing the reduction to slavery, as outlawed by the prohibition of the slave trade.<sup>110</sup> The Tokyo Tribunal convicted General Shunroku Hata, Commander-in-Chief Heitaro Kimura, Foreign Minister Mamoru Shigemitsu and War Minister Hideki Tojo, of war crimes for slave labour policies that relied upon 'conscriptio[n] of persons by way of false promises.<sup>111</sup> Conscriptio[n] or acquisition by false promises appears to be evidence of the slave trade's *actus reus*. Moreover, Nuremberg and Tokyo facts arguably demonstrate that the defendants' *mens rea* was based upon an intent to reduce individuals into slavery in order to execute slave

107 See *Kunarac*, *supra* note 11, at § 540; *Krnjelac*, *supra* note 15. The slave trade was not charged even though unenumerated war crimes could be incorporated into Art. 3 of the ICTY according to the *Tadić* test. Further, the ICTR did not explicitly incorporate slavery and the slave trade even though its Art. 4 refers to APII. Nonetheless, under customary international law, the slave trade is implicitly included in the ICTY, ICTR.

108 See Section 4, *infra*, for an explanation of human trafficking and intent.

109 Slavery's *mens rea* concerns knowingly exercising powers of ownership over a person. The *actus reus* encompasses the various acts of exercising that power. Proof of the mental state of the victim is not a requirement. *Kunarac*, *supra* note 11.

110 See International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg* (1947), available online at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf) (visited 27 September 2019), at 340–341.

111 See International Military Tribunal for the Far East, *The Tokyo Judgment: The International Military Tribunal for the Far East*. B.V.A. Röling and C.F. Rüter (eds) (1977), available online at <https://www.legal-tools.org/doc/8bef6f/pdf/> (visited 27 September 2019), 389, 407, 409, 416–417, 445–452 and 457–463.

labour programmes. Distinct facts relevant to the slave trade such as transfer or conscription of persons into situations of slavery appeared to have been characterized under the ‘deportation’ prong of Article 6(b) of the London Charter.

Next, Section turns to the Rome Statute’s (mis)treatment of the slave trade as an international crime.

## 4. Disentangling Slavery and the Slave Trade from Human Trafficking

The Rome Statute’s erasure of the slave trade is bewildering, even if well intentioned. First, neither the prohibition of the slave trade nor slavery is enumerated under Article 8, the exclusive war crimes’ provisions that prevent further supplementation.<sup>112</sup> Hence, *Ntaganda* and *Katanga* could not adjudicate conduct that constituted slave trading as war crimes. Allain writes that slavery and the slave trade were bracketed in the informal texts of the Chair of the Preparatory Committee under war crimes in non-international armed conflict.<sup>113</sup> The Women’s Caucus for Gender Justice recommended the inclusion of the slave trade as understood by treaty and customary law. Subsequent preparatory works, however, reveal no commentary about the slave trade. Bartels suggests that the omission of slavery and the slave trade, as well as starvation, as war crimes, was ‘non-deliberate and non-logical’.<sup>114</sup>

112 Art. 8 ICCSt. Omission from the war crimes provisions does have possible effects on practice at the international level.

113 Allain, *supra*, note 10, at 273; see United Nations, United Nations Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Addendum, 14 April 1998, available online at [https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v3\\_e.pdf](https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf) (visited 7 January 2020), at 20 (citing to draft Option II for § D that would have inserted ‘slavery and the slave trade in all their forms’ as a war crime in non-international armed conflict).

114 The Women’s Caucus for Gender Justice’s Recommendation 3 stated ‘war crimes should encompass ... Protocols I and II and the progressive developments in the laws and customs of war’. Recommendation 8 stated that, ‘enslavement and slavery-like practices as a violation in all war, internal and international’. Women’s Caucus for Gender Justice in the International Criminal Court, Recommendations and Commentary for December 1997 Prep. Com., Part III: War Crimes, Recommendation 7 (1–12 December 1997), at 44; see R. Bartels, ‘Time to Fix the Rome Statute and Add the Crime of Starvation in Noninternational Armed Conflicts’, EJIL: Talk! 3 December 2019, available online at <https://www.ejiltalk.org/time-to-fix-the-rome-statute-and-add-the-crime-of-starvation-in-non-international-armed-conflicts/> (visited 13 January 2020); see also W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford University Press, 2016); O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Hart Publishing, 2016); R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999); V. Oosterveld, ‘Sexual Slavery and the International Criminal Court: Advancing International Law’, 25 *Michigan Journal of International Law* (2003–2004) 605–651.



Secondly, Article 7(2)(c), the crimes against humanity provision, states that “(e)nslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’ The Women’s Caucus proposals intended that enslavement reflect aspects of trafficking and the slave trade.<sup>115</sup> The resulting qualification of enslavement, however, arguably conflates without substantively adding to the definitions of slavery and slave trade found in the 1926 Slavery Convention.<sup>116</sup> It also tends to exclude the core of the slave trade prohibition — the *mens rea* or intent to reduce a person to slavery — and transposes conduct that normally could constitute acts of the slave trade to *indicia* of slavery.<sup>117</sup>

Thirdly and most notably, this description confusingly inserts the descriptive phrase ‘trafficking in persons’, which is a transnational crime and does not require the jurisdictional elements of crimes against humanity. Notwithstanding Article 7(2)(e)’s description of enslavement, the International Criminal Court (ICC) Elements of Crimes do not cite any elements of trafficking as a crime.<sup>118</sup> Ostensibly, trafficking is neither a separate crime nor an element of enslavement under the Rome Statute. Rather, it describes conduct.<sup>119</sup>

The ICC’s Office of the Prosecutor (OTP) affirms this conclusion, noting that the Court has no jurisdiction over trafficking cases.<sup>120</sup> The OTP’s strategic plan states that ‘ICC crimes usually do not occur in isolation from . . . other types of criminality, transnational organized criminal activity’.<sup>121</sup> The OTP lists trafficking among transnational activities, clarifying that trafficking is distinct and not an international crime within the ICC’s jurisdiction.<sup>122</sup>

115 Art. 7(2)(g) ICCSt; See Women’s Caucus for Gender Justice, *Recommendations and Commentary for the Elements of Crimes (Based on the Rolling Text PCNICC/L.5/Rev.1/Add.2) Submitted to the Preparatory Commission for the International Criminal Court* (13–31 March 2000), available online at <http://www.iccnw.org/documents/WCGJElementsofCrimMarch2000.pdf>. The Women’s Caucus opposed the inclusion of monetary references in the definition or elements of enslavement under the Rome Statute. *Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence Submitted to the Preparatory Commission for the International Criminal Court* (12–30 June 2000), available online at <http://www.iccnw.org/documents/WCGJElementsofCrimeMay2000.pdf>.

116 1926 Slavery Convention, *supra* note 4, at Art. 1(1); Art. 7(g) ICCSt.

117 Art. 7(g) ICCSt.; Art. 7(g) Elements of Crimes.

118 Elements of Crimes.

119 P. Viseur Sellers, ‘Q&A, The Nexus Between Conflict-related Sexual Violence and Human Trafficking for Sexual Exploitation in Times of Armed Conflict During Court Proceedings: An Insider’s View’, 3 *Journal of Trafficking and Human Exploitation* (2019) 147–158.

120 ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (2014), at 16 and 17.

121 ICC, Office of the Prosecutor, *Strategic Plan 2016–2018* (6 July 2015), § 30, available online at <http://www.pgaction.org/pdf/OTP-Draft-Strategic-Plan-2016-2018.pdf> (visited 27 September 2019), at 14.

122 *Ibid.*; see N. Siller, “‘Modern Slavery’ Does International Law Distinguish between Slavery, Enslavement and Trafficking?” 14 *Journal of International Criminal Justice* (2016) 405–427, at 415.

The elements of trafficking differ from the elements of slavery and the slave trade.<sup>123</sup> The purpose of criminalizing trafficking is to prevent individuals from being subjugated to forms of exploitation, with slavery being one form of exploitation. Under the Palermo Protocol, '[t]rafficking in persons' refers to 'the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation'.<sup>124</sup> The purpose of criminalizing the slave trade is to eradicate the reduction of persons into slavery or the trade or transport of slaves from one slaveholder to another.<sup>125</sup> The slave trade similarly condemns the forms of reducing persons into slavery and the transporting of slaves.<sup>126</sup> While a thin overlapping factual line exists between subjugation to exploitation and reduction into slavery, salient legal differences distinguish slave trade from human trafficking.

The slave trade, unlike trafficking, does not necessitate proof of subsequent exploitation. The intent to reduce or maintain someone in slavery and an act of slave trading suffices to establish the crime; it is not dependent upon the outcome<sup>127</sup> of slavery occurring or the type of service extracted from slaves.<sup>128</sup> A person, also, can be traded into slavery and not perform any toil.<sup>129</sup> Although trafficking seems to coincide with transporting persons into the exploitation of slavery, its purpose does not require intent to reduce someone into slavery. Exploitation does not readily equate with the intent to reduce someone into *de jure* or *de facto* slavery.<sup>130</sup> Traffickers' exploitative purpose towards victims may be financial, charging exorbitant prices for transportation to foreign states with promises of employment that never materialize. Such exploitation would constitute trafficking but not amount to an intent to the slave trade.<sup>131</sup>

123 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 15 November 2001, 2237 UNTS 319 (hereafter 'Palermo Protocol'), at Art. 3.

124 *Ibid.*, at Art. 3(a). The Special Rapporteur on trafficking in persons, Joy Ngozi, affirmed this interpretation, stating that 'the definition of 'trafficking in persons' under Article 3(a) of the Palermo Protocol makes clear that trafficked persons are deceived or forced (by threat or coercion) to move for the purpose of exploitation'. *Report for the Sixty-Fifth Session for the General Assembly*, UN Doc. A/65/288, 9 August 2010, § 24.

125 van der Wilt. *supra* note 77, at 303.

126 *Ibid.* The slave trade's *mens rea* aligns with slavery objective because the purpose of transportation is to reduce the victim to the ownership of another. *Ibid.*

127 1926 Slavery Convention, *supra* note 4, at Art. 1(2).

128 P. Viseur Sellers, 'Wartime Female Slavery: Enslavement?' 44 *Cornell International Law Journal* (2011) 115–143, at 123.

129 Sellers and Kestenbaum, *supra* note 10.

130 Palermo Protocol, *supra* note 123, at Art. 3(a).

131 In *US v. Farrell*, e.g. defendants in South Dakota recruited Filipino workers, supplying visas, employment contracts and housing, to work in their hotel. When the workers arrived in the USA, however, the defendants forced them to give up their passports and placed crippling debts on the workers, forcing them to work more than 13 hours each day. *Farrell*, 563 F3d (2009), at 368–370; United Nations Office on Drugs and Crime, *Evidential Issues in Trafficking in Persons Cases: Case Digest* (2017), at 150–154. The United Nations Office on Drugs and Crime (UNODC) specifically found that the defendants' threat of criminal immigration sanctions coerced workers to the exploitation of forced labour. *Ibid.*, at 151.

Moreover, trafficking requires proof of 'means', whereas the slave trade does not countenance such proof.<sup>132</sup> Trafficking's element of means is to demonstrate an adult victim's lack of consent.<sup>133</sup> Proof must establish that traffickers used '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'.<sup>134</sup> Defendants can challenge the proof of coercion to claim a consent defence regarding adult victims.<sup>135</sup> Only when 'any of the means set forth in [Article 3](a) have been used',<sup>136</sup> the Palermo Protocol disallows consent as a defence.<sup>137</sup> The trafficker, however, may raise a consent defence to negate the *prima facie* element of coercive means by alleging that the victim was informed and agreed to be trafficked.<sup>138</sup> According to the UNODC, in most trafficking cases the defendants *do* raise consent to rebut evidence of severe exploitation.<sup>139</sup> The Special Rapporteur on Trafficking in Persons has stated that 'no person willingly consents to the suffering and exploitation that trafficking of persons entails'.<sup>140</sup> Notwithstanding, legally a consent defence can negate evidence of coercive means under trafficking.<sup>141</sup>

132 Palermo Protocol, *supra* note 123, at Art. 3(a); see also *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto Part II*, Art. 3, available online at [http://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074\\_ebook-e.pdf](http://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf) (visited 27 September 2019) (explaining the legislative history surrounding the language and elements of the Palermo Protocol), at 33–48. Slavery does not permit consent as a consideration.

133 Siller, *supra* note 122, at 417.

134 Palermo Protocol, *supra* note 123, at Art. 3(a); A.M. Pesman, *Prosecuting Human Trafficking Cases as a Crime Against Humanity?* (November 2012) 15 and 16; Beverly Balos, 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' 27 *Harvard Journal of Law & Gender* (2004) 137–176, at 148 ('Nonconsent and the use of force or coercion by traffickers have emerged in recent international human rights documents as essential, yet controversial, elements of human rights violations in the context of trafficking.').

135 Siller, *supra* note 122, at 417.

136 Palermo Protocol, *supra* note 123, at Art. 3(b).

137 S. Huda (Special Rapporteur on trafficking in persons, especially women and children), *Integration of the Human Rights of Women and the Gender Perspective*, UN Doc. E/CN.4/2005/71, 22 December 2004, available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/169/28/PDF/G0416928.pdf?OpenElement> (visited 27 September 2019), § 6.

138 See UN Office on Drugs and Crime (UNODC), *The Role of 'Consent' in the Trafficking Person Protocol, Issue Paper* (2014), available online at <https://www.unodc.org/documents/human-trafficking/2014/UNODC.2014.Issue.Paper.Consent.pdf> (visited 27 September 2019) (discussing how the 'means' element is intended to demonstrate the negation of consent. This element is inapplicable to children due to the fact that they have diminished or no legal capacity.).

139 UNODC, *Evidential Issues in Trafficking in Persons Cases: Case Digest*, (2017), available online at [https://www.unodc.org/documents/human-trafficking/2017/Case\\_Digest\\_Evidential\\_Issues\\_in\\_Trafficking.pdf](https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf) (visited 27 September 2019), at 141–172 (identifying various cases within the Human Trafficking Case Law Database that found the issue of consent to be relevant to convicting a perpetrator of human trafficking).

140 Huda, *supra* note 137.

141 The United Nations Office on Drugs and Crime has indicated that '[c]onsent of the victim can be a defence in domestic law, but as soon as any of the improper means of trafficking are established, consent becomes irrelevant and consent-based defences [sic] cannot be raised.' See UNODC, *Toolkit*

In contrast, the slave trade does not require proof of coercive circumstances.<sup>142</sup> Coercive circumstances are of no legal relevance and are insufficient to counter proof of the *mens rea* or *actus reus* under the slave trade.<sup>143</sup> Likewise, consent is neither an element nor a defence to the slave trade.<sup>144</sup> Consistent with the plain language in Article 1(2) of the 1926 Slavery Convention, what is determinative is the slave traders' intent and their actions, not the victim's state of mind.<sup>145</sup>

Trafficking indeed resembles the slave trade, in that neither requires the exercise of any powers of ownership over the person being trafficked. Whenever traffickers exercise powers of ownership over a person, they essentially are perpetrating slavery. The Rome Statute's Article 7(2)(e) accordingly describes a form of slavery when it cites to trafficking acts when powers of ownership are exercised.

In sum, the Rome Statute does not enumerate the slave trade or slavery, under Article 8 as war crimes. It does not define the slave trade within the crime of enslavement under Article 7(g) as a crime against humanity or enumerate a distinct provision sanctioning the slave trade within the context of a widespread or systematic attack on the civilian population.<sup>146</sup> Consequently, slave traders' conduct is not implicated explicitly under ICC jurisdiction. The Rome Statute sanctions only persons exercising powers attaching to rights of ownership, not perpetrators of the slave trade who transport or engage in any acts of the slave trade without exercising such powers. The 1926 Slavery Convention, 1956 Supplemental Slavery Convention and Additional Protocol II condemn the slave trade as a distinct crime, not as a lesser-included offence of slavery, a form of aiding and abetting slavery, or as a 'form' of trafficking. Muddling the slave trade and trafficking is problematic. The practical

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*to Combat Trafficking in Persons* (2008), available online at [https://www.unodc.org/documents/human-trafficking/HT\\_Toolkit08\\_English.pdf](https://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf) (visited 27 September 2019), at 6 and 7.

- 142 Granted, proof of the indicia of exercise of powers attaching to the right of ownership under slavery might entail facts focusing on 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor'. *Kunarac*, *supra* note 15, at §119. Nevertheless, proof of coercive circumstances is not an element of slavery or the slave trade. In *Kunarac*, for instance, the ICTY held that lack of consent is not an element of enslavement. *Ibid.*, at § 542; Siller, *supra* note 122, at 417. Similarly, the ECCC and SCSL have held that proof of lack of consent is not required to prove enslavement. Judgment, *Duch* (001/18-07-2007-ECCC/SC) 3 February 2012, § 346; *Taylor*, *supra* note 13, § 420.
- 143 1926 Slavery Convention, *supra* note 4; *Kunarac*, *supra* note 15, at § 540–543. The Court defines the crime of enslavement as including only the elements of *mens rea* and *actus reus*. *Ibid.* The Court then describes factors or methods of control 'as taken into consideration in determining whether enslavement was committed'. *Ibid.*
- 144 *Kunarac*, *supra* note 15, at § 542; Siller, *supra* note 122, at 417. Similarly, the ECCC and SCSL have held that proof of lack of consent is not required to prove enslavement. *Duch*, *supra* note 147, at § 346; *Taylor*, *supra* note 13, at § 420.
- 145 Siller, *supra* note 122, at 417.
- 146 J. Allain, *The Definition of 'Slavery' in General International Law and the Crime of Enslavement Within the Rome Statute* (ICC-CPI 2007), at 12.

consequence is the underemphasis of judicial redress for victims of the slave trade.<sup>147</sup> Unfortunately, the Rome Statute creates an almost inconceivable impunity gap by omitting the slave trade entirely as a war crime and as a crime against humanity.

Section 5 assesses the feasibility of reactivating the slave trade prohibition to redress crimes committed against the Yazidis in Iraq.

## 5. Towards Accountability for Slave Trade Crimes in Iraq

Section 2 described ISIS's control over the distribution of Yazidis destined for slavery to strengthen the adherence of ISIS fighters to the Caliphate. Institutionalized slavery was preceded by organized slave trading. As a result, ISIS fighters subjected Yazidi women and children to the exercise of powers of ownership by exerting severe physical, psychological and sexual violence, together with domestic labour or military conscription.<sup>148</sup> The authors advance that the Caliphate's policies could be aligned with the legal framework envisioned by the 1926 Slavery Convention to prevent and suppress slavery and the slave trade.

Iraq is a state party to the 1926 Slavery Convention<sup>149</sup> and the 1956 Supplementary Convention.<sup>150</sup> Moreover, the Iraqi Constitution's Article 37, Third Section, prohibits slavery and the slave trade.<sup>151</sup> The Iraqi Penal Code, however, does not criminalize either crime, as ordinary crimes, when committed on Iraqi soil.<sup>152</sup> Section 4, Article 13 of the Penal Code, however, does outlaw the trade in slaves under its universal jurisdiction provision for perpetrators who commit such crimes outside of Iraq and then enter Iraq.<sup>153</sup> Given

147 See Allain, *supra* note 10, at 274. The ICC enslavement crime provision — essentially a reduction to the crime of slavery — is more limiting than the customary law meaning of enslavement. It gives primary importance to the exercise of powers of ownership over a person, including while trafficked, without giving meaning to the slave trade. *Ibid.*

148 *They Came to Destroy*, *supra* note 57, at § 120.

149 1926 Slavery Convention, *supra* note 4 (acceded 18 January 1929).

150 1956 Supplementary Slavery Convention, *supra* note 15 (signed 7 September 1956 and ratified 30 September 1963).

151 Iraq Constitution, Art. 37 (Third), available online at [https://www.constituteproject.org/constitution/Iraq\\_2005.pdf?lang=en](https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en) (visited 27 September 2019), at 15. Art. 37 (Third) reads: 'Forced labor, slavery, *slave trade*, trafficking in women or children, and sex trade shall be prohibited' (emphasis added).

152 The Iraqi penalization of the slave trade in the constitution seems to align with Bassiouni's observation, that of a 'common international crime' comprising the bridge to general principles of law. Bassiouni, *supra* note 1, at 448–449. However, the Iraqi penal code, notwithstanding, does not criminalize genocide, crimes against humanity, or war crimes committed on Iraqi soil. Iraqi Penal Code, available online at <https://www.refworld.org/docid/452524304.html> (visited 27 September 2019).

153 Art. 13 reads, in part: '... all those who enter Iraq subsequent to committing an offence abroad whether as principals or accessories to the following offences: Destroying or causing damage to international means of communications or *trading* in women, children, *slaves* or *drugs*' (emphasis added). *Ibid.* § 4, Art. 13.

the domestic framework, legitimate questions arise as to whether Iraqi courts can pursue the crime of the slave trade committed in Iraq. Furthermore, serious logistical and practical barriers to full judicial accountability exist — and are likely to endure for the foreseeable future — in Iraq.

To avert blatant impunity for acts of slave trading, Iraqi justice actors have contemplated redressing ISIS's conduct under Iraq's anti-trafficking law.<sup>154</sup> While a welcome recognition of the need to hold perpetrators to account for gender-based crimes in the conflict,<sup>155</sup> as examined in Section 4, *supra*, anti-trafficking laws are inadequate to prosecute crimes of slavery or the slave trade. The Iraqi anti-trafficking law remains problematic. Although it disallows consent, irrespective of age, it necessitates proof of means for child victims.<sup>156</sup> The Iraqi law also requires that the means be committed 'in order to sell *and* exploit' the individual.<sup>157</sup> As described in Section 1, *supra*, Yazidi female slaves were gifted and regifted. Their re-enslavement often did not depend upon sales and, thus, would elude the Iraqi trafficking law's reach. The conflation and mischaracterization of slavery and the slave trade with the crime of trafficking inevitably will lead to inadequate, ineffective and incomplete justice.<sup>158</sup> Moreover, the Caliphate administrators of slave markets and holding centres, or the policy architects who authored the ISIS manifesto on slavery and the slave trade, conceivably, would escape liability for the more specific international offences of slavery and the slave trade if charged under national anti-trafficking law.<sup>159</sup>

Another option would be to amend the Iraqi penal code to explicitly redress the slave trade and slavery committed on Iraqi territory in alignment with

154 Law No. 28 of 2012, Combating Trafficking in Persons (Iraq), available online at [https://sherloc.unodc.org/cld/document/irq/2012/law\\_of\\_2012\\_trafficking\\_in\\_persons.html?](https://sherloc.unodc.org/cld/document/irq/2012/law_of_2012_trafficking_in_persons.html?) (visited 27 September 2019).

155 See Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq*, available online at <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq> (visited 27 September 2019).

156 Art. 1 First, *supra* note 154. Compare with Art. 3(c) of the Palermo Protocol, which reads: '[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article', Palermo Protocol, *supra* note 123. The United Nations Office on Drugs and Crime under the framework of Global Action against Trafficking in Persons and the Smuggling of Migrants — Asia and the Middle East noted in an implementation workshop that Iraqi trafficking law did not satisfy the requirements of the Palermo Protocol regarding children. See 'GLO.ACT Supports Counterparts in Iraq to Review National Legislation on Trafficking in Persons' (13 January 2020), available online at <https://www.unodc.org/unodc/en/human-trafficking/glo-act2/Countries/glo-act-supports-counterparts-in-iraq-to-review-national-legislation-on-trafficking-in-persons.html> (visited 14 February 2020).

157 Art. 1 First, *supra* note 154 (emphasis added).

158 Cardozo Law Institute in Holocaust and Human Rights, *Memo on Comments to the United Nations Crimes Against Humanity (CAH) Treaty Draft Concerning Enslavement and Related Crimes*, November 2018 (on file with author).

159 Global Justice Center, *Iraq's Criminal Laws Preclude Justice for Women and Girls*, March 2018, available online at <http://globaljusticecenter.net/files/IraqiLawAnalysis.4.6.2018.pdf> (visited 27 September 2019), at 6.

Iraq's obligations under international treaty and international customary law, and importantly, domestic constitutional law.<sup>160</sup> Amendments to the domestic criminal code, however, must comply with due process. Challenges to violations of the principle of legality,<sup>161</sup> specifically with regard to *ex post facto* criminal legislation for ISIS-era crimes, would be raised. Even if this avenue were pursued, additional due process challenges in Iraq and the KRI persist about the basic fairness of trials carried out against ISIS fighters, including sentences handed down that carry the death penalty.<sup>162</sup>

A third option to consider is that Iraqi national courts could invoke their universal jurisdiction, which outlaws the trade in slaves in section 4 of Article 13 of the Penal Code. Incidents recounted in Section 2 concerning slave trading and slavery occurred in the Caliphate when it straddled Iraqi and Syrian territory. Yazidi females or boys were transported to several holding sites and enslaved in several locations, including Syria. Yazidi boys might have been forced to engage in military operations or spent part of their enslavement on Syrian territory. Some criminal conduct conceivably took place in Syria, even if it possibly continued in Iraq. For Caliphate leaders and ISIS fighter who individually or collectively perpetrated slavery or the slave trade in a neighbouring state and then entered Iraq, section 4, Article 13 might be an avenue of penal pursuit not barred by *ex post facto* considerations.

The proceedings could adhere to definitions of slavery and the slave trade crimes found in the 1926 Slavery Convention and its 1956 Supplementary Slavery Convention,<sup>163</sup> characterizing them as war crimes, crimes against humanity or as distinct international crimes. The approach using national-designated universal jurisdiction provisions more accurately would reflect the harms perpetrated against survivors of enslavement and the slave trade as it conformed with the principle of legality. Again, a resort to this provision of the Iraqi Penal Code would narrow the impunity gap that exists when using Iraq's anti-trafficking law.

The fourth option to counter impunity would be to establish an international or hybrid judicial mechanism based on customary international law with jurisdiction over international crimes, inclusive of the slave trade, and transnational crimes, such as trafficking.<sup>164</sup> The slave trade could be enumerated

160 Amendments to the Iraqi penal code might affect criminal prosecutions in the Kurdistan Region of Iraq (KRI).

161 The principle of legality, or *nullum crimen sine lege, nulla poena sine lege*, is expressed in the International Covenant on Civil and Political Rights (Art. 15) as well as the Iraqi Constitution in Art. 19, Second Section. Iraq Constitution, *supra* note 151.

162 M. Coker and F. Hassan, 'A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects', *The New York Times*, 17 April 2018, available online at <https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html> (visited 2 January 2020).

163 1926 Slavery Convention, *supra* note 4; 1956 Supplementary Slavery Convention, *supra* note 4.

164 The Supreme Iraqi Special Tribunal provides precedent to include international crimes and nationally recognized crimes. See Law of the Supreme Iraqi Special Tribunal, available online at <https://web.archive.org/web/20090325152656/http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (visited 14 February 2020), at Art. 14. The authors recognize that

under war crimes, as a crime against humanity, or as a distinct international criminal law crime. Any judicial mechanism that applied customary international law would have to withstand challenges to the international crime of the slave trade's accessibility and foreseeability to adhere to the principle of legality.<sup>165</sup>

The slave trade — despite its underuse, its implicit position in certain international judicial statutes and disconcerting absence in the Rome Statute — still constitutes a feasible if not vital legal tool for redress. The international community's political will to establish an ad hoc judicial mechanism would wade through a complexity of substantive political and financial issues, not to speak of the impracticality of accessing the terrain where both the physical evidence and witnesses are located. Creation of such a mechanism could also extend its jurisdiction to acts of slavery and slave trading even when executed by ISIS outside of Iraq but continuing on Iraqi soil. Enumeration of specific provisions for the slave trade as a war crime and as a crime against humanity might usher in long-awaited judicial relief to the Yazidis and other ISIS enslavement victims-survivors. Investigations teams, including those working under the UNITAD or the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM), can contribute towards future to redress through meticulous documentation and appropriate legal characterization of the facts that comprise the slave trade, and slavery crimes, in Iraq and Syria.

A fifth option would be to encourage third states to bring cases against ISIS defendants. The third states, such as Germany, should investigate, document and pursue acts of slave trading as war crimes, crimes against humanity or international crimes under their respective domestic penal codes using extra-territorial jurisdiction, including passive personality or universal jurisdiction. Similar to Article 13, section 4, of the Iraqi penal code that contemplates extra-territorial universal jurisdiction for trading in slaves, third party states should examine their customary law, constitutional law and penal code jurisdiction over the slave trade. Universal jurisdiction cases, however, are likely to present their own challenges, such as the ability to bring defendants into custody and accessing material evidence and witnesses far from the territory

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establishing the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM) and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD) investigation mechanisms likely represents the present extent of the political will of the international community (of which Iraq and Syria are a part) to ensure accountability and justice in Iraq and Syria. These mechanisms can contribute meaningfully towards accountability for crimes of the slave trade by investigating and documenting adequately precursory conduct, i.e. facts surrounding slavery crimes.

165 Judgment, *Kaing Guek Eav* (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, § 31.



in which the crimes occurred. Each prospect of redress is ordained with complex procedural and substantive concerns.

## 6. Conclusion

The slave trade prohibition is a 'core' international crime with *erga omnes* responsibilities.<sup>166</sup> Its conceptual absence from legal measures of redress ingrains the dearth of protection from the intent to reduce and to maintain persons in slavery. Its implicit and explicit omission from international judicial instruments, especially as a war crime, a crime against humanity or a distinct international crime based in customary law, is baffling. Given the prevalence of unlawful precursory acts to slavery, it is not unreasonable to surmise that the slave trade persists, especially in relation to armed conflict.

The analysis above leads the authors to conclude that several factors may have contributed to the slave trade crime's underutilization. First, adjudication of international cases that entail conduct characterizable as slavery and the slave trade has focused narrowly on the slavery prong, even when presented with evidence of the slave trade. Secondly, miscomprehension of its legal framework serves to diminish the slave trade's juridical utility. Thirdly, statutes of the ad hoc tribunals failed explicitly to enumerate or seek recourse for the slave trade as a war crime. Likewise, Article 8 of the Rome Statute omits slavery and the slave trade from the list of war crimes. Fourthly, although well intended, the Rome Statute's Article 7(g) does not incorporate the customary law prohibition of the slave trade under crimes against humanity, neither as a distinct prohibition nor as part of the definition of enslavement. The acknowledged precursory conduct of enslavement is left legally bereft as observed in *Ntaganda*. Fifthly, the descriptor 'trafficking in persons'<sup>167</sup> disarrays the distinctions between the slave trade and slavery, hampering their inter-linked functionality. These factors should be re-examined and addressed.

The jurisprudence on the prohibition of slave trading seems hesitant if not illusive, even though unlawful precursory conduct to slavery is identifiable. A resort to charging the specificity of the criminal conduct of the slave trade is warranted. On the national level, recourse to articles that condemn the slave trade contained in constitutions, penal codes and universal jurisdiction provisions is needed. The desuetude of the slave trade has the potential to erode state practice and *opinio juris* and, thus, corrode the strength of customary international law. On the international level, the express enumeration, even via amendments, of prohibitions of the slave trade into statutes and treaties

166 R. Rastan, 'Complementarity: Contest of Collaboration', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, FICHL Pub. Ser. No. 7, 2010), at 123, available online at [https://www.fichl.org/fileadmin/fichl/documents/FICHL\\_7\\_Web.pdf](https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf) (visited 15 February 2020).

167 Art. 7(g) ICCSt.

should commence. Indeed, the Rome Statute and the draft Crimes Against Humanity Treaty<sup>168</sup> should include provisions that proscribe the slave trade.

We conclude that the slave trade's prohibition remains a stalwart legal means to eradicate human bondage as envisioned by the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention. The legal neglect of the slave trade exacted upon the 'Comfort Women' and the potential denial of redress for enslaved Yazidis are compounded by the failure to refurbish this peremptory norm.

The slave trade appears to have been 'missing in action' for far too long. Send out a search party.

168 *Crimes Against Humanity, Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee*, UN Doc. A/CN.4/L.935, 15 May 2019, Art. 2(1), available online at <https://legal.un.org/docs/?symbol=A/CN.4/L.935> (visited 16 March 2020).