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Human Trafficking as a Crime Against Humanity:

An analysis of the legal potential to prosecute human trafficking in the International Criminal Court with reference to the trafficking of Rohingya Muslims in Southeast Asia

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ABSTRACT

This paper examines the legal potential to prosecute human trafficking as a crime against humanity (CAH) in the International Criminal Court (ICC). Although the ICC has been equipped with the legal tools necessary to prosecute human trafficking, it has not yet brought a single trafficking case to the Court. In order to fully comprehend the bar for prosecution of human trafficking as a CAH at the ICC, the paper applies the CAH framework to the situation of the persecuted Rohingya minority in Myanmar and Thailand in Southeast Asia. Chapter 1 will briefly introduce the rationale behind the hypothesis as well as present the limitations of the scope of the thesis. Chapter 2 shall examine the general characteristics of human trafficking including the universal definition in the Palermo Protocol. Chapter 3 will deal with the CAH framework, including the customary nature of human trafficking as CAH, as well as conducting an in-depth analysis of the chapeau requirements of CAH in the Rome Statute. Chapter 4 will study the complementarity requirement and the gravity threshold, two of the most contentious concepts concerning jurisdiction and admissibility of the ICC. Finally, chapter 5 will apply the international law on human trafficking and the CAH framework to the case study on the Rohingya minority. The objective is to analyse whether there is a *prima facie* case concerning the CAH perpetrated against Rohingya in Myanmar and Thailand that may justify human trafficking persecutions by the ICC engaging individual criminal responsibility.

ABBREVIATIONS AND ACRONYMS

AI	Amnesty International
CAH	Crimes Against Humanity
CCL10	Allied Council Control Law No. 10
CIL	Customary International Law
DKBA	Democratic Karen Buddhist Army
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organisation
MSF	Médecins Sans Frontières
NGO	Non-Governmental Organisation
Palermo	The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
Rohingya	The Rohingya minority
SPDC	State Peace and Development Council of Myanmar
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNTOC	United Nations Convention against Transnational Organised Crime
UNODC	United Nations Office on Drugs and Crime

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1. INTRODUCTION

Alongside illicit arms trade and drug trafficking, human trafficking[1] is one of the three most rapidly growing organized criminal industries in the world. Although the difference may be clear on paper, the three branches of trafficking are often intertwined. All three illicit trades have devastating consequences, causing deaths and suffering to humans commonly based on the abuse of the imbalance of power, economy or addiction. However, with human beings as its commodities, human trafficking differs from the other two criminal trafficking industries because the International Criminal Court[2] has jurisdiction to prosecute this branch of trafficking.[3]

Although the ICC has been equipped with the legal tools necessary to prosecute human trafficking, it has not yet brought a single trafficking case to the Court.[4] The potential of the ICC to expand the current legal paradigm and include other criminal offences among the Court's current priorities is underestimated. The extensive list of crimes included in the Rome Statute allows the Court to place new issues on the agenda and thereby reflect the wide range of offences applicable as the most serious crimes in the contemporary international community. Affecting an estimated number of near 30 million people worldwide according to international NGOs[5], human trafficking is one of the main challenges in our time. The ICC has already demonstrated independence and capacity to make controversial choices[6] and hand

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[1] Human trafficking are commonly referred to as; trafficking in human beings, trafficking of humans, trade in

[2] Established by the Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF. 183/9 (1998) (entered into force 1 July, 2002). Hereinafter "the ICC" or simply "the Court".

[3] Article 7(2)(c) of the Rome Statute stipulates the meaning of "enslavement" as a crime against humanity and explicitly includes trafficking in persons as one of the acts that are incorporated in the terminology when exercised with right of ownership over another person, in particular women and children.

[4] The ICC has indicted individuals for sexual slavery (e.g. Joseph Kony and Vincent Otti) and enslavement (Raska Lukwiya, Okot Odhiambo, Dominic Ongwen and Vincent Otti) as CAH but specific charges on human trafficking as enslavement has as of 13 April 2014 not been prosecuted by the ICC.

[5] Not for Sale: http://www.notforsalecampaign.org/about/slavery/ (accessed 7 May 2014), Free the Slaves: https://www.freetheslaves.net/sslpage.aspx?pid=375 (accessed 7 May 2014), Walk free: http://www.walkfree.org/learn/ (accessed 7 May 2014).

[6] The ICC has issued arrest warrants against both current and former heads of states reflecting the ICC's stance against impunity for grave violations of human rights and that no one is above the law. The arrest warrant for the Sudanese president Omar al-Bashir on charges of war crimes and CAH has not yet lead to the arrest of the head

down landmark decisions[7] and this paper examines whether the time has come for the ICC to prosecute trafficking in persons as a crime against humanity[8] by opening up investigations into the situation of the persecuted Rohingya[9] minority in Southeast Asia with a particular focus on Myanmar[10] and Thailand.

Following fifty years of ruthless military rule, the Southeast Asian State of Myanmar has opened up to democratic changes with president Mr. Thein Sein. The democratic development includes drastic economic reforms and the release of many political prisoners, most noteworthy Miss Aung San Suu Kyi's release from house arrest.[11] However, internal violent conflicts based on ethnic divisions prevail in many regions, in particular in the Arakan state southwest in the country with borders to Bangladesh. The Rohingya living in Arakan is often referred to as the most persecuted minority in the world.[12]

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of state: Another high profile person that has been brought to the ICC is on allegations of CAH is the former president of the Ivory Coast, Laurent Gbagbo. One of the most disputed ICC investigations concerns the Kenyan president Uhuru Kenyatta over allegations of CAH in the aftermath of the 2007 elections.

[7] The ICC has convicted Thomas Lubanga, a Congolese warlord for the use of child soldiers.

[8] Hereinafter "CAH". Human trafficking may be prosecuted as enslavement or alternatively as sexual slavery in accordance with Article 7(1)(c) or 7(1)(g).

[9] Hereinafter "Rohingya".

[10] The English name Burma from the colonial time, as well as names of several cities was changed when the new military government took the power in the country in 1989. Burma was turned into Myanmar and Arakan state was changed to Rakhine state. For consistency, notwithstanding the political symbolism of the two names, the thesis will use the name Myanmar in accordance with the practice of the United Nations and the Association of Southeast Asian Nations (ASEAN). However, while Rakhine State is the official name of Arakan, the Rohingya still use Arakan as the name of their homestate. Hence the thesis will employ Arakan as the name of the Rakhine state to symbolize sympathy with the persecuted Rohingya minority.

[11] Miss Aung San Suu Kyi (born 19 June 1945) is the current head of Myanmar's political party "National League for Democracy" (NLD) and a Nobel Peace Prize Laureate. Symbolizing the democratic movement in Myanmar, Miss Suu Kyi has led a peaceful battle against the military leadership in the country. Miss Suu Kyi was released from house arrest in 2010 after being detained as a political prisoner for almost 15 years. http://www.biography.com/people/aung-san-suu-kyi-9192617#awesm=~oCe7V5A2aIfHyT

[12] The UN Special Rapporteur to Myanmar is commonly cited as the origin of the notion that Rohingya is the most persecuted minority in the world. However, it is unclear whether this is accurate, as the report by the Special Rapporteur to Myanmar does not include any such statement. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.58_AUV.pdf (accessed 24 March 2014).

The discrimination and persecution against the Muslim stateless minority make them especially vulnerable to human traffickers when trying to escape to neighbouring countries. The Rohingya are also vulnerable for trafficking and extortion in neighbouring countries like Thailand. There is already a wide range of international organizations and academics that have been claiming for years that Rohingya are victims of CAH,[13] substantiating the claim that Rohingya might be victims of enslavement as one of several enlisted acts under Article 7 of the Rome Statute. Among those alleging that CAH have occurred against Rohingya in Myanmar is Prof. William A. Schabas, who in relation to his report *"Crimes Against Humanity in Western Burma: The Situation of the Rohingyas"* stated the following; "Describing the violations as crimes against humanity raises the possibility that cases against those Burmese officials who are responsible could be referred to the International Criminal Court."[14] Hence, there are already important voices within international law pushing for the involvement of the ICC in regards to the situation of the Rohingya. The inclusion of human trafficking charges as enslavement under Article 7 supplementing the other potential CAH-indictments does therefore not seem far-fetched. The objective of this paper is subsequently the examination of whether the requisite elements for such a ground-breaking trial at the ICC is present, feasible and credible.

[13] William A. Schabas argues in the report *"Crimes Against Humanity in Western Burma: The Situation of the Rohingyas"* released by the ICHR in 2010 that the crimes committed by the Burmese government against the Rohingya in the Arakan state may constitute CAH. An extensive open-source investigation was carried out on a fact-finding mission to Myanmar, Thailand and Bangladesh in order to reach the conclusions of the Report. Other internationally respected actors or organizations agreeing with Schabas are; the UN Special Rapporteur on Human Rights to Myanmar Tomás Quintana, Human Rights Watch (HRW), Human Rights House (HRH), and Amnesty International's Myanmar researcher Benjamin Zawacki.

[14] NUI Galway, 'NUI Galway report concludes CAH committed against Rohingya': http://www.nuigalway.ie/about-us/news-and-events/news-archive/2010/june2010/nui-galway-report-concludes-crimes-against-humanity-committed-against-rohingyas-1.html (accessed 20 April 2014).

1.1. ARGUMENT AND STRUCTURE

This dissertation analyses the ICC framework to prosecute human trafficking cases that fall within the enslavement category deriving from Article 7 of the Rome Statute, and further examines whether the Court ought to open investigations into the situation of Rohingya in Myanmar and Thailand[15] in order to evaluate whether the situation reaches the threshold required for prosecution of CAH in general and trafficking in persons in particular.

The legal concept of CAH was chosen over war crimes and genocide for two grounds. Firstly, human trafficking is explicitly referred to in the enlisted act of enslavement under Article 7 of the Rome Statute, making CAH the natural selection of a legal framework for the prosecution of human trafficking at the ICC. Secondly, CAH is more suitable and easier to establish for the situation of Rohingya than war crimes or genocide. Although the Myanmar army is frequently involved in the persecution and sometimes trafficking of Rohingya, the concept of war crimes requires the existence of an international or internal armed conflict for its application[16], and that do not seem to be the case neither in Myanmar nor in Thailand. Likewise, regardless of the existing evidence of ethnic cleansing in Myanmar, state policy seem to be more inclined to forcefully remove the minority group than to exterminate the group as such. Although that may well fall within the scope of genocide, it has been argued that international tribunals has set the bar high for prosecuting genocide when there is lack of a clear intention to physically destroy the victimized group in question.[17]

[15] Neighbouring countries, especially Bangladesh and Malaysia, are also involved in the crimes carried out against Rohingya according to the Report by NUI Galway, "Crimes Against Humanity in Western Burma: The Situation of the Rohingyas", (Irish Centre for Human Rights, 2010), but Myanmar and Thailand seem to be more involved in terms of trafficking in persons according to various NGOs and news agencies. For that reason, these two countries have been chosen for this paper.

[16] Article 8 of the Rome Statute. The situation is more likely to constitute internal tensions and riots, which, according to Article 8(2)(d), does not fall within the scope of war crimes.

[17] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p.43 and NUI Galway, op. cit., p.29.

In order to assess the legal potential of the ICC to prosecute human trafficking with the aim of an application of law to the case of Rohingya in Southeast Asia, an analysis of the requirements and obstacles will be carried out in the following manner; Firstly, the elements of human trafficking will be analysed, laying the basis for an application of these components to the case study of the Rohingya in chapter 5. Secondly, the various *chapeau* requirements to establish CAH will be carefully scrutinized, including the customary nature of enslavement as CAH, to ensure that the case study is taking all relevant criteria into consideration. Thirdly, the conditions of admissibility to the ICC must be explored as the principle of complimentarity and the gravity threshold may set the bar high for prosecution of human trafficking at the Court. Fourthly, facts on the persecution against- and trafficking of Rohingya will be briefly introduced before the legal findings of the paper will be applied to the case study.

The purpose of the application is to demonstrate that Rohingya are victims of human trafficking as the enlisted act of enslavement as CAH and that the ICC subsequently have jurisdiction to prosecute the perpetrators of these offences together with other potential CAH charges.[18] Although interpretation of the Rome Statute is at the core of this paper, other international criminal law jurisprudence, predominantly from the ICTY and the ICTR will be referred to in order to provide clear legal foundations for the analysis. The paper will sum up with some concluding observations on the legal potential for prosecutions of human trafficking at the ICC with reference to the trafficking of Rohingya in Southeast Asia.

[18] It is important to highlight that there might exist other situations of human trafficking as CAH that might be equally applicable for prosecution by the ICC. (E.g. North Korean women trafficked to China for prostitution, enforced marriage or other forms of forced labour and Mauritanian children and adults from slave castes are systematically forced into marriage, sexual slavery and forced labour).

2. HUMAN TRAFFICKING

Human trafficking can be difficult to define due to the countless components that make up the crime, and because it is often mistaken for smuggling or illegal migration. Common for all human trafficking, however, is unlawful movement and confinement of one or more persons for exploitation, although the means and methods may vary.[19]

In the early 20th century, human trafficking was mainly understood as sexual exploitation of women and children, but the definition has later come to include other forms of trafficking.[20] Human trafficking is rooted in slavery and the slave trade and some of the first conventions on the crime referred to the delinquency as *white slavery*.[21] The campaigning and debate on abolition of slavery was at the core in the collaboration of creating international legal instruments. Despite international efforts to abolish slavery, human trafficking has expanded with globalization. At present, human trafficking encompass almost all types of forced work or commodification of persons,[22] although it is categorized solely as enslavement in the Rome Statute.

As most criminal offences, human trafficking is also considered a violation of human rights, which are "rights and freedoms to which every human being is entitled."[23] While human trafficking has received a lot of attention as a human rights violation internationally, it has not been awarded the same focus as an international crime by international criminal tribunals. Both the International Criminal Tribunal of former Yugoslavia[24] and the International Criminal Tribunal of Rwanda[25] were frontrunners in their time for the development of gender

[19] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 25. December, 2003, 2225 U.N.T.S. 209, (Art. 3) (entered into force 29. September 2003).

[20] Cerone, J., "Human Trafficking" Max Planck Encyclopedia of Public International Law, p.1.

[21] International Agreement for the Suppression of White Slave Traffic 1904.

[22] Cerone, op cit., p.1.

[23] E. Martin and J. Law, Oxford Dictionary of Law, 6th ed. (Oxford: Oxford University Press, 2006).

[24] Hereinafter the ICTY. Established by Resolution 827 on 25 May 1993.

[25] Hereinafter the ICTR. Established by Resolution 955 on 8 November 1994.

crimes adjudicating cases involving rape and sexual slavery as war crimes and even as CAH.[26] With the explicit inclusion of human trafficking in its Statute, the ICC could equally be a frontrunner of its time by prosecuting human trafficking as CAH.

2.1. DEFINING HUMAN TRAFFICKING

The universal definition of human trafficking was ultimately established in one of the supplementary protocols to the *United Nations Convention against Transnational Organized Crime*[27] *(UNCTOC)* in Palermo, Italy in 2000. The General Assembly adopted the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*[28], by Resolution 55/25[29] and the Protocol entered into force in 2003 as the first international legally binding instrument with a commonly agreed definition on trafficking in persons. The universal definition was aimed at the facilitation of cooperation between States in the investigation and prosecution of such crimes, in addition to the strengthening of the protection and assistance to victims of human trafficking taking full account of their human rights.[30] Although the Protocol's main purpose was inter-state cooperation, its clear and precise definition seems equally suitable for interpretation by an international tribunal.

Article 3(a) of the Palermo Protocol, defines trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

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[26] Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković, Case No. IT-96-23-T (Trial Chamber, 22 February 2001) held that rape may constitute a war crime or CAH and that it may be one of the underlying acts of enslavement.

[27] United Nations Convention against Transnational Organized Crime, 15 November 2000, GA RES 55/25. Hereinafter UNTOC.

[28] Hereinafter the Palermo Protocol.

[29] UNGA Res. 55/25

[30] UNODC: United Nations Convention against Transnational Organized Crime and the Protocols Thereto: http://www.unodc.org/unodc/treaties/CTOC/ (Last accessed 27 February 2014)

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".[31] Upon a closer examination and contrary to the beliefs of many, the Palermo definition of trafficking in persons does not require movement across borders and may subsequently occur within the borders of a State. The definition of human trafficking is widely accepted among states, with 117 signatories and 159 parties to the Palermo Protocol.[32]

One of the more controversial issues in the creation of the international human trafficking legislation was defining the victim, and more specifically, whether a victim's consent to being smuggled across borders or being voluntarily moved to work in industries considered exploitative would be excluded from the category.[33] However, the universal definition was construed in a manner such as to avoid defining the victims of human trafficking altogether. Victims of human trafficking are not defined in the Palermo Protocol, allowing for prosecutors to be flexible and adapt the definition as they see fit. The issue on whether allegations of a victim's consent would exclude him or her as a trafficking victim have been explicitly addressed in Art. 3(b) of the Palermo Protocol, where it is stipulated that where any of the means listed in Art. 3(a) may be affirmed[34]; the consent of the victim is irrelevant.[35] This provision serves to distinguish traffickers from migrant smugglers in situations in which the migrant has consented to the non-exploitative conditions.

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[31] Palermo Protocol, Art 3(a) – Use of Terms

[32] UN treaty collection - ratifications: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en (Accessed 3 March 2014) Myanmar accepted the Palermo Protocol 30 March 2004 but has not yet ratified the Protocol. Thailand signed the Protocol 18 December 2001. Both countries have reservations to Art 15 on settlements of disputes concerning referral to the International Court of Justice (the ICJ), which might reflect a negative attitude towards adjudication in international tribunals in general, including potential protest to the future involvement of the ICC.

[33] Cerone, op. cit., p.2

[34] That is the threat, use of force, coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

[35] Palermo Protocol, Art 3(b)

Human trafficking must be distinguished from migrant smuggling. Although the two crimes often overlap or are less clear-cut in practice, there are substantial statutory differences between the two. Migrant smuggling is defined in the parallel Protocol supplementing the UNTOC, namely *the Protocol against the Smuggling of Migrants by Land, Sea and Air*, as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident"[36]. Hence, in contrast to human trafficking, migrant smuggling do require movement across borders and may therefore not occur within the borders of a State. Moreover, and perhaps more importantly, migrant smuggling does not includes an element of control or ownership nor does it include an element of exploitation, as opposed to human trafficking. The distinction between trafficking in persons and migrant smuggling is important because most states are more lenient to assist victims of trafficking than those who have been smuggled across borders and thus perceived as voluntary, illegal and economic migrants. As previously mentioned, the distinction is less clear-cut in practice, leaving a large number of victims of human trafficking considered as illegal migrants, which, as will be shown, also is the case for most Rohingya refugees in Thailand. Similarly, economic migrants in search of a better future often aim to prove that they are victims of trafficking in order to obtain protection, visa or residency under the asylum laws of the state of destination.

The exploitative component of trafficking in persons is the crucial element for determining the existence of human trafficking. Yet, evidence of exploitation will not alone suffice in the establishment of trafficking in persons, as labour exploitation can often occur in poor societies outside the context of trafficking.[37] The distinguishing factor for labour exploitation outside and inside the context of human trafficking is that a person can consent to poor labour conditions considered exploitative, but no one can consent to being trafficked.[38] The definition of human trafficking as well as its differences from related international crimes is

[36] Protocol against the Smuggling of Migrants by Land, Sea and Air Art, supplementing the United Nations Convention against Transnational Organized Crime, 3(a)

[37] UN, "Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices", United Nations, New York, 2003, p.26

[38] Ibid, p.27

essential for the appreciation of further analysis of the international crime as CAH in the Rome Statute.

2.2. THE ELEMENTS OF HUMAN TRAFFICKING

In order to establish the potential of the ICC to prosecute trafficking in persons as CAH, it is necessary to examine the components of human trafficking in further detail. As will be demonstrated in chapter 5, Rohingya are victims of several of the enlisted acts constituting CAH in article 7 of the Rome Statute. However, for the purposes of this paper, only the elements of human trafficking as enslavement will be examined so as to establish the criteria for which it may constitute CAH and be prosecuted at the ICC.

With the aim to include as many means and methods of human trafficking as possible, the Palermo Protocol had to incorporate numerous elements into its definition. When dissecting the definition from the Palermo Protocol, three key elements may be found to make up the definition. These three components are *the act*, *the means* and *the purpose* of trafficking in persons.[39] Firstly, *the acts* referred to are enlisted as "recruitment, transportation, transfer, harbouring or receipt of persons"[40]. Secondly, the crime may be carried out by *means o*f "threat, use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, giving or receiving payments or benefits to achieve the consent of a person controlling another person"[41]. Thirdly, *the purpose* must be exploitation, although the exploitation itself may come in many forms, including but not limited to; prostitution, other forms of sexual exploitation, forced labour or services, slavery or similar practices, servitude or organ removal.[42] Hence, in order to identify a crime as human trafficking, at least one of the enlisted

[39] UNODC on the elements of Human Trafficking: http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html (accessed 3 April 2014).

[40] Palermo Protocol, Art 3(a) – Use of Terms

[41] Ibid.

[42] Ibid.

acts, means and purposes must be fulfilled.[43] For example, the victim can have been recruited (act) due to her vulnerability (means) for purposes of exploitation through prostitution (purpose). The elements of human trafficking are important for the case study examination in Chapter 5.

2.3. HUMAN TRAFFICKING IN THE ROME STATUTE

As the paper argues that human trafficking ought to be prosecuted in the ICC, the inclusion of trafficking in persons as the enlisted act of enslavement as CAH in the Rome Statute is paramount. Curiously, in relation to the establishment of the Court, Trinidad and Tobago wrote a letter to the UN Secretary General reiterating the need for an international court with jurisdiction to prosecute drug trafficking.[44] Although their request failed, the Rome Statute did include trafficking of persons, and one might speculate as to why trafficking of drugs or trafficking of weapons were excluded from the Statute. Though nothing from the *Travaux Préparatoires* of the ICC Statute[45] seems to indicate that human trafficking was included because of its superior gravity to the other forms for trafficking, its use of human beings as commodities certainly makes it different from the other two.

Article 7 of the Rome Statute refers to several enlisted acts as CAH "when committed as part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack"[46]. Several of the enlisted acts may occur as direct or indirect results

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[43] It must be noted that if the victim is a child, the means element is not required for the crime to qualify as human trafficking under the Palermo Protocol.

[44] UN GAOR, 7th Session, Supplement #11, UN Doc A/2136 (1952). See also Addendum to the Report of the Bureau of the Review Conference, 8th session, the Hague, 18-26 Nov. 2009 ICC-ASP/8/43/Add-1 http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-43-Add.1-ENG.pdf#search=trafficking (accessed 12 April 2014) where Trinidad and Tobago propose amendments to the Rome Statute 7 years after the entry into force of the Rome Statute in accordance with Article 121 in terms of suggesting the inclusion of international drug trafficking.

[45] Background documents for the establishment of the ICC: http://www.un.org/law/icc/ (accessed 8 May 2014) and ILC Report Doc A/CN.4/SER.A/1993/Add.1 on state responsibility: http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1993_v2_p1_e.pdf and ILC Report Doc A/49/10 1994 Vol II: http://legal.un.org/ilc/documentation/english/A_49_10.pdf p.26.

[46] Article 7(1) of the Rome Statute.

of trafficking in persons, although they are not equally relevant to this paper.[47] Among the enlisted acts is enslavement in article 7(1)(c), commonly referred to as the "trafficking clause", with an explanation provided in article 7(2)(c), which explicitly refers to trafficking in persons, in particular women and children in the description of the crime: "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"[48]. The article is important as it illustrates the possibility of the Court to prosecute modern slavery including human trafficking situations where these reach the gravity of CAH. However, the Statute has been criticized for the absence of a definition on human trafficking, arguably making it difficult for the Court to prosecute such crimes.[49] Although the ICC has not implemented the trafficking in persons-definition from the Palermo Protocol, the "means" element from the definition has been recognised as customary international law and should subsequently be taken into account by the Court.[50]

Article 7(1)(g) enlists those additional acts relevant for the prosecution of human trafficking for purposes of sexual exploitation.[51] In general, this subsection of article 7 is mostly relevant for women and children, often more vulnerable to this type of human trafficking. It seems likely that the ICC will utilize the human trafficking definition from the Palermo Protocol when the time has come for adjudication by the Court for allegations of this crime as it represents the only universal definition of the crime.

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[47] Only Article 7(1)(c), explained in Article 7(2)(c) is relevant for the prosecution of human trafficking by the ICC, although Article 7(1)(c) enslavement, (f) torture,(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity and (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, may equally be committed during the course of the trafficking by the perpetrators.

[48] The Rome Statute, Art 7(2)(c). The definition is similar to the definition of slavery in the Slavery Convention 1926. See also Elements of Crimes document ICC-ASP/1/3(part II-B), adopted and entered into force 9 September 2002. It is of explanatory nature, with the aim of facilitating the identification of enlisted crimes in those articles where this is relevant, such as CAH: http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf footnotes 18, 53 and 65.

[49] Kim, Jane. "Prosecuting Human Trafficking as a Crime Against Humanity under the Rome Statute", A.B. Harvard University, Columbia Law School, 2011, p. 4.

[50] Ibid., p. 11.

[51] The Rome Statute, Art 7(1)(g).

Pursuant to article 9, the Elements of Crimes document[52] may assist the ICC in interpreting and applying articles 6, 7 and 8 of the Rome Statute. The Elements of Crimes document provides three explanatory notes to the requisite elements of article 7(1)(c) on the CAH of enslavement. Firstly, that any or all of the powers attaching to the right of ownership must have been exercised by the perpetrator over one or more persons.[53] This may have been carried out by means of purchase, sale, loan or trade by one or more persons, or through a comparable deprivation of liberty.[54] Forced labour, human trafficking or other forms of slavery are in some circumstances examples of such deprivations of liberty.[55] Secondly, it is required that the conduct was committed as part of a widespread or systematic attack directed against a civilian population in accordance with the general nature of article 7.[56] Thirdly, the perpetrator must have known or intended that his or her conduct conformed part of a widespread or systematic attack directed against a civilian population.[57]

The first explanatory note is highly consistent with the definition of human trafficking in the Palermo Protocol, although naturally not as detailed in its description. This is useful as it gives the ICC indications as to the most important elements of enslavement, namely powers of ownership as well as clear examples of the means and methods for which the enslavement is carried out. The two other explanatory notes are less helpful as it merely reiterates the general requirements of article 7 of the Rome Statute.

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[52] The Elements of Crimes doc. Op cit.

[53] Ibid., p.6

[54] Ibid., p.6

[55] Ibid., p.6, footnote 11.

[56] Ibid., p.6

[57] Ibid., p.6

3. CRIMES AGAINST HUMANITY

This chapter will examine the concept of CAH with a particular focus on the chapeau requirements of article 7 of the Rome Statute. The aim is to lay a solid basis for further analysis and application of the CAH framework deriving from the ICC Statute to the situation of Rohingya in Myanmar and Thailand. Moreover, the following subsections will take into account relevant case law concerning CAH in general, and the enslavement category in particular, as a means to examine the general criteria for establishing CAH. In order to justify the application of case law from other international courts than the ICC, a brief assessment of the customary nature CAH in general and of human trafficking as enslavement in particular, will be presented in the following subchapter.

3.1. THE CUSTOMARY NATURE AND DEVELOPMENT OF CAH

It is purported that whereas genocide or war crimes has crystalized through codification in treaties, CAH has developed in customary international law[58] (CIL[59]) and reflects custom. CIL refers to State conduct or behaviour practiced based on a feeling of a legal obligation to behave in such a way. CIL is one of the core sources of international law provided in article 38 of the ICJ Statute where it is simply referred to as "evidence of a general practice accepted as law".[60] The two requisite elements for determining whether a legal norm has acquired customary status are State practice and *opinio juris*.[61] CAH has subsisted in CIL for decades and are also established as CIL in some national courts.[62]

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[58] Cryer, R., et al. *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2010), pp. 230-233.

[59] Hereinafter CIL. Provided as a source of law in article 38(1)(b) of the The Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945), entered into force 24 October 1945). Hereinafter the ICJ Statute.

[60] Article 38 directs the Court to decide disputes referred to it in accordance with IL by applying: a) Int. conventions, whether general or particular, establishing rules expressly recognized by the contesting States, **b) Int. custom, as evidence of general practice accepted as law,** c) The general principles of law as recognized by civilized nations, d) Subject to the provisions of art 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

[61] CIL comprises two elements: a material element and a psychological element. The material element refers to the behavior of States, in other words State practice. The psychological element denotes States believing that the conduct is not discretionary but mandatory; opinio juris sive necessitatis is the technical term. The North Sea

The London Charter[63], creating the Nuremberg Tribunal, was the first legal instrument of international criminal law that created a written codification of CAH.[64] As opposed to war crimes committed by one national against another, the new defined crime in the London Charter was important because it applied to circumstances where victims and perpetrators shared the same nationality.[65] This is of particular relevance to prosecution of human trafficking where the victims and the perpetrators often are nationals of the same country, if not stateless. Enslavement was already included in the London Charter as an enlisted act in article 6(c), although there were no specific references to human trafficking in the Charter.[66]

The definition of CAH derived from the London Charter changed considerably over time in various international legal instruments such as the Tokyo (IMTFE) Charter[67], the Allied Control Council Law No. 10 (CCL10)[68], the ICTY[69], the ICTR, as well as by the Rome Statute. Historically, CAH was thought to require an armed conflict to be applicable,

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Continental Shelf Cases: Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands) (1969) ICJ Reports 3, para 44 provides further explanation of CIL: "Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. (…) The States concerned must feel that they are conforming to what amounts to a legal obligation."

[62] See for example *Imre Finta* (Canada), *Klaus Barbie* (France), *Maurice Papon* (France) explained in Hwang, P., 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court', *Fordham International Law Journal*, Vol. 22(2), 1998, pp. 469-476.

[63]The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. (Created in London, 8 August 1945), establishing the International Military Tribunal at Nuremberg: http://avalon.law.yale.edu/imt/imtconst.asp (last accessed: 24 April 2014)

[64] Antonio Cassese, International Criminal Law (Oxford: Oxford University Press, 2008), p. 101–102. Bassiouni, M. Cherif, Chapter 4: Historical Legal Foundations: International Humanitarian Law and the Regulation of Armed Conflict in "Crimes Against Humanity in International Criminal Law", (Dordrecht: Martinus Nijhoff Publishers, 1992) p. 147.

[65] Bassiouni, op. cit., p. 179.

[66] The Charter and Judgment of the Nürnberg Tribunal: http://legal.un.org/ilc/documentation/english/a_cn4_5.pdf (p.65) (last accessed: 23 April 2014)

[67] Article 5(c) of the IMTFE Charter, establishing the International Military Tribunal for the Far East at Tokyo.

[68] The criterion of a link to the conduct of war was removed in the Allied Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity 1945. Revised at the Avalon Project: http://avalon.law.yale.edu/imt/imt10.asp (last accessed 24. April 2014). Hereinafter CCL10.

[69] The ICTY interprets article 5 on CAH of its Statute as CIL. Although the article requires a nexus to an armed conflict, it has held that this criterion is not mandatory under CIL.

illustrated in the London Charter, the IMTFE Charter and the ICTY Charter.[70] According to the ICTY case of *Tadic*, an armed conflict was present "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[71] However, the ICTY Appeals Chamber in *Tadic* held that customary international law is broader in scope than Art 5 of the ICTY statute and that there was subsequently no longer a requirement of a nexus between the CAH and an armed conflict.[72] In fact, the CCL10 and article 3 of the ICTR did never require a link to war or protracted armed violence, and the subsequent establishment of the ICC Statute abolished the criteria altogether. Therefore, as opposed to war crimes, there is no requirement of protracted armed violence in order to establish CAH, which may occur in peacetime such as human rights violations. The ICTR did, however, require the acts to be carried out on discriminatory grounds, although this was not a criterion used by any other international criminal tribunal.

In terms of the enlisted acts, the definition of CAH initially involved criminal elements such as murder, extermination, enslavement, deportation, persecution and other inhumane acts, but came to later on include other components included by international tribunals. The CCL 10, the ICTY and the ICTR expanded the definition to incorporate the criminal acts of rape, imprisonment and torture.[73] The Rome Statute took a further step by adding forcible transfer of population, enforced disappearance, apartheid, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable severity to its definition.[74] Human trafficking was also explicitly included as CAH for the first time in history in the Rome Statute. When establishing whether enslavement constitutes CIL as CAH under the Rome Statute, the ICC may take into account jurisprudence and

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[70] Schwelb, Egon, "Crimes Against Humanity" 23 B.Y.B. Journal of International Law 178 (1946) pp. 205-206 and Bassiouni, op. cit. p. 183.

[71] The Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber, 2 October 1995) Para 561.

[72] Ibid., para. 140–141.

[73] The CCL10: http://avalon.law.yale.edu/imt/imt10.asp, the ICTY: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (p.6) and the ICTR: http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf (p.61) (all three last accessed: 24 April 2014).

[74] Article 7(1)(g) of the Rome Statute

interpretations developed through case law from the abovementioned criminal tribunals, as they also are reflections of custom. Hence, when discussing the chapeau requirements, it seems reasonable to rely on case law from other criminal tribunals.

3.1.1. ENSLAVEMENT AS A CUSTOMARY INTERNATIONAL LAW

The definition of enslavement in the Rome Statute was inspired by the Slavery Convention of 1926, which is commonly recognised as constituting custom.[75] The prohibition of slavery or slavery-like practices has been recognized in a number of international treaties and conventions.[76] These legal instruments illustrate the widespread understanding of a prohibition of enslavement and forced labour as CIL.[77] The use of forced labour has been recognized as CIL falling within the enslavement category,[78] and may constitute an international wrongful act implicating State responsibility.[79]

Although it is unclear whether human trafficking constitutes CIL, trafficking in persons is indisputably an element of the crime of enslavement in the Rome Statute. Moreover, forced labour is usually the means for exploitation in trafficking. Hence, as trafficking in persons falls within the scope of enslavement, it might be argued that also trafficking in persons,

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[75] 1926 Slavery Convention, adopted 25 September 1926 (entered into force 9 March 1927), Article 1(1); "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." In comparison to the definition of enslavement in article 7(1)(c) which equally focuses on ownership, although the Rome Statute explicitly refers to trafficking in persons as a type of enslavement. On the customary nature of slavery or enslavement see: Bassiouni, op cit., p. 445, and ILC Report, 48th session, 1996, GA, Supplement No. 10 (A/51/10) para. 93 and Kunarać et al. (Trial Chamber) para. 124 and 537.

[76] 1926 and 1930 Slavery Conventions: Convention to Suppress the Slave Trade and Slavery, 60 U.N.T.S. 253, adopted 25 September 1926 (entered into force 9 March 1927), (1926 Slavery Convention) and Convention concerning Forced or Compulsory Labour 28. June, 1930, C029 (entered into force 1. May, 1932), Article 4 of the United Declaration of Human rights 12. December 1948, GA Res. 217A, UN GAOR, 3rd Session, UN Doc. A/810, Article 8 of the International Covenant on Civil and Political Rights 16. December, 1966, 999 U.N.T.S. 302 (Art. 8), (entered into force 23. March 1976), Convention concerning the Abolition of Forced Labour 25. June, 1957, C105 (entered into force 1. January, 1959), Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17. June, 1999, C182 (entered into force 19. November, 2000).

[77] NUI Galway, op. cit. p. 53-55.

[78] The Prosecutor v. Milorad Krnojelac, Case No. IT-97-25, (Trial Chamber, 15 March 2002), para. 353. Both the Kunarac and the Krnojelac cases were adjudicated several years after the adoption of the ICC Statute.

[79] NUI Galway, op. cit. p.9.

reaching the level of CAH also constitutes CIL. The recognition of enslavement as CIL signifies that the legal concept applies to all States, regardless of whether or not they are parties to the relevant legal instruments.

Acknowledging the customary nature of both CAH and enslavement, and presuming that trafficking in persons equally constitutes CIL as it falls within the scope of the crime of enslavement, general case law from international criminal tribunals will be used for illustration in the analysis of the chapeau elements of CAH.

In summary, the ICC may prosecute human trafficking without any nexus to an armed conflict, without any discriminatory ground and regardless of the nationalities of the perpetrators and the victims. This chapter will subsequently discuss the constitutive elements of CAH through interpretation of article 7 of the Rome Statute. However, as the introduction in this chapter on CAH demonstrated that article 7(1)(c) of the Rome Statute reflects custom, the subsequent subchapters will refer to international case law.

3.2. DEFINING CRIMES AGAINST HUMANITY

As already submitted in Chapter 2, Art. 7(1) of the Rome Statute lists acts that constitute a crime against humanity ”when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.[80] The enlisted acts or *actus reus*, which is latin for ‘a guilty act’, is “the essential conduct element of a crime that must be proved to secure a conviction.”[81] Art 7(1)(c) refers to enslavement, meaning “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”[82]. Although the decision on the general criteria of CAH was highly

[80] Article 7 of the Rome Statute

[81] Oxford Dictionary of Law, op cit., actus reus.

[82] Article 7(2)(c) of the Rome Statute.

disputed throughout the drafting of the ICC Statute,[83] the consensual definition is relatively clear and unproblematic.

3.3. THE *CHAPEAU* ELEMENTS OF CRIMES AGAINST HUMANITY

In order to enable the application to the case study on the Rohingya it is necessary to examine the components of the Rome Statute's definition of a CAH. It was stated in *Kunarac et al* that "the civilian population" should be identified prior to the examination on whether the attack was widespread and systematic.[84] Hence, the chapter will analyse the element of "an attack directed against any civilian population" prior to the "widespread or systematic" component, despite the order in which they appear in the CAH definition in article 7(1) of the Rome Statute. A general and brief application to human trafficking situations will be presented to each one of the following interdependent elements of CAH.

3.3.1. AN ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION

An attack directed against any civilian population involves two components that must be examined, "an attack" and "any civilian population".

Article 7(2)(a), elaborating article 7(1)(a), defines "an attack" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 (…)"[85]. Hence an attack may be any of the enlisted crimes, committed multiple times, and may refer to a course of conduct, a campaign, mistreatment[86], or a sequence of events amounting to an operation carried out against any civilian population. An "attack" may be established when it can be proved that a collective group is targeted by the perpetrators in their carrying out of acts of violence or other criminal conduct. It is defined broadly and is not limited to a military

[83] As previously mentioned, the armed conflict criterion was removed. Robinson, D., 'The Elements for Crimes against Humanity', in Lee, R.S. (ed.) The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (New York. Transnational Publishers, 2001) pp. 57-65.

[84] Kunarac et al, (Appeals Chamber), para. 95.

[85] Article 7(2)(a) of the Rome Statute

[86] The Prosecutor v. Vasiljević, Case No. IT-98-32, (Trial Chamber, 29 November 2002), para. 29-30.

attack.[87] An attack directed against the civilian population may be established if the civilian population is the primary object of the attack.[88]

It is important to emphasize that the human trafficking or enslavement need not constitute the attack itself to be prosecuted as CAH at the ICC. The criminal conduct of human trafficking or enslavement need simply form part of an attack that may comprise of a variety of CAH enlisted in article 7 of the Rome Statute.

"Any civilian population" generally refers to a group of people that are under the attack, requiring a population of a collective nature. The group of persons should have a common characteristic that makes them a cognizable group or sets them apart from the rest of the society, and it should be interpreted broadly.[89] The civilian population cannot be defined exclusively by the attack, but it may be a factor in determining the visibility of the group within the society. Moreover, not all members of the civilian population must be under an attack for the group of people to suffice the criteria of constituting a civilian population. Furthermore, the members of the group need not know each other or associate with each other to fulfil the criteria of belonging to the same group. According to *Kunarac et al*, a sufficient number of the population must be subject to the attack.[90] Attacks on individuals may constitute CAH in exceptional situations "if it is the product of a political system based on terror and persecution"[91] and if it is found to have a requisite nexus to the widespread and systematic attack.[92]

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[87] The Elements of Crimes document ICC-ASP/1/3(part II-B) p. 5. Vasiljević, (Trial Chamber), para. 29-30. See also Kunarac et al, (Appeals Chamber), para. 86.

[88] Kunarac et al. (Appeals Chamber), para. 90:

[89] The Prosecutor v. Goran Jelisić, Case No. IT-95-10, (Trial Chamber, 14 December 1999). para. 54. See also The Prosecutor v. Drago Josipović, Vladimir Šantić, Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić & Dragan Papić, Case No. IT-95-16, (Trial Chamber, 14 January 2000), para. 547-549.

[90] Kunarac et al. (Appeals Chamber), para. 90.

[91] Tadic, (Trial Chamber), para 649.

[92] *Kupreskic et al.,* (Trial Chamber), para. 550 and The Prosecutor v. Dario Kordić and Mario Cerkez, Case No. IT-95/14/2, (Trial Chamber 26 January 2001), para. 178

Moreover, the victims may be of the same nationality as the perpetrators or even be stateless.[93] The fact that some members of the persecuted group are also carrying out acts forming part of the attack does not exclude the victims of the attack from being recognized as a "civilian population", as there is no requirement that the attack are to be carried out against a different national group or ethnicity. This is particularly relevant to human trafficking cases where at least some of the perpetrators tend to have the same nationality as the victims in order to recruit them and maintain communication with the victims during their exploitation.

3.3.2. WIDESPREAD OR SYSTEMATIC NATURE

Although historically disagreed upon, it is now clear that the attack need either be widespread or systematic.[94] It is important to highlight that it is the attack that must be widespread or systematic and not the specific acts of the accused.[95]

A widespread attack implies that the attack either is directed against a large number of people or directed over a large physical area.[96] The number of people and the geographical area affected usually overlap in practice, as there are often a large number of people living in a large physical area and vice versa.

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[93] Elsea, J., chapter 'International Criminal Court: Overview and Selected Legal Issues' in Kessler, G. M., (ed.), *Law and Law Enforcement Issues,* (New York: Novinka Book, 2003), p. 20.

[94] Rome Statute, Art 7(1). The Prosecution and Defence in Tadic disagreed whether the attack needed be "widespread or systematic" or "widespread and systematic", but the Court held that one of the adjectives would suffice. This is also true according to Art 18 of the ILC Draft Code of Crimes Against the Peace and Security of Mankind. Other examples may be found in The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-424 (15 June 2009) para 82-83 and The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Choi, No. ICC-01/04-01/07-717 (1 October 2008). para 394-397.

[95] Kunarac et al, (Trial Chamber), para. 431: "Only the attack, not the individual acts of the accused, must be 'widespread or systematic.'"

[96] The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14 (Trial Chamber 3 March 2000), para. 206: "The widespread characteristic refers to the scale of the acts perpetrated and to the number of victims."

In the event that the attack cannot be proved to be widespread, it would have to be established whether or not the attack is systematic of nature. A systematic act connotes that the acts carried out are following an organized pattern or strategy often subject to instructions or an overriding policy. Unplanned, remote or unsystematic acts falls outside the scope of qualifying as systematic acts. In general, it is more difficult to establish that an attack is systematic as it involves to a higher extent the involvement of the State or at a minimum level an organized entity with de facto control over the affected area.[97]

Blaskic provides four factors to determine the systematic nature of acts.[98] Firstly, a political objective, plan or ideology that lay down the grounds for which the attack is carried out to extinguish or weaken a community is crucial. Secondly, the acts must constitute the commission of a large-scale crime against a civilian group or repeated persecution of inhumane acts. Thirdly, the level of arrangement and spending of public and private resources may be a determinative factor. Fourthly, the involvement of political, public or military high-ranking officials in the planning of the attack is evidence of a certain level of systematization.

As human trafficking must be both strategic and organized to be successful and generate value for the traffickers it is usually systematic of nature. The bigger the trafficking network, the more likely it is that it will satisfy the requirement of systematization. Moreover, human trafficking involves a variety of persons, being it traffickers, customers, victims, border guards, police or other state officials. The trafficking involves the transfer of victims from location to location, which implies the need for planning and strategies. The amount of money generated from trafficking is another indicator for well-planned operations and conscious administration of the criminal enterprise. The meticulous detection and violent tactics of exploitation and transfer of vulnerable groups of victims, demonstrates that human trafficking are rarely unintentional or isolated acts.[99] The strategic recruitment of new human commodities when current ones stop being profitable for the traffickers (for example due to

[97] Tadic, (Trial Chamber).

[98] Blaskic, (Trial Chamber), para. 203.

[99] Kim, op. cit. pp. 24-25.

sale or death) is another illustration of the repeated and systematic acts that human trafficking involves.

3.3.3. STATE OR ORGANISATIONAL POLICY

One of the most difficult elements to establish is whether the attack was carried out pursuant to or in furtherance of a state or organizational policy as stipulated in article 7(2)(a) of the Rome Statute. Often referred to as *the policy requirement*, the criterion is closely related to the requirement of the systematic nature of the attack indicating the level of organization or policy implicated. An attack can hardly be systematic if not based on a state or organizational policy but an attack may be widespread regardless of the existence of a clear policy. Widely debated, the policy criterion has been undermined[100], weakened[101] and defined by a wide range of case law. It is however relatively clear that the policies directing the criminal conduct need not be expressly specified nor instructed to the perpetrators of the acts carried out.[102] Neither must the highest-ranking state officials stand behind the plan of the attack.[103]

In order to qualify as subjects of international law, the definitions of a "state" or an "organization" must be addressed. A "state" must comply with the criterions of public international law, requiring a functioning government, a defined territory, a population, independence and capacity to enter into international relations with other States.[104] To simplify this definition, it is generally thought that UN member States qualifies, although it is not a criterion of statehood as such. Other governments would have to argue that they fulfil

[100] Despite the relatively clear definition of article 7(2)(a) of the Rome Statute requiring the acts carried out to be pursuant to or in furtherance of a State or organizational policy, the ICTY case of Kunarac et al. (Appeals Chamber), para. 98 stipulate that there is no requirement that the attack or acts carried out by the accused were supported by a policy or plan: "It is not necessary to show that they were the result of the existence of a policy or plan." "The existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime."

[101] *Gombo* (Trial Chamber) para. 81 stipulates that the policy need not be formalised. *Katanga* (Trial Chamber) para 396 states that the policy need not be explicitly defined.

[102] *Blaskic*, (Trial Chamber), para. 204.

[103] Ibid., para. 205.

[104] Montevideo Convention on the Rights and Duties of States, 26 December 1933 (entered into force 26 December 1934), article 1.

the enlisted requirements in order to be recognized.[105] In the US case *Kadic v Karadzic* it was held that non-state actors could be held liable for CAH, genocide and war crimes, and ruled out that it had to be policy of the State itself.[106]

An "organization" is difficult to define because their association and structure is not homogenous and their activity may expand beyond national borders.[107] The legal conclusion from *Tadic* is that CAH can be conducted by an entity in de facto control of an area, meaning that the emphasis will be placed on the effective rather than the judicial control. The judgment is important because it allows for the prosecution of criminal networks and organisations whether affiliated with the State or not, as long as it can be established that the group in question exercised effective control in the area. The *Nikolic* case narrowed the *Tadic* definition by highlighting that although the government itself need not exercise the policy instructing the CAH, simple instructions by separate individuals themselves may not suffice.[108]

As the majority of the human trafficking perpetrators are non-State actors, technical difficulties may arise in terms of the recognition of the group as an organization with capacity to carry out CAH. However, in cases reaching the threshold to qualify as CAH, state officials at various levels are often involved in the creation of an underlying state policy encouraging, ignoring or denying the involvement of enslavement of civilians.

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[105] Taiwan, Palestine and Western Sahara are examples of non-member States of the UN.

[106] Kadic v. Karadzic, 64 U.S.L.W.3832, 3832 (2nd Cir, Court of Appeals, US. 1996).

[107] Boskovic, Milo, 'Organized Crime – Definition Problems', *HeinOnline*, 39, Zbornik Radova, 35, 2005, p. 36.

[108] The Prosecutor v. Dragan Nikolić, Case No. IT-94-2 (Trial Chamber, 18 December 2003), para. 26.

3.3.4. NEXUS BETWEEN THE ACTS AND THE ATTACKS

Article 7 requires the criminal conduct to form part of the attack on the civilian population.[109] Whether the trafficking in persons as enslavement is forming part of an overall attack on a civilian population must be established on the facts of the individual case. Seemingly isolated incidents of human trafficking must be reasonably related to an overall attack on the civilian population under attack to satisfy this element.

3.3.5. PERPETRATOR KNOWLEDGE OF INTENT

The knowledge or intent requirement demands evidence of the perpetrator's knowledge of the criminal conduct forming part of the attack or alternatively intending the conduct to be part of the attack. This element will have to be established on a case-by-case basis. The perpetrator must have the requisite *mens rea* to carry out the criminal offence for which he is charged and additionally he must have been aware of the attack on the civilian population and either known that his offence was part of the attack or at a minimum knowingly taking the risk of his offence being considered part of the attack.[110] Although the requirement touches upon the perpetrators awareness of his conduct and its potential consequences, there is no criterion that he or she must know about the specifics of the policy or the attack.[111] Circumstantial evidence is crucial to determine whether the perpetrator had knowledge of the attack and understood under the circumstances that his or her actions would be forming part of the attack.

3.3.6. ENSLAVEMENT AS THE ENLISTED ACT

For purposes of this paper, enslavement will be examined as the enlisted act and human trafficking as the specific type of enslavement. *Kunarac et al* provide the criteria for which enslavement may be established as "control of someone's movement, control of physical

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[109] Tadic (Appeals Chamber), para. 251 and 271. See also The Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34, (Trial Chamber, 31 March 2003), para. 234: "The acts of the accused must not be isolated but form part of the attack. This means that the act, by its nature or consequence, must objectively be a part of the attack.".

[110] Kunarac et al, (Appeals Chamber), para. 102 and *Blaskic*, (Trial Chamber), para. 257.

[111] Kim, op.cit., p. 28.

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 labour".[112] Human trafficking, entailing threats, abductions, deprivation of freedom and the like in order to physically exploit other persons. The trafficking of multiple persons, albeit not all persons of the collective group in may be held to constitute CAH when fulfilling the abovementioned criteria. Notwithstanding the fact that smaller groups of the civilian population are trafficked at different points in time, the conduct will amount to part of an attack if it can be established that it is a product of a political system based on terror and persecution.[113]

[112] Kunarac et al, (Appeals Chamber), para. 119. According to the *Kunarac et al case*, the actus reus of enslavement is "'the exercise of any or all of the powers attaching to the right of ownership over a person, and the *mens rea* of the violation consists in the intentional exercise of such powers." Para 116.

[113] Tadic, (Trial Chamber).

4. JURISDICTION AND ADMISSIBILITY OF THE ICC

This chapter will examine the jurisdiction of the ICC to prosecute human trafficking as CAH and the admissibility requirements that must be satisfied for such a prosecution to take place. There are two categories of gravity that must be examined; firstly, the gravity of a given crime category over another and secondly, the gravity of a given instance of crime. In terms of the former category the ICC has jurisdiction to prosecute "the most serious crimes of concern to the international community as a whole"[114]. Only genocide, CAH, war crimes and the crime of aggression[115] fall within the scope of the jurisdiction of the ICC. The latter category concerns the gravity of a particular instance of crime and will be decided on a case-by-case basis. It is important to emphasize that whereas the former category is merely a formality, the Rome Statute regime is mainly concerned with the latter, namely the gravity of a particular instance of the crime in question. There might be categories of crimes that seem sufficiently grave *prima facie*, yet the specific situation may be *de minimis* and subsequently ineligible for prosecution under the ICC Statute.

In terms of jurisdiction, according to Article 13 of the Rome Statute, the ICC may only exercise jurisdiction if the situation is referred to the ICC by a State Party, by the Security Council or by the Prosecutor of the ICC. If the ICC is given jurisdiction in a particular case, in accordance with the independence of the ICC no other authority may intervene, except the UN Security Council.[116] It is also important to note that only crimes committed after the Rome Statute entered into force are prosecutable.[117] The Vienna Convention on the Law of Treaties 1969 stipulates in article 34 that international legal instruments bind only contracting States.[118] Hence, only states that have ratified the Rome Statute may be subjected to the court's power unless the Security Council refers the situation to the Court. Finally, the state in

[114] Article 5 of the Rome Statute

[115] The ICC will not have competence to adjudicate on cases concerning aggression until 1st of January 2017 at the earliest. See I.C.C. Doc. RC/Res. 6 art. 15 ter (June 11, 2010).

[116] As of 30 May 2014 this has not yet happened.

[117] Article 11 of the Rome Statute

[118] Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, (entered into force 27 January 1980), article 34.

question has the right to challenge the jurisdiction of the ICC or the admissibility of the case in accordance with Article 19 of the Rome Statute.

Article 17 stipulates four situations in which a case is inadmissible for the prosecution by the ICC. Firstly, if the state with jurisdiction over the situation are investigating or prosecuting the perpetrators, unless the ICC has evidence of the state being unable or unwilling to carry out any legal procedure.[119] Secondly, a case inadmissible if the State has duly investigated the situation and has decided not to prosecute.[120] Thirdly, and in accordance with the principle *"ne bis in idem"*, the ICC will not prosecute if the perpetrators has already been tried for the same conduct in national tribunals.[121] This principle, named *double jeopardy* in common law systems, requires the legal proceedings that has been carried out to be independent, impartial and without intentions to shield the perpetrator from criminal responsibility.[122] Fourthly, as the ICC only have jurisdiction over the most serious crimes when they reach the requisite threshold of gravity to justify involvement by the Court.[123] This paper will elaborate further on the two most controversial admissibility requirements, viz. the complementarity and the gravity principle.

4.1. COMPLEMENTARITY

First, the Court's jurisdiction is complementary to that of the national courts.[124] The ICC will only try cases when the State with custody of the accused is unable or unwilling to genuinely prosecute. When that is determined to be the case, the ICC may claim jurisdiction if either the

[119] Article 17(1)(a) of the Rome Statute.

[120] Ibid. article 17(1)(b).

[121] Ibid. article 17(1)(c) and article 20.

[122] Ibid. article 20(3)(a) and (b).

[123] Ibid. article 17(1)(d).

[124] The UNSC may also refer cases to the Court subject to complementarity.

state on whose territory the conduct occurred or the state of nationality of the person accused is party to the Rome Statute or consents to the jurisdiction of the ICC.[125]

Article 7(2) of the Rome Statute provides for three basic criteria to measure a country's unwillingness to prosecute. Firstly, the State is unwilling if its conduct is based on the aim to shield a person from criminal responsibility.[126] Secondly, unjustified delay may similarly be interpreted as unwillingness.[127] Thirdly, lack of fair, independent and impartial legal proceedings are a clear indicator of the ICC's jurisdiction to prosecute.[128] In terms of a State's ability to prosecute, Article 7(3) sets forth that the Court must consider the availability and functioning of the domestic legal system, the State's ability to get hold of the perpetrator(s), as well as its capability to obtain evidence and testimonies. It is always a matter for the court to establish admissibility of the case based on an assessment of a State's genuine willingness and unbiased ability to prosecute.

Although the court has to respect the sovereignty of the States affected, numerous human trafficking cases without any State involvement may eventually lead to the ICC's jurisdiction over a situation in accordance with Art 17, justified on the grounds that the State has demonstrated inability or unwillingness to prosecute this type of crime. When a state considers victims of human trafficking as illegal immigrants and prosecutes these rather than the persecutors, this must also be considered a sign of unwillingness to prosecute, which will be further illustrated in Chapter 5.

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[125] Elsea, op. cit. p. 28. Article 12(3) of the Rome Statute provides that a non-member State may accept the jurisdiction of the ICC in regards to a particular crime.

[126] Article 17(2)(a) of the Rome Statute

[127] Ibid. article 17(2)(b).

[128] Ibid. article 17(2)(c), see also *Kenyatta* Case No. ICC-01/09-02/11, where the ICC did not find sufficient evidence to the fact that an effective investigation and prosecution of the crimes committed took place nationally. As a likely result of the ICCs dedication to prosecute regardless of Kenyas intervention, Kenya's Parliament passed a resolution for withdrawal from the ICC and the Rome Statute 5 September 2013. If Kenya decides to go through with it, the withdrawal may not effectively take place until a year later and it will not halt on-going prosecutions.

According to the UN, an effective law enforcement of trafficking requires; deterrence, investigation, arrest, prosecution, punishment, restorative justice and administrative sanctions of the trafficker and demands; prevention, identification/rescue, protection, recovery, rehabilitation, reintegration, restorative justice and potentially repatriation or return of the victim.[129] Although compliance with all the abovementioned elements hardly can be required of a State to demonstrate ability and willingness, the ICC has recently seemed more susceptible to exercise its complementarity "right" when a State is failing to intervene in violent and heartless attacks against parts of its population.[130] Whereas the ICC may prosecute the perpetrators of human trafficking as CAH in accordance with the complementarity principle, clients of the traffickers exploiting the victims are the responsibility of the State's of whose nationals are purchasing humans as commodities, whether it is for purposes of sexual exploitation or forced labour.

4.2. THE GRAVITY THRESHOLD

The ICC may only investigate and prosecute the most serious international crimes of "sufficient gravity" in accordance with article 5 and 17(1)(d) of the Rome Statute. However, due to the lack of a definition of "gravity" in the Statute, the term has been subject to considerable academic debate. The threshold is high, and taken that the ICC has not yet brought a single trafficking case to the Court it may appear as if human trafficking risks falling short of the criteria or that it is harder to satisfy the gravity threshold for trafficking cases. Although the reason for the ICC's lack of prosecution of human trafficking cases may be many, including lack of capacity and resources, this paper argues that the time has come for an evaluation of prosecution of human trafficking cases at the ICC in general and of the situation of the Rohingya in particular.

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[129] UN, "Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices", United Nations, New York, 2003, p.24

[130] In The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, (27 June 2011), the ICC decided that Libya was not able and willing to prosecute Gaddafi's son Saif based on the fact that Libya's investigation did not cover all charges by the ICC and due to their lack of capacity to get witnesses to testify, lack of control over different prison facilities, the lack of adequate protection of witnesses and the immense danger Gaddafi's lawyers would be exposed to. However, Libya was given jurisdiction over Al-Senussi as they could demonstrate a genuine case against him covering the same charges as those by the ICC.

Human trafficking will only satisfy the requirement of being a serious international crime in accordance with article 5 of the Rome Statute if it can be shown that the human trafficking constitutes CAH provided for in article 7 of the Rome Statute. While it is relatively straightforward to establish human trafficking as a crime category of sufficient gravity as it is codified as enslavement in article 7, the gravity of a particular instance of the crime requires further examination. As the ICC has yet to prosecute a human trafficking case as CAH, there is no precedence on the criteria taken into consideration by the Court when prosecuting this type of crime. However, there are general factors used by the ICC to decide upon the gravity of a particular instance of crime, primarily taking into account the scale, severity and systematic application of the crimes as well as the impact and number of victims.[131] Moreover, some argues that the Kenyatta case[132], challenged for not satisfying the gravity threshold, is an illustration to the fact that the ICC has lowered the gravity threshold for admissibility to the ICC.[133] In the case, the Court found that the gravity threshold was fulfilled, arguing that the post-election violence was "not a mere accumulation of spontaneous or isolated acts" because there was an association between local leaders, businessmen and politicians.[134] Although every situation must be assessed on its merits, human trafficking is generally serious of nature with human beings as its commodities. The exploitation is usually inhuman, degrading, abusive, violent and cynical. Human trafficking is often based on discrimination, whether that is based on gender, religion, ethnicity or other. In the end of the following chapter, this paper's case study will illustrate how the abovementioned criteria on complementarity and gravity may be applied to a particular instance of crime.

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[131] SáCouto, S. and Cleary, K. A., 'The Gravity Threshold of the International Criminal Court', *American Journal of International Law* 23, no.5 (2008), pp. 809-810 and pp.824-825. And Deguzman, M. M., 'The International Criminal Court's Gravity Jurisprudence at Ten', *Washington University Global Studies Law Review*, Vol. 12, 475-486, and Situation in the Democratic Republic of Congo, Case No. ICC-01/04-tEN-Corr. Concerning arrest warrants for Thomas Lubanga and Bosco Ntaganda. See also Prosecutor v Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, para 30-31 (Feb. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf. The Rules of Procedure and Evidence related to sentencing may also be taken into account when determining the gravity threshold.

[132] The Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, (23 January 2012).

[133] Kim, op.cit., p. 31

[134] Ibid., p. 31, and Situation in the Republic of Kenya, Case No. ICC-01/09-19 (Pre-Trial Chamber, 31 March 2010), para 116-118.

5. APPLICATION OF THE CAH FRAMEWORK TO THE SITUATION OF THE ROHINGYA

The main objective of this chapter is to assess whether Rohingya in Myanmar and Thailand are *prima facie* victims of human trafficking falling within the enlisted act of enslavement as CAH enumerated in article 7 of the ICC Statute, giving rise to ICC jurisdiction. Indeed, this chapter will not aim to carry out an exhaustive analysis or attempt to make an objective decision based on the relevant facts at hand, as it is outside the scope of this paper.

This chapter will introduce the most essential events and frictions leading to the trafficking of Rohingya as a CAH. It is important to highlight that several countries in Southeast Asia might be involved in the CAH against Rohingya, although this paper will primarily focus on the attacks carried out by Myanmar and Thailand. Partly as a result of the trafficking of Rohingya, both Thailand and neighbouring Malaysia are currently at risk of being downgraded to Tier 3, the lowest category of the annual Trafficking in Persons Report issued by the US State Department. Curiously, Myanmar does not seem to be in the same risk.

Reports indicates that a variety of international crimes have been committed against Rohingya. This chapter will not go into debt regarding these crimes, but they will be presented as an illustration of a general attack against Rohingya, which in turn will strengthen the notion of CAH being a crime committed against Rohingya. More specifically, the chapter focus on whether the human trafficking of Rohingya reaches the level of constituting enslavement as CAH. As explained in the introductory chapter, the CAH framework was chosen over war crimes and genocide as there seem to be no evidence of neither international nor non-international armed conflict in Myanmar and Thailand and because the evidence is less straight-forward regarding the possibilities for ethnic cleansing or genocide taking place.

The chapter will be applying the legal analysis from Chapter 2-4 to the Rohingya situation. Firstly, the general situation of the Rohingya minority will be introduced with a brief introduction of the historical background of their situation with particular focus on the attacks carried out by the Southeast Asian nations of Myanmar and Thailand. Secondly, it will be

examined whether the requisite elements to establish human trafficking pursuant to the Palermo Protocol are present on the facts of the case. Thirdly, the general contextual requirements enumerated in article 7 of the ICC Statute will be systematically applied to some of the relevant facts at hand concerning the crimes carried out against Rohingya. However, the two latter chapeau elements will not be examined as the knowledge or intent requirement demands evidence of the perpetrator's knowledge of the criminal conduct forming part of the attack and as the nexus criteria is dependant upon conduct of an individual perpetrator. As both requirements must be considered on a case-by-case basis, the application of these two chapeau elements falls outside the scope of this paper. Likewise, as the complementarity requirement and the gravity threshold are controversial concepts that require extensive analysis of both law and facts of the case, the word limit of this paper renders it impossible to provide for a meaningful application of the law to the situation in Myanmar or Thailand.

5.1. THE ROHINGYA

The Rohingya has attempted to emigrate from Myanmar to neighbouring countries for decades due to discrimination and persecution in the country. The minority originates from a mix between Buddhists, Bengalis and Arabs.[135] Although there are disagreements as to the specifics of the historical background of the Rohingya and even their existence as an indigenous minority[136], they certainly exist as a minority group in Myanmar, primarily residing in the north of the underdeveloped state of Arakan with significant military presence. The southern State has borders with Bangladesh, where a large group of Rohingya now reside in refugee camps. There is also a mountain range separating the State from the rest of the country.

According to numbers from the UNHCR, it is estimated that approximately 800,000 stateless

[135] HRW, "Perilous Plight – Burma's Rohingya Take to the Seas" (Human Rights Watch, New York, 2009) p.6.

[136] The government of Myanmar, represented by the SPDC has repeteadly denied the existence of Rohingya as an ethnic minority. See the statement by the Foreign Minister in 1992 in the Report by Amnesty International (AI), 'The Rohingya Minority: Fundamental Rights Denied', (18 May 2004) p.3: http://www.amnesty.org/en/library/asset/ASA16/005/2004/en/9e8bb8db-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.pdf (last accessed: 15 May 2014).

Rohingya remain in the Arakan state of Myanmar.[137] Moreover, refugees have fled to neighbouring countries such as Bangladesh, Saudi Arabia, United Arab Emirates, Pakistan, Malaysia, Thailand, Indonesia and Japan following persecution in the country. One of the main reasons for the displacement of the Rohingya is that they are stateless because the government of Myanmar does not recognize them as citizens.[138] Moreover, Rohingya are among those ethnic minorities that are worst affected by imposed forced labour by Myanmar itself, through its public officials and army. Equally, Rohingya are among those ethnic minorities that suffer most in the hands of human traffickers, as they are easy targets when trying to escape persecution in their home country by escaping to neighbouring countries. Pursuant to article 7(1)(h) of the Rome Statute, persecution signifies the intention to severely deprive a collective group from their fundamental rights based on discriminatory grounds. The following analysis indicates the widespread and systematic persecution and enslavement of the Rohingya by Myanmar and Thailand.

5.1.1. GENERAL ATTACKS ON THE ROHINGYA BY MYANMAR

Discrimination against the Muslim ethnic minority is deeply rooted among Myanmar citizens and is subsequently reflected in law and politics.[139] The government's lack of recognition of the Rohingya as the country's citizens has widespread backing among its citizens.[140] In particular those citizens residing in Arakan are carrying out hostile discriminatory practices towards Rohingya and while many citizens of Myanmar acknowledges Rohingya as an ethnic group, citizens in Arakan often rejects the Rohingya's very existence, referring to the population as Bengalis and illegal immigrants in Myanmar. The extreme hardship the

[137] UNHCR, '2014 UNHCR country operations profile – Myanmar', UNHCR Global Appeal 2014-2015: http://www.unhcr.org/528a0a32b.html (last accessed: 15 May 2014).

[138] AI, 'The Rohingya Minority: Fundamental Rights Denied', op. cit. p.3:

[139] Panorama – Insight into Asian and European Affairs, 'Myanmar in Transition: Polity, People & Processes', (Konrad Adenhauer Stiftung, January 2013): https://www.kas.de/wf/doc/kas_36387-1522-1-30.pdf?140108131020

[140] HRW, "Perilous Plight" op.cit. p.7

Rohingya are exposed to is an instrument by Myanmar aiming for the discharge of Rohingya from the country.[141]

The Rohingya's situation as a stateless, persecuted minority began with the end of the British colonialism when the border between India and Burma[142] was defined.[143] The defined border left the Rohingya in-between the two countries, with the majority on the Burmese side of the new border. However, the Rohingya was not particularly welcomed in neither of the two countries. Since the coup d'état by General Ne Win in 1962, Rohingya have struggled to be recognized as citizens in the country, despite arguments to the fact that some have been living in Arakan since the 8th century.[144] In 1982 a new law created two citizen classifications[145], disqualifying Rohingya from both categories, while including most other ethnic groups. The official reason for excluding the Rohingya from the latter category of "associate citizens" was based on their lack of ability to demonstrate ancestor roots prior to 1948. Following the enactment of the new law, the Burmese authorities carried out a population census including citizens in both categories and thereby rendering Rohingya stateless by exclusion.[146]

The Rohingya have been forcefully displaced on a number of occasions in recent history. In particular five violent events can be attributed to the overall persecution of Rohingya in Myanmar. One of the first and most serious attacks on the minority was carried out in 1978

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[141] Shan Human Rights Foundation and Shan Women's Action Network, 'Licence to Rape: The Burmese Military Regime's Use of Sexual Violence in the on-going War in Shan State' (May 2002): http://www.burmacampaign.org.uk/reports/License_to_rape.pdf (last accessed: 15 May 2014).

[142] As the name of Myanmar prior to 1989 was Burma, the old name will be used for historical accuracy in this section.

[143] The Anglo-Burman war in 1824 ended with a signed treaty in 1826 where Arakan became part of British-India. However, the independence of Burma in 1948 led to internal disturbances and violence, in particular in areas with ethnic minorities. NUI Galway, op.cit. pp. 24-25.

[144] Bajoria, J., 'Understanding Myanmar', *Council on Foreign Relations*, (21 June 2013): http://www.cfr.org/human-rights/understanding-myanmar/p14385 (last accessed: 15 May 2014).

[145] http://www.restlessbeings.org/projects/rohingya (accessed 24. March 2014); The first group was that of "full citizens of Burma" and the second category was that of "associate citizens of Burma" including the Chinese minority and many Southeast Asian minorities.

[146] HRW, "Perilous Plight" op.cit. p.6

under the name "Operation Dragon King",[147] leading to the forced displacement of almost 200.000 Rohingya escaping to Bangladesh as a result of widespread attacks in the form of killings and rapes carried out by the Burmese army. The operation was orchestrated by the Burmese Head of State, General Ne Win, as one of the measures of his nationalisation programme, "the Burmese way to socialism".[148] Moreover, due to the poor conditions offered by the Bangladeshi authorities to Rohingya refugees fleeing ethnic cleansing in Myanmar, an estimated number of 10,000 died of hunger and illnesses.[149] The second major violent attack against Rohingya took place in 1991 involving killings, rapes, torture and forced labour leading to an even higher number of Rohingyas fleeing Myanmar for Bangladesh.[150]

The following three violent attacks against Rohingya are of a lower scale than the two former in terms of casualties, although equally important when considering the evidence of a widespread and systematic attack against Rohingya. In 1995, the Rohingya were forcefully repatriated back to Myanmar by Bangladesh with the curious support of the UN. However, security forces on the Myanmar side of the border did not wilfully receive the arriving Rohingya and violence and killings took place again. In 2001, violence broke out between the Rohingya and the Buddhist population in Sittwe in Arakan leading to deadly violence and destruction of mosques and homes.[151] In 2012, fatal battles erupted in the southern Myanmar between Rakhine Buddhists and Arakan Rohingya, leading to hundreds of deaths and several thousands without homes on both sides.[152] Those Rohingya living in Arakan are to a large extent still alive thanks to international humanitarian agencies.[153] Rohingya who attempt to

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[147] Zawacki, Benjamin. "Defining Myanmar's "Rohingya Problem"" Human Rights Brief 20, no. 3 (2013), p.18.

[148] Other ethnic minorities were also victims of persecution under this campaign, in example ethnic chinese residing in Burma but Rohingya has in general been victims of harsher treatment than the other ethnic minorities.

[149] HRW, "Perilous Plight", op.cit. p.6

[150] Ibid. p.6

[151] Zawacki, op.cit., p.18

[152] The background for the violence was the rape and murder of a Buddhist woman allegedly carried out by three Muslim men, followed by the killings of 10 Rohingya attempting to travel through a Buddhist dominated area by bus shortly after the former incident. UK Reuters, 'Special Report – Flaws found in Thailand's Human Trafficking crackdown' (Marshall & Lefevre, 11 April 2014): http://uk.reuters.com/article/2014/04/10/uk-thailand-rohingya-specialreport-idUKBREA3922N20140410 (last accessed: 15 May 2014).

[153] UNHCR, MFS and the UNWFP are among those organisations that have provided emergency humanitarian aid to the Rohingya population in Arakan. Myanmar recently expelled the humanitarian organization Médicins

escape Myanmar are particularly in the risk zone for trafficking into prostitution, sexual slavery and forced labour.[154]

The abovementioned information was not intended as a complete account of the violence against Rohingya in Myanmar. The objective was to give some historical and contextual elements to the application of the events to the analysis in this chapter.

5.1.2. TRAFFICKING OF ROHINGYA IN MYANMAR

Having addressed the general attacks against the Rohingya above, this subchapter will focus on the trafficking of the minority in Myanmar with a special focus on the military presence in Arakan as one of the main factors for forced labour and sexual slavery. According to the Special Rapporteur on the Situation of Human Rights in Myanmar, the military make use of forced labour, as they do not receive the necessary assistance and resources from the government.[155] Both the forced labour and the sexual slavery of the Rohingya are endemic in the country, and a common factor is the discriminatory intent behind the commission of the crimes. There seem to be evidence to the fact that the State Peace and Development Council (SPDC) [156], the actual governing body in Myanmar is involved in the enslavement and arguably trafficking of the Rohingya in Myanmar. The minority has been victims of imposed forced labour by the SPDC for decades despite supervision by the International Labour Organisation (ILO)[157]. In fact, the ILO itself has examined whether it ought to advise the

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Sans Frontières (MSF) from the country due to allegations that the organization was biased in terms of favouring the view of the Rohingya minority over the Buddhist community. The absence of MSF's presence in the Arakan state in Myanmar has further deteriorated the Rohingya's situation and increases their vulnerability to trafficking.

[154] Trafficking in Persons (TIP) Report 2013: Burma, (US State Gov.) pp.111-114: http://www.state.gov/documents/organization/210738.pdf (last accessed: 15 May 2014).

[155] Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, UN Doc. A/HRC/4/14 (12 February 2007): http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/107/31/PDF/G0710731.pdf?OpenElement (last accessed: 15 May 2014) para. 48

[156] Hereinafter SPDC. The political regime has been referring to itself as the SPDC since 1997. NUI Galway, op.cit. p. 22

[157] Hereinafter the ILO. NUI Galway, op.cit. p.37

referral of the situation to the ICC.[158] Of particular importance to this paper, the ILO found that the CAH framework was predominantly of relevance for the widespread use of forced labour in Myanmar.[159] Some of the forced labour in Myanmar qualifies for constituting human trafficking. The following section will address some of the most common forms of forced labour employed in Myanmar. Chapter 5.2. will assess which of the methods of forced labour employed satisfies the criteria for trafficking in persons *prima facie*.

Rohingya have been forced to construct "model villages" in Arakan.[160] The men and boys are picked up randomly and are forced to immediately follow the authorities to the construction sites. Rejection of this so-called duty of forced labour results in killings, torture and rape of other family members unless the person concerned pays financial compensation to the authorities.[161] Other forms of forced labour subject to the same conditions above are sentry duty, agricultural work and other types of construction work.[162] As will be seen below, these facts satisfy the elements of human trafficking in accordance with the Palermo Protocol.

Rohingya women are mainly subject to a different type of abuse in Myanmar as rape and sexual violence is widespread in the country.[163] Representing a minority group, Rohingya women's vulnerable status without legal rights make them easy targets for trafficking and sexual slavery, often qualifying as trafficking in persons in accordance with the Palermo Protocol. It is mainly the military presence in Rohingya dominated areas such as in the northern parts of Arakan who make the women targets for rape and sexual violence by the

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[158] ILO Governing Body, 'Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)', Doc. No. GB.297/8/2 (November 2006), para 20: http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/gb-8-2.pdf

[159] Ibid.

[160] NUI Galway, op.cit. p.41

[161] Ibid. p.10

[162] Ibid. p.41

[163] Ibid. p.11

soldiers and even the police.[164] It is particularly the systematic sexual slavery of the Rohingya women at military premises who are of relevance to this paper. Some women are abducted or forcefully taken to the military bases by military officials while their husbands, brothers, fathers or sons are subject to forced labour, while others are taken to the premises for forced labour where they end up as sex slaves for the military.[165]

5.1.3. TRAFFICKING OF ROHINGYA IN THAILAND

This subchapter will account for some of the incidents of human trafficking of Rohingya in Thailand. Although there are other crimes committed against the Rohingya in Thailand, the crimes does not seem to satisfy the criteria of a widespread or systematic attack as such. The repeated rejections to receive boats with Rohingya refugees by Thai border guards in 2008-2009, pushing the boats back out into the high seas are among the most serious crimes committed by Thailand against Rohingya in addition to the trafficking in persons.[166] Nevertheless, the knowledge of the perpetrators of the general attack against Rohingya in Myanmar should suffice for the purposes of demonstrating that human trafficking can be tried as a CAH in the ICC *prima facie*.

Often, Rohingya are transferred to the Malaysia border upon arrival by boat to Thailand. Before crossing the border they are often tortured and threatened by Thai officials or Malay border guards for money.[167] There seem to be evidence to the fact that Thai military officials have been directly involved in the trafficking of Rohingya asylum seekers for purposes of

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[164] Ibid.

[165] TIP Report 2013: Burma, op.cit. pp.111-114.

[166] Following events documenting interception of Rohingya by Royal Thai Navy forces on Thai coasts early 2009, Thailand was criticized for its so-called "push out" policy. The policy seemed to be a result of Thailand's overcrowding of asylum seekers in its immigrant detention camps creating challenges for the authorities and dissatisfaction among its citizens. However, Thailand remains certain that Rohingya are economic migrants. Another illustration of Thailand's discriminatory approach towards Rohingya is the fact that is penalizes Rohingya for unlawful entry and returns Rohingya to Myanmar despite the risk of persecution upon return by Burmese authorities who equally claims that Rohingya are unlawfully residing in the country. HRW, "Perilous Plight" op.cit. and Zawacki, op.cit., p.18

[167] UK Reuters, (Marshall & Lefevre,) op.cit.

forced labour in Thai or Malay plantation sites or on Thai fishing boats.[168] According to victim's stories given to the news agency Reuters, several hundred Rohingya have been deprived of their liberty by traffickers and tortured while extorted for money.[169] It is assumed that human traffickers are moving their illicit enterprises to Malaysia as a result of Thailand's new harsh policy to close down refugee camps, as well as imprison and return Rohingya refugees to Myanmar.[170]

However, Thailand denies any official involvement in persecutory treatment of Rohingya, and especially any association in the human trafficking of Rohingya refugees. It does not deny their existence of detention camps in the country, but alleges that Rohingya are illegal economic immigrants brought to the country with the help of human smugglers. The fact that reports shows that hundreds of Rohingya were deprived of their liberty in inhumane trafficking camps in the outskirts of Thailand and that 40.000 Rohingya temporarily inhabited the camps only in 2013 seems to have had little effect on the opinion of Thailand.[171] Although human smuggling also takes place in Thailand, the events referred to certainly falls within the boundaries of trafficking in persons. Hence, Thailand seem to have a misconception of the definition of human trafficking found in the Palermo Protocol, despite the fact that Thailand signed the Protocol already in 2001.

Some reports show that Rohingya refugees were expelled from Thai officials and forcefully returned, sold or trafficked into the northern areas of Myanmar controlled by the Democratic Karen Buddhist Army[172]. The DKBA group is infamous for its involvement in trafficking, illegal logging and extortion of migrant workers, and many of Rohingya were therefore victims of re-trafficking or coercion to obtain money from their family members to save their

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[168] TIP Report 2013: Burma, op.cit. pp.111-114.

[169] UK Reuters, 'Exclusive – Trafficking abuse of Myanmar Rohingya spreads to Malaysia' (Grudgings, 6 March 2014): http://uk.reuters.com/article/2014/03/06/uk-malaysia-rohingya-exclusive-idUKBREA2504Y20140306

[170] Ibid.

[171] UK Reuters, (Marshall & Lefevre,) op.cit.

[172] Hereinafter DKBA.

lives.[173] Those who were unable to comply with the money extortion by the DKBA, where either trafficked back into Thailand or to Malaysia.[174] It could be assumed that the Thai officials had knowledge of the DKBAs reputation prior to their actions, given their reputation.

In terms of the trafficking of Rohingya in Thailand one could wonder whether they are more likely to fall in the hands of traffickers than refugees or migrants from other countries arriving in the country. However, whereas other refugees or migrants may have a chance at given a legal status as temporary refugees or migrants in Thailand, Rohingya's chances seem close to zero taken the clear stance by Thai authorities not to accept Rohingya as refugees. The fear of the Rohingya to be repatriated to Myanmar or to be pushed back out at sea put them in a very difficult position where being trafficked for forced labour or sexual exploitation seem like the better option.

The abovementioned facts and incidents are only a fraction of the crimes committed against Rohingya in the two countries, and the aim was not to give an exhaustive background into the trafficking of Rohingya as it is outside the scope of this paper.

5.2. ESTABLISHING HUMAN TRAFFICKING

As already established in chapter 2, human trafficking is composed of three elements, being *the act*, *the means* and *the purpose* of trafficking in persons. Firstly, in terms of the act, in Myanmar, Rohingya men are recruited or transferred to sites of construction, agriculture, sentry duty or other forms of forced labour while women are recruited based on age and looks and then transferred and harboured at military premises or other sites for forced labour or sexual slavery. In Thailand, Rohingya are sold or resold to Thai, Malay and Burmese traffickers involving the recruitment, transportation, transfer, harbouring or receipt of persons. Secondly, Rohingya are subject to several of the means enlisted in the Palermo Protocol in both Myanmar and Thailand, but in particular their vulnerability as a persecuted minority without citizenship. In Myanmar, Rohingya are taken by force, abducted or threatened to life or torture or abuse of family members. In Thailand, traffickers disguised as people smugglers

[173] TIP Report 2013: Burma, op.cit. pp.111-114.

[174] HRW, "Perilous Plight", op.cit. p.8

threaten Rohingya with return to Myanmar or uses force in trafficking camps. Thirdly, Rohingya are destined to forced labour on construction sites, in agriculture, on sentry duty, in plantations or fishing boats, for prostitution and sexual exploitation in military installations or brothers, or forced marriage with Thai, Malay or Myanmar men, all sharing a common factor of exploitation as the purpose behind the trafficking. As at least one of the enlisted acts of each of the three elements is satisfied, it may be concluded that Rohingya are victims of human trafficking *prima facie* according to the Palermo Protocol. In order to establish whether the human trafficking falls within the scope of enslavement as CAH, the CAH framework of the Rome Statute, as well as interpretations deriving from case law concerning CAH, will be applied to the situation of the Rohingya.

5.3. ESTABLISHING CRIMES AGAINST HUMANITY

In order to examine whether the trafficking of Rohingya in Southeast Asia constitutes enslavement as a CAH under the Rome Statute, several interdependent elements must be analysed. CAH may be established if it can be proven that enslavement is carried out as part of a widespread and systematic attack perpetrated against Rohingya and that the perpetrators had knowledge of the overall attack on the Rohingya.

The core elements of CAH will be applied to the facts of the Rohingya both pursuant to article 7 in the Rome Statute and as a matter of CIL. Therefore, international criminal law jurisprudence will be used as illustration of the interpretation of the CAH framework.

5.3.1. ESTABLISHING AN ENLISTED ACT UNDER ARTICLE 7

Before embarking upon an examination of the chapeau elements, it is necessary to establish one or several of the enlisted acts under article 7 of the Rome Statute. The paper will aim to establish enslavement as one of the enlisted acts for purposes of the hypothesis regarding human trafficking of Rohingya. However, it is important to note that several of the enlisted acts may be equally applicable, such as; murder, forcible deportation or transfer of the

population, imprisonment or other severe deprivation of physical liberty.[175] Yet this paper will only address the enlisted act of enslavement due to its inclusion of human trafficking pursuant to article 7(1)(c). As demonstrated in subchapter 5.2. above, the forced labour and sexual slavery carried out in Myanmar and Thailand satisfies the elements of constituting trafficking in persons. Assuming that the ICC will apply the trafficking definition from the Palermo Protocol due to the lack of a definition of the crime in the Rome Statute or the Elements of Crimes Document, the crimes perpetrated in both countries constitutes human trafficking.

Enslavement is the use of powers of ownership over another person, including when the power of ownership is used in relation to trafficking, in particular women and children.[176] Furthermore, as the exercise of powers attaching to the right of ownership over others are paramount for the conduct of both Myanmar military forces and Thai traffickers or border guards when subjecting Rohingya to forced labour or sexual slavery. Rohingya men subject to forced labour on construction sites, on sentry duty or in agriculture and the women that were abducted and subjected to sexual slavery inside military campsites in Myanmar were not acting out of free will. They were deprived of their liberty and physical integrity and treated, as they were human commodity or property of the perpetrators and abusers. The same can be pertained to those Rohingya that were trafficked, resold or extorted by Thai traffickers, Thai border guards or the DBKA for purposes of forced labour, prostitution or simply economic gain. Likewise, the sale or trafficking of Rohingya by Thai officials to work on plantations in Thailand or neighbouring countries or on fishing vessels are examples of the practice of ownership over another person. In fact, Rohingya women and children used as sex slaves on military premises in Myanmar or those sold by Thai officials to trafficking rings for purposes of prostitution and sexual slavery are explicitly referred to in the Rome Statute. Hence, the facts presented seem to establish a *prima facie* case of enslavement as CAH pursuant to article 7 of the Rome Statute and the chapeau elements will thus be analysed.

[175] NUI Galway, op.cit. full report.

[176] Article 7(2)(c) of the Rome Statute.

5.3.2. AN ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION

In order to establish whether the human trafficking of Rohingya constitutes an attack directed against any civilian population, it must first be established whether the Rohingya constitute a civilian population and second whether an attack is taking place. It is important to highlight that the fact that the acts of violence in Arakan does not constitute armed conflict is not hindering the application of the CAH framework, in fact the lack of an armed conflict involving combatants, insurgents or mercenaries strengthens the notion of the Rohingya as a civilian population.

"An attack" means a course of conduct involving multiple commissions of the enlisted acts in article 7 of the Rome Statute,[177] and it is not limited to a military attack.[178] The Rohingya have been subject to multiple crimes committed by perpetrators in both Myanmar and Thailand, including but not limited to killings, enslavement, rape, sexual violence, torture and imprisonment. Moreover, the SPDC is specifically targeting Rohingya when committing the abovementioned criminal conduct with the aim or removing the minority from the country. Similarly, Thai border guards have been instructed by their authorities that Rohingya are not to be treated as humanitarian refugees but rather as illegal economic migrants that must be repatriated to Myanmar. This has made the minority vulnerable for targeting by traffickers for forced labour, prostitution of sexual slavery or other criminal conduct.

"Any civilian population" refers to a group of people that are under attacks of a collective nature. The composition of the victim group or CAH as "any civilian population" is important because through the inclusion of the word "any", stateless persons are included[179], as victims on equal basis as other nationals. This is of particular relevance to Rohingya as they have been rejected citizenship by the SPDC and are thus mainly a stateless group. The term

[177] Ibid. article 7(2)(a).

[178] Kunarac et al, (Appeals Chamber), para. 90.

[179] Tadić, (Trial Chamber,) para 635.

"civilian" entails persons who are not combatants.[180] There are relatively few disputes as to the civilian nature of the Rohingya population, although the SPDC has attempted to argue to the contrary.[181] In fact, in *Blagojevic* it was held that the group need not be completely civilian but must be predominantly civilian ruling out the relevance of whether there are any insurgent groups within the minority.[182] The term "population" is included to distinguish isolated acts from crimes of a collective nature.[183] The Rohingya are a group of persons with common characteristics in terms of religion, ethnicity, culture and history, which makes them a cognizable group and sets them apart from the rest of the society. According to *Kunarac*, a sufficient number must be subject to the attack.[184] There is undoubtedly a large group of Rohingya that are or have been subject to the enlisted acts of murder, persecution, enslavement, torture, rape and sexual slavery which have led them to flee the country.

Given the available data, the attacks on Rohingya by Myanmar seem to constitute an attack against any civilian population pursuant to both the Rome Statute and CIL.

5.3.3. WIDESPREAD OR SYSTEMATIC NATURE

As examined in chapter 3, subchapter 3.3.2., "widespread" refers to the number of persons affected or the impact on the victims,[185] whereas "systematic" means a methodical strategy.[186]

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[180] Common article 3 to the Geneva Conventions of 1949 and 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, (entered into force 7 December 1978), 1125 UNTS 3, article 50.

[181] NUI Galway, op.cit. p.33-34.

[182] Prosecutor v. Blagojević et al., Case No. IT-02-60-T (Trial Chamber, 17 January 2005) para.552.

[183] Martin, F. F., and Wilson, R. J., *The Rights International Companion to Criminal Law & Procedure - An International Human Rights & Humanitarian Law Supplement*, (The Hague: Kluwer Law International, 1999), p. 119.

[184]Kunarac et al, (Appeals Chamber), para. 90-91: "'population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population,' rather than against a limited and randomly selected number of individuals."

[185] The Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Judgment, 2 September 1998), para. 580.

[186] Kunarać, (Appeal Chamber), para. 94-95

It must be emphasized that it is only the attack, and not the specific acts of the perpetrators, that must be widespread or systematic.[187] Thus, the question is whether Rohingya are victims of an attack of a widespread or systematic nature where human trafficking as enslavement may simply be one of several enlisted acts that jointly constitute such an attack. The persecution against Rohingya affects many if not most of the 800.000 Rohingya in Arakan as well as many of the Rohingya attempting to escape to neighbouring countries. I terms of the physical area affected only Arakan stretches over a geographical area of 36.780 km², an area slightly larger than Belgium, although it is important to highlight that the Rohingya mainly reside in the north of Arakan. However, Rohingya are not only victims in Arakan in Myanmar, but in several of the neighbouring countries in Southeast Asia, such as Thailand. The large number of Rohingya that are rendered victims to the attack carried out in Myanmar and Thailand addressed in the former subchapter may be sufficient to prove the widespread nature of the attack in question.[188] In the alternative, if the ICC is unable to establish that the attack against Rohingya is widespread, the systematic element must be established. Various reports claims that the criminal conduct perpetrated by the military in Myanmar against Rohingya is carried out in a systematic manner, and some argue that they conform to the criteria of being part of a plan or a state policy directed by the SPDC.[189] Given the close link between this criterion and that of a state or organisational policy, the requirement will be examined further in the following subchapter.

5.3.4. STATE OR ORGANISATIONAL POLICY

Often interpreted as one of the more restrictive criteria in terms of the CAH framework, the state or organizational policy requirement must establish the existence of a policy or strategy behind the attack. The fact that the State must be "actively" involved in the attack,[190] seem to exclude the possibility of arguing that Myanmar's omission to act infers state policy. As previously mentioned, the Rohingya have been refused citizenship by its government,

[187] Kunarac et al, (Trial Chamber), para. 431.

[188] Kim, op.cit., p. 25. See also Rome Statute, Art. 25(3).

[189] NUI Galway, op.cit. p.34.

[190] Elements of Crimes doc. p. 5 footnote 6: "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population".

rendering the minority stateless without fundamental rights. The SPDC, representing the government, has actively carried out this policy fully aware of its implications. The decision to expel the humanitarian NGO MSF from Arakan is another illustration of the policy by the SPDC to impose unnecessary hardship on a minority that was dependant upon the health services by the NGO. The forced labour imposed on the Rohingya is yet another example of the discriminatory and persecutory policies carried out against the Rohingya. Although the military is the state authority actively engaged in the forced labour against the Rohingya, it is reasonably to assume that they are based on instructions from the SPDC. Even if this is not the case, the SPDC's lack of providing the army with adequate resources has led to the army's employment of the Rohingya to carry out necessary labour, which one would assume that the SPDC is aware of. Moreover, other states acceptance of Rohingya refugees or neighbouring States decisions to offer temporary amnesty to Rohingya refugees may indicate an international perception of persecutory treatment in Myanmar against this minority. [191]

In the alternative, should the ICC be unconvinced by the abovementioned argument, one might argue that the SPDCs deliberate failure to take action in fact reveals the existence of a policy. After many decades of instability, Myanmar finally seems to become stabilized and more democratic[192] and facing such a controversial issue as determining whether or not to give citizenship to the Rohingya could drag the country back into unrest and internal conflicts. Although that may well be a plausible political argument, the fact remains that conscientious omission to get involved in an attack on a part of its population may still qualify as state policy and satisfy article 7 of the Rome Statute.

Less relevant for this subchapter is the reference to organisational policy as an alternative to State policy, because the non-State actors such as trafficking groups in Thailand and Myanmar seem to fall short of the requirement of the attack being of a widespread and systematic nature.

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[191] HRW, "Perilous Plight", op.cit. p. 8.

[192] The Economist, "Special Report: Myanmar", (The Economist, 25 May 2013).

5.5. CONCLUDING OBSERVATIONS

This paper submits that prosecution of human trafficking as CAH at the ICC is feasible, but requires flexibility by the Court due to the lack of a definition of human trafficking in the Rome Statute or the Elements of Crimes Document. Although human trafficking falls within the act of Enslavement in article 7 of the Rome Statute, it seems equally relevant to the crime of sexual slavery. A meaningful prosecution of human trafficking at the court requires a broad interpretation of human trafficking to encompass the relevant criminal conduct.

As demonstrated in the preceding chapters, the Rohingya in Myanmar are victims of CAH, including but not limited to the crime of enslavement pursuant to article 7(1)(c) of the Rome Statute which incorporates human trafficking as a form for enslavement. Whether or not the trafficking of Rohingya in Thailand constitutes CAH are less certain as there is a lack of state policy and although the trafficking may be sufficiently widespread, it seems unclear whether Rohingya are targeted as a specific group or if all arriving migrants are equally vulnerable.

In Myanmar however, the Rohingya have been subject to forced labour such as construction work, agricultural work, sentry duty subject to threats on their own- or their family members life or dignity. Moreover, even if carrying out the forced labour without protest, their female family members are still at high risk of rape and sexual violence in their absence. Women recruited for forced labour at military premises are vulnerable to rape and sexual violence and some women are selected specifically for this purpose and held as sex slaves on military premises for an unspecified time. The conclusion is that it seems to be a *prima facie* case concerning the CAH perpetrated against Rohingya in Myanmar that may justify human trafficking persecutions by the ICC engaging individual criminal responsibility.

REFERENCES

Books & Articles

Bajoria, J., 'Understanding Myanmar', *Council on Foreign Relations*, (21 June 2013): http://www.cfr.org/human-rights/understanding-myanmar/p14385 (last accessed: 15 May 2014).

Bassiouni, M. C., *Crimes Against Humanity in International Criminal Law*, (Dordrecht: Martinus Nijhoff Publishers, 1992).

Bassiouni, M. C., "Enslavement as an International Crime", New York University Journal of International Law and Politics, (vol. 23), 1991

Boskovic, Milo, 'Organized Crime – Definition Problems', *HeinOnline*, 39, Zbornik Radova, 35, 2005.

Cassese, A., *International Criminal Law*, (Oxford: Oxford University Press, 2008).

Cerone, John 'Human Trafficking', *Max Planck Encyclopedia of Public International Law*, Heidelberg and Oxford University Press, 2013.

Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2010).

Deguzman, M. M., 'The International Criminal Court's Gravity Jurisprudence at Ten', *Washington University Global Studies Law Review*, Vol. 12, 475-486.

Elsea, J., chapter 'International Criminal Court: Overview and Selected Legal Issues' in Kessler, G. M., (ed.), *Law and Law Enforcement Issues,* (New York: Novinka Book, 2003).

Hwang, P., 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court', *Fordham International Law Journal*, Vol. 22(2), 1998.

http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1594&context=ilj

Kim, J., 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute', A.B. Harvard University, Columbia Law School, 2011.

Martin, E., and Law, J., *Oxford Dictionary of Law*, 6th ed. (Oxford: Oxford University Press,

2006).

Martin, F. F., and Wilson, R. J., *The Rights International Companion to Criminal Law & Procedure - An International Human Rights & Humanitarian Law Supplement*, (The Hague: Kluwer Law International, 1999).

Robinson, D., 'The Elements for Crimes against Humanity', in Lee, R.S. (ed.) The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (New York. Transnational Publishers, 2001)

SáCouto, S. and Cleary, K. A., 'The Gravity Threshold of the International Criminal Court', *American Journal of International Law* 23, no.5 (2008), 807-854.

Schwelb, Egon, "Crimes Against Humanity" 23 B.Y.B. Journal of International Law 178 (1946).

UN, *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices*, (New York: United Nations, 2003).

Zawacki, Benjamin. "Defining Myanmar's "Rohingya Problem"" Human Rights Brief 20, no. 3 (2013), pp. 18-25.

Reports

Addendum to the Report of the Bureau of the Review Conference, 8th session, the Hague, 18-26 Nov. 2009 ICC-ASP/8/43/Add-1

Amnesty International, 'The Rohingya Minority: Fundamental Rights Denied', (18 May 2004) http://www.amnesty.org/en/library/asset/ASA16/005/2004/en/9e8bb8db-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.pdf (last accessed: 15 May 2014).

Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, UN Doc. A/HRC/22/58, (6 March 2013): http://responsibilitytoprotect.org/Quintana%20Report%20on%20Burma%20-%206%20March%202013.pdf (last accessed: 15 May 2014).

Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, UN Doc. A/HRC/4/14 (12 February 2007): http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/107/31/PDF/G0710731.pdf?OpenElement (last accessed: 15 May 2014).

Human Rights Watch, "Perilous Plight – Burma's Rohingya Take to the Seas", (New York: Human Rights Watch, 2009).

I.C.C. Doc. RC/Res. 6 art. 15 ter (June 11, 2010).

ILC Draft Code of Crimes Against the Peace and Security of Mankind. ILC Report, 48th session, 1996, GA, Supplement No. 10 (A/51/10).

ILC Report Doc A/CN.4/SER.A/1993/Add.1 on state responsibility

ILC Report Doc A/49/10 1994 Vol II

ILO Governing Body, 'Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)', Doc. No. GB.297/8/2 (November 2006), para 20: http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/gb-8-2.pdf

NUI Galway, "Crimes Against Humanity in Western Burma: The Situation of the Rohingyas", (Irish Centre for Human Rights, 2010).

Panorama – Insight into Asian and European Affairs, 'Myanmar in Transition: Polity, People & Processes', (Konrad Adenhauer Stiftung, January 2013): https://www.kas.de/wf/doc/kas_36387-1522-1-30.pdf?140108131020 (last accessed: 15 May 2014).

Shan Human Rights Foundation and Shan Women's Action Network, 'Licence to Rape: The Burmese Military Regime's Use of Sexual Violence in the ongoing War in Shan State' (May 2002): http://www.burmacampaign.org.uk/reports/License_to_rape.pdf (last accessed: 15 May 2014).

The Economist, "Special Report: Myanmar", (The Economist, 25 May 2013).

US State Gov.: Trafficking in Persons Report 2013: Burma, pp.111-114: http://www.state.gov/documents/organization/210738.pdf (last accessed: 15 May 2014).

UK Reuters, 'Special Report – Flaws found in Thailand's Human Trafficking crackdown' (Marshall & Lefevre, 11 April 2014): http://uk.reuters.com/article/2014/04/10/uk-thailand-rohingya-specialreport-idUKBREA3922N20140410 (last accessed: 15 May 2014).

UK Reuters, 'Exclusive – Trafficking abuse of Myanmar Rohingya spreads to Malaysia' (Grudgings, 6 March 2014): http://uk.reuters.com/article/2014/03/06/uk-malaysia-rohingya-exclusive-idUKBREA2504Y20140306

UNHCR, '2014 UNHCR country operations profile – Myanmar', UNHCR Global Appeal 2014-2015: http://www.unhcr.org/528a0a32b.html (last accessed: 15 May 2014).

Treaties and Legal Instruments

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. (Created in London, 8 August 1945), establishing the International Military Tribunal at Nuremberg.

Allied Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity 1945

Convention concerning the Abolition of Forced Labour 25. June, 1957, C105 (entered into force 1. January, 1959).

Convention concerning Forced or Compulsory Labour 28. June, 1930, C029 (entered into force 1. May, 1932).

Convention to Suppress the Slave Trade and Slavery, 60 U.N.T.S. 253, adopted 25 September 1926 (entered into force 9 March 1927), (1926 Slavery Convention).

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 17. June, 1999, C182 (entered into force 19. November, 2000).

Elements of Crimes document ICC-ASP/1/3(part II-B), adopted and entered into force 9 September 2002: http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf

International Agreement for the Suppression of White Slave Traffic 1904

International Covenant on Civil and Political Rights 16. December, 1966, 999 U.N.T.S. 302 (Art. 8), (entered into force 23. March 1976).

International Military Tribunal for the Far East Charter (IMTFE Charter) (19 January 1946)

Montevideo Convention on the Rights and Duties of States, 26 December 1933 (entered into force 26 December 1934).

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, (entered into force 7 December 1978), 1125 UNTS 3: http://www.icrc.org/ihl/INTRO/475?OpenDocument

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 25. December, 2003, 2225 U.N.T.S. 209, (Art. 3) (entered into force 29. September 2003).

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

Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945), entered into force 24 October 1945).

United Declaration of Human rights 12. December 1948, GA Res. 217A, UN GAOR, 3rd Session, UN Doc. A/810, (Art. 4)

United Nations Convention against Transnational Organized Crime, 15 November 2000, GA RES 55/25.

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, (entered into force 27 January 1980).

Case Law (ICC/ICTY/ICTR)

Abu Garda — Situation in Darfur, Sudan, In the Case of the Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, (8 February 2010).

Akayesu	The Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Judgment, 2 September 1998).
Al Bashir	The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, (4 March 2009 and 12 July 2010).
Blagojević et al.	The Prosecutor v. Blagojević et al., Case No. IT-02-60-T (Trial Chamber, 17 January 2005)
Blaskić	The Prosecutor v. Tihomir Blaskić, Case No. IT-95-14, (Trial Chamber, 3 March 2000).
Gaddafi et al.	The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, (27 June 2011).
Gbagbo	The Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, (23 November 2011).
Gombo	The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, (15 June 2009).
Jelisić	The Prosecutor v. Goran Jelisić, Case No. IT-95-10, (Trial Chamber, 14 December 1999).
Josipović et al.	The Prosecutor v. Drago Josipović, Vladimir Šantić, Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić and Dragan Papić, Case No. IT-95-16, (Trial Chamber, 14 January 2000).
Katanga et al.	The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Choi, Case No. ICC-01/04-01/07-717, (1 October 2008).
(Kenya)	Situation in the Republic of Kenya, Case No. ICC-01/09-19, (Pre-Trial Chamber, 31 March 2010).
Kenyatta	The Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, (23 January 2012).
Kony et al.	The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Case No. ICC-02/04-01/05, (27 September 2005).

Kordić et al.	The Prosecutor v. Dario Kordić and Mario Cerkez, Case No. IT-95/14/2, (Trial Chamber, 26 January 2001).
Krnojelać	The Prosecutor v. Milorad Krnojelać, Case No. IT-97-25, (Trial Chamber, 15 March 2002).
Kunarać et al.	The Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković, Case No. IT-96-23-T (Trial Chamber, 22 February 2001) and IT-96-23/1-T, (Appeal Judgment, 12 June 2002).
Lubanga	The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, (14 March 2012).
Naletilić et al.	The Prosecutor v. Naletilić and Martinović, Case No. IT-98-34, (Trial Chamber, 31 March 2003).
Nikolić	The Prosecutor v. Dragan Nikolić, Case No. IT-94-2, (Trial Chamber, 18 December 2003).
Tadić	The Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber, 2 October 1995) and Case No. IT-94-1-T, 649, (Trial Chamber, 7 May, 1997)
Vasiljević	The Prosecutor v. Vasiljević, Case No. IT-98-32, (Trial Chamber, 29 November 2002).

Case Law (ICJ)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p.43.

The North Sea Continental Shelf Cases: Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands) (1969) ICJ Reports 3

Case Law – National Courts

Kadic v. Karadzic, 64 U.S.L.W.3832 (2nd Cir, Court of Appeals, US. 1996).

Websites

Not for Sale: http://www.notforsalecampaign.org/about/slavery/ (accessed 7 May 2014)

Free the Slaves: https://www.freetheslaves.net/sslpage.aspx?pid=375 (accessed 7 May 2014)

Walk free: http://www.walkfree.org/learn/ (accessed 7 May 2014).

Restless Beings: http://www.restlessbeings.org/projects/rohingya

Biography: http://www.biography.com/people/aung-san-suu-kyi-9192617#awesm=~oCe7V5A2aIfHyT

UN Treaty Collection: https://treaties.un.org/