

**SELL THE CHILDREN OR STARVE TO DEATH? – THE
INTERNATIONAL CRIMINAL RESPONSIBILITY OF THE
TALIBAN BEFORE THE ICC**

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Table of Contents

Abstract	1
1 Introduction.....	1
2 Methodology	3
3 Human trafficking trends in the Afghan context	4
3.1 Most vulnerable groups – The place of children in society.....	5
3.2 Forced marriage and sexual exploitation of women and children.....	7
3.3 Forced child labour and forced recruitment of adult and children into armed groups	9
3.4 Anti-trafficking measures in Afghanistan before the Taliban	10
3.5 Afghanistan as a failed state after the Taliban takeover	11
4 Defining human trafficking.....	14
4.1 The definition of human trafficking under international law	14
4.2 Elements of crime of human trafficking.....	17
4.3 The efficacy of international legal instruments against trafficking in children.....	18
5 Defining crimes against humanity	20
5.1 Elements of the crimes	21
5.2 Addressing human trafficking as a crime against humanity.....	22
6 Human trafficking under the Rome Statue	23
6.1 Enslavement and sexual slavery	23
6.2 Other inhumane acts	24
6.3 Deportation or forcible transfer	24
6.4 Amendment of the Rome Statute.....	25
7 The Taliban before the International Criminal Court	26
7.1 Establishing jurisdiction	26
7.2 Crimes against children – An aggravating factor or not?	28
7.3 ICC Prosecution against the Taliban	29
8 Conclusion	32

9	Bibliography	34
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Abstract

Even though human trafficking is the third biggest crime industry of the world making many victims especially children's lives miserable, it is still one of the hardest to fight. The aim of this paper is to prove the gravity of this issue in the case of Afghanistan, and why the international community must find ways to tackle it. The phenomenon of child trafficking in Afghanistan is rooted in social and cultural norms and the lack of an adequate legal system. The chaos and poverty of the country made selling children a coping mechanism, to fight malnutrition. A question, which never should be raised comes up in families in Afghanistan: should they sell their children or should they starve to death. By comparative methods this paper answers the question whether human trafficking could be prosecuted as a form of crimes against humanity before the ICC or not. Using the sources of international law and other studies and academic papers the reader will know by the end, that in theory it is possible, but in reality, there are many obstacles. By researching data of the devastating situation of the children of Afghanistan, this paper aims to show how imperative it is that this be changed. Examining the international criminal responsibility of the Taliban in regards of human trafficking cases, especially if they could be prosecuted for it in the already ongoing ICC investigation against them. The results show that justice won't be served in this particular investigation for the victims of Trafficking in Persons (TIP) in Afghanistan, as the crime of human trafficking cannot be attached to the crimes listed in the accusation.

1 Introduction

In 2021 after the fall of Kabul the biggest humanitarian crisis of the world begins in Afghanistan, making half of the population's life miserable. As the US and NATO forces left Afghanistan, and the Taliban gained non legitimate control over the country Afghanistan became a failed state.¹ The result of the crisis is that 24.4 million people are in need of immediate humanitarian assistance, from which 12.9 million are children.² Components like

¹ UK Parliament, House of Commons Library, Claire Mills, Withdrawal of military forces in Afghanistan and its implications for peace Viewed: 2022.09.30 Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9241/>

² UNICEF: Afghanistan Viewed: 2022.09.30. Available at: <https://www.unicef.org/afghanistan/children-afghanistan#:~:text=More%20than%20half%20of%20the,assistance%2C%20including%2012.9%20million%20children.>

economic problems, lack of health care, forced displacement, malnutrition, and natural hazards, all accumulate to the biggest humanitarian crisis of the world. The collapse of the economy is inevitable, as before the Taliban, the country was highly dependent on foreign assistance, around 75% of the economy relied on that.³ Most international parties froze their assets and cut off, which made the prices of the country go higher than ever, to the extent that most inhabitants can't even cover for their basic needs. 95% of the population's food consumption is insufficient, out of 34 provinces 28 the acute malnutrition rates high, with 3,5 million children, who are in need of immediate nutrition treatment.⁴ According to the warning of the Food and Agricultural Organisation the humanitarian assistance in Afghanistan is crucial to prevent deaths.⁵ Many Afghans have been forcibly displaced due to war, by the end of 2021 around 6 million Afghans, 80% of whom were children and women.⁶ These people were displaced internally in the territory of Afghanistan, but many had to cross border and became a refugee primarily in Pakistan, but also in Iran, Turkmenistan, Uzbekistan and Tajikistan affected.⁷

During constant conflicts and warfare, crimes are commonplace, as laws and peaceful conflict management do not exist. Meanwhile human trafficking is the third biggest crime industry of the world with around 40 million victims around the globe.⁸ Exploitation of humans to gain profit is an obvious violation of human rights, as it is a violation against the dignity of the person. Criminals spare no one in terms of human trafficking, refugees, women and children and anyone at a vulnerable position is a potential target. The presence and actuality of the issue in Afghanistan is undeniable, as the situation is only deteriorating. According to the data of the UN, the population in Afghanistan is 40 million currently, as almost half of its populations is

³ United Nations, UN News, Ten years of Afghan economic growth, reversed in just 12 months: UNDP Viewed: 2022.10.10. Available at: <https://news.un.org/en/story/2022/10/1129287>

⁴ United Nations, UN News, Afghanistan: Food insecurity and malnutrition threaten 'an entire generation' Viewed: 2022.10.10. Available at: <https://news.un.org/en/story/2022/03/1113982>

⁵ Observer Research Foundation, Shoba Suri and Mona, "The Crisis of Food Insecurity in Afghanistan," ORF Special Report No. 171, December 2021, Viewed: 2022.10.11. Available at: https://www.orfonline.org/wp-content/uploads/2021/12/ORF_SpecialReport_171_Food-Crisis-Afghanistan.pdf

⁶ USA for UNHCR, The UN Refugee Agency, Afghanistan Refugee Crisis Explained Viewed: 2022.10.11. Available at: <https://www.unrefugees.org/news/afghanistan-refugee-crisis-explained/#What%20are%20some%20of%20the%20greatest%20challenges%20displaced%20people%20from%20Afghanistan%20face%20today>

⁷ CDP: Afghanistan Humanitarian Crisis Viewed: 2022.09.30. Available at: <https://disasterphilanthropy.org/disasters/afghanistan-humanitarian-crisis/#:~:text=Key%20facts,one%20form%20of%20humanitarian%20assistance.>

⁸ ecpat, Dr. Mark Kavenagh, The trafficking of children for sexual purposes: One of the worst manifestations of this crime Viewed: 2022.09.30. Available at: <https://ecpat.org/trafficking-the-third-largest-crime-industry-in-the-world/>

under the age of 18 years,' child trafficking in the context of Afghanistan is an existing and presence issue.⁹

To see how trafficking in persons could be prosecuted in the context of a failed state, I chose to investigate human trafficking in Afghanistan, with special attention to trafficking in children. As human trafficking cases fall under national jurisdiction, with a non-legitimate government the last hope of the victims of human trafficking is the international community. In this paper I research and unfold how human trafficking could be addressed within the framework of international criminal law.¹⁰

It is thus my hypothesis that the International Criminal Court is the only institution, which has the jurisdiction to address the human rights violations happening in Afghanistan.¹¹

In this paper I would like to examine whether the ICC has the legal power to prosecute human trafficking as a crime against humanity under the Rome Statute or not. In my paper I will assess for possibilities and solutions on how these cases could be incorporated as a part of crimes against humanity, highlighting why it is important that they are addressed. Gaining a clear understating on this, I would like to investigate the situation of Afghanistan, and whether the Taliban could be held accountable for the crimes of human trafficking. The International Criminal Court has launched investigation against the Taliban for crimes against humanity and war crimes committed in Afghanistan since 1, July 2002. Examining the indictment and the request of the Prosecutor of the existing inspection, I seek to find out whether these human rights violations of human trafficking could be prosecuted under this investigation of the ICC or not.¹²

2 Methodology

I aim to investigate human trafficking in Afghanistan, especially trafficking in children, using comparative method by examining the humanitarian crisis in the country, social and cultural norms, types of trafficking, and the place of children in the society. To get a better understanding of the situation I wish to use also quantitative methods, because only the numbers

⁹ Worldometer: Afghanistan Population Viewed: 2022.09.30 Available at: <https://www.worldometers.info/world-population/afghanistan-population/>

¹⁰ Aston, Dr. Joshua Nathan and Paranjape, Vinay N., Human Trafficking and Its Prosecution: Challenges of the ICC (December 20, 2012). Viewed: 2022.09.30. Available at: <http://dx.doi.org/10.2139/ssrn.2203711>

¹¹ International Criminal Court: ICC at Glance Viewed: 2022.09.27 Available at: https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/afet_04112008_icc/afet_04112008_iccen.pdf

¹² International Criminal Court: Afghanistan Viewed: 2022.09.27. Available at: <https://www.icc-cpi.int/afghanistan>

and percentages could show how real the problem is. I wish to examine child trafficking from the perspective of international public law, and also from international criminal law. Comparing which could prosecute cases of TIP and seeing how human trafficking is addressed in theory and in practice. Using mainly English sources this paper will show an in-depth insight about the challenges the international community faces while dealing with crimes, by unfolding some of the deficiencies of international law. I researched sources of international law on human trafficking, on the rights of children and crimes against humanity, these being the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000)*; *the Convention on the Rights of the Child (1989)*; and *the Rome Statute of the International Criminal Court (last amended 2010)*. I only used the most relevant sources of international law concerning children rights, human trafficking, therefore it is not a comprehensive elaboration of all international instrument on trafficking in children. I also investigated academic papers, studies, reports of the United Nations and other NGOs and news which shows every aspect of the crisis in Afghanistan. My paper is divided into three parts. After reading the first part the reader will gain an insight on the problem, which is the constant exploitation of children in Afghanistan. In the second part I will evaluate all the relevant legal definitions such as human trafficking and rights of children properly and see the conventions and protocols given by international law about them. In the last part, the term crimes against humanity is going to be investigated and whether human trafficking can be attached to it. I will demonstrate how the perpetrators of human trafficking could be prosecuted before the International Criminal Court, and whether the Taliban could be held liable for the crimes of human trafficking committed in Afghanistan.

3 Human trafficking trends in the Afghan context

Gathering data about human rights violations like human trafficking in Afghanistan is not easy because of the corruption and general chaos in the country. Information about the topic could mainly be found between 2001 and 2021 before the Taliban takeover. Looking into the context of human trafficking in Afghanistan I would like to examine the targeted victims, the forms of exploitation, and the perpetrators. Afghanistan serves mainly as a source country, meaning that many Afghans were trafficked internally and internationally especially to Pakistan, Iran or Oman. Afghanistan appears less as a transit or destination country in terms of trafficking,

Pakistani and Irani women are also sometime trafficked to Afghanistan as sex slaves. While cross-border trafficking also exists in the Afghan context, internal trafficking is more widespread. Understanding vulnerability in Afghanistan is complex, because not only well-known characters like age, gender, family background, ethnicity or social class plays a role. In Afghanistan other aspects like patriarchy, cultural, religious, and social norms, and the ongoing conflicts all define someone's vulnerability in the context of trafficking.¹³

3.1 Most vulnerable groups – The place of children in society

The most targeted victims of human trafficking are children and women and migrants and refugees. A reason behind the vulnerability of girls and women could be, the deprivation of their right to live a free and equal lives.¹⁴ Women and girls are usually victims of sexual exploitation, many times exposed by their own family. What worsens the situation is the cultural perception behind it. There is no recovery for these women being exploited, because they can be criminalised and put into jail for committing moral crime or killed by her own family for taking their honour.¹⁵ Children are also at high risk, as the country is often in war, families lack on income and make the choice to send children for forced labour or to sell them. Another important note is that even in this patriarchal society many boys are victims of human trafficking. There is even a whole “culture” built up around it, called bacha bazi, which is the sexual exploitation of prepubescent boys.¹⁶

The high number of refugees and internally displaced persons exposed to human trafficking comes from the high number of refugees and asylum seekers fleeing from Afghanistan. In 2021 the number of refugees and asylum seekers fleeing Afghanistan was 2,8 million.¹⁷ As legal channels of migration are congested, migration is much more dangerous. Individuals as well as families are ready to make harsh decisions about selling their daughters/sons, their organs or

¹³ Thi Hoang: Human trafficking in the Afghan context Caught between a rock and a hard place? Viewed: 2022.09.21. Available at: [Human trafficking in the Afghan context: Caught between a rock and a hard place? \(birmingham.ac.uk\)](https://www.birmingham.ac.uk/study/your-course/subjects/anthropology/trafficking-in-the-afghan-context)

¹⁴ United Nation, UN News, UN agencies recommitment to women, girls in Afghanistan one year after Taliban takeover Viewed: 2022.10.11. Available at: https://news.un.org/en/story/2022/08/1124662?fbclid=IwAR1Wvwb1v5dPr2AY3_C7KctklAtArhNzeiFZma0PMA0gb88cCtr66eh_slc

¹⁵ Tahirin Justice Center, Forced Marriage Initiative, Forced Marriage Overseas: Afghanistan Viewed: 2022.09.21. Available at: <https://preventforcedmarriage.org/forced-marriage-in-afghanistan/>

¹⁶ Humanium, Bacha Bazi – severe child abuse disguised as an Afghani custom Viewed: 2022.09.21. Available at: <https://www.humanium.org/en/bacha-bazi-severe-child-abuse-disguised-as-an-afghani-custom/>

¹⁷ USA for UNHCR, The UN Refugee Agency, Afghanistan Refugee Crisis Explained Viewed: 2022.10.11. Available at: <https://www.unrefugees.org/news/afghanistan-refugee-crisis-explained/#What%20are%20some%20of%20the%20greatest%20challenges%20displaced%20people%20from%20Afghanistan%20face%20today>

exposing themselves as slaves to be able to finance their journey. At this point the definition irregular migration which is the smuggling of migrants (SOM) and trafficking in persons (TIP) must be distinguished. While there is some overlap between the two crimes, and SOM can turn into TIP, migrant smuggling is crime against the state and trafficking in persons is crime against the human.¹⁸ Trafficking is for the purpose of profiting from the exploitation, in the case of migrant smuggling the aim is to gain from the movement.¹⁹

After exploring the affected groups, I would like to examine how children are viewed by law, and culture, what role they have in the society, and whether they are respected or not. To understand the different aspects of life in Afghanistan we have to understand that they view religion as a fundamental principal of life. In Afghanistan customs and morality have a significant role in determining society knowledge, attitudes, and actions. Conservative principles that derive from the spirit of Islamic theory, law, and its various interpretations are incorporated in almost every part of their life. The institution of family in the culture of Afghani people is very important, their society is built up around clans and families. Islam views children as a gift of God, and they guide parents to revive their children. Children takes a significant part of society in Afghanistan as around 48.5% of the population is under the age of 18.²⁰ Child mortality rate is high, and life expectancy is around 65 years as they lack on proper healthcare. Most Afghan women give birth at home, as they are not allowed to go to hospitals, because it would destroy the honour of their husbands.²¹ This is a huge risk for the mother and for the new-born. Another aspect is that only around 6% of children are officially registered, leaving the rest invisible without a nationality or identity. This expose them to danger as, people without documentation of Afghan nationality, can be deported or relocated if authorities decide on that.²²

¹⁸ The Cornerstone Report: Human Trafficking vs Human Smuggling Viewed: 2022.09.27. Available at: <https://www.ice.gov/sites/default/files/documents/Report/2017/CSReport-13-1.pdf>

¹⁹ United Nations Romena: Human Trafficking and Migrant smuggling Viewed: 2022.09.06. Available at: <https://www.unodc.org/romena/en/human-trafficking-and-migrant-smuggling.html>

²⁰ Save the Children, Number of Afghan children without enough to eat up 3.3 million is just four months Viewed: 2022.09.26. Available at: <https://www.savethechildren.net/news/number-afghan-children-without-enough-eat-33-million-just-four-months>

²¹ Institute for War and Peace Reporting, Afghanistan: "Honour" Rules Deny Care to Mothers and Babies, 22 October 2015, ARR Issue 525, Viewed: 2022.09.26. Available at: <https://www.refworld.org/docid/564b572f4.html>

²² Forced Migration Review, Maira Kuppers, Stateless in Afghanistan Viewed: 2022.09.26. Available at: <https://www.fmreview.org/afghanistan/kuppers>

To see the dynamics of trafficking in persons in Afghanistan, I am also researching different forms of this crimes which happen in Afghanistan. As in my paper's focus is children, I am going to examine mainly those where the victims are children.²³

3.2 Forced marriage and sexual exploitation of women and children

Sexual exploitation and forced marriage of women and children sadly is quite common in Afghanistan. According to a national survey conducted by UNICEF forced child marriage is present in the 42% of the surveyed household.²⁴ In the matter of sexual exploitation 271 cases of sexual and gender-based violence were documented only in 2020 by the United Nations Assistance Mission in Afghanistan (UNAMA).²⁵ documented Either they are abducted by military groups or sold by their male relatives such as father, brother or uncle. Firstly, we have to see the cultural beliefs and legal background of women in the society. Women have no rights and are treated as a property of men, therefore when they are sold or forced to a marriage they cannot disagree. Mostly girls are also involved and many of them are married before the age of 12, although the legal age for it, would be 16 years old. In 2018 and 2019 the UNICEF registered 183 child marriages in just two provinces in Herat and Baghdis, the actual numbers could be much higher as Afghanistan there are 34 provinces in Afghanistan.²⁶ If they try to escape a forced marriage it counts as a 'moral crime', and they are incarcerated for that. Any sexual contact before marriage also counts as a 'moral crime' for women. No matter the circumstances, if they were raped or sold as sexual slaves, their honour is ruined, and they are treated as sinned, and treated like they committed adolescence or prostitution.²⁷ The Taliban forces often abducted women and children and later sold them as sex slaves in order to fund their regime. Not only Afghans are in danger of this, because many foreign girls and women from other countries like China, Pakistan, Tajikistan and Iran were trafficked to Afghanistan. They were

²³ U.S. DEPARTMENT of STATES: 2021 Trafficking in Persons Report: Afghanistan Viewed: 2022.09.21. Available at: <https://www.state.gov/reports/2021-trafficking-in-persons-report/afghanistan/#:~:text=transnational%20trafficking%20cases,-.PROTECTION,the%20validity%20of%20the%20figures>.

²⁴ Government of the Islamic Republic of Afghanistan. (2018). Child marriage in Afghanistan: Changing the narrative. Commissioned by MoLSAMD and supported by UNICEF Afghanistan. Viewed: 2022.09.21. Available at: <https://www.unicef.org/afghanistan/sites/unicef.org.afghanistan/files/2018-07/afg-reportChild%20Marriage%20in%20Afghanistan.pdf>

²⁵ United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, Afghanistan Viewed: 2022.09.21. Available at: <https://www.un.org/sexualviolenceinconflict/countries/afghanistan/>

²⁶ UNICEF: Girls increasingly at risk of child marriage in Afghanistan Viewed: 2022.09.21. Available at: <https://www.unicef.org/press-releases/girls-increasingly-risk-child-marriage-afghanistan>

²⁷ International Organization for Migration (Ed.). (2003). Trafficking in persons: An analysis of Afghanistan Viewed: 2022.09.21. Available at: https://publications.iom.int/system/files/pdf/trafficking_afghanistan.pdf

offered jobs and then became slaves and wives of commanders and fighters.²⁸ Others are sold by their family for many reasons, which come from their poor life circumstances and the culture of treating females as they are a property. Fathers could sell their daughters as a mean of repaying debts, by forcing her daughters to marry the creditor, or arranging a marriage with another man, who pays for his daughter. The humanitarian crisis and the deep poverty results that parents sell their children because they cannot feed them, they can even arrange it before the birth. Despite being ashamed that they are selling their children, they feel that this is their last chance, and at least their children could eat in this way.²⁹ Another typical cause for arranged marriages is dispute settlement between families. When a male family member commits a crime against the other family, the accuser family marry one of her female members to the victims' family. If there isn't any girl in the family above the age of 10, then a younger girl become a domestic servant of the victim's family. Although this should preserve the peace between the families, it means a lifetime of suffering and abusing for the girl, because it is linked to the tradition of 'bad nikkah'. She has to carry the shame for that crime for the rest of her life, and the victim's family can treat her like a criminal.³⁰

Trafficking for sexual exploitation usually threatens women and girls, however in Afghanistan young boys are just as much affected. Some reports on the abduction of boys aging 4-5 years are extremely alarming, as after they were recovered with injuries and rectal bleeding, as undeniable evidence of sexual assault. A much more usual form of sexual exploitation of boys in Afghanistan is called the bacha bazi. Bacha bazi is a tradition where prepubescent boys are dressed up as women and are used by adult men for sexual entertainment. Despite Afghanistan being a religious country, they cannot stop the activity of exposing young boys as sexual slaves. Usually, boys coming from critical and poor life circumstances become victims of these act, they are either kidnapped, or tricked into practicing this activity. As they are so young, often they are not even aware of the abuse happening to them, and as they are so poor, they feel that they must do this in order to provide for their family. Other studies also show, that breaking the cycle of abusing is almost impossible, as many dancing boys later became the abusers themselves, if they manage to break out of poverty. The lack of limitations and education allows men to have a family and also entertain themselves with boy sex slaves. They view that "*a wife*

²⁸ U.S. Department of State, 2021 Trafficking in Persons Report: Afghanistan Viewed: 2022.09.21. Available at: <https://www.state.gov/reports/2021-trafficking-in-persons-report/afghanistan/>

²⁹ iGlobe News, "Mama Don't Sell Me": Afghan Girls Sold For Food Amid World's Worst Humanitarian Crisis Viewed: 2022.09.21. Available at: <https://www.iglobenews.org/mama-dont-sell-me-afghan-girls-sold-for-food-amid-worlds-worst-humanitarian-crisis/>

³⁰ International Organization for Migration (Ed.). (2003). Trafficking in persons: An analysis of Afghanistan Viewed: 2022.09.21. Available at: https://publications.iom.int/system/files/pdf/trafficking_afghanistan.pdf

is for procuring children and a bacha is for pleasure". The Afghani laws describe sex between a man and a boy unlawful, but still there was few cases where it was applied, as many commanders and men in high position is involved in the crime.³¹

3.3 Forced child labour and forced recruitment of adult and children into armed groups

In Afghanistan children remain the biggest target for human trafficking, not only for sexual exploitation but for forced labour as well. According to the International Organization for Migration up to a third of children were involved in labour in the country. They are either sent to work by their family members, or they are kidnapped and then recruited to work. They are involved in working as street beggars, domestic servants, drug mules or at other high-risk jobs. 92,5% of children involved in forced labour work more than 42 hours a week under adverse and severe work conditions.³² The most widespread areas where child labour is present are mining, shoe shining, begging, agriculture, carpet industry and even metal work. As these children are around school age, when working they miss out on education, which also contributes to that they cannot escape poverty. Trafficking for criminal activity in Afghanistan is also common, in children they are often used to smuggle drugs, tobacco or fuels.³³

Another dangerous activity many Afghan children are recruited to is, to be a soldier in armed groups. Armed conflict is one of the biggest fuels for illegal activities like human trafficking and forced labour. While women and girls are used as sex slaves of the commanders in such groups, children are also used to boost the capacity of military groups. Insurgent, non-state forces like the Taliban and government financed security groups both used children as suicide bombers, camp guards, spies or weapon transporters. Not only children who were abducted were targeted, but children became victims through their families, as they were sold.³⁴

Finally, another common form of trafficking, which must be mentioned, but it is not highly relevant in the case of children is trafficking for organ removal. People usually sell one of their

³¹ Amalendu Misra: Men on top: sexual economy of *bacha bazi* in Afghanistan Viewed: 2022.09.23. Available at: <https://link.springer.com/content/pdf/10.1057/s41311-022-00401-z.pdf>

³² International Organization for Migration (Ed.). (2008). Trafficking in persons in Afghanistan: Field survey report. Viewed: 2022.09.23. Available at: https://www.iom.int/sites/g/files/tmzbd1486/files/jahia/webdav/shared/shared/mainsite/activities/countries/docs/afghanistan/iom_report_trafficking_afghanistan.pdf

³³ ILO: TRAINING MANUAL ON CHILD LABOUR IN AFGHANISTAN Viewed: 2022.09.23. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/instructionalmaterial/wcms_667934.pdf

³⁴ Human Rights Watch: This is our opportunity to end the Taliban's use of child soldiers Viewed: 2022.09.23. Available at: <https://www.hrw.org/news/2021/09/20/our-opportunity-end-talibans-use-child-soldiers#:~:text=For%20more%20than%20two%20decades,remain%20in%20their%20ranks%20today.>

kidneys, as they can live with only one. What is dangerous that in those poor life circumstances they live in, this contributes to the deterioration of their health.³⁵

3.4 Anti-trafficking measures in Afghanistan before the Taliban

To prove my hypothesis, that only the International Criminal Court is able to address human rights violations in Afghanistan, it is inevitable to examine the laws against human trafficking and courts at national levels. Before the Taliban takeover, the country had a legal and judicial system. Despite its flaws and insufficiencies, it sought to establish a democratic political system. Regarding human trafficking, two laws are relevant, one had been presented in 2008 to combat human trafficking and kidnapping, and the other later in 2017 to ban the act of bacha bazi. However, combating trafficking in persons in Afghanistan didn't happen because of several reasons.³⁶ It starts with the fact that, there was not a court, dedicated to hearing cases of trafficking, people had no idea where they should report it. If they decided to report it, they would go to the local police, which was reluctant to register or pursue a case. Activists of the Institute for War and Peace Reporting provided information, that only in one province of the country Takhar around 400 cases of children sexual assaults were reported to the police each year. From this only around 10 or 15 cases were registered.³⁷ Even when prosecution happened, cases ended with unrealistically light sentences. All of this happened, because of the high-level corruption in the country, which is present at all sectors, influencing people to deny the truth and making jurisdiction inefficient.³⁸ Millions of US dollars had been spent on this legal system to improve the rule of law over the past years. After the Taliban took control, any such progress and achievements quickly disappeared. The Taliban didn't declare, whether they would rule according to the previous laws and constitution or not. Their action show that they have no intention to govern within the framework of the legal system that has been built over the past 20 years. They highlighted that they are going to govern according to the Sharia, which is the main Islamic religious law, and it means the "correct path" in the Islamic tradition. They even indicated that the Constitution made by the previous government in 2004, is against the Sharia, even though Islam is declared as state religion in it.³⁹ They mentioned that they may implement

³⁵ The Organization for World Peace: Growing Organ and Children Trade in Afghanistan Viewed: 2022.09.23. Available at: <https://theowp.org/growing-organ-and-children-trade-in-afghanistan/>

³⁶ REUTERS: Human trafficking on the rise in Afghanistan despite new laws Viewed: 2022.11.15. Available at: [Human trafficking on the rise in Afghanistan despite new laws | Reuters](https://www.reuters.com/world/afghanistan/human-trafficking-on-the-rise-in-afghanistan-despite-new-laws-2022-11-15/)

³⁷ IWPR: Afghanistan: Child Abuse Going Unpunished Viewed: 2022.11.15. Available at: <https://iwpr.net/global-voices/afghanistan-child-abuse-going-unpunished>

³⁸ Ibidem

³⁹ Constitution of Afghanistan, 3 January 2004 Viewed: 2022.11.15. Available at: <https://www.refworld.org/docid/404d8a594.html>

the Constitution made by King Zahir Shah in 1964. Other than that, no statements had been made about the law and order of the country. Therefore, complete lawlessness and anarchy is present in Afghanistan.⁴⁰ According to the report of the U.S. State of Department the Taliban even decreased the anti-trafficking measures of the country, shut down all protective services and shelters for trafficking victims, and stopped reporting crimes of trafficking.⁴¹ It is no doubt that the judicial system became chaotic and dysfunctional. The lack of national proceedings and intention on prosecuting cases of human rights violations, gives space for the international community to interfere in grave violations that would be under the jurisdiction of national courts through the International Criminal Court. The reason for this is to secure legal remedy for victims, even when their national forces are incapable of starting an investigation.⁴²

3.5 Afghanistan as a failed state after the Taliban takeover

Afghanistan is commonly referred to as a “failed state”, however it is more complicated than that as, under international law there is no precise instrument which describes it.⁴³ The term failed state doesn’t stand for a defined situation, it refers to a phenomenon that can be understood in several ways. As my paper’s disquisition is mainly legal, I analyse it from a legal and political perspective. This approach is based on the description of former Security-General of the United Nations Boutros Boutros-Ghali. From this point of view, failed states can be identified based on three elements, these being the territorial aspect, political aspect, and functional aspect. Regarding the territory, it is acknowledged that failed states are ‘*associated with internal and endogenous problems.*’ The political aspect states that ‘*the internal collapse of law and order*’ makes the state a failed one. When the system and structure of rule of law is destroyed, the state fails to guarantee order. Lastly, the functional aspect, declares that there are no institutions and bodies which could represent the state itself.⁴⁴ The existence of Afghanistan as a state is not a question, however aspects of its statehood are relevant, because of the government in power and the lack of laws and order in Afghanistan. Considering these aspect

⁴⁰ JURIST: Going Back to Zero: How the Afghan Legal and Judicial System is Collapsing Under the Taliban Regime Viewed: 2022.11.15. Available at: <https://www.jurist.org/commentary/2022/03/mahir-hazim-afghan-legal-judicial-system-collapsing-taliban-regime/>

⁴¹ U.S. Department of State 2022 Trafficking in Persons Report: Afghanistan Viewed: 2022.09.26. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/afghanistan/>

⁴² United Nations: Afghanistan: Humanitarian assistance has saved lives, but immense needs remain Viewed: 2022.09.26. Available at: <https://news.un.org/en/story/2022/08/1124522>

⁴³ Brian Dube and Proceed Manatsa: FAILED STATE DISCOURSE UNDER INTERNATIONAL LAW: THE PLACE, ATTRIBUTES AND IMPLICATIONS Viewed: 2022.11.12. Available at: <http://www.onlineresearchjournals.com/ijopagg/art/141.pdf>

⁴⁴ Daniel Thürer, The “failed State” and international law Viewed: 2022.11.12. Available at: <https://www.icrc.org/en/doc/resources/documents/article/other/57jq6u.htm>

and interpretations of failed states, Afghanistan is a failed state meaning that it failed to function as a state, because its government in power is not legitimate, and the rule of law in the country is not established. The state cannot provide basic services to their people such as law enforcement, economic stability, justice or military defence. Failed states are also dangerous for the international community, because they are not able to fulfil their international obligations or enter internationally binding legal relations.⁴⁵

To consider another determination of what counts as a failed state. Failed states can also be classified as one, based on a subjective analysis on how they perform or fail to perform as a state. There are many indicators which show the fragility and vulnerability of states. The most important assets of state functionality are the following aspects: *security threats, economic development, human rights violations, refugee flows, history of violence, delegitimation of the State, non-provision of public services, little practical control of government over its territory, widespread corruption and criminality*.⁴⁶ To be specific and examine what these indexes show, the Fragile State Index investigates 12 factors based on cohesion, social, economic and political indicators, the most vulnerable and fragile states get the highest scores.⁴⁷ The 2022 Fragile State Index by the Fund for Peace ranks Afghanistan as 8th, the maximum score is 120, in 2022 Afghanistan's FSI Score is 105.9.⁴⁸ This score can also be compared to indexes of previous years, from that it is visible, that the situation is only getting worse in Afghanistan since 2020. This categorization of failed states also shows why Afghanistan is a failed state.⁴⁹

To get into more details about indicators showing the failure of Afghanistan as a state, I would like to mention some more, also with examples to it. The lack of order gives space for criminal groups and endangers the population. Currently the Taliban does nothing to end suicide bomb attacks, which put so many lives in danger, especially women and girls. The UN confirmed that in October 2022 53 people were killed, from which at least 46 were women and children, and further 110 people were injured in only one attack.⁵⁰ It is no surprise that Afghanistan ranks

⁴⁵ ThoughtCo. What is a Failed State? Definition and Examples Viewed: 2022.10.01. Available at: <https://www.thoughtco.com/what-is-a-failed-state-definition-and-examples-5072546>

⁴⁶ Brian Dube and Proceed Manatsa: FAILED STATE DISCOURSE UNDER INTERNATIONAL LAW: THE PLACE, ATTRIBUTES AND IMPLICATIONS Viewed: 2022.11.12. Available at: <http://www.onlineresearchjournals.com/ijopagg/art/141.pdf>

⁴⁷ Fund for Peace: Fragile States Index – Measuring Fragility Viewed: 2022.12.29. Available at: <https://fragilestatesindex.org/>

⁴⁸ Fund for Peace: Fragile States Index Annual Report 2022 Viewed: 2022.12.29. Available at: <https://fragilestatesindex.org/wp-content/uploads/2022/07/22-FSI-Report-Final.pdf>

⁴⁹ Ibidem

⁵⁰ FRANCE24: Death toll tops 50 in suicide attack on female Afghan students, UN says Viewed: 2022.12.29 Available at: <https://www.france24.com/en/asia-pacific/20221003-death-toll-rises-in-afghan-suicide-attack-on-female-students-in-exam-centre>

first in the world of the Global Terrorism Index (GTI) developed by the Institute for Economics & Peace (IEP), based on incidents, fatalities, hostages, and injuries.⁵¹ Many are also concerned that the rights of children and women won't be respected by the Taliban, as the education for 3,6 million girls is be banned again. The country's literacy is already low, only 28% of the population is able to read and write.⁵² A year passed, and the situation is not likely to improve, as girls have not been allowed to go to school since. All the achievements of international human rights protection and women rights seem to be vanished, as the Taliban gain control over the country. Because of the lack of education and their rights not being noticed, they became more vulnerable to forced marriages, domestic servitude, or all the other means of trafficking. Another factor dangerous for children, is that many are left without families. Due to the war and because of the Taliban takeover most of the children in orphanages were sent away to live with their relatives, because these facilities became unable to host them anymore. This change made thousands of children homeless and exposed to human traffickers.⁵³ Women and their rights became invisible as they are excluded from society, which according to a UN reports results in the fact that every day one or two women commit suicide.⁵⁴ The Human Development Index of the UNDP shows how devastating the situation is compared to other countries, as Afghanistan ranks 180th place out of 191 countries.⁵⁵ In this ranking the ones behind have very low human development within their countries. The indicator is based on three dimensions, these being the education, health and standard of living.⁵⁶

The last report of the UN between January 2019 and December 2020 shows that grave violations against children are increasing. From the study it is also clear that armed groups, mainly the Taliban committed around 46% of these crimes, but it is also visible that they are not the only perpetrators, around 35% of the violations were committed by governmental forces, and the rest can be attached to landmines and other remains of the war. During the examined period overall 6,473 grave violations were verified against 6,131 children, from that nearly the

⁵¹ Visions of Humanity: Overall Terrorism Index Score Viewed: 2022.12.29. Available at:

<https://www.visionofhumanity.org/maps/global-terrorism-index/#/>

⁵² Humanium: Children of Afghanistan Viewed: 2022.09.26. Available at:

<https://www.humanium.org/en/afghanistan/#:~:text=In%20Afghanistan%2C%20around%2020%25%20of,jobs%20done%20by%20Afghan%20children.>

⁵³ TRTWORLD: Afghan orphans left without shelter Viewed: 2022.09.12 Available at

<https://www.trtworld.com/magazine/afghan-orphans-left-without-shelter-51751>

⁵⁴ United Nations, UN News: In Afghanistan, women take their lives out of desperation, Human Rights Council hears Viewed: 2022.09.27. Available at <https://news.un.org/en/story/2022/07/1121852>

⁵⁵ UNDP: Human Development Report 2021/2022 Overview Viewed: 2022.12.29. Available at:

<https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22overviewpdf.pdf>

⁵⁶ UNDP: Human Development Index Viewed: 2022.12.29 Available at: <https://hdr.undp.org/data-center/human-development-index#/indicies/HDI>

half of it can be attached to the Taliban.⁵⁷ It is no surprise, that Afghanistan is also on the top of the list of the Security Threats Index, with the highest possible score, which is 10. This indicator, also made by the Fund for Peace, and is attached to the Fragile States Index considers criminality in the country, domestic security, bombing, terrorism, rebel movements, and battle related deaths, which acts are all present in the country.⁵⁸

These numbers are only increasing, due to the devastating life circumstances around the country and the ruling of the Taliban. For this reason, it is urgent to explore possibilities to help the victims in Afghanistan and to assess whether the international community could find a solution to serve justice and remedy for the ones suffering. It is true, that the international community is not legally obliged to help, but the concept of humanitarian intervention or the responsibility to protect cannot be disregarded. The children and the people of Afghanistan cannot be left behind, therefore the international community has a moral responsibility to provide humanitarian assistance.⁵⁹

4 Defining human trafficking

Human trafficking, a word we often hear when talking about crimes. Trafficking is a crime against humanity because it violates the dignity of human, to such an extent that there is no legal remedy to compensate. It is the complete humiliation of a person's existence. Human trafficking in international agreements is referred to as 'trafficking in persons' meaning the act of obtaining individuals by coercion, fraud, or deception for the purpose of exploitation for financial gain.⁶⁰

4.1 The definition of human trafficking under international law

It was not until the 1990s that the international community recognised that this is an issue that needs to be dealt with individually, separated from other practices such as illegal migration and

⁵⁷ OSRSG for Children and Armed Conflict, Alarming Scale of Grave Violations Against Children as Current Security Situation Collapses, Country Facing the Unknown Viewed: 2022.09.27. Available at: <https://childrenandarmedconflict.un.org/2021/08/138737/>

⁵⁸ theGlobalEconomy.com: Security threats index-Country Rankings Viewed: 2022.12.29. Available at: [Security threats index by country, around the world | TheGlobalEconomy.com](https://theGlobalEconomy.com/security-threats-index-by-country-around-the-world/)

⁵⁹ United Nations, UN News: World 'must engage' or risk Afghanistan's collapse, Security Council hears Viewed: 2022.11.15. Available at: <https://news.un.org/en/story/2022/09/1128151>

⁶⁰ Blue Campaign: What Is Human Trafficking? Viewed: 2022.09.02. Available at: <https://www.dhs.gov/blue-campaign/what-human-trafficking#:~:text=Human%20trafficking%20involves%20the%20use,here%20in%20the%20United%20States.>

migrant smuggling. The first definition the international community agreed on was incorporated in the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol). This Protocol is the first legally binding document to face trafficking in persons, which gained international recognition, and has 178 signatory parties. In this treaty States declare that they shall act on a national level to combat and prevent the crime of trafficking in persons, by implementing the rules and recommendations set out in the Palermo Protocol. The legitimate government of Afghanistan ratified this on 15 August in 2014, together with some national laws about work conditions and about prohibiting child labour.⁶¹

To be clear

article 3 of the mentioned Protocol defines human trafficking the following way:

- (a) "Trafficking in persons" shall mean 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. 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;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.⁶²

⁶¹ United Nations Office of the High Commissioner: Human Rights and Human Trafficking Viewed: 2022.09.02. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/FS36_en.pdf

⁶² General Assembly resolution 55/25 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) Viewed: 2022.09.02. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>

The definition of the Protocol provides a detailed and understandable description of what falls under the term of human trafficking. The Protocol lays down three main elements of trafficking which serve as the constitution of trafficking, these being the act, the means, and the purpose. What must be mentioned, is that trafficking in persons under the age of eighteen is treated differently, as in these cases the means element is not defined. Examining the above introduced cases of Afghanistan, it is clear that they fall under the definition of human trafficking.⁶³ According to UNODC the statistics on the magnitude of trafficking in persons in Afghanistan is not reliable as there is no sufficient legislation and reporting mechanism. It is hard to substantiate human trafficking cases due to the lack of security, and lack of understanding of law enforcement actors.⁶⁴

We can see that the Palermo Protocol sets a specific standard for policymakers in the signatory states. Now almost every UN Member State has made human trafficking a criminal offense, and the UN definition is always the base of the criminalisation process.⁶⁵

The 3 points of focus of the Palermo Protocol is to prevent, suppress and punish trafficking. The State Parties are asked to make sure that the social, physical and psychological recovery of victims is provided by proper counselling, educating, training, and of course by medical and material assistance like housing. For the recovery of victims Afghanistan Network in Combating Trafficking in Persons (ANCTIP) was created, alongside with shelters for women and also for boys under the age of 18. All this only could happen with the contribution of NGOs within the country. Also, as a preventative mechanism the Parties are asked to secure vulnerable groups of the society, which are at a higher risk of human trafficking. The Palermo Protocol is a well-written guideline for State Parties willing to solve the problem but is not a sufficient solution. For many governments it is not a priority, and what's more they are also involved in it, as it is clearly the situation in Afghanistan. There is barely any enforcement against human trafficking, giving traffickers almost complete impunity.⁶⁶

⁶³ United Nations Office of the High Commissioner: Human Rights and Human Trafficking Viewed: 2022.09.02. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/FS36_en.pdf

⁶⁴ United Nations: Office on Drugs and Crime Viewed: 2022.09.05. Available at: https://www.unodc.org/documents/human-trafficking/Legal_Responses_to_Trafficking_in_Persons_Manual_for_Parliamentarians_of_Afghanistan.pdf

⁶⁵ UNODC: The Protocol for human trafficking Viewed: 2022.09.06. Available at: <https://www.unodc.org/unodc/en/human-trafficking/protocol.html>

⁶⁶ The Borgen Project: Human Trafficking in Afghanistan Viewed: 2022.09.06. Available at: <https://borgenproject.org/human-trafficking-in-afghanistan/>

4.2 Elements of crime of human trafficking

When talking about human trafficking we have to distinguish between different forms. As it was also investigated in the Afghan context the two most common ones are sexual exploitation and forced labour. To understand these actions and to look into it from a legal perspective, I would like to provide a definition for each and also a percentage to see which is more common globally.⁶⁷

According to the 2020 Global Report on Trafficking of the UNDOC gathering data from 148 countries, presumably with the highest numbers of trafficking sexual exploitation takes up 50% of human trafficking. Sexual exploitation is an attempted abuse, by taking advantage of another person's vulnerability, power, or trust. With the next highest percentage of 38% forced labour is the second most common form of human trafficking. It means any kind of work that is demanded of a person under threat of punishment or penalty, for which the individual has not applied voluntarily. In addition, there are other types which occur less often taking up around the remaining 12% of human trafficking, these being trafficking for criminal activities, begging, trafficking for the removal of organs, baby selling and other unknown forms. These activities were recorded episodically and not that frequently, but they are still part of trafficking, and since these are only the cases that has been reported, the actual numbers can easily be higher.⁶⁸ For a long time in many countries the public as well as the law enforcement defined trafficking in persons as sexual exploitation. They did not distinguish between the two different acts, resulting that forced labour has not been detected. Another problem is that detecting trafficking for forced prostitution is more visible, it happens more in front of the eyes of public. Compared to this forced labour is more likely to happen in hidden locations, with less witnesses. These factors could also contribute to higher number of sexual exploitations, because the perception of victims of forced labour is less probable.⁶⁹

In Afghanistan all of this can be found. Unfortunately, this study of the UNDOC doesn't incorporate the data of Afghanistan, but still, it can serve as a good source to make a comparison and to see the global pattern. The percentages of the composition of the cases are bit different in Afghanistan, here mainly people living under poor life circumstances are affected. There are two outstanding elements in the Afghan context which are contrasting compared to trafficking

⁶⁷ City and County of San Francisco, Human Rights Commission, What is Human Trafficking? Viewed: 2022.09.06. Available at: [What is Human Trafficking? | Human Rights Commission \(sf-hrc.org\)](https://www.sfdph.org/dph/hrc/WhatIsHumanTrafficking.aspx)

⁶⁸ UNODC: Global Report on Trafficking in Persons 2020 Viewed: 2022.09.12. Available at: https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf

⁶⁹ UNODC: Global Report on Trafficking in Persons Viewed: 2022.09.06. Available at: https://www.unodc.org/documents/Global_Report_on_TIP.pdf

in other countries. Firstly, the presence of family members in the cases as perpetrators, because of the humanitarian crisis and culture beliefs they are willing to sell their daughters, wives, or sons. Secondly the presence of boy victims for sexual exploitation or for recruitment to military groups.⁷⁰

4.3 The efficacy of international legal instruments against trafficking in children

When talking about child protection and children's rights, the Convention on the Rights of the Child must be mentioned. The international convention on the rights of children was ratified in 1989, as a unique commitment to every child around the world. The convention is a legally binding international convention and has been ratified by the greatest number of countries in history, concerning human rights.⁷¹ The purpose of the UN Convention is to transform the life of children and be a lifebelt for every child even those children, whose rights aren't represented and who for some reason cannot get the protection, that every child is entitled to. With this treaty it is agreed that children are individual human beings equal to adult humans and they are not an object. There are four pillars of this Convention, these being the right to survival, right to protection, right to development and right to participation. These all must be implemented along with the principle of non-discrimination. Other than this, the Convention on the Rights of the Child consist of 54 Articles covering civil, political, economic, social, and cultural rights that all children different rights of the children. Still in signatory countries the emphasis on child protection is not big enough.⁷² Next to this there are other important supplementary protocols about child rights that addresses some of the worst situations a child can go through, with special regard child prostitution, the sale of the children, child pornography, or children in armed conflict.⁷³

However, Afghanistan signed the Convention in U1994 and adopted some measures on national levels in order to protect the rights of children, not much happened in practice. These given instruments in force, regarding children's rights and human trafficking are not successful in practice, not only in the Afghan context. To see why that is, firstly I would like to cover how

⁷⁰ UNODC: Global Report on Trafficking in Persons 2020 Viewed: 2022.09.12. Available at: https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf

⁷¹ UNICEF Afghanistan: Convention on the Rights of the Child Viewed: 2022.09.06. Available at: <https://www.unicef.org/afghanistan/convention-rights-child>

⁷² UNICEF: Convention on the Rights of the Child Viewed: 2022.09.06. Available at: <https://www.unicef.org/child-rights-convention>

⁷³ UNICEF: Strengthening the Convention on the Rights of the Child: Optional Protocols Viewed: 2022.09.06. Available at: <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols>

these treaties are built into international law. A convention is a legally binding pact between states that serves as a primary source of international law. They describe what a country should do to make sure that the written rights are secured.⁷⁴ A protocol is another form of international agreement between parties, also a source of international law, but less formal than a treaty or convention.⁷⁵ In many cases it is an instrument subsidiary to the treaty, which covers obligations and rights of the signatory parties.⁷⁶ However in general the purpose of protocols would be to have a mechanism built in them to certify compliance and methods to deal with noncompliance, because only obligatory means of an agreement secure that the actual content of the treaty is implemented also in practice, the Palermo Protocol on human trafficking doesn't establish a mechanism to deal with non-compliance, therefore cannot be enforced. This is the reason why despite all the effort of the international community by treaties and conventions about children's rights and about the crime of trafficking in persons, in many countries they are not respected, and because of the sovereignty of states there is nothing what for example the UN could do. Beside ratifying the Protocol, it is completely left to domestic law to solve the issue, investigate cases and to make justice about it. There isn't any judicial or penal system, or an international counterpart standing above every state, which would deal with the breaches of international agreements. Also, there is no intention and political support for creating such organ. Another reason why trafficking is hardly addressed by international law, is that it cannot be treated as a real threat to the whole of international peace and security, so the UN Security Council won't deal with it. Therefore, human trafficking is left to be handled at national criminal courts of the States. The still rising numbers of human trafficking, and the fact that human trafficking is the third biggest criminal industry of the world, obviously shows that these national courts are not sufficient in solving the issue, and that international public law has no authorization to change that. In this paper I am presenting another solution and investigate whether TIP has the required elements to be prosecuted as crimes against humanity by international criminal law.⁷⁷

⁷⁴ United Nations: Treaty Collections: Definition Conventions Viewed: 2022.09.06. Available at: https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#conventions

⁷⁵ United Nations: Treaty Collections: Definition Protocols Viewed: 2022.09.06. Available at: https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#protocols

⁷⁶ United Nations Forum on Forests, Secretariat of UNFF An Overview of International Law Working Draft Viewed: 2022.09.13. Available at: <https://www.un.org/esa/forests/wp-content/uploads/2014/12/background-3.pdf>

⁷⁷ American Society of International Law: Enforcing International Law Viewed: 2022. 09.12. Available at: <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law>

5 Defining crimes against humanity

The first time when the term crimes against humanity came up is after the Second World War, during the establishment of the Nuremberg International Military Tribunal in 1945. Historically the law has made distinctions between crimes against persons, public orders, morals, and property, this standard classification of legally protected values, was supplemented by offenses that are crimes against humanness.⁷⁸ It developed and became part of the case law of ad-hoc tribunals dealing with international criminal law. Therefore, the first definitions can be found in the Statutes of the International Criminal Tribunal for the former Yugoslavia⁷⁹ and for Rwanda⁸⁰. In 1998 it became part of the Rome Statute, which is the foundation of the International Criminal Court.⁸¹ The evolution of the definition through the years is visible, the most recent and expansive list of particular crimes that qualify as crimes against humanity is found in the Rome Statute. What is interesting that crimes against humanity are not concluded particularly in an international treaty, other than the Rome Statute. Still, it is a part of customary international law, and it is considered as a peremptory norm, which have to be applied on all States with no derogation.⁸²

The definition of crimes against humanity under Article 7 of the Rome Statute is the following:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

⁷⁸ David Luban: A Theory of Crimes Against Humanity 2004 Viewed: 2022.10.11. Available at: <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1165&context=facpub>

⁷⁹ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, Viewed: 2022.09.20. Available at: <https://www.refworld.org/docid/3dda28414.html>

⁸⁰ UN Security Council, Statute of the International Criminal Tribunal for Rwanda 1994, Viewed: 2022.09.20. Available at: <https://www.refworld.org/docid/3ae6b3952c.html>

⁸¹ TRIAL International: What are crimes against humanity? Viewed: 2022.09.20. Available at: <https://trialinternational.org/topics-post/crimes-against-humanity/>

⁸² United Nations: Crimes against humanity Viewed: 2022.09.20. Available at: <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁸³

5.1 Elements of the crimes

To have a better understanding of crimes against humanity and to see the similarities with human trafficking, an aspect which I would like to examine is the elements of these kind of crimes. The Rome Statute under Article 7 establishes elements that serves as the basis of a grave crime, these being the physical, contextual, and mental elements. These elements are important because they distinguish ordinary crimes from crimes against humanity. The physical element is about the act itself, any action stated in the Article 7 of the Rome Statute can count as crimes against humanity. Contextual elements are more detailed and shows more features of the crimes committed. First it must be *an attack directed against any civilian population*, which can happen also in peacetime and at wartime. It can be the joint combination of different crimes, and there must be a repetition of the crimes which are *widespread and systematic*. To deal with such cases, it is necessary that the committing of the crime happened multiple times, and that

⁸³UN General Assembly, Rome Statute of the International Criminal Court Viewed: 2022.09.19. Available at: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

there is a followed pattern.⁸⁴ Regarding human trafficking cases many of these have the needed features to be addressed by the ICC, as traffickers usually target vulnerable groups like women, children or minorities and traffic multiple persons for a longer period. Next to this the characteristic of the perpetrator must be determined. According to the *State or organizational policy* actors should be State parties or other organized entities. Lastly for the mental element, it can count as a crime against humanity if actors are aware of the criminal act, it must be committed *with knowledge of the attack*, while the awareness is a requirement, personal motives are not relevant here. All the above listed elements could be found in the cases of child trafficking in Afghanistan, as it happens many times, and there are organization exactly established for this kind of activity, and targets children systematically.⁸⁵

5.2 Addressing human trafficking as a crime against humanity

As in the previous sections examined human trafficking is a wide issue covering many parts of public international law. Now I would like to analyse human trafficking from another perspective, from international criminal law mainly through the Rome Statute of the ICC. From the previous part it is obvious that the convention on human trafficking is not useful in prosecuting the perpetrators, because it lacks on any kind of enforceable mechanism. The ICC is the only international permanent court that has the power to act over countries and rule on crimes that would fall under the jurisdiction of the domestic law system, when it is necessary, and if the State is failed to do so. The ICC has jurisdiction over '*the most serious crimes of concern to the international community as a whole*', these being: war crimes, genocide, crimes against humanity and the crime of aggression. The Rome Statute serves as the legal framework of the ICC, explaining what falls under the term grave crimes. In this part of my thesis, I am examining whether it can deal with human trafficking cases or not, making a remark on how this could be implemented in the case of Afghanistan. Although the Rome Statute, the treaty establishing the ICC, doesn't mention 'trafficking in person' individually, there are implications under crimes against humanity where human trafficking could be attached, and addressed. Having examined the definition and reports on trafficking, it is easy to see that trafficking is a serious crime violating the human existence. For this reason, it is a crime against humanity and

⁸⁴ International Criminal Court Elements of Crimes Viewed: 2022.09.19. Available at: <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>

⁸⁵ Omar Grech The contextual elements in Crimes Against Humanity: key developments from the Nuremberg Tribunal to the Rome Statute Viewed: 2022.09.19. Available at: https://www.um.edu.mt/library/oar/bitstream/123456789/79212/1/The_contextual_elements%20in_crimes_against_humanity_key_developments_from_the_Nuremberg_Tribunal_to_the_Rome_Statute_2021.pdf

should be addressed by the international criminal law. To prove my statement, I would like to investigate the Rome Statute of the ICC, the elements of crimes against humanity, and the ICC jurisdiction over them. The human trafficking protocol pays special attention to children, that's why it is important to explore if the ICC has such complimentary policy on the protection of children, or humans under and above the age of eighteen are handled the same in front of the ICC.⁸⁶

6 Human trafficking under the Rome Statute

The current form of the Rome Statute already has four acts where human trafficking could be read and interpreted. However, these are not entirely the same as trafficking, and despite having similarities they can differ sometimes, making the prosecution of human trafficking in front of the ICC difficult.

6.1 Enslavement and sexual slavery

The first act, which has for the most part many similarities with human trafficking is enslavement listed in Article 7 (1) (c) of the Rome Statute. The definition of enslavement is *the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children*. The wording of the article and the given definition opens space for questions and debate whether human trafficking is a form of enslavement, or human trafficking is the broader category, which contains enslavement as one form of exploitation. The similarities between these two acts of crimes can be seen, when the above-mentioned definition and the definition of human trafficking from the Palermo Protocol is brought together. From this trafficking means all acts connected to or carried out for the purpose of slavery. Despite these two crimes overlapping, there are some differences in the prosecution of them. Trafficking requires a 'means' element, to be considered as trafficking, while in enslavement this is not necessary and the focus is on the perpetrator's intentions, and how it exercises the power of ownership. Other than enslavement, sexual slavery is also mentioned in the Rome Statute under Article 7 (1) (g),

⁸⁶ International Criminal Court: How the Court works Viewed: 2022.09.19. Available at: <https://www.icc-cpi.int/about/how-the-court-works#:~:text=As%20a%20judicial%20institution%2C%20the,%20assets%2C%20and%20enforcing%20sentences.>

which criminalises sexual and gender-based crimes. Human trafficking not only consists of the crime of sexual exploitation, and within the context of sexual slavery only that part could be addressed. However, the trafficking cases in Afghanistan could actually be targeted under this, as sexual exploitation of woman and children is very high. The act of bacha bazi is very similar, the boys exposed to this are referred to as boy sex slaves, from this wording it is clear that they are treated like slaves, so these cases could be addressed as sexual slavery.⁸⁷

6.2 Other inhumane acts

The second act which refers to human trafficking lays in Article 7 (1) (k) in the Rome Statute, listed as '*Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*' As human trafficking is not only sexual exploitation, but also others form exists, which I introduced in the context of Afghanistan, it is inevitable that those are prosecuted too. Some say that this section was to include crimes like trafficking into the Rome Statute, however still human trafficking cannot be brought entirely into this article. There are two main issues, first being the trafficking must cause the victim great suffering and a serious injury mentally or physically. Secondly it should be similar to the other acts of crimes against humanity mentioned by the Rome Statute. Most of the cases of human trafficking meets with these criteriums, so it is another sufficient form to incorporate trafficking into the Rome Statute. The problem could only arise with legality, the drafters left this category wide, therefore it must be interpreted conservatively, as the scope of crimes against humanity cannot be unnecessary expanded. Which means that, it is also not that effective in regards of taking immediate action to save the children of Afghanistan.⁸⁸

6.3 Deportation or forcible transfer

Under Article 7(1)(g) deportation or forcible transfer can also serve as a possible solution for implementing human trafficking between the lines of the Rome Statute. The definition of this requires that the act is carried out by coercion and force, which requirement is met in the case

⁸⁷ Jean-Pierre Gauci and Marina Cardoso Farias: Human Trafficking as a Crime Against Humanity: Some Legal Questions Viewed: 2022.09.21. Available at: https://www.um.edu.mt/library/oar/bitstream/123456789/79210/1/Human_trafficking_as_a_crime_against_humaniy_some_legal_questions_2021.pdf

⁸⁸ Parliamentarians for Global Action: Modernising the International Criminal Court: Crimes against the Environment, Trafficking in Human Beings, Hybrid Justice and Corporate Accountability Viewed: 2022.09.21. Available at: <https://www.pgaction.org/pdf/2022/report-expanding-the-jurisdiction-of-the-icc.pdf>

of human trafficking. However, it is arguably hard to attach all human trafficking cases to deportation and forcible transfer, because the definition states that there must be a population as victims included, who are present at the area lawfully they are displaced from. Unfortunately, many refugees and migrants are trafficked in Afghanistan, therefore they don't fall under the scope of deportation or forcible transfer.⁸⁹

6.4 Amendment of the Rome Statute

After looking into the possible implementations of human trafficking as a crime against humanity, it is visible that within the framework of the already existing Rome Statute human trafficking can be addressed, but not as easily and obviously. Despite many overlapping elements all aspect of human trafficking written in the Palermo Protocol, cannot be addressed in the current form of the Rome Statute. That is why a solution for taking down human trafficking could be the amendment of the Rome Statute. Another aspect which I would like to briefly mention is about the perpetrator of the crimes. Many of these crimes cannot be addressed by the ICC because the perpetrator falls out within the scope of 'State or a State-like entity'. Including organized criminal gangs and interpreting them as organized entities for the benefit of the Rome Statute, would also help. The amendment of the Rome Statute would give a practical tool to the international community to address the crime of human trafficking in international criminal law to fight impunity.⁹⁰

Having human trafficking as crimes of humanity would also influence the evolution of universal jurisdiction. Another reason why it would be beneficial treating trafficking as a crime against humanity because it would help the enforcement of the norms and principles of human rights against non-State actors. However, it is accepted that trafficking in person is a violation of human rights, human rights law cannot be enforced against non-State parties committing trafficking. The advantage of classifying trafficking as a crime against humanity rather than a regular crime is that it would put a bigger impact on States the pressure on States and the International community to support indirect enforcement of the relevant human rights norms.

⁸⁹ Clare Frances Moran: Human Trafficking and the Rome Statute of the International Criminal Court Viewed: 2022.09.21. Available at: <https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/2125>

⁹⁰ Ibidem

To sum up, the possibility for recognizing trafficking as a crime against humanity is to facilitate international action against the phenomenon.⁹¹

7 The Taliban before the International Criminal Court

The International Criminal Court was established by the Rome Statute in July 1989 and began their work in the year of 2003 in the Hague, Netherlands. The aim of the court is to serve justice in the most inhumane grave crimes happening around the world, these being genocide, war crimes, crimes against humanity, and crime of aggression. The ICC consist of four main organs, the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor, and the Registry.⁹²

7.1 Establishing jurisdiction

The Rome Statute establishes the complementarity principle of the International Criminal Court, which means that the ICC could only investigate and prosecute cases complementary to the national courts. The ICC serves as a “last resort” and takes on only specific types of cases for which there are no immunities, no amnesties. In the past we could see operating models like the International Military Tribunal at Nuremberg and the International Criminal Tribunal for the former Yugoslavia with primarily jurisdiction, the permanent court still became complementary. Setting up the International Criminal Court with complementarity, so that it doesn’t hurt the sovereignty of States. Another reason for this is that in many cases, but definitely not in the case of Afghanistan, practicing national jurisdiction is way more effective because it is much cheaper and practical. Lastly if proceeding in these cases is done right, it helps to boost public trust in the national institutions. Still the question arises, could the ICC be a more successful tool fighting impunity, if it wasn’t complementary?⁹³

⁹¹ Cambridge University Press: Tom Obokata: Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System Viewed: 2022.09.16. Available at: <https://www.jstor.org/stable/3663256>

⁹² International Criminal Court: Understanding the International Criminal Court Viewed: 2022.09.19. Available at: <https://www.icc-cpi.int/sites/default/files/understanding-the-icc.pdf>

⁹³ Paul Seils: Handbook on Complementarity An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes Viewed: 2022.09.16. Available at: https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf

When examining the complementarity, there is another term that comes up, which is admissibility, to see whether the crime is admissible before the ICC or not. A case of grave violation becomes inadmissible before the ICC, when the national court is already dealing with it. However, there is an exception to the rule because when the national jurisdiction fails to process the case or is unwilling, then the ICC must interfere. The issue of inadmissibility must be examined with a Two-Step Process, which determines whether the case can come before the ICC or not. The ICC can only start its investigation if there is evidence that it falls under the jurisdiction of ICC. In the case of Afghanistan, it is undeniable that the national jurisdiction failed to prosecute cases of human trafficking, therefore these violations are admissible before the ICC.⁹⁴

The jurisdiction of ICC can only be exercised on cases of genocide, crimes against humanity and war crimes that have happened since 1 July 2002, or since the State Party ratified the Rome Statute. On crimes of aggression cases, the ICC can exercise power as of 2018. The ICC can exercise jurisdiction in three different ways. The first being, when the case is presented to the Prosecutor by the States. Secondly the ICC can interfere in cases which are referred to them by the United Nations Security Council acting in accordance with Chapter VII of the United Nations Charter. The third possibility how the ICC can get involved is if the Prosecutor initiates an independent investigation. Both in the first and third procedure the consent of territorial States or States of the accused's nationality is necessary. Also because of the supplementary principle of the court if a case is under national investigation and prosecution, the Court would deem it incompetent to deal with. From these methods we can see that bringing human trafficking cases is not easy, because of the principle of sovereignty and different interests of States, they would hold back the ICC to investigate effectively. However, there is another solution to get the ICC to be involved, which is relevant in the case of Afghanistan. The consent of States is not needed when it can be clearly demonstrated that the States are not doing the required measures addressing the crime, they are not willing to investigate and punish the offenders for a crime listed in the Rome Statute. Such a situation can occur in the context of trafficking if States do not pass legislation against the activity, permit traffickers, or are unable to conduct independent and impartial trials because of corruption. It is visible that the

⁹⁴ ICTJ: What is complementarity? Viewed: 2022.09.16. Available at: <https://www.ictj.org/sites/default/files/subsites/complementarity-icc/>

jurisdiction of ICC leaves place for national courts but interferes if it is needed. In the case of prosecuting the Taliban an investigation is highly needed.⁹⁵

7.2 Crimes against children – An aggravating factor or not?

Children are one of the most vulnerable victims of international criminal law, for this reason they are often targets of different atrocities. Children are being unwittingly used as symbols of military conflict and brutality, which is also demonstrated in the context of Afghanistan. Many initiatives addressing the situation of children are made by the UN and UNICEF, to promote children rights, and regulate how children must be protected in any kind of situation in war and in peacetime. Despite of the big pile of normative measure to protect the children, in practice they don't have effective results. To address this issue the Rome Statute mentions the importance of child protection regarding grave crimes. The Rome Statute is about crimes, where sadly children appear as victims at a high percentage. For this reason, the investigation and prosecution of crimes affecting children, must be handled carefully. The Office of the Prosecutor ranked this as one of the six strategic goals that the ICC must pay special attention to in the 2012-2015 Strategic Plan, and in the following Strategic Plan in 2016-2018. To align with these goals and to put a bigger pressure on fighting crimes against children, the Office of the Prosecutor made the Policy on Children.⁹⁶ The question if they are really treated as a high priority during investigations of the ICC, and if the ICC prioritizes prosecuting cases where the victims are children can hardly be answered. It is visible that serving justice for children takes place in the current ICC Prosecutor Karim Asad Ahmad Khan's plan, as meetings and speeches were established, but in practice a model for it can hardly be found.⁹⁷

The ICC considers persons under the age of eighteen as children, and any kind of original crimes are regarded as grave crimes, if it is committed against children. This secures the special protection the child must enjoy. The Office takes on child-sensitive approaches while working together with children, recognising their individual rights set in the 1989 Convention on the Rights of the Child. The ICC Policy on Children highlights, that the Office following this

⁹⁵ Cambridge University Press: Tom Obokata: Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System Viewed: 2022.09.16. Available at: <https://www.jstor.org/stable/3663256>

⁹⁶ Diane Marie Amann: The Policy on Children of the ICC Office of the Prosecutor: Toward greater accountability for crimes against and affecting children Viewed: 2022.09.19. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548800

⁹⁷ Justice Rapid Response: ASP event: ICC Prosecutor commits to put policy into action on justice for children Viewed: 2022.09.19. Available at: <https://www.justicerapidresponse.org/asp-event-icc-prosecutor-commits-to-put-policy-into-action-on-justice-for-children/>

approach, views crimes affecting minors particularly serious offenses. However, there is no written agreement that a child being the victim of the grave crime happened, count as an aggregating circumstance. Unfortunately, the Rules of Procedure and Evidence of the ICC, which establishes what counts as an aggregating or mitigating factor of the sentence, doesn't mention it.⁹⁸ The Rome Statute makes specific mentions about crimes regarding minors, and crimes directly against them.

Some of the most obvious ones, are the following:⁹⁹

- (a) Conscription, enlistment, and use of children under the age of fifteen years to participate actively in hostilities
- (b) Forcible transfer of children and prevention of birth
- (c) Trafficking of children as a form of enslavement
- (d) Attacks against buildings dedicated to education and health care
- (e) Torture and related crimes
- (f) Persecution
- (g) Sexual and gender-based crimes

As in my thesis's focus is human trafficking, with a special attention to child trafficking, I would like to explore the (c) part *Trafficking of children as a form of enslavement* of the Policy. This can be attached to the Article 7 (2)(c) and (1)(c) of the Rome Statute about enslavement. There is a strong reference to children, according to the interpretation of enslavement given by the Rome Statute children trafficking cases can be addressed by the ICC, if they meet the requirements of crimes against humanity. This could be a reasonable article where child trafficking cases of Afghanistan could be attached and prosecuted. If the ICC started investigation on this, it would show a real commitment of protecting children, who are victims of grave violations, on behalf of the ICC.¹⁰⁰

7.3 ICC Prosecution against the Taliban

The idea of prosecuting crimes committed in Afghanistan in front of the International Criminal Court is not an entirely new one, as preliminary examination started in the year of 2007, to

⁹⁸ International Criminal Court: Rules of Procedure and Evidence Viewed: 2022.11.27. Available at: <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>

⁹⁹ International Criminal Court, The Office of the Prosecutor: Policy on Children Viewed: 2022.09.19. Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF

¹⁰⁰ Ibidem

investigate and identify perpetrators. Then, in 2017 a request was filed by the Prosecutor to start an actual investigation on crimes that have been committed on the territory of Afghanistan since 1 May 2003, and on crimes that can be linked to the armed conflict and situation in Afghanistan and were committed on the territory of any State Party to the Rome Statute since 1 July 2002. The investigation was requested because during the preliminary examination the OTP found reasonable evidence of grave violations and found that no national prosecution was made. The Islamic Republic of Afghanistan was not likely to start an investigation on its own, despite being an ICC member. After ratifying the Rome Statute in 2003 they accepted a new criminal code, where the four grave crimes can be prosecuted on national grounds, however in practice they didn't do anything. As evidence cases of 699 victims were brought to the Pre-Trial Chamber between December 2017 and February 2018. The request of the Prosecutor was denied in 2017 by the ICC. Claiming that due to corruption and not enough evidence the investigation wouldn't be successful, stating that the ICC should care with other cases, where a successful investigation is more likely to happen. The OTP filed in an appeal to challenge the decision in 2019, and the Appeals Chamber decided to authorise the appeal of the Prosecutor on 5 March 2020. The investigation and prosecution against the Taliban and the Islamic State could finally start, based on the principals on complementarity and gravity. The proceedings were stopped due to the request of the legitimate government of Afghanistan, stating that they will proceed the investigation. After the fall of Kabul and the Taliban takeover the OTP decided to start investigation and give priority to the case, as the current situation in Afghanistan makes it more urgent for the ICC to investigate and don't let grave violations unpunished anymore. However, it is a good achievement, the investigation is slow and there hasn't been significant progress. The situation is not easy, the ICC is responsible to take action, because making real steps and arrests could be helpful restraining the behaviour of the Taliban. This would require a more aggressive action on the behalf of the ICC, and a tight cooperation between the state parties.¹⁰¹

What is mentioned in the Prosecutor's request are war crimes and crimes against humanity committed by the Taliban and their affiliated Haqqani Network, war crimes committed by Afghan National Security Forces, National Directorate for Security, Afghan National Police, and war crimes committed by the United States, and US Central Intelligence Agency. From the perspective of prosecuting perpetrators of human trafficking this investigation is not likely to

¹⁰¹ Coalition for the International Criminal Court: Afghanistan Viewed: 2022.09.29. Available at: <https://www.coalitionfortheicc.org/country/afghanistan>

hold any success. As under crimes against humanity the request doesn't contain those terms where trafficking can be interpreted, only murder, and imprisonment or other severe deprivation of physical liberty is mentioned, neither of this could be attached to TIP.¹⁰²

To understand why enslavement, other inhumane acts, or other forcible transfer, where human trafficking could be addressed, is not in focus within this investigation I would like to present some possible reasons. Firstly, the case of Afghanistan shows how slow the proceeding of the ICC is. Despite being able to act over States when needed, the ICC makes careful and established decisions and steps. To gather evidence on cases in Afghanistan is not easy and here institutions of the international community like the UN and its mission group the United Nations Assistance Mission in Afghanistan play a role, as they are on field, they can connect with victims. The report of UNAMA shows a high number of grave violations against children, 1,483 have been injured and 653 children have been killed between January and September 2018.¹⁰³ The mission group doesn't have that much evidence on child trafficking, although UNICEF reported data on child marriages and forced child labour, as it seems it is not enough for the ICC. The question remains unanswered. Next to murder or deportation the exploitation of humans is also counts as serious crime, and people experiencing it are suffering. The lack of evidence can be one reason, because the constitution of the investigations and prosecutions of the ICC requires established evidence of the cases. In the always ongoing chaos, it is hard to gather evidence, and this can be a valid reason why it cannot be addressed by international criminal law. Another problem can be the identification of victims, as often the reason why they are sentenced to this is because otherwise they wouldn't survive. They do not see the grave crime in the action, because they are not thought about human rights, and because they don't have any other choice. Families sell their children and hope that, their children there could eat at least once a day. They see it as a survival method, and that can also contribute to that, the identification of victims and specific cases is hard, resulting that the ICC doesn't have enough evidence. Another reason is the high-level corruption of Afghanistan, human trafficking is not only an underground activity but also arises on state level, where many influential people favour

¹⁰² International Criminal Court: The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan Viewed: 2022.09.29. Available at: <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation>

¹⁰³ UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN (UNAMA) Children must be protected from all conflict-related grave violations Viewed: 2022.09.29. Available at: <https://unama.unmissions.org/children-must-be-protected-all-conflict-related-grave-violations>

impunity, if they also profit from the action.¹⁰⁴ Taking into consideration all these arguments, an investigation on human trafficking cases in Afghanistan is hardly going to happen in the near future. In best case scenario the situation gets better if the perpetrators are prosecuted for the war crimes and crimes against humanity which are listed in the ongoing prosecution. However, if it is done, trafficking in persons still would be an issue, as it was present while the legitimate government was in power, and as it will not cure the root of the problem.¹⁰⁵

8 Conclusion

In a country where the rule of law doesn't exist crimes will always arise, and there always be vulnerable groups. Researching human trafficking in the Afghan context, the first part of my work shows that children are at the most vulnerable position regarding human trafficking. Girls being exploited as wives, domestic servants or sex slaves, and boys are trafficked for the act of bacha bazi and for armed groups as child soldiers. Because of the devastating life circumstances children are trafficked for forced labour, or they are sold by their own family. It is also clear that measures against human trafficking are non-existent because, the rule of law is not established in the country, since the Taliban takeover. The international community should interfere to help children, who are left without proper jurisdiction. The examination of the definition of human trafficking, and the international treaties in regard of human trafficking shows that the cases of Afghanistan can be legally qualified as human trafficking. Unfortunately, the legal qualification of the problem does not serve as a solution, as public international law leaves all cases of trafficking in person to be handled at national level. Afghanistan being a signatory State to the Convention on the Rights of Children and the Palermo Protocol, should apply measures to secure the rights of the children and prevent, suppress and punish trafficking in persons, but as I also highlighted it before, there is no intention for it on behalf of the Taliban. As there is no enforceable mechanism built into the Palermo Protocol, the international community doesn't have a sufficient tool to enforce non-compliance of States. Still victims need justice as crimes of TIP is a serious violation of human

¹⁰⁴An Urgent Need for Justice: Expediting the International Criminal Court's Afghanistan Investigation Viewed: 2022.09.30. Available at: <https://thediplomat.com/2022/02/an-urgent-need-for-justice-expediting-the-international-criminal-courts-afghanistan-investigation/>

¹⁰⁵JUSTICEINFO.NET: Could the ICC address human trafficking as an international crime? Viewed: 2022.09.30. Available at: <https://www.justiceinfo.net/en/41684-could-icc-address-human-trafficking-international-crime.html>

existence. For that very reason I believe that the International Criminal Court has jurisdiction to act over cases of human trafficking under crimes against humanity, as enslavement, sexual slavery, deportation or forcible transfer, and as other inhumane acts. In this section of my work, I explored the possibility of such prosecution to be done by the International Criminal Court. The results show that, although the prosecution is possible, the current form of the Rome Statute doesn't serve articles where it could be easily and entirely done. This shows an insufficiency of the ICC, which is also confirmed by the fact that within the framework of the currently ongoing investigation against the Taliban, human trafficking cases cannot be included. Therefore, in my paper I suggested the amendment of the Statute of the ICC, to incorporate the crime of trafficking in person with the exact wordings of the definition of trafficking in persons. The ICC dealing with cases of TIP could be a useful mechanism to fight impunity and to fight the third biggest crime industry of the world. Trafficking in person can be brought in front of the International Criminal Court therefore, perpetrators of child trafficking in Afghanistan could be prosecuted and this could serve as a solution to the problem, proposed in the beginning of this paper. The answer to the question whether the Taliban could be held liable for the crimes of child trafficking in front of the ICC is complex. After reading this paper the culpability of Taliban is not a question anymore, however the structure of the international community now, cannot solve the crime human trafficking. To change this, it would require a different approach of all states of the world. The definition of human trafficking in coalition with the elements and definition of crimes against humanity shows that human trafficking can be addressed by the International Criminal Court. The problem is that in practice there is no precedent and on behalf of the ICC there is no intention to change that. Still this paper serves as evidence that human trafficking in Afghanistan is a presence issue which cannot stay unpunished, and ways has to be found to address it through international criminal law. A possible way, which I suggested, could be through the International Criminal Court with the amendment of the Rome Statute. This paper aims to prove that with the amendment of the Rome Statute justice can be served for victims of human trafficking internationally. In this manner, the results of my research supported my hypothesis, that the International Criminal Court is the only institution with jurisdiction to address the human rights violations happening in Afghanistan. The people of Afghanistan are not only in need of justice, but they deserve justice, and the reality is that this justice can only be served by the international community.

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