

Legal Prostitution: A Crime Against Humanity?*

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Not far from the Labor Court, a woman in a snake-skin dress sits next to a wooden outhouse. The city has set up these so-called labor boxes for prostitutes. There, they are supposed to work and do their business simultaneously. It smells like feces and urine. She had just given a john a blowjob for twenty euros, the prostituted woman says—the drug addicts would do it for five euros. The woman says she’s saving for a house for herself and her six-year-old son. “At some point, the time will come when we in Germany will be ashamed of what we have done to these young women from Eastern Europe,” says Leni Breymaier, Bundestag MP for the Social Democratic Party (SPD). She has been campaigning for a sex purchasing ban in Germany for years. “To me, this is the slave trade of our time.”

— *Der Spiegel*,
June 23, 2023.[†]

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[†] Katrin Langhans, *Der Spiegel*, June 23, 2023.

[B]ecause crimes against humanity occur in peacetime, as well as during armed conflict, addressing them through prevention and punishment can play a key role in staunching . . . an “atrocities cascade” before it descends into unstoppable conflict and overwhelming criminality.

— *Leila Nadya Sadat* (2022).[‡]

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INTRODUCTION

Legalizing prostitution, meaning sex for other compensation,¹ or decriminalizing it across-the-board,² is increasingly considered and

[‡] Leila Nadya Sadat, *The Academy and War Crime Prosecutions: Little Progress in the Sixth Committee on Crimes Against Humanity*, 54 CASE W. RES. J. INT’L L. 89, 91 (2022) (discussing distinction between prevention and deterrence, the former being broader, in *Bosn. & Herz. v. Serb. & Montenegro*, Judgment, 2007 I.C.J. 43 (Feb. 26)). Professor Sadat is the James Carr Professor of International Criminal Law at Washington University St. Louis and served as the Special Advisor on Crimes Against Humanity to the ICC Prosecutor 2012–2023.

1. Each jurisdiction and culture defines prostitution in its own way. Under capitalism, the currently dominant economic form globally, sex acts in prostitution are typically exchanged for money, or bartered for commodities such as drugs, armaments, cigarettes, cars, or fuel.

2. Decriminalization and legalization both occur against a backdrop of prior criminalization, such that removing a criminal sanction for an act makes that act no longer a crime, hence legal. New Zealand supposedly illustrates the decriminalized freer model, Germany the supposedly legalized more regulated one. See, e.g., GLOBAL NETWORK OF SEX WORK PROJECTS, DECRIMINALISATION VS. LEGALISATION: UNDERSTANDING KEY DIFFERENCES IN SEX WORK LEGISLATION 3–11 (2024) [<https://perma.cc/697U-RM5M>] [hereinafter GLOBAL NETWORK OF SEX PROJECTS]. The distinction between

aggressively promoted around the world,³ as if eliminating all criminal penalties for selling and buying people for sexual use will reduce or avoid

the two is often overdrawn and misleading. In practice, and considered precisely, the two are often virtually indistinguishable or even reversed. Although specifics vary by jurisdiction, legalization decriminalizes, decriminalization legalizes. Few, if any, modern states that eliminate criminal penalties for prostitution, often termed decriminalization, do so without any regulations. Apart from its numerous statutory rules, New Zealand, for example, prohibits foreigners from involvement. *See* Prostitution Reform Act 2003, s 19 (N.Z.). Germany, by contrast, permits foreign recruitment for its brothels. *See, e.g., infra* notes 7, 74–77 and accompanying text. Overwhelmingly, as shown throughout this article, *infra* notes 5–7, 30–31, 41–47, 56–105, 181, 198–99, 285–86 and accompanying text, the two permit the same harms to proliferate, with legalization sometimes purporting to mitigate them, and decriminalization not even pretending to do so. Politically, the distinction chiefly functions to permit disavowal of the data on harms of legalization, which has a longer track record, in order to support the claim that state restrictions—not prostitution itself—produce them, supporting decriminalization initiatives in the interest of the sex industry. *See generally* GLOBAL NETWORK OF SEX PROJECTS, *supra*, which deploys this distinction for this purpose. When existing and relevant, technical and practical differences between the two approaches are kept in mind throughout this analysis. Most often, the two function relatively interchangeably.

3. For some recent prostitution legalization/decriminalization activity, see, e.g., *Sex Work Decriminalisation Act (No. 7) 2022* (Vic) ss 7–9 (Austl.), which repealed the *Sex Work Act 1994* (Vic) ss 18–20 (Austl.), a legalized regime. Queensland’s attorney general also intended to decriminalize in April 2023, see Press Release, The Queensland Cabinet and Ministerial Directory, Government to Decriminalise Sex Work (Apr. 24, 2023) [<https://perma.cc/NSM7-J5TA>] (promising “sex workers the same rights and legal protections as any other business or industry”), but the promised action has been delayed or possibly canceled. *See* Arianna Levy, *Workers, Advocates Rally in Brisbane in Push to Decriminalise Sex Work in Queensland*, ABC NEWS (AUSTL. BROAD. CO.) (Dec. 6, 2023) [<https://perma.cc/F3NK-4AEQ>] (“Dozens of people have rallied in Brisbane’s CBD to decriminalise sex work”). For proposed decriminalization elsewhere, see, e.g., Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022 (S. Afr.) [<https://perma.cc/QZV6-TR6E>]; S. Afr., Gov’t, *Minister Ronald Lamola on Criminal Law Amendment Bill of 2022—Decriminalisation of Sex Work* (Dec. 9, 2022) [<https://perma.cc/Z2BY-P7KN>] (explaining proposal, inviting public comments until Jan. 31, 2023); Norges Offentlige Utredninger [NOU] 2022:21 Strafferettslig vern av den seksuelle selvbestemmelsesretten [government report series] 248–50 (Nor.) [<https://perma.cc/CGL6-ZPVX>] (recommending repeal of the 2009 law prohibiting purchase of sex); *but see* The Equality & Anti-discrimination Ombud, Nor., Comment on NOU 2022:21 (in Norwegian), at subheading 2.7. “Purchase of Sexual Services from Adults: The Issue of Repealing § 316” (Apr. 13, 2023) [<https://perma.cc/2NL3-NQFY>] (“Instead of repealing the criminal law, it should be considered whether technical legal measures could be introduced to make implementation of the prohibition easier, so that it has the desired effect.”). Repeated talk in Canada and France urges repeal or invalidation of their laws that decriminalize prostituted people and prohibit purchasing them for sexual use in favor of also decriminalizing buyers and sellers.

its well-documented harms to those bought and sold.⁴ A large body of evidence, much of it published by legalized and decriminalized regimes themselves, shows that neither improves the situation of prostituted persons.⁵ Both instead maintain and increase known harms of prostitution,⁶

4. For the harms of prostitution, see *infra* notes 22–35, 74–105, 156–82, 187–202, 282–86 and accompanying text. For the purported aims of legalization or decriminalization campaigns, see, e.g., VICTORIAN STATE GOVERNMENT, DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY, DISCUSSION PAPER: DECRIMINALISING SEX WORK (n.d.) [<https://perma.cc/647D-QNF8>], which asserted that because the admitted harms of its legalization of prostitution will be eliminated by full decriminalization, the government “will decriminalise sex work in Victoria to maximise sex workers’ safety, health, and human rights, while also reducing stigma and fear of criminal repercussions for sex workers.” See also Lucy Platt et al., *Associations Between Sex Work Laws and Sex Workers’ Health: A Systematic Review and Meta-Analysis of Quantitative and Qualitative Studies*, 15(12) PLOS MEDICINE e1002680, 46 (2018) (“The recognition of sex work as an occupation is an important step towards conferring social, labour, and civil rights on all sex workers.”).

5. See, e.g., FED. MINISTRY (GER.) FOR FAM. AFFS., SENIOR CITIZENS, WOMEN AND YOUTH, GER. FED. GOV’T, REPORT BY THE FEDERAL GOVERNMENT ON THE IMPACT OF THE ACT REGULATING THE LEGAL SITUATION OF PROSTITUTES 79 (2007) [<https://perma.cc/0sd3L6pB1CE>] (acknowledging that legalization of prostitution in Germany in 2002 had “not been able to make actual, measurable improvements to prostitutes’ social protection,” nor did it improve “working conditions,” “prostitutes’ means for leaving prostitution,” or “reduce[] crime”); MINISTRY OF JUST., N.Z. GOV’T, REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003 at 57, 122, 167 (2008) [<https://perma.cc/0dW66NBn2Ti>] (finding no indications that violence in prostitution decreased yet very few prostituted persons reported violence or crime; acknowledging “some” foreigners being prostituted despite prohibition, noting these persons were “vulnerable to exploitation”—yet not a single prosecution for sex trafficking had been brought to date); ERIKA SCHULZE ET AL., SEXUAL EXPLOITATION AND PROSTITUTION AND ITS IMPACT ON GENDER EQUALITY 38 (European Parliament Briefing Paper, 2014) [<https://perma.cc/7UXW-Q6TY>] (“Alarmed by persistent abuses and the presence of organized crime in the prostitution sector, into which it is estimated that between 60–70% of the women are forced by criminal groups, the Dutch authorities are considering amending the national prostitution policy.” (footnotes omitted)); J. Smith, *What REALLY Happened in New Zealand After Prostitution Was Decriminalized?*, NORDIC MODEL NOW! at 24 (Sept. 25, 2023) [<https://perma.cc/R75M-X3YF>] (describing how, in government reports on decriminalization since 2003, “pages upon pages document the expansion of the sex trade, abuse and violence”). For further documentation of the harms of prostitution, which continue in force under legalization and decriminalization, see *infra* notes 22–35, 74–105, 156–82, 187–202, 282–86 and accompanying text.

6. Since Germany legalized prostitution in 2002, the sex industry is reported to have exploded in size three or four times. Nisha Lilia Diu, *Germany’s Mega Brothel Left Me Cold*, TELEGRAPH ONLINE (UK) (Jan. 30, 2015), available in 2015 WLNR 2909766 [hereinafter Diu, *Germany’s Mega Brothel*]. The estimated total number of people in prostitution 2002–2016 ranged from 150,000–400,000, Jude Towers et al.,

notably by escalating demand for paid sex, drawing more vulnerable people into the sex industry, and providing a powerful economic incentive for sex trafficking.⁷ Despite documentation of the direct relation between eliminating sanctions for pimps, brothel owners, and buyers, and increased harms to the women and girls and others exploited in the sex trade,⁸ no legal steps have been taken against legalizing or decriminalizing authorities to deter or hold them accountable for the abuses their legislative, executive, administrative, and policy actions provably cause.

International criminal law prohibiting crimes against humanity under the Rome Statute of the International Criminal Court (“ICC”) and elsewhere,⁹ as shown in Part II, provides such a claim and disincentive.

Measuring Trafficking EU-28, in STUDY ON THE GENDER DIMENSION OF TRAFFICKING IN HUMAN BEINGS: FINAL REPORT 57, 81–82 (European Commission ed., 2016) (citing sources), to 100,000–700,000. FOUNDATION SCHELLES, SEXUAL EXPLOITATION 250 (5th Global Report, 2019) [<https://perma.cc/4666-BE8M>] (citing sources). The German federal government published a study on violence against women in 2007 containing a subsample of 110 prostituted women, among which 92% reported having suffered sexual harassment, 87% physical violence, 59% sexual violence, 52% parental physical child abuse, 43% sexual child abuse, and 41% having experienced violence in prostitution. FED. MINISTRY (GER.) FOR FAM. AFFS., SENIOR CITIZENS, WOMEN AND YOUTH, HEALTH, WELL-BEING, AND PERSONAL SAFETY OF WOMEN: A REPRESENTATIVE STUDY OF VIOLENCE AGAINST WOMEN IN GERMANY 24–25 (2007) [<https://perma.cc/W6CT-4KRT>]. About half exhibited symptoms of depression, a quarter had “frequent or occasional thoughts of suicide,” a third had anxiety and panic attacks, and one in seven intended to injure herself in the last 12 months. *Id.* at 25. For further evidence of harms under regimes in which prostitution is legal across the board, see *supra* note 5; *infra* notes 6–7, 30–31, 41–47, 56–105, 181, 198–99, 285–86 and accompanying text.

7. For discussion and evidence, see *supra* notes 5–6 and *infra* notes 7, 30–31, 41, 56–105, 181, 198–99 and accompanying text. In November 2019, *Die Zeit* reported that only 19% of women registered in prostitution were German citizens. Andrea Buhtz, 32.800 offiziell angemeldete Sexarbeiterinnen in Deutschland, DIE ZEIT ONLINE (Nov. 26, 2019) (Lexis). Previous studies estimated that 65% to 80% of prostituted women in Germany were foreign. Cordula Meyer et al., *How Legalizing Prostitution Has Failed*, DER SPIEGEL ONLINE INT’L (May 30, 2013), available in 2013 WLNR 13379917 [<https://perma.cc/ZQ3G-XZQY>]; Seo-Young Cho, Alex Dreher, and Eric Newmayher, *Does Legalized Prostitution Increase Human Trafficking?* 41 WORLD DEVELOPMENT 67, 71 (2015) (finding in cross-section of 150 countries on average, “[c]ountries where prostitution is legal experience a larger reported incidence of human trafficking inflows”).

8. For this documentation, see *supra* note 5–7 and *infra* notes 30–31, 41–47, 56–105, 181, 198–99, 285–86 and accompanying text.

9. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Many nations independently codify crimes against humanity in their national legislation, as do the statutes of the several hybrid courts and international tribunals.

Recognition of this possible prosecution properly names these policies and identifies its constituent criminal acts.¹⁰ It would further alert societies and non-corrupt officials to the reality of their initiatives. In contrast, the Nordic or Equality Model—decriminalizing only those bought and sold in prostitution and offering them exit support and services if desired, while maintaining or enhancing penalties for their buying and selling by johns and pimps/traffickers—effectively mitigates and discourages the sex trade, and provides relief to those victimized in and by it, so does not incur these consequences, social or legal.¹¹

For collectively-based—beyond mass—atrocities, crimes against humanity is an expansion joint in international criminal law. It is the rubric under which genocide, the intentional destruction of peoples as such,¹² was first legally recognized before becoming a separate international crime.¹³ It is where maintaining apartheid, “an institutionalized regime of systematic oppression and domination by one racial group over any other . . .” is

10. A subsequent article by the authors, *Criminal Responsibility for Legal Prostitution as a Crime Against Humanity* [hereinafter *Criminal Responsibility*], discusses how responsible officials are connected to the downstream acts they induce and promote.

11. See *infra* notes 56–105 and accompanying text; see also Max Waltman, *Substantive Equality Prostitution Law 1999–2019*, in *PORNOGRAPHY: THE POLITICS OF LEGAL CHALLENGES* 334, 334–70 (Oxford, 2021) [hereinafter *Substantive Equality Prostitution Law*]; Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271 (2011); Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT’L L. 133 (2011) [hereinafter *Prohibiting Sex Purchasing*]; European Parliament Resolution on the Regulation of Prostitution in the EU: Its Cross-border Implications and Impact on Gender Equality and Women’s Rights, ¶ 16, ¶ 22, P9_TA(2023)0328 (Sept. 14, 2023); Report on the Regulation of Prostitution in the EU: Its Cross-border Implications and Impact on Gender Equality and Women’s Rights; Motion for a European Parliament Resolution, ¶ 22, A9-0240/2023 (Aug. 8, 2023) (Rapporteur Maria Noichl et al.) (favoring Equality Model). The Equality Model French law was upheld against “private life” attack in *Affaire M.A. et Autres v. France*, ECtHR, Appl. No. 63664/19 ¶¶ 154–55 (25 July 2024), available at <https://hudoc.echr.coe.int/eng?i=001-235143> [<https://perma.cc/VN3H-LF85>], in which the Strasbourg court found that the harms attributed to law were harms of prostitution itself, i.e., the Apex Court emphasized that while prostituted persons still face undeniable difficulties and risks, those phenomena were already present and observed before the new law was passed.

12. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

13. Genocide was not explicit in the Nürnberg Charter. See Charter of the International Military Tribunal at Nuremberg art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279, 288; see also WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 12–13 n.36 (2nd ed. 2009) (noting that during the initial drafting of the Genocide Convention, some countries referred to genocide as a crime against humanity). Raphael Lemkin coined “genocide” no later than 1944. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944).

internationally criminalized.¹⁴ It is under crimes against humanity that diverse forms of socially organized hierarchies of inequality—including, but not only the formalized ones that resemble military command structures—are recognized as potentiating criminal responsibility.¹⁵

Recognized specific acts that, when widespread or systematic, constitute crimes against humanity, are well-documented to be integral to prostitution.¹⁶ Prostitution itself is widespread.¹⁷ It is systematic, being deeply rooted in each society's unequal systems based on sex/gender, race/ethnicity, and often age,¹⁸ as well as tightly interconnected with state policies.¹⁹ Prostitution has been documented to encompass: enslavement and sexual slavery,²⁰ in that persons in prostitution are treated as owned property, constrained to be bought, sold, and rented for sexual use; torture, as prostituted²¹ people are often required to sexually service up to

14. Rome Statute, *supra* note 9, arts. 7(1)(j) & (2)(h). The Rome Statute established the International Criminal Court ("ICC")'s prohibitions on the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. Apartheid has never been internationally prosecuted. See, e.g., Clive Baldwin, *Apartheid and Persecution: The Forgotten Crimes Against Humanity*, HUMAN RIGHTS WATCH (HRW.ORG) (Apr. 30, 2021) [<https://perma.cc/9VXV-VS5D>].

15. See, e.g., Rome Statute, *supra* note 9, arts. 25 (on individual criminal responsibility), 27 (on the irrelevance of official capacity), 28 (on the responsibility of commanders and other superiors), and discussion in subsequent article, *Criminal Responsibility*, *supra* note 10.

16. See *infra* Section II.C, specifically notes 183–218, and accompanying text.

17. See *infra* note 107.

18. See *infra* notes 154–77, 194–99 and accompanying text.

19. See *infra* Section II.D.

20. See *infra* Subsections II.C.1–2.

21. The sector or activity examined here is termed "prostitution." Use of "prostituted persons" or "prostituted people" or "people or women or those in prostitution" here is guided by a large international survivor movement, see, e.g., COALITION AGAINST PROSTITUTION (CAP) INTERNATIONAL, <http://www.cap-international.org/> [<https://perma.cc/2QB5-N7GZ>] (visited Apr. 25, 2023) (coalition of thirty-five frontline and survivor-led NGOs in twenty-eight countries), as well as extensive empirical research. They—the research, the movement, hence the terms—identify people used for sex in prostitution as placed and kept there by coercive social forces and acts of others. See *infra* Subsections II.C.1–2. By contrast, the term "sex worker" conveys a freely chosen occupation, when entry is marked by options precluded; it suggests sex, in the sense of intimacy and mutual pleasure, and work in the sense of productivity and dignity, when survivors are clear that neither characterizes prostitution. As expressed by Native survivor scholars, "[r]eferring to these women as 'sex workers' in an attempt to give them dignity or to portray them as empowered only makes invisible the systemic violence and other profound oppressions in their lives. Using the term 'sex worker' does nothing to change the circumstances of their lives." CHRIS STARK & EILEEN HUDON, COLONIZATION, HOMELESSNESS, AND THE PROSTITUTION AND SEX TRAFFICKING OF NATIVE WOMEN (2020) [<https://perma.cc/>

thirty men a day or more,²² are tied to beds,²³ burned,²⁴ whipped,²⁵ cut,²⁶

G4XS-SZY3]. The noun “prostitute,” which suggests a characteristic of the person rather than a role imposed by unequal social forces—purporting to name who the person is rather than what is being done to them—is rejected here as stigmatic and inaccurate.

22. See, e.g., Dawn Whittaker & Graham Hart, *Research Note: Managing Risks; the Social Organisation of Indoor Sex Work*, 18 (3) SOCIO. HEALTH & ILLNESS 399, 404–05 (1996); KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 80 (New introd., 1984) (1979) (stating that women were “forced to take up to 120 men a day” in the North African quarters of Paris); *id.* at 70–71 (describing women testifying being forced into sex with sixty to eighty mercenaries daily in Corsica in 1978); *id.* at 78 (retelling how a prostituted woman’s four children were kidnapped, forcing her to serve 100 sailors daily in Dakar, unable to leave for two years); Elizabeth & James Vorenberg, *The Biggest Pimp of All*, THE ATLANTIC (Jan. 1977) [<https://perma.cc/RNW9-TM8X>] (“At the bottom of the ladder . . . prostitutes [in Paris] work in small hotels and rooming houses, servicing as many as eighty men a day.”); Reem Alsalem (Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences), *Prostitution and Violence Against Women and Girls*, ¶¶ 12–13, U.N. Doc. A/HRC/56/48 (May 7, 2024) [hereinafter Spec. Rapporteur on VAW & Girls] (citing reports of grassroots groups on people in prostitution who are “exploited for long hours” and pimps who “take decisions regarding their time, the ‘service’ and the ‘remuneration’ to be provided” while often socially isolating them, preventing their freedom of movement).

23. See, e.g., H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152, at *3 (S.D. Ohio Dec. 6, 2019) (recounting survivor’s allegations of being discovered by staff “tied to the guest room bed” at one location and “chained up in the bathroom of the hotel room out of which she was being trafficked” at another location while the staff ignored her “despite her desperate pleas for help”); A.J. Walker, *Forced into Sex Trafficking While Trying to Become a Supermodel*, CBS12 NEWS (May 6, 2019) [<https://perma.cc/5F5E-38L9>] (describing survivor’s account of being drugged, waking up tied to a bed for three days while traffickers sold her to multiple men who brutally beat, choked, and raped her, including knocking her out until an opportunity to escape occurred).

24. IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 115, 118 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) (transcribing woman’s public testimony on behalf of a group of prostitution survivors recounting johns burning them with cigarettes); BARRY, *supra* note 22, at 107 (citing *Le Monde* reporting witness stating French transnational prostitution ring tortured uncooperative women by, inter alia, beating and mutilating their genitals with cigarettes); Spec. Rapporteur on VAW & Girls, *supra* note 22, ¶ 10 (noting it is common that “[w]omen and girls are mutilated or burned, including with cigarettes,” in prostitution).

25. United States v. Carson, 870 F.3d 584, 590 (7th Cir. 2017) (describing how a pimp beat prostituted women with a belt, an extension cord, held a knife to one woman’s throat, and punched her in the eye); United States v. Cephus, 684 F.3d 703, 705–06 (7th Cir. 2012) (describing how a pimp whipped, beat, or choked prostituted women who refused to have sex with johns, including by using an extension cord, a metal bar, and a broomstick that he broke on a woman’s back).

26. Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 92–94 (1993) (finding 27% of fifty-five prostitution survivors in Portland, Oregon, were mutilated as a result of torture on average seven times a

beaten²⁷ and infected with diseases,²⁸ among other tortures;²⁹ rape, in that for most prostituted people, none of the acts of sexual intercourse (for which other people in the role of pimps or traffickers³⁰ are typically

year, including, inter alia, “having skin cut or carved,” with legal action taken in nine cases, one conviction); BARRY, *supra* note 22, at 105 (witnessing prostituted woman showing San Francisco police how a john had slashed her arm and crisscrossed her back with razor blades).

27. See, e.g., *supra* notes 23–25; BARRY, *supra* note 22, at 116–17 (describing two undercover police officers in San Francisco beating a prostituted woman unconscious, exonerated at trial); cf. Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 SEX ROLES 857, 864–65 (1984) (describing how numerous survey participants made unsolicited comments that trying to calm assailants by revealing that they were in prostitution made the attacker “significantly more violent, beating and punching the women excessively, often using weapons” while mentioning specific pornography in which women were presented enjoying being beaten); Spec. Rapporteur on VAW & Girls, *supra* note 22, ¶ 10 (mentioning “severe beatings” among the “multiple forms of violence against women and girls” in prostitution).

28. Massive numbers of prostituted persons are infected with diseases, lacking means for self-protection. See, e.g., Mohammad Farahmand et al., *Prevalence and Genotype Distribution of Genital Human Papillomavirus Infection in Female Sex Workers in the World: A Systematic Review and Meta-analysis*, 20 BMC PUBLIC HEALTH art. 1455, at 2, 4 (2020), <https://doi.org/10.1186/s12889-020-09570-z> [<https://perma.cc/E54H-5PKX>]; Spec. Rapporteur on VAW & Girls, *supra* note 22, ¶ 13 (noting “exposure to sexually transmitted diseases and HIV, and difficulties in access to treatment” as a result of prostitution, citing Indian grassroots groups and the UNAIDS Hum. Rts. Ref. Group).

29. E.g., BARRY, *supra* note 22, at 104–05 (describing a court case in which a prostituted woman several times tried to escape a brutal, violent pimp who said he intended to kill her, including screaming for help in a restaurant and a motel, being forcibly handed over to the pimp by male owners/managers). The parallel situation of Oxsana, who did not survive her prostitution, is documented in *Rantsev v. Cyprus & Russia* App. No. 25965/04, 2010-I Eur. Ct. H.R. 67, 80–81, which includes police complicity in her trafficking for sex.

30. A synthesis of several estimations worldwide found that third-party profiteers control 84% of prostituted women. Melissa Farley et al., *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1041–42 & n.14 (2014) [hereinafter *Online Prostitution*]. Although the extent of this exploitation may be challenging to assess in every instance, the legal brothels in Nevada have been studied extensively and are suggestive of the power disparities in legal prostitution—inequities that often determine what prostituted people make. For instance, twenty-two out of forty-four survivor respondents in Nevada’s legalized, i.e., decriminalized prostitution believed that external pimps controlled at least half of the women in the Nevada brothels; 57% whispered (to avoid the listening devices) that they gave part or all their earnings to someone other than the brothel owner. MELISSA FARLEY, PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS 24, 31–32 (2007); cf. BARRY, *supra* note 22, at 132; ALEXA ALBERT, BROTHEL: MUSTANG RANCH AND ITS WOMEN 71 (2001) (“Even though the brothels no longer required women to have pimps, many of Mustang’s working girls

largely paid³¹) are personally desired sexually,³² as well as when buyers use

still did, confided Brittany in a hushed tone. How many women? I asked, incredulous. Brittany glanced quickly around the room and let out a sigh before replying that almost all the girls did, in her opinion.”).

31. Women in Nevada’s legal brothels make about 20% of what the johns pay to use them. LENORE KUO, PROSTITUTION POLICY 83 (2002); *cf.* Rachel T. MacFarlane et al., SEX INDUSTRY AND SEX WORKERS IN NEVADA, in THE SOCIAL HEALTH OF NEVADA 11 (Dmitri N. Shalin ed., 2017) [<https://perma.cc/J54M-WZV6>] (mentioning that prostituted women “typically earn 40–50%” from the johns, minus tips to brothel staff, but omitting that the other “house” expenses are often gouged). Brothels typically charge inflated prices for everything inside, from rent to food, and will typically split cab drivers’ cuts of 20–40% with the prostituted persons. FARLEY, *supra* note 30, at 19, 133; KUO, *supra*, at 83; *see also* Michelle L. Price, *Pandemic Makes Prostitution Taboo in Nevada’s Legal Brothels*, ASSOC. PRESS (Feb. 20, 2021) (“Brothels and prostitution are illegal in the counties that include Las Vegas and Reno, but some brothels are a half-hour to an hour away. Some offer free limo rides from the casino-heavy cities.”); *cf.* BARRY, *supra* note 22, at 132. Thus, women in Nevada legal brothels typically retain 50% of the fees that the johns pay upfront, but only *after* the prostituted persons have tipped employees such as cooks, managers, bartenders, bouncers, and runners for errands when they are forced to stay on the premises, which may last weeks. FARLEY, *supra* note 30, at 17, 19; KUO, *supra*, at 81–83; *cf.* BARRY, *supra* note 22, at 132; Sara MacNeil, *Nevada Sex Workers Return to Brothels, Making Up for Lost Time*, LAS VEGAS SUN (May 19, 2021) [<https://perma.cc/Y2RR-UYXB>] (reporting that the Chicken Ranch takes a 50% cut); Melissa Dittmore, *Sex and Taxes*, THE GUARDIAN (Apr. 16, 2009) [<https://perma.cc/SB4D-5DYE>]; *cf.* MacFarlane et al., *supra*, at 11 (noting curfews for prostituted persons in some towns). Electronic surveillance operates inside the brothels to prevent prostituted persons from “cheating” during transactions. FARLEY, *supra* note 30, at 16. Note that these brothels are not, in the respects discussed here, regulated, they are simply decriminalized, although termed legalized.

32. A study conducted in Boston, which compared 101 johns with 101 ethnically, educationally, and age-matched men who did not buy sex, found that the johns “self-reported a higher likelihood of raping, and had a greater history of sexual aggression” than the men who did not buy sex. Melissa Farley et al., *Comparing Sex Buyers with Men Who Do Not Buy Sex: New Data on Prostitution and Trafficking*, 32 J. INTERPERSONAL VIOLENCE 3601, 3616 (2017) [hereinafter *Comparing Sex Buyers*]. Many johns are also physically violent beyond what they pay for, as their typical personality characteristics suggest. Among 200 prostituted persons in San Francisco, 70% said that sex purchasers had raped or similarly victimized them “beyond the prostitution contract” an average of 31.3 times; 65% reported being victimized by violence an average of 9.2 times. Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. BEHAV. 395, 397 (1981). Similarly, among 200 prostituted women in Chicago, 21% reported having been raped over ten times—a finding that was similar in escort prostitution, street prostitution, and in-call (residential) prostitution. Raphael & Deborah L. Shapiro, *Violence in Indoor and Outdoor Prostitution Venues*, 10 VIOLENCE AGAINST WOMEN 126, 134–35 (2004); *accord* Hunter, *supra* note 26, at 92–94 (finding among fifty-five prostitution survivors in Portland, Oregon, 78% were raped on average forty-nine times a year). When asked, 79% of 110 johns in Scotland and 48% of 113 johns

them sexually but do not pay, and when police officers corruptly demand sex in exchange for legal consideration;³³ and disappearance, especially commonly well-documented when Indigenous women are trafficked (i.e., forcefully sold by pimps) for sex, go missing and never reappear.³⁴ It is common for women to be abducted and deported from poor countries or zones of conflict or climate catastrophes for the sex trade in richer countries, imprisoned in brothels, or killed in the course of being used

in Chicago admitted to buying prostituted sex acts for which they felt uncomfortable asking their partners, or sex acts their partners refuse to perform, such as oral sex, anal sex, and sadism and masochism. Melissa Farley et al., *Attitudes and Social Characteristics of Men Who Buy Sex in Scotland*, 3 PSYCHOLOGICAL TRAUMA: THEORY, RES., PRACTICE, & POL'Y 369, 376 (2011) [hereinafter *Men Who Buy Sex in Scotland*]; RACHEL DURCHSLAG AND SAMIR GOSWAMI, DECONSTRUCTING THE DEMAND FOR PROSTITUTION: PRELIMINARY INSIGHTS FROM INTERVIEWS WITH CHICAGO MEN WHO PURCHASE SEX (2008) 12 [<http://perma.cc/5V4Q-PH32>]. From the evidence, it is overwhelmingly clear that prostituted people do not desire the sex that johns are practicing on them in prostitution. See Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRACTICE 33, 51 tbl.8 (2004) [<https://perma.cc/V7FM-YXKQ>] [hereinafter *Nine Countries*] (finding that 89% of 854 prostituted persons in nine countries spontaneously said they most of all wanted to leave prostitution but did not know how).

33. Many police officers buy sex in jurisdictions where prostitution is illegal, or extract sex without paying, abusing their power and authority. See, e.g., Susan G. Sherman et al., *The Role of Sexually Transmitted Infections in Police as Clients Among Street-Based Female Sex Workers in Baltimore City*, 48 SEXUALLY TRANSMITTED DISEASES 12, 14–16 (2021) (finding sixty-two (24.8%) of 246 prostituted persons affirmed they had at least one “police client” during 2016, of which twenty-one (34%) had sex for fear of arrest, of which 41% “separately reported being forced or pressured by police to have sex”).

34. For disappearances of prostituted Native women in North America see, for example, Christine Stark, *Strategies to Restore Justice for Sex Trafficked Native Women*, in THE PALGRAVE INTERNATIONAL HANDBOOK OF HUMAN TRAFFICKING 1220, 1229 (John Winterdyk & Jackie Jones eds., 2019) (referring to witnesses of pimp-related disappearances on commercial ships in Duluth Harbor, MN, one child trafficking survivor describing sexually violent sailors, one saying they could dump the girls in the sea, making them disappear); NICOLE MARTIN ROGERS & VIRGINIA PENDLETON, MISSING AND MURDERED INDIGENOUS WOMEN TASK FORCE: A REPORT TO THE MINNESOTA LEGISLATURE 1, 7–8, (2020) [<https://perma.cc/MG86-HN6K>] (acknowledging that the legacy of settler colonialism, racism, sexual objectification, poverty, inter alia, place Indigenous women at a higher risk of being used in prostitution, human trafficking, going missing, and being murdered); Spec. Rapporteur on VAW & Girls, *supra* note 22, ¶ 10 (noting that “[k]idnapping, abduction, and enforced disappearance are also common” in prostitution). BARRY, *supra* note 22, at 124, referred to NYC crime reports in 1975 alone, conservatively detailing seventy-one prostitution homicides, at least fifty-four committed by pimps or johns.

for sex.³⁵ A wartime instance yet to be fully adjudicated or repaired is that of the so-called “comfort women,” who were forcibly acquired, sexually enslaved, and used by the Japanese military during World War II.³⁶ Enforced prostitution is a recognized crime against humanity.³⁷

Crimes against humanity is the doctrine under which newly recognized forms of systematic, even systemic, victimization of civilians—not new to the world of atrocities—have emerged, overlapping with international human rights violations, within the canon of international criminal

35. See, e.g., ASIA WATCH & WOMEN'S HUMAN RIGHTS PROJECT (DIVISIONS OF HUMAN RIGHTS WATCH), A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND 1–3 (1993), (reporting Thai NGOs estimated 10,000 Burmese women and girls were trafficked into brothels in Thailand annually, interviewing thirty survivors, mostly from poor rural Burmese villages, almost none dared trying to escape); CARITAS, TRAFFICKING IN HUMAN BEINGS IN CONFLICT AND POST-CONFLICT SITUATION 17 (2015) [<https://perma.cc/89ME-Q3NV>] (noting that “[n]umerous observers in countries at war confirm that . . . women and teenagers are being abducted and then sold abroad” mainly for “forced prostitution” such as in Egyptian nightclubs); HUMAN RIGHTS WATCH, CLIMATE OF FEAR: SEXUAL VIOLENCE AND ABDUCTION OF WOMEN AND GIRLS IN BAGHDAD 3 (2003) [<https://perma.cc/4C8V-3EWN>] (interviewing Baghdad police investigator stating gangs specializing in “kidnapping girls . . . sell them to Gulf countries [T]hey can get them in and out without passports [W]e have no authority to solve or investigate them.”); *Prostitution Murders*, SEX INDUSTRY KILLS (last visited Apr. 25, 2023), at <https://sexindustry-kills.de/doku.php?id=prostitutionmurders:start> [<https://perma.cc/T32X-EZHS>] (tracking prostituted people murdered worldwide); John J. Potterat et al., *Mortality in a Long-term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778, 783 (2004) (finding that in a population of 1,969 prostituted persons in Colorado Springs from 1967 to 1999, those within three years of first being observed in prostitution were eighteen times more likely to be murdered than those in a comparable non-prostituted population). The final report of a Canadian inquiry published in 1985 quoted estimates from the City of Regina suggesting that, between violent death and drug overdose, mortality for prostituted persons might have been forty times higher than the national average. SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION IN CANADA, SECOND REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION IN CANADA 350 (1985). See also Spec. Rapporteur on VAW & Girls, *supra* note 22 (noting that “[p]rostitution also leads to femicide, serial killings, and death threats,” citing reports of grassroots groups).

36. See, e.g., Jootaek Lee, *International Criminal Law: Unresolved Issues from the Past in the Korean Peninsula*, 28 J. TRANSNAT'L L. & POL'Y 77, 79–80 (2019); Shin Hae Bong, *Compensation for Victims of Wartime Atrocities*, 3 J. INT'L CRIM. JUST. 187, 188–89 (2005); Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335 (2001) (including testimony of survivors); see also *infra* notes 211–12 and accompanying text.

37. See, e.g., Rome Statute, *supra* note 9, art. 7(1)(g).

legal accountability.³⁸ In recognizing that systematic atrocities do not require armed conflict in the classical sense, crimes against humanity is a uniquely appropriate legal rubric under which to expand international criminal law beyond old wars into “new wars”³⁹ into so-called peacetime. Prostitution flourishes in all of these settings, all the more when legal.

I. PROSTITUTION AND ITS LEGALIZATION

Short of outright legalization, individuals and social forces acting together, in reality, enforce prostitution. When legal, or when its illegality is ignored, the state enforces prostitution through its laws and officials, by action or inaction, permitting force—physical and social—to operate unchecked to coerce people into prostitution and keep them there, exploiting them, including through coercive circumstances that differentially force people of certain groups into prostitution as their only way to survive. In terms of social forces, white supremacist male dominant societies—through specific hierarchies of inequality of sex and race that accumulate and intersect and differentially target women and girls of color at far higher rates—pervasively rank-order social status, resources, and power on the basis of which people are prostituted. Poverty, operating through gender and often race and ethnicity, is prostitution’s primary enforcer, disproportionately aggravating the vulnerability of women and girls, people of color in white racist societies, and marginalized migrants in the Global North,⁴⁰ as well as making a mockery of any genuine notion of choice or consent on their part to the acts involved.

These social forces of inequality pervade and structure societies; those on the lower rungs of their command-deference ladders—through the coercion of precluded options as well as under direct force from more privileged and powerful people—live subjected to socially systematic forces. Leaders in this systematic violation may or may not be difficult to discern using traditional tools of criminal law, with its built-in concept

38. See, e.g., *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 96, 99, 105, 114 (Sept. 26, 2006); *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, OEA/Ser.L./V/II.91, doc. 7 at 157, n. 43 and accompanying text (1996).

39. See generally CHRISTINE CHINKIN & MARY KALDOR, *INTERNATIONAL LAW AND NEW WARS* (2017).

40. For documentation of poverty, including its mediation by gender, race, ethnicity, and age, see *infra* notes 154–77, 187–99 and accompanying text.

of exceptionality and individuality. But perpetrators of particular acts of violence are not difficult to distinguish from victims at any point in time. Socially organized dynamics drive this reality, which empowers with impunity the individuals who engage in it and disempowers those who are acted upon. Prostitution is, in this sense, organized. Frequently, prostitution is explicitly organized in the more conventional sense as well, including by pimps, sometimes in networks, brothels, behind or above or in strip clubs, and when sex trafficking is practiced by cartels of organized crime, which can be well-connected in government.⁴¹

Under the most formal legalized regimes, prostitution is state-organized. If prostitution is typically not seen as a “campaign,” or an “attack,” its crimes against humanity to date largely ignored, it is because its atrocities are so pervasive, glamorized, sensationalized, minimized, and sexualized that they are normalized, even naturalized, or hidden as a regular feature of the social landscape in unequal societies. And most societies are unequal. When made legal, its atrocities are officially legitimated. Obviously, the usual complementarity principle followed in the international system that might be relied upon for domestic prosecutions of crimes against humanity is severely challenged or precluded by national laws legalizing or decriminalizing prostitution.

Beyond the social forces that propel it, prostitution is officially enforced when it is made legal, typically through legislation. When made legal, prostitution—the buying and selling of human beings for sexual use, with all its demonstrably inherent and consequential atrocities—becomes state policy. Law enforcement against the acts within prostitution is effectively defanged when prostitution is decriminalized

41. See, e.g., CENTER FOR THE STUDY OF DEMOCRACY ET AL., EXAMINING THE LINKS BETWEEN ORGANISED CRIME AND CORRUPTION 108, 134–35 (2010) (mentioning case where head of Germany’s Secret Service resigned in 2007 after allegations of withholding information from prosecution regarding children abused in Leipzig brothel frequented by politicians, police, and prosecutors, organized by international prostitution ring; case where Russian-Georgian “mafia” member involved in sex trafficking bribed Belgian politicians to obtain Belgian nationality; a “well-known” trafficker/pimp with “undue influence” on some Bulgarian MPs; four Greek police officers arrested for allegedly participating in sex-trafficking ring involving “hundreds” of Balkan and Eastern European women; German police officers making themselves vulnerable to blackmailing by visiting brothels, then bribed into providing information to criminal groups; Belgian, French, and Cypriot embassy staff issuing fictitious work visas to prostituted persons, numbering 20,000–25,000 in the French case; Dutch municipal officials being bribed to permit brothels).

or legalized, however formerly corrupt or flabby it was when prostitution was formally criminalized, when prostitution is often de facto legal by tacit male bond. When officially decriminalized across the board, all pre-existing criminal penalties attached to sex purchasers and third parties who sell or benefit from the sale of others, such as pimps, madams, and brothel owners, are removed. Decriminalization makes prostitution further effectively legal because, beyond being no longer illegal, it is not putatively regulated as “work.” Under legalization, state involvement in prostitution frequently takes the forms of brothel licensing fees,⁴² special health programs,⁴³ specific regulations for sex acts within houses of prostitution,⁴⁴ registration requirements,⁴⁵ taxation,⁴⁶ and similar rules

42. Government income from licensing and other fees is considerable in the more formally legalized prostitution regimes. *See, e.g., infra* note 103. As reported, these fees may be large enough to thwart “small or self-employed brothels.” KUO, *supra* note 31, at 87.

43. Since 1987, Nevada has required weekly health checks and monthly blood tests of prostituted persons for sexually transmitted diseases and cervical cancer. FARLEY, *supra* note 30, at 39–40; *cf.* MACFARLANE ET AL., *supra* note 31, at 11. Johns, from whom the diseases are acquired, are subject to no health controls; in fact, they often bribe prostituted persons to have unsafe sex, and many brothels do not care. FARLEY, *supra* note 30, at 44; *see also* KUO, *supra* note 31, at 84. If the women “insist” on condoms, a woman in a brothel reported, such johns would complain via bedroom-phones to the management, who would then instruct the women to “comply.” FARLEY, *supra* note 30, at 44.

44. Suzanne Daley, *New Rights for Dutch Prostitutes, But No Gain*, N.Y. TIMES (Aug. 12, 2001) [<https://perma.cc/U4W4-QUH8>] (quoting a Dutch legal brothel owner critical of government regulations requiring a pillow in the room: “‘You don’t want a pillow in your room. It’s a murder weapon.’”). If belts, shoelaces, ties, and cigarette lighters must be confiscated at the entrance, and if lamps and phones cannot have cords, the johns who wish to use those for sex go elsewhere. Thus, legalization can make prostitution more dangerous, and certainly no less so, for those women who have the fewest options to begin with.

45. To illustrate, prostituted persons in Nevada must register and obtain a “work card” from the local police for a fee, to be renewed periodically. BARBARA G. BRENTS ET AL., *THE STATE OF SEX: TOURISM, SEX, AND SIN IN THE NEW AMERICAN HEARTLAND* 9 (2010); *cf.* MACFARLANE ET AL., *supra* note 31, at 11. German law now also requires that all prostituted persons register with the authorities, undergo mandatory health counseling sessions, and attend an initial consultation and advice session, among other things. Gesetz zum Schutz von in der Prostitution tätigen Personen [Prostituiertenschutzgesetz] [ProstSchG] [Prostitution Protection Act] Oct. 21, 2016, BGBl I at 2372, as amended, §§ 3, 7–9, 29–31 (Ger.) [<https://perma.cc/9SHE-DZCE>].

46. For example, as reported in 2018, seven of Germany’s sixteen federal states usually implement an “all-inclusive prepayment procedure” whereby brothel operators are taxed between €7 to €30 for each day a prostituted woman is “working.” Ina Hunecke, *Germany*, in *ASSESSING PROSTITUTION POLICIES IN EUROPE* 107, 115 (Synnøve

that attempt to control and benefit from the sex trade. The ineffectiveness of rules that purport to protect prostituted people under legalization—including those against sex trafficking that often remain mostly as window dressing,⁴⁷ failure of prostituted people to participate in health,

Økland Jahnsen & Hendrik Wagenaar eds., 2019). In 2007, some states had imposed flat-rated taxes on prostituted persons regardless of actual earnings, in Berlin €35 per day. See BARBARA KAVEMANN ET AL., THE ACT REGULATING THE LEGAL SITUATION OF PROSTITUTES—IMPLEMENTATION, IMPACT, CURRENT DEVELOPMENTS 42 (2007) [<https://perma.cc/FT75-LJKM>]. The German federal government also requires value-added tax (VAT; *Umsatzsteuer*), which is 19%, and has to be paid by self-employed prostituted persons who earn above a certain threshold. BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND, THE NEW PROSTITUTE PROTECTION ACT (DAS NEUE PROSTITUIERTENSCHUTZGESETZ) 13 (2017). An additional “entertainment tax” (*Vergnügungssteuer*) is levied in some cities and municipalities. *Id.* For example, in Duisburg, brothels and similar venues must pay €6.50 per square meter per month regardless of actual income, and women prostituted indoors in other venues must pay a flat-rate of €6 per day, while street prostitution in *Verrichtungsboxen* (i.e., “sex boxes”) is exempt. See Vergnügungssteuersatzung [Sexsteuersatzung] [Entertainment Tax Statute] Apr. 7, 2014, AMTSBLATT FÜR DIE STADT DUISBURG NR. 17 at 117–19, §§ 1, 3–4 (Ger., Duisburg) [<https://perma.cc/5MPF-9LVF>]; cf. *Vergnügungssteuer: sogenannte Sexsteuer*, STADT DUISBURG (last visited Sept. 27, 2020) [<https://perma.cc/HR73-WZTZ>]. By contrast, at least in December 2010, Dortmund required prostituted persons to purchase day-tickets at €6 to be allowed to walk the streets. See Ilka Platzek, *Tagestickets für den Straßenstrich, Steuer für Dortmunder Prostituierte*, WESTDEUTSCHER RUNDFUNK (Dec. 8, 2010) [<https://perma.cc/76EK-T9V3>]. Unsurprisingly, German activists report tax debts that become “major” barriers to exit, Francine Sporenda, *Prostitution Law in Germany: Regulation for Taxation; interview with Inge Kleine*, NORDIC MODEL NOW! (Jan. 13, 2019) [<https://perma.cc/82KF-LPHU>], locking many in prostitution indefinitely, becoming a state-sanctioned form of forcing a person into prostitution.

47. See *infra* notes 91–108 and accompanying text for the impotence of antitrafficking regulation in legalized, i.e., legal or decriminalized, prostitution. This consequence is produced by dismantling centuries’ common sense laws against pimping, brothel-keeping, and other third-party activities. New Zealand in 2003 repealed a series of century-old laws forbidding brothel-keeping, living on earnings of prostitution, and procuring. See Crimes Act 1961, ss 147–49 (N.Z.) (repealed in 2003). Sex trafficking remains illegal if in narrow terms, such as requiring a purpose of “exploitation” or knowledge of coercion or deception. Crimes Act 1961, ss 98D(1)&(3) (N.Z.). “Exploitation” requires “an act of deception or coercion” to involve someone in prostitution. *Id.* s 98D(4). This requirement thus does not include, as a factor coercing a person in prostitution, an environment of coercive economic and social conditions and a position of vulnerability, i.e., the lack of real and acceptable alternatives. The governmental machinery against the sex industry was thereby so eviscerated that not a single prosecution for sex trafficking was brought from these changes in 2003 to 2008. MINISTRY OF JUST., N.Z. GOV’T, *supra* note 5, at 167. Not one. The annual U.S. Trafficking In Persons Reports, promulgated by the State Department, meticulously record sex trafficking prosecutions; in the 2009 edition, the Report notes that despite the fact that New Zealand prohibits international sex trafficking under its Crimes Act of 1961,

it had “prosecuted no offenses under this law.” OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERS., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 222 (9th ed. 2009) [hereinafter TIP REPORT(S)]. The 2010 TIP Report noted that child trafficking victims in New Zealand were “found engaging in prostitution illegally in brothels, and other teenage girls who engage in prostitution on the street” were “closely controlled by local gangs.” TIP REPORT 251 (10th ed. 2010). Yet the N.Z. government “made little discernible progress in its anti-trafficking law enforcement efforts during the past year,” did “not have a comprehensive anti-trafficking law,” and “did not arrest or prosecute any trafficking offenders” under the trafficking law except for one man prosecuted for two child trafficking-related offenses. *Id.* Neither did the government arrest or prosecute trafficking offenders in 2010, 2011, or 2012. *See* TIP REPORT 275 (11th ed. 2011); TIP REPORT 265 (12th ed. 2012); TIP REPORT 280–81 (13th ed. 2013). Ten years after legalization in 2013, New Zealand further “decreased efforts to hold traffickers accountable” by failing to initiate “any” investigations or prosecutions. TIP REPORT 292 (14th ed. 2014). Although investigations and prosecutions were initiated in the following years, only ten convictions for lesser offenses resulted during the period 2014–2019. *See* TIP REPORT 261 (15th ed. 2015); TIP REPORT 285 (16th ed. 2016). TIP REPORT 299 (17th ed. 2017); (18th ed. 2018); TIP REPORT 348 (19th ed. 2019); TIP REPORT 372 (20th ed. 2020). For a country with an estimated 5,932 persons in prostitution in 2007, *see* J. Smith, *supra* note 64 and accompanying text, these efforts are less than minuscule. Regarding exit strategies, the U.S. 2020 TIP Report noted that “some civil society experts” in New Zealand “reported a lack of adequate services available for child victims of sex trafficking, that services were not easily accessible for victims of labor and sex trafficking, and that government officials did not provide clear guidance to some NGO service providers seeking government assistance.” TIP REPORT 373 (20th ed. 2020). In 2003, N.Z. Prime Minister Helen Clark said that prostitution is “abhorrent.” John Banks [Auckland City Mayor], *City Shoulders Load of Making Law Work*, N.Z. HERALD, Sept. 15, 2003 (Lexis). Yet her government apparently had no plans to support exit or alternatives to prostitution. *See infra* note 99 (citing critique of the lack of prostitution exit strategies in New Zealand). This, the decriminalization model.

Likewise, *das Prostitutionsgesetz* in Germany in 2002 eliminated the prior ban on promoting prostitution while the threshold for applying the penal code against pimping was raised. KAVEMANN ET AL., *supra* note 46, at 12; FED. MINISTRY OF FAM. AFFS., *supra* note 5, at 9. The penal code now only criminalizes pimping under a narrower range of conditions: when the prostituted person is “held in personal or financial dependency[,]” when the pimp “exploits” a prostituted person, when the pimp controls various conditions such as the time, place, and the extent of the person’s prostitution “for their own pecuniary benefit,” or when the pimp “undermines another person’s personal or financial independence” by commercially promoting that person’s prostitution. STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 180a, 181a, https://www.gesetze-im-internet.de/englisch_stgb/index.html [<https://perma.cc/JLY4-C3GH>] (Ger.). (Note that STGB §§ 232, 232a are only applicable to foreigners in prostitution; the Penal Code’s pimping laws, §§ 180, 181, are the primary tools to address domestic prostitution.) Under *das Prostitutionsgesetz*, the German sex industry is said to have exploded in size by three or four times, being estimated in 2016 at thirty times the size of the per capita rate of prostitution in Sweden (the first to pass an Equality Model law).

pension, or other programs, and the persistence of prostitution's abuses—are well-documented.⁴⁸ Decriminalization initiatives that may substitute for or follow on legalization aim to do away with even the window dressing, give buyers and sellers of human flesh a yet freer hand, and keep all profits in the hands of the cabals.

The one approach to prostitution law that does protect prostituted people, and supports their exit from the sex trade, operates asymmetrically on this asymmetrical reality: the Nordic or Equality Model. It penalizes third parties, the sellers—pimps and traffickers—and buyers—johns, punters, tricks—and decriminalizes prostituted people, the sold.⁴⁹ This model promotes substantive equality between the sexes and genders by raising the status of prostituted people, largely women and girls, female and/or feminized including trans women, as well as boys, and some men, and other trans people, and lowering that of their violators, overwhelmingly men (so assigned at birth and remaining so identified).⁵⁰ The Equality Model, a form of partial decriminalization,

See supra note 6 and *infra* note 59 and accompanying text. Moreover, nothing suggests a qualitative improvement in the conditions of prostitution in Germany since 2002; rather, just like everywhere else where prostitution has been made legal, the evidence clearly points to a worse outcome for most persons in prostitution—qualitatively and quantitatively. *See supra* notes 5–7, 30–31, 41, and *infra* notes 56–105, 181, 198–99, 285–86 and accompanying text. For example, the annual U.S. Trafficking in Persons (TIP) Report in 2020 concurred with the assessment of the European Group of Experts on Action against Trafficking in Human Beings (GRETA), namely, that the official numbers of trafficking victims “do not reflect the true scale of the trafficking in Germany due to the absence of a comprehensive and coherent approach to detecting and identifying victims.” TIP REPORT 221 (20th ed. 2020) (citing GRETA). The narrowing of the reach of the pimping, brothel, and other third-party laws prevents an efficient, comprehensive approach to fighting human sex trafficking. *See* Max Waltman, *Assessing Evidence, Arguments, and Inequality in Bedford v. Canada*, 37 HARV. J. L. & GENDER 459, 511–28 (2014) [hereinafter *Assessing Bedford*] (demonstrating how similar Canadian laws against “bawdy-houses” or “living on the avails” cover third-party conduct not effectively covered by anti-trafficking laws); ROYAL CANADIAN MOUNTED POLICE (RCMP), HUMAN TRAFFICKING IN CANADA 37 (2010), available at <http://perma.cc/JJM7-XJN5> (noting that trafficking charges are “sometimes omitted as other associated charges are believed to have greater odds of a successful prosecution,” even in cases with “strong elements of human trafficking” due for instance to difficulties “in ‘measuring’ exploitation”).

48. *See infra* notes 74–105, 181, 198–99, 285–86 and accompanying text, and *supra* notes 41 and accompanying text.

49. *See* cross-references cited *supra* note 11.

50. The number of female johns appears insignificant for policy purposes but is theoretically interesting, given that the social construction of gender empowers men to

does not give rise to crimes against humanity because it penalizes buyers and sellers, reducing the atrocities they inflict, removing penalties from those they exploit, and supporting the exit of the latter from the sex trade if and as they choose.

A recent resolution by the European Parliament (the only democratically elected pan-European public body) came close to fully endorsing the Nordic/Equality Model on September 14, 2023 as a majority of its Committee on Women's Rights and Gender Equality had proposed.⁵¹ There, the Parliament noted that “only if demand is reduced can the prostitution market, and therefore the number of those exploited in it, shrink.”⁵² Further, the Parliament stressed “that human trafficking for the purpose of sexual exploitation, including child sexual abuse, is increasing due to high demand,” while pointing out “that this is particularly visible in countries with a liberal regulatory model, whereas Member States such as France and other countries that follow approaches like the Nordic/Equality model are no longer big markets for human trafficking for that purpose;” “[D]ue to demand-reducing measures in place in these countries,” it further noted, “trafficking for the purpose of sexual exploitation still exists, but is decreasing.”⁵³ The Parliament noted the Nordic/Equality model decreased the “demand for people in prostitution” and decreased the “amount of people in prostitution,” while condemning “the reality of coercion, manipulation, violence and exploitation in prostitution” and its “link[] to structural violence to which women are disproportionately exposed and that often creates precarious life situations that drive women

initiate sexual relations. Their near-vanishing presence in the industry has made them of little interest to the industry itself or even abstractly to researchers. A Swedish population estimate surveying 50,000 individuals aged 16–84, yielding a 31% response rate, found that, with weighted estimates, 9.4% of men admitted paying or giving other remuneration for sex at least once, but only 0.4% of women had. FOLKHÄLSOMYNDIGHETEN [PUBLIC HEALTH AGENCY OF SWEDEN], SEXUELL OCH REPRODUKTIV HÄLSA OCH RÄTTIGHETER I SVERIGE 2017 at 192 (2019), *available at* <https://www.folkhalsomyndigheten.se/> [<https://perma.cc/DPD6-99KT>].

51. *Compare* European Parliament Resolution of 14 September 2023 on the Regulation of Prostitution in the EU: Its Cross-border Implications and Impact on Gender Equality and Women's Rights, ¶ 16, P9_TA(2023)0328 (Sept. 14, 2023) [hereinafter Eur. Parl. Res. 14 Sept. 2023], *and id.* ¶ 22 *with* Report on the Regulation of Prostitution in the EU: Its Cross-border Implications and Impact on Gender Equality and Women's Rights; Motion for a European Parliament Resolution, ¶ 22, A9-0240/2023 (Aug. 8, 2023) (Rapporteur Maria Noichl et al.).

52. Eur. Parl. Res. 14 Sept. 2023, *supra* note 51, ¶ 16 (footnote citations omitted).

53. *Id.* ¶ 22 (footnote citations omitted).

and girls into prostitution.”⁵⁴ The Parliament also recognized that “the human rights of women and girls are inalienable, but are systematically breached on the prostitution market due to its exploitative conditions.”⁵⁵

Once the crimes endemic to prostitution are exposed, the dramatic increase in the number of prostituted persons and acts of prostitution produced by legalization means an increase in those crimes and supports the case for the causal relation of that policy to them. Empirically, prostitution multiplies exponentially in legalized environments compared with those that have adopted the Nordic/Equality Model. For example, Sweden, which in 1999 passed the first law against the purchase of sex while keeping those bought and sold decriminalized, saw a decrease in the number of prostituted women (both on the streets and indoors), maybe as much as five times in less than ten years,⁵⁶ while prostitution increased exponentially elsewhere. In roughly the same period, Germany, which in 2002 legalized prostitution, including of foreign persons,⁵⁷ saw the flesh market increase by three to four times.⁵⁸ A 2016 report commissioned by the European Commission, based on a synoptic analysis of various sources, estimated the rate of prostituted persons per 100,000 of the population to be in the range of 185–493 in Germany and 53–118

54. *Id.* ¶¶ AF, AJ, 9, 22.

55. *Id.* ¶ 32.

56. In 1993, an estimated 2,500–3,000 women were prostituted in Sweden, 650 on the streets. Statens Offentliga Utredningar [SOU] 1995:15 *Könshandeln: Betänkande av 1993 års Prostitutionsutredning* [government report series] 98–99 (Swed.). In 1998, a year before the new law was implemented, approximately 726 women were involved in street prostitution. SOCIALSTYRELSEN [NAT’L BD. HEALTH & WELFARE], SWED. GOV’T, PROSTITUTION IN SWEDEN 2003 at 23 (2004) [hereinafter PROSTITUTION IN SWEDEN 2003], available at <https://perma.cc/0vWJVmQN1Ea>. By 2007, that number had declined to about 300; 300 women and 50 men were advertised online. Charlotta Holmström, *Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion*, in PROSTITUTION I NORDEN 303, 314 (ed. Charlotta Holmström & May-Len Skilbrei, 2008), available at <https://perma.cc/U4WP-PTJA>; cf. SOCIALSTYRELSEN, PROSTITUTION IN SWEDEN 2007 at 52 (2008) [PROSTITUTION IN SWEDEN 2007], available at <https://perma.cc/DS2K-36HS>. The need for visibility to potential johns militates against any substantial “hidden prostitution,” especially on the streets. Given that the same method of estimation has been used, any underestimates will be similar over time. See Statens Offentliga Utredningar [SOU] 1995:15, *supra*, at 81–82, 85–87, 98–99, 153–58; PROSTITUTION IN SWEDEN 2003, *supra*, at 23–25 (reporting numbers for 1998–2003); PROSTITUTION IN SWEDEN 2007, *supra*, at 11, 33–34.

57. See sources cited in *supra* note 7 and accompanying text.

58. See sources cited in *supra* note 6 and accompanying text.

in the Netherlands, compared with 7–15 in Sweden.⁵⁹ Compared with Sweden, Germany had roughly thirty times more people in prostitution; the Netherlands, which legalized in October 2000,⁶⁰ but prohibited third parties from intentionally recruiting foreigners into prostitution in the Netherlands,⁶¹ had eight times more prostituted people per capita than Sweden. Similarly, in New Zealand, the 2008 Prostitution Law Committee estimated 2,332 persons in prostitution in 2007 under legalization (no foreigners permitted).⁶² This figure meant about eight times more per capita than Sweden's roughly 600 women in prostitution, coincidentally estimated at the same time.⁶³ Debunking data manipulation, one study based on New Zealand's census data found that in 2001, prior to decriminalization, 4,272 people were engaged in prostitution; five to seven months after decriminalization in 2003, this number increased by 38.9% to 5,932.⁶⁴ Per capita, this figure meant that New Zealand had roughly twenty-three times more prostituted persons in 2003 than Sweden's roughly 600 women in 2007; or, arguendo, twenty-one times more prostituted persons if also including Sweden's fifty prostituted men in 2007.⁶⁵ By any estimate, these differences in prostituted population sizes are massive.

59. Jude Towers et al., *Measuring Trafficking EU-28*, in STUDY ON THE GENDER DIMENSION OF TRAFFICKING IN HUMAN BEINGS 57, at 82 tbl.5.12 (European Commission ed., 2016).

60. See, e.g., Wim Huisman & Edward R. Kleemans, *The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands*, 61 CRIME, L. & SOC. CHANGE 215, 215 (2014); Sietske Altink et al., *The Netherlands*, in ASSESSING PROSTITUTION POLICIES IN EUROPE, 62, 64 (Synnøve Økland Jahnsen & Hendrik Wagenaar eds., 2019).

61. Artikel 273f:1 lid 3 SR (Neth.) (the provision prohibits, inter alia, the recruitment of persons with the intent that they should be prostituted in another country with or for a third party).

62. MINISTRY OF JUST., N.Z. GOV'T, *supra* note 5, at 40. The Prostitution Reform Act 2003, s 19 (N.Z.), prohibits foreigners from being involved in prostitution.

63. See Holmström, *supra* note 56, at 303, 314. For comparable population figures in 2007, see *Population: Stats NZ*, STATS NZ TATAURANGA AOTEAROA (2020) [https://perma.cc/Q8TZ-4BA4] (select any month during 2007); *Population and Population Changes 1749–2018*, STATISTICS SWEDEN (SCB) (2019) [https://perma.cc/G8L5-DTQF]. Holmström, *supra* note 56 at 314.

64. J. Smith, *supra* note 5, at 3–4.

65. See *id.*; Holmström, *supra* note 56, at 303, 314; *Population: Stats NZ*, *supra* note 63 (select March 2003); *Population* (Sweden), *supra* note 63 (select year 2007) [women-only formula: $9,182,927 \div 4,013,300 \approx 2.2881 \times 5,932 \approx 13,573 \div 600 \approx 22.622$].

Similar methods of estimation of street prostitution and advertisements in Denmark, where sex purchasing is legal, found an increase from 2002 to 2007, resulting in almost sixteen times as many prostituted women per capita compared with Sweden.⁶⁶ When buying sex was legal in Norway, comparable methods found that prostitution increased in the new millennium, leading to Norway's proportion of prostituted women being almost nine times higher per capita than Sweden's.⁶⁷ A Scandinavian survey in August 2010 studied the incidence of sex purchasing, indicating a consistent pattern,⁶⁸ in which the proportion of men who reported buying sex during the *last six months* was about 4.7 times greater per capita in Denmark, and 3.1 times greater per capita in Norway (where sex purchasing was criminalized only in 2009) than in Sweden.⁶⁹ A more extensive 2014 study of eight European countries, in which only Sweden and Norway had passed the Equality Model, found that criminalizing sex purchasers reduced the buying of sex.⁷⁰ Compared to Sweden, every country studied exhibited a significantly and substantially larger proportion of men who reported having purchased sex during the last six months, except Norway.⁷¹ In Germany, the number of these johns was about fourteen times higher per capita than in Sweden, in Denmark ten times higher per capita, and in the Netherlands eight times higher per capita.⁷² In addition, asking male

66. For a detailed sourced explanation of numbers, see Waltman, *Substantive Equality Prostitution Law*, *supra* note 11, at 341–43.

67. *Id.*

68. Andreas Kotsadam & Niklas Jakobsson, *Shame on You, John! Laws, Stigmatization, and the Demand for Sex*, 37 EUR. J. L. & ECON. 393, 396 (2014).

69. The percentage buying sex during the previous six months was 2.63% in Denmark, 1.71% in Norway, and 0.56% in Sweden. *See id.*, at 396 & tbl.1. The differences were statistically significant and robust ($p=.002$). *Id.* at 396. As to advertising itself, when indoor prostitution was decriminalized in Rhode Island in 2003, advertisements for indoor commercial sex rose by over 100%; when recriminalized in 2007, they decreased dramatically, suggesting a causal relation. *See* Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health* 11, 16, 35 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20281, 2014).

70. Sofia Jonsson, *Does Criminalizing the Purchase of Sex Reduce Sex-buying? Evidence from a European Survey on Prostitution*, 56 EUR. J. L. & ECON. 91, 102 (2023).

71. *See id.* at 109 tbl.7 (finding percentages of men who said they purchased sex to be: Germany (5.5%), Spain (4%), Denmark (3.8%), Netherlands (3.3%), United Kingdom (3.2%), France (2.3%), Norway (1.6%), and Sweden (0.4%). *See also id.* at 95–97 (describing legal frameworks).

72. *Id.* at 109 tbl.7 (calculations: $5.5 \div 0.4 = 13.75 \approx 14$; $3.8 \div 0.4 = 9.5 \approx 10$; $3.3 \div 0.4 = 8.25 \approx 8$).

respondents if they “know anyone” who paid for sex over the last six months found much larger percentages in legalized countries such as Germany (16.6%) and the Netherlands (12%) than in Equality Model states such as Norway (7.2%) and Sweden (2.9%).⁷³

Exacerbating this situation, after legalization, the incomes of prostituted persons in Germany declined dramatically,⁷⁴ meaning their daily quotas of servicing johns—known to be more brutal than other men⁷⁵—would have to increase for the prostituted people to survive economically. The influx of prostituted persons, mostly women and girls, from other countries, especially Eastern Europe—legalization being a magnet for traffickers—contributed to increasing competition and reducing earnings.⁷⁶ Demand intensified for more harmful sex, producing flat rates at brothels that afforded unlimited time for sexual use, in some instances for sex of any kind—anal, unprotected, and so-called gang-bangs prominent among them.⁷⁷ Similar developments have been reported from New Zealand.⁷⁸ One governmental survey found that in the prior twelve months, 35.3% of the respondents reported accepting a client they did not want

73. *Id.* at 109 tbl.7. Note that Norway had only had the Equality Model law for five years, while Sweden had it for fifteen years at the time of the survey.

74. Hunecke, *supra* note 46, at 114 (noting numerous complaints from prostituted persons and “consultation facilities” that “their sources of income have decreased significantly over recent years” since legalization and that “one can indeed observe a dramatic decline in prices of the sex market over the years”); *cf.* Meyer et al., *supra* note 7 (quoting Nuremberg social worker Andrea Weppert, who stated that “[i]n Germany on the whole . . . ‘significantly more services are provided under riskier conditions and for less money than 10 years ago,’” and quoting industry association Erotik Gewerbe Deutschland (UEGD) spokesperson Holger Rettig, who stated that the influx of Romanian and Bulgarian women contributed “‘to a drop in prices’”).

75. *See supra* note 32.

76. Hunecke, *supra* note 46, at 114; *cf.* Meyer et al., *supra* note 7.

77. Meyer et al., *supra* note 7. This is reported despite official and sex industry denials.

78. Julie Bindel, *My Work as a Prostitute Led Me to Oppose Decriminalization*, BBC NEWS (Oct. 2, 2017) [<https://perma.cc/ZDQ6-UE8D>] (interviewing survivor); Sabrina Valisce, *Testimonials*, SPACE INTERNATIONAL (2017) [<https://perma.cc/T6Q3-BTCF>] (“The myth of health being better was proved false in less than 6 months of the law reform. Women were kissing and risking herpes, doing oral sex without condoms with the risk of throat warts, doing rougher and riskier practices just to get the jobs.”).

and 10.5% had been punished for refusing one.⁷⁹ As one brothel operator put the situation, “How can they refuse? The girls are paid to do it.”⁸⁰

In June 2023, Germany’s premier weekly magazine, *Der Spiegel*, concluded that twenty years of legalized prostitution has been “a fatal mistake, as the brutal reality on the street and in the brothels shows.”⁸¹ Horrifically, if predictably, at least eighty-five completed and forty-nine attempted murders of prostituted persons have been reported in Germany, most of them of women, committed by purchasers or other people in the prostitution milieu, from legalization to April 2023.⁸² Several murders have also been reported in New Zealand’s prostitution context since decriminalization.⁸³ By contrast, although women had been victims of attempted and completed murder in prostitution in Sweden before its 1999 sex purchasing law,⁸⁴ no person has been murdered there in or around prostitution since.⁸⁵ Persons in prostitution describe purchasers

79. MINISTRY OF JUST., N.Z. GOV’T, *supra* note 5, at 46 (citing a survey conducted under the auspices of the Christchurch School of Medicine).

80. ELAINE MOSSMAN & PAT MAYHEW, KEY INFORMANT INTERVIEWS: REVIEW OF THE PROSTITUTION REFORM ACT 2003 at 46 (Vict. Univ. Wellington [gov’t comm’d rep.] 2007), *available at* <https://perma.cc/45JK-ANCT>.

81. Katrin Langhans, *Prostitution in Deutschland: Vergewaltigt, vergessen, verloren*, DER SPIEGEL no. 26 (June 23, 2023), *at* <https://www.spiegel.de/panorama/gesellschaft/prostituierte-in-deutschland-vergewaltigt-vergessen-verloren-a-8b3d6b82-8c5b-430c-be19-70cf52d3535c> [<https://perma.cc/EJY7-A2HD>].

82. See *Prostitution in Germany: Homicides and Attempted Homicides* (Jan. 2002—Apr. 2023), FONDATION SCÉLLES (last visited May 27, 2023) [<https://perma.cc/8F9J-Z53R>] (providing list of links to information about known prostitution homicides and attempts in Germany, as reported in media or verified).

83. Penny White, Commentary, *Remembering the Murdered Women Erased by the Pro-Sex Work Agenda*, FEMINIST CURRENT (Nov. 13, 2015) [<https://perma.cc/CS8A-JMPU>].

84. See, e.g., Statens Offentliga Utredningar [SOU] 1995:15 Könshandeln [government report series] 140–43 (Swed.).

85. Sweden in 1999 went from a roughly similar legal framework to Germany’s before 2002—i.e., with laws prohibiting most forms of third-party control of prostitution, see Waltman, *Prohibiting Sex Purchasing*, *supra* note 11, at 135–36 & nn. 9–10—to the Equality Model law and zero murders in prostitution. Germany legalized third-party control considerably in 2002, see KAVEMANN ET AL., *supra* note 46, at 12; FED. MINISTRY OF FAM. AFFS., *supra* note 5, at 9, and saw many murders in prostitution. See *Prostitution in Germany: Homicides and Attempted Homicides* (Jan. 2002—Apr. 2023), *supra* note 82 and accompanying text. Although German prostitution is obviously more lethal than Sweden’s, complementary information *before* the legalization of German prostitution may highlight to what extent, if any, legal prostitution contributed to its safety or lethality. Manuela Schon & Anna Hoheide, *Murders In the German Sex Trade: 1920 to 2017*, [Vol.] 6 DIGNITY: A JOURNAL OF ANALYSIS OF EXPLOITATION AND VIOLENCE [Art.4] at 7 tbl.1 (2021), chiefly via archival sources and media reports

as being more careful now that they can be liable for attempting to purchase sex, while the prostituted person commits no offense—a situation respondents in studies say gives them a bargaining advantage that strengthens their control, safety, security, and personal integrity.⁸⁶ Legalization provides none of this empowerment of prostituted people, which can sometimes reduce prostitution's crimes against them, although as long as they remain in prostitution, they will be subjected to its intrinsic violations.

Similarly, as a response to the Supreme Court of Canada declaring most of its prior prostitution laws that prevented brothel owning and pimping unconstitutional,⁸⁷ the increased harm due to this judicial decriminalization led the Canadian Parliament in 2014 to pass an Equality Model law while declaring “grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it.”⁸⁸ Repeated constitutional challenges to the new law are

(incomplete as they may be), found ninety-four murders committed from 1950 to 1969; twenty murders and one attempt from 1970 to 1979; thirty-eight murders and one attempt from 1980 to 1989; sixty-one murders and four attempts from 1990 to 1999; fifty murders and twelve attempts from 2000 to 2009; and (if we recalculate the last seven years as average 10-year rates) approx. fifty-one murders and thirty-three attempts from 2010 to 2020 (this is based on 2010–2017, when thirty-six murders and twenty-three attempts were committed, decimals rounded). *Id.* Hence, Germany's legalization did not make prostitution less lethal, given the sudden outburst of attempted murders and the marginally decreasing numbers of successful murders compared with the uniquely high mark of 1990–1999.

86. SUZANN LARSDOTTER, RFSL, ET AL., OSYNLIGA SYNLIGA AKTÖRER: HBT-PERSONER MED ERFARENHET AV ATT SÄLJA OCH/ELLER KÖPA SEXUELLA TJÄNSTER 98–99, 245, 260 (2011), *available at* <https://perma.cc/X5PY-TSB3>; NIKLAS ERIKSSON & HANS KNUTAGÅRD, RFSL RÅDGIVNINGEN SKÅNE, SEXMÄNSÄLJER.SE/X: NÖJE BLIR FUNKTION 54, 76 (2005), *available at* <https://perma.cc/YEV7-M4KF>. Implying a similar dynamic, a Swedish government agency reported that an informant knew “several” prostituted women who “dared to file rape complaints” against purchasers due to the new law, which was seen as “a source of strength and support.” PROSTITUTION IN SWEDEN 2003, *supra* note 56, at 34.

87. *Canada (Att’y Gen.) v. Bedford*, 3 S.C.R. 1101 ¶ 164 (Can.). See Waltman, *Assessing Bedford*, *supra* note 47, for an analysis of how Canada's comprehensive legal system to fight sexual exploitation at the time was jeopardized by the Supreme Court's decision in *Bedford*, how the Court relied on a flagrant misreading of key research in the trial court, and how it could have resolved the judicial question in favor of an Equality Model law that was passed in Parliament the following year, *infra* note 88.

88. Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess., 41st Parl., 2014, *pmbi.* (assented to 6 November 2014), S.C. 2014, c. 25 (Can.) [short title: *Protection of Communities and Exploited Persons Act (PCEPA)*].

failing to show Parliament incorrectly assessed prostitution's harms or that its new law produced increased harms.⁸⁹ On the contrary, one case found fifty-four murders of prostituted persons five years before the new law, twenty of whom were Indigenous, and thirty-five murders of prostituted persons five years after the law, seven of whom were Indigenous—the latter period including an increase of Canadian “homicides” from 2,745 to 3,229, while “the number of injuries reported by sex workers also declined.”⁹⁰

Consistently, the U.S. State Department found New Zealand's decriminalized prostitution regime failed to prevent, prosecute, and protect those victimized by human trafficking.⁹¹ As early as 2010, New Zealand was cited as “a source country for underage girls subjected to trafficking in persons, specifically forced prostitution.”⁹² Under New Zealand's decriminalization law, “brothel owners can't retain employee age identification, and the police can't compel age verification from suspected victims of underage sexual exploitation in prostitution . . . whom the [Parliamentary Law Review Committee, 2008] refers to as ‘sex workers under the age of 18.’”⁹³ A 2007 survey of people in prostitution in New Zealand found these victims to be disproportionately of color, with 29.1% of Maori and 31.7% of Pacific Islander prostituted persons entering the sex trade before age 18, compared with 11.7% of those of New Zealand European heritage.⁹⁴ Globally, as of 2022, traffickers were found to continue to target vulnerable populations, such as children, migrants, and adult victims of domestic and family violence for exploitation in sex

89. See *R. v. Kloubakov*, 2023 ABCA 287, ¶¶ 52, 54, CanLII (Alta. C. A.); *R. v. N.S.*, 2022 ONCA 160, ¶ 131, CanLII (Ont. C. A.); see also Canadian Alliance for Sex W. L. Rfm. v. Attorney General, 2023 ONSC 5197, ¶ 217, CanLII (Ont. Super. Ct.).

90. *Can. Alliance for Sex W. L. Rfm.*, 2023 ONSC 5197, ¶ 218 (citations omitted).

91. TIP REPORT 412 (22nd ed. 2022).

92. TIP REPORT 251 (10th ed. 2010).

93. J. Smith, *supra* note 5, at 10 (referring to Prostitution Law Review Committee (“PLRC”), i.e., MINISTRY OF JUST., N.Z. GOV'T, *supra* note 5, at 112 (noting that the Police was *requesting* the Committee to “consider” amendments to require brothels to keep record of age identification and enable law enforcement to control the age of people in prostitution, both suggestions of which the Committee rejected) & at 31 (using the phrase “sex workers under the age of 18”)).

94. GILLIAN ABEL, LISA FITZGERALD, & CHERYL BRUNTON, THE IMPACT OF THE PROSTITUTION REFORM ACT ON THE HEALTH AND SAFETY PRACTICES OF SEX WORKERS: REPORT TO THE PROSTITUTION LAW REVIEW COMMITTEE 67 tbl.4.10 (University of Otago, Christchurch, Nov. 2007) (add together columns for age <16 and 16–17 in the respective ethnic category).

trafficking.⁹⁵ Data sourced from the New Zealand police, official New Zealand statistics, show numerous “trafficking-related offenses” being *reported* from 2003 (the date of decriminalization) to 2014 (the last date such data were apparently kept).⁹⁶ These offenses included trafficking in people by means of deception or coercion, offenses involving persons under eighteen (receiving earnings, dealing in slaves, dealing in people for sex, and assisting in their provision of sexual services), as well as similar crimes for people over age eighteen, including inducing or compelling them to provide sexual services.⁹⁷

Comparative European research shows a strong, significant association between attitudes toward prostitution and existing legal frameworks.⁹⁸ Simply put, legalization creates toleration of human sex trafficking.⁹⁹ Indeed, the Netherlands distinguishes migrant prostitution from domestic

95. TIP REPORT 412 (22nd ed. 2022).

96. J. Smith, *supra* note 5, at 16; *also id.* at 30 “Appendix. Table 5: Human Trafficking Related Offences (1994–2014).”

97. J. Smith, *supra* note 5, at 30 “Appendix. Table 5.” Note that officially reported crimes are not the equivalent of actual crime prevalence. Moreover, there is a considerable attrition rate from reports to prosecution—yet even larger to conviction, as there are in virtually every criminal justice system.

98. Sofia Jonsson & Niklas Jakobsson, *Is Buying Sex Morally Wrong? Comparing Attitudes Toward Prostitution Using Individual-Level Data Across Eight Western European Countries*, 61 WOMEN’S STUD. INT’L F. 58 (2017).

99. One survivor from New Zealand recounted wishing to exit after five years in legal prostitution, but “[n]one of the sex worker advocacy agencies ever offered a contingency to get me out of the sex industry.” Jade, *The Fake You, in PROSTITUTION NARRATIVES: STORIES OF SURVIVAL IN THE SEX TRADE* 49, 52 (Caroline Norma & Melinda Tankard Reist eds., 2016). Another survivor testified publicly that women in New Zealand “are trying to leave the sex trade and there is no help for them. They are leaving and then going back, leaving and going back, because no one is listening to them.” *Sex Industry Bill 2019*, Public Hearing Transcript at 18, Econ. Pol’y Scrutiny Committee, 13th Assembly (Oct. 29, 2019) (N.T., Australia.), *available at* <https://perma.cc/A33G-25NG> (statement by Ally-Marie Diamond, prostitution survivor in New Zealand). Irish prostitution survivor, journalist, and author Rachel Moran and researcher Melissa Farley have noted that the New Zealand Prostitutes Collective, a major lobbyist for decriminalization, “offered no programmatic support such as job training or housing advocacy for the large majority of those in prostitution who wanted to escape it.” Rachel Moran & Melissa Farley, *Consent, Coercion, and Culpability: Is Prostitution Stigmatized Work or an Exploitive and Violent Practice Rooted in Sex, Race, and Class Inequality*, 48 ARCH. SEX. BEHAV. 1947, 1950 (2019). Absent governmental action, Streetreach, an NGO, has had funding applications for exit programs rejected while the communities they reside in seem to wish to get rid of prostitution only when it becomes a public nuisance. See Phil Taylor, *Street Legal: Ten Years after Prostitution Decriminalisation*, N.Z. HERALD (June 7, 2013) [<https://perma.cc/882U-TZVZ>].

prostitution by criminalizing procurement of people from another country for prostitution, regardless of whether the procurer traffics them.¹⁰⁰ However, sex trafficking occurs “frequently” in licensed and unlicensed prostitution in the Netherlands,¹⁰¹ thus, Dutch criminologists in 2014 found that human trafficking “still thrives behind the legal façade” of regulated prostitution.¹⁰² Governments where prostitution is presumptively legal earn considerable sums from cashing in on it through taxes, considered the pimp’s cut when not governmental.¹⁰³

The attacks on people that make up prostitution—found endemic to it on a daily basis—are rendered effectively legal by decriminalization of third-party actors in it or affirmatively if selectively legal under legalization policies.¹⁰⁴ When buying and selling prostituted people is no

100. Artikel 273f:1 lid 3 SR (Wetboek van Strafrecht) (Neth.). A 2000 Supreme Court decision confirmed this interpretation. See NATIONAL RAPPOORTEUR ON TRAFFICKING IN HUMAN BEINGS, GOV’T, NETH., TRAFFICKING IN HUMAN BEINGS: CASE LAW ON TRAFFICKING IN HUMAN BEINGS 2009–2012; AN ANALYSIS 70 (2012). According to the Dutch Rapporteur, some lower courts do not interpret the procuring law literally, having decided that it prevents women prostituted in poorer countries from earning better incomes in the Netherlands where prostitution is legal, obstructing the free movement of “services” under EU law. See *id.* at 69 & n.170. The legality of prostitution is also “fairly regularly incorrectly invoked as a reason for not convicting or imposing a sentence” in trafficking cases. *Id.*, at 168. Sometimes, this involves women who previously worked in prostitution, in which judges believe the women tolerate the “risk of exploitation.” *Id.* In some cases, judges have regarded prostitution “as normal” for underaged persons, which can lead to acquittals. *Id.* at 67; cf. *id.* at 65–67; see also *id.* at 67 n.156 (discussing acquittal of trafficking 15-year-old girl, another acquittal for trafficking 19-year-old stepdaughter); cf. *id.* at 168.

101. NAT’L RAPPOORTEUR, NETH., *supra* note 100, at 168; cf. Altink et al., *supra* note 60, at 65.

102. Huisman & Kleemans, *supra* note at 60, at 227.

103. The German city of Duisburg, population slightly below 500,000, earned €913,000 in 2015 from brothels alone. *Sexsteuer spielt vier Millionen in die Kassen von Kommunen*, FOCUS ONLINE (Aug. 10, 2016) [<https://perma.cc/ZVQ2-47ZE>]. In Dortmund, population slightly below 600,000, the city estimated the revenue from prostitution at €750,000 in 2010. Ilka Platzek, *Tagestickets für den Straßenstrich, Steuer für Dortmunder Prostituierte*, WESTDEUTSCHER RUNDFUNK (Dec. 8, 2010) [<https://perma.cc/76EK-T9V3>]. Local governments in Nevada with legal brothels “earn thousands to hundreds of thousands annually in brothel work card, application, licensing, and liquor license fees.” MACFARLANE ET AL., *supra* note 31, at 9. In 2017, Lyon County in Nevada received \$543,757 in licensing fees and “room and liquor taxes” from the brothels, plus \$5,000 for issuing “work cards;” Nye County totaled \$192,188 when \$56,779 is added for work cards. *Id.*, at 10 tbl.1.

104. Effective decriminalization, that is, ignoring criminal laws against pimps, traffickers, brothel owners and sex buyers in prostitution, which is common, usefully

longer a crime, the torture within the sex trade becomes state torture. Under full decriminalization and legalization, the buying and selling of people, mostly women and children by others for sexual use by still others, mostly adult men—sexual slavery—is explicitly exempted from official scrutiny. It is affirmatively facilitated, promoted, and authoritatively legitimated as if, by dint of official policy, constituting no deprivation of the humanity of the people bought and sold for sexual use at all.

Fully decriminalizing or legalizing prostitution is thus state policy to promote the commission of the attacks on people in prostitution that their purchase, sale, and use in the sex trade, with all abuses documented, constitutes and requires. As this Article shows in detail, with high-story industrial brothel chains and links to organized international crime in particular (but not alone),¹⁰⁵ legislative and executive policies that decriminalize pimping and narrow trafficking laws so that they only cover the most conventionally proveable, violent, and visible situations, transform pimps, traffickers, brothel-owners, and “madams” into legitimate businesspeople and entrepreneurs, and buyers into mere customers or clients. Legalization seals and legitimates this status. Where such facts occur, legalizing prostitution foreseeably furthers campaigns and operations that attack prostituted persons.

Any prosecution would, of course, necessarily be based on context-specific evidence. The data that support the present analysis are commonly

shows much of what decriminalization looks like. But unless specific facts make those responsible for the policy and its implementation and consequences clear, further analysis of criminal responsibility is required that is beyond the scope of our subsequent article, see *Criminal Responsibility*, note 10 *supra*.

105. *Paradise*, for example, was recently regarded as a top-tier German chain that ran high-story brothels in several cities. See Nisha Lilia Diu, *Welcome to Paradise*, TELEGRAPH ONLINE, n.d. (2015) [<https://perma.cc/9WS2-EGC5>] [hereinafter Diu, *Paradise*]; cf. Diu, *Mega Brothel*, *supra* note 58. Its founder/owner was arrested in 2017 and, in 2019, reportedly sentenced to five years imprisonment for “aiding and abetting” human sex trafficking by international organized crime, including motorcycle gangs that supplied *Paradise* with young women through threats and violence. See, e.g., Hilke Lorenz, *Trouble in Paradise: The Rise and Fall of Germany’s “Brothel King,”* THE GUARDIAN (June 22, 2019) [<https://perma.cc/UA5R-ZRSY>]; Sabine Försterling, *Langjährige Haftstrafen für Bordellchef Rudloff und Marketingleiter: Fünf Jahre Haft für Paradise-Chef*, ESSLINGER ZEITUNG (Feb. 27, 2019) [<https://perma.cc/Z675-GEK4>]. Another example is *Pascha*, a well-known German high-story building brothel chain regarded as a middle-tier venue. Diu, *Paradise*, *supra*. Its founder was reportedly sentenced to three years and nine months imprisonment for tax evasion, but served only twenty-three months. See M. Krücken et al., *Bordell-König in Freiheit; “Pascha”-Gründer Hermann Müller aus der Haft entlassen*, KÖLNER EXPRESS, Aug. 22, 2018 (Lexis).

available, vary if within limits, and serve to illustrate the legal arguments and establish their plausibility and the nature of their evidentiary basis under some known conditions. The chapeau elements¹⁰⁶ would need to be proven in each case; they are readily provable in many of the current situations in which prostitution is fully decriminalized or legalized. Prostitution tends to be widespread, seemingly nonexistent in almost no place.¹⁰⁷

106. See *infra* subsections II.A–E for the chapeau elements.

107. Prostitution's contemporary scope and scale is almost a truism, if its cultural universality is at times challenged, depending on definition or profession (historians vs. anthropologists), older versus more current work, with observation of its lesser prevalence in some indigenous cultures. For some suggestive scholarship, see Kingsley Davis, *The Sociology of Prostitution*, 2 AM. SOCIO. REV. 744 (1937) (“[P]rostitution sets a profound problem: Why is it that a practice so thoroughly disapproved, so widely outlawed in Western civilization, can yet flourish so universally?”); William W. Sanger, *THE HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES, AND EFFECT THROUGHOUT THE WORLD* 35 (1858) at <https://babel.hathitrust.org/cgi/pt?id=hvd.32044097784078&seq=41> [<https://perma.cc/8UFU-UUJX>] (“[P]rostitution is coeval with society We can trace it from the earliest twilight in which history dawns to the clear daylight of to-day, without a pause or a moment of obscurity.”); GEORGE RYLEY SCOTT, *A HISTORY OF PROSTITUTION* 53 (1936), available at <https://perma.cc/49VB-GKCJ> (“Prostitution is in the present-day legal sense of the term is a sore of civilization. Strictly speaking, it has never existed among savage races (*sic*) in [this] sense”); Kathleen Barry, *The Underground Economic System of Pimping*, 35 J. INT’L AFFS. 117 (1981) (referring to “myths such as those that assume that prostitution is a cultural universal, and that it must therefore be a social necessity”); BARRY, *supra* note 22, at 137 (“[M]isogyny, the use of prostitutes to act out one’s contempt for the lower and degraded sex, is the single most powerful reason why prostitution has always been considered a cultural universal—the oldest profession, the indestructible institution, the necessary social service.”); Liat Kozma, *Prostitution and Colonial Relations*, in *SELLING SEX IN THE CITY: A GLOBAL HISTORY OF PROSTITUTION, 1600s–2000s* at 730, 734 (2017) (noting that while prostitution existed in some pre-colonial societies, there were “societies in which there was no prostitution as the society had little or no money/wage labour, and therefore there was no exchange of sex for money”); PETER N. STEARNS, *SEXUALITY IN WORLD HISTORY* 34 (2nd ed. 2017) (“Agricultural societies certainly generated the practice of prostitution.”); Timothy J. Gilfoyle, *Prostitutes in History*, 104 AM. HIST. REV. 117, 119 (Feb. 1999) (“Even that old cliché—‘prostitution is the world’s oldest profession’—is questioned; historians increasingly recognize that the sale of sexual services is hardly an essential feature of all societies in all historical eras.”); Gerda Lerner, *The Origin of Prostitution in Ancient Mesopotamia*, 11 SIGNS: J. OF WOMEN IN CULTURE & SOC’Y 236, 247 (Winter 1986) (noting that “commercial prostitution” was likely precipitated by “enslavement of women and the consolidation and formation of classes,” that enslavers prostituted women, that “some masters set up commercial brothels,” and that “[b]y the middle of the second millennium B.C., prostitution was well established as a likely occupation for the daughters of the poor”). Other scholars find around fifty synonyms for people in prostitution in the Sanskrit and Pali literature from “a few centuries B.C. and the twelfth century A.D.” Satarupa

Regardless of its status under law, it is also overwhelmingly systematic in that it falls most heavily on certain groups. Even when illegal, prostitution might already be said to be a crime against humanity; legal difficulties under criminal law may arise in singling out defendants and showing a policy or plan. Neither difficulty occurs when prostitution is legalized or decriminalized. With the exception of the arrest of prostituted persons and their exploitation and abuse by police that often accompanies its criminalization, as well as its invitation to corruption by powerful men, all its abuses when illegal continue to occur when no longer criminal, and then some.

Under legalization, prostitution's many acts of violation and violence against prostituted people, and their exploitation by buyers and sellers, metastasize as a result of, and distinctive to, its legal status.¹⁰⁸ With appropriate evidence, which exists, these attacks can be proven to be a direct result of their promotion and encouragement by state policy. Who initiated, sponsored, and approved such policy, those primarily responsible, are typically clear, even heralded, with the requisites of criminal liability to be shown separately in each case.¹⁰⁹

Those who fully decriminalize and legalize prostitution are responsible for the tsunami of crimes against humanity that their policies fail to sanction and unleash with impunity. By growing exponentially and becoming more violent, abusive, and degrading to prostituted persons, legal prostitution, as documented here,¹¹⁰ exponentially increases rapes and torture; forced prostitution;¹¹¹ enslavement, including human trafficking, and sexual slavery;¹¹² persecution;¹¹³ and other acts enumerated

Dasgupta, *Commercial Sex Work in Calcutta: Past and Present*, in *SELLING SEX IN THE CITY*, *supra*, at 519, 520–21. Beneath the lines here lurk positions or presuppositions on whether prostitution is a big or small problem or a problem at all, whether its prevalence proves that it is natural and inevitable, or whether it is social and changeable. The view that it has been coextensive with the inequality of the sexes, and the observation that it is at present a regular feature of late capitalism (as one economic form among others), harmonizes the evidence on past extent and current near universality with the possibility of abolishing it, as the Nordic/Equality model moves to do.

108. See *supra* notes 5–7, 30–31, 41–47, 56–105, and *infra* notes 181, 198–99, 285–86 and accompanying text.

109. See subsequent article *Criminal Responsibility*, *supra* note 10.

110. See *supra* notes 5–7, 30–31, 41–47, 56–105, and *infra* notes 181, 198–99, 285–86 and accompanying text.

111. See *infra* Subsection II.C.1.

112. See *infra* Subsection II.C.2.

113. As discussed subsequently by the authors in *Legalized Prostitution as Persecution*.

under international law.¹¹⁴ Hence, as will be argued,¹¹⁵ when policymakers legalize prostitution, they can be held responsible for crimes against humanity under international law.

II. ELEMENTS

To constitute a crime against humanity under the Rome Statute of the ICC, currently the most demanding of its internationally-implemented definitions,¹¹⁶ specified acts must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹¹⁷ Each prosecution, of course, requires proof of specific facts that satisfy every element of this substantive test. However, the acts of violence against people in prostitution that make up its “attack” on them—widespread or systematic, specified, and directed against civilians—are readily exemplified in diverse settings, escalating where legal.

A. *Widespread or Systematic Attack*

The Rome Statute requires that an “attack,” to constitute a crime against humanity, be “widespread *or* systematic.”¹¹⁸ This chapeau element is disjunctive; a showing of either is sufficient.¹¹⁹ Only the scope claimed for the attack, not the individual acts of perpetrators, must be widespread

114. *Id.*

115. See *infra* Subsections II.D (on the “policy requirement”); II.E (on the “nexus requirement”); subsequent article *Criminal Responsibility*, *supra* note 10 (on criminal responsibility).

116. Customary international law is wider. See, e.g., GUÉNAËL METTRAUX, INTERNATIONAL CRIMES: LAW AND PRACTICE; VOL. II: CRIMES AGAINST HUMANITY 194–356 (2020) [hereinafter METTRAUX, CRIMES AGAINST HUMANITY]; GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 155–74 (2005) [hereinafter METTRAUX, TRIBUNALS]. National and regional justice systems provide potential alternate venues, even if the ICC, the only court with global jurisdiction, may “indirectly contribute to the restriction of the customary rules.” ANTONIO CASSESE ET AL., CASSESE’S INTERNATIONAL CRIMINAL LAW 90 (3rd ed., 2013).

117. Rome Statute, *supra* note 9, art. 7(1)(a)–(k).

118. Rome Statute, *supra* note 9, art. 7(1) (emphasis added).

119. See, e.g., Situation in the Republic of Kenya, ICC-01/09-19-Corr, Authorization of an Investigation, ¶ 94 (Mar. 31, 2010), <https://www.legal-tools.org/doc/f0caaf/> [https://perma.cc/LUC8-99KJ] (majority opinion). That Kenya situation cases were dropped for lack of the ability to procure evidence, e.g., Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Withdrawal of Charges, ¶ 9 (Mar. 13, 2015), <https://www.legal-tools.org/doc/2c921e/> [https://perma.cc/VP22-DXXJ]; Prosecutor v. Muthaura, ICC-01/09-02/11-696, Withdrawal of Charges, ¶¶ 9, 11 (Mar. 18, 2015), <https://www.legal-tools.org/doc/2c921e/>.

or systematic; thus, one person could be responsible for a crime against humanity within a certain larger context, even if he committed one rape in a concentration camp.¹²⁰ The ICC Pre-Trial Chamber II in *Bemba* (2009) acknowledged that although the evidence could only prove two murders with “certainty,” “the jurisprudence and legal doctrine are consistent that an individual may be held responsible for crimes against humanity even if he or she perpetrates one or two offences.”¹²¹ If criminal responsibility standards are otherwise met, political leaders and policymakers could be held responsible for campaigns of crimes against humanity without personally having committed a single one of the specified acts within such campaigns.¹²² Attacks encompassed under this rubric have also been

legal-tools.org/doc/44ecc9/ [https://perma.cc/8U87-9E8H], does not disqualify its usefulness on this point.

120. See, e.g., *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment, ¶¶ 1090, 1092 (Mar. 7, 2014), <https://www.legal-tools.org/doc/f74b4f/> [https://perma.cc/R83P-CNWU]; *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 94; *Almonacid-Arellano*, Preliminary Objections, *supra* note 38, ¶ 96; *Prosecutor v. Kordić*, IT-95-14/2-A, Appeals Judgment, ¶ 94 (Int’l Crim. Trib. Former Yugo. [hereinafter ICTY], Dec. 17, 2004), <https://www.legal-tools.org/doc/738211/> [https://perma.cc/7CYU-GA59]; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Judgment, ¶ 101 (ICTY, July 29, 2004), <https://www.legal-tools.org/doc/88d8e6/> [https://perma.cc/MS3W-NGDQ]; *Prosecutor v. Kupreškić*, IT-95-16-T, Judgment, ¶ 550 (ICTY, Jan. 14, 2000), <https://www.legal-tools.org/doc/a4a6ae/> [https://perma.cc/JGC5-Q8U5] (mentioning denunciation cases in Germany as an example); Int’l Law Comm’n, Report on the Work of its Seventy-First Session, *Ch. IV.E: Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity (with Commentaries)*, U.N. Doc. A/74/10, at art. 2, commentary 12 (2019) [hereinafter Draft Convention].

121. *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision on Charges, ¶ 151 (June 15, 2009), <https://www.legal-tools.org/doc/07965c/> [https://perma.cc/2GEU-Q8A5]. This view on numbers is not undercut by Bemba’s ultimate acquittal for inadequate proof of command responsibility. *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Appeals Decision, (June 8, 2018), <https://www.legal-tools.org/doc/40d35b/> [https://perma.cc/UTN8-RBGB].

122. See, e.g., *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the Appeal, ¶ 458 (Dec. 1, 2014), <https://www.legal-tools.org/doc/585c75/> [https://perma.cc/3946-V357] (“[A]rticle 25(3)(a) . . . does not establish that co-perpetrators need to carry out the crime personally and directly.”); *Katanga*, Judgment, *supra* note 120, ¶ 1391 (“[A]rticle 25(3)(a) . . . encompass both the physical perpetrators of the crimes and the persons who direct their realisation without executing them themselves.”); *Prosecutor v. Karadžić*, IT-95-5/18-T, Public Judgment, ¶¶ 5996–6010 (Mar. 24, 2016), <https://www.legal-tools.org/doc/173e23/> [https://perma.cc/A6XA-F5WA], *aff’d* MICT-13-55-A, Appeals Judgment, ¶¶ 776–77 (Int’l Resid. Mech. Int’l Crim. Trib., Mar. 20, 2019), <https://www.legal-tools.org/doc/jt3mc2/> [https://perma.cc/RB5Q-89R2] (increasing also penalty to life imprisonment); *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, ¶ 6994 (May 18, 2012), <https://www.legal-tools.org/doc/8075e7/>

recognized to extend beyond military conflicts to violent or even non-violent but severe systemic mistreatment.¹²³ This jurisprudence does not strictly bind future prosecutions but forms a persuasive and informative benchmark against which its chambers could, and likely would, measure the adequacy of a prosecution.

Chambers of the ICC have developed the elements of crimes against humanity to reflect the situations these courts have confronted, often drawing in part on ad hoc tribunal decisions. A widespread or systematic attack has been distinguished from one in which the underlying offenses are “isolated” or random.¹²⁴ Under this test, extensive time, place, numbers, or severity, have often been sought, even when it is emphasized that “[t]he assessment of whether the attack is widespread is neither exclusively quantitative nor geographical, but must be carried out on the basis of all the relevant facts of the case.”¹²⁵

Trial Chamber VI in *Ntaganda* (2019) echoes others in stating that “widespread” is to be “understood to mean that the attack is large-scale

[<https://perma.cc/L6BA-WTK5>] (convicting former President of Liberia for aiding and abetting and planning crimes against humanity including, inter alia, rape, sexual slavery, murder, and other inhumane acts), *aff’d* SCSL-03-01-A, Appeals Judgment ¶ 708 (Sept. 26, 2013), <https://www.legal-tools.org/doc/3e7be5/> [<https://perma.cc/22YL-UT93>].

123. See, e.g., Prosecutor v. Akayesu, ICTR-9604-T, Judgment, ¶ 581 (Sept. 2, 1998), <https://www.legal-tools.org/doc/b8d7bd/> [<https://perma.cc/B3E5-724N>] (“An attack may also be nonviolent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner . . . if orchestrated on a massive scale or in a systematic manner.”). See also *infra* notes 151–152 and accompanying text.

124. See, e.g., *Katanga*, Judgment, *supra* note 120, ¶ 1123; Prosecutor v. Katanga, ICC-01/04-01/07-717, Decision on Charges, ¶ 394 (Sept. 30, 2008), <https://www.legal-tools.org/doc/67a9ec/> [<https://perma.cc/A7SK-3YBW>] (quoting Prosecutor v. Harun, ICC-02/05-01/07-1-Corr, Decision on Prosecution [Summons] Application, ¶ 62 (Apr. 27, 2007), <https://www.legal-tools.org/doc/e2469d/> [<https://perma.cc/NKM9-MRC8>]).

125. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment, ¶ 691 (July 8, 2019), <https://www.legal-tools.org/doc/80578a/> [<https://perma.cc/G98T-8WVQ>]; *accord* Prosecutor v. Al Hassan, ICC-01/12-01/18-35-Red2-t-ENG, Decision on Warrant of Arrest, ¶ 51 (Mar. 27, 2018), <https://www.legal-tools.org/doc/182fc7/> [<https://perma.cc/MT54-94BP>]; Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment, ¶ 163 (Mar. 21, 2016), <https://www.legal-tools.org/doc/edb0cf/> [<https://perma.cc/78HR-CRFS>]; see Prosecutor v. Gbagbo, ICC-02/11-01/11-656-Red, Decision on Charges, ¶ 222 (June 12, 2014), <https://www.legal-tools.org/doc/5b41bc/> [<https://perma.cc/44F7-PAPU>]; Situation in the Republic of Côte d’Ivoire, ICC-02/11-14, Authorization of an Investigation, ¶ 53 (Oct. 3, 2011), <https://www.legal-tools.org/doc/7a6c19/> [<https://perma.cc/7TXN-E7JB>]; *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 95.

in nature and targeted at a large number of persons.”¹²⁶ Numerous chambers similarly specify that a widespread attack is “massive, frequent, carried out collectively with seriousness and directed against a multiplicity of victims.”¹²⁷ Numerosity, while often present, is not absolutely required, and may be outweighed by severity. Several chambers hold that “a widespread attack may be the ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.’”¹²⁸ Geography can also be a factor, counterbalancing numerosity, or vice versa. In *Katanga* (2008), for example, Pre-Trial Chamber I noted that “[i]n the jurisprudence of the *ad hoc* Tribunals, the term ‘widespread’ has also been explained as encompassing an attack carried out over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians.”¹²⁹ Under the “widespread” rubric, some chambers also consider whether an attack is “extended over a time period,” which can be contextual or a significant measure of severity on its own.¹³⁰

126. *Ntaganda*, Judgment, *supra* note 125, ¶ 691; *accord Katanga*, Judgment, *supra* note 120, ¶ 1123; *Harun*, Summons Application, *supra* note 124, ¶ 62. Many other chambers use similar or identical phrases describing “widespread” in terms of “large-scale” and “large number of targeted persons.” *E.g.*, *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 51; *Bemba*, Judgment, *supra* note 125, ¶ 163; *accord Katanga*, Judgment, *supra* note 120, ¶ 1123; Prosecutor v. Blé Goudé, ICC-02/11-02/11-186, Decision on Charges, ¶ 131 (Dec. 11, 2014), <https://www.legal-tools.org/doc/0536d5> [<https://perma.cc/W5ZV-XJA5>]; *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 95.

127. *E.g.*, *Ntaganda*, Judgment, *supra* note 125, ¶ 691; *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 51; Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on Charges, ¶ 176 (Jan. 23, 2012), <https://www.legal-tools.org/doc/96c3c2/> [<https://perma.cc/FC5C-UE8R>]; *Côte d'Ivoire*, Authorization of Investigation, *supra* note 125, ¶ 53; *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 95 (majority opinion).

128. *E.g.*, *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 51 (indicting for torture, rape, sexual slavery of chief of police); *Côte d'Ivoire*, Authorization of Investigation, *supra* note 125, ¶ 53; *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 95.

129. *Katanga*, Decision on Charges, *supra* note 124, ¶ 395 (footnote omitted); *accord Bemba*, Decision on Charges, *supra* note 121, ¶ 83; *Bemba*, Judgment, *supra* note 125, ¶ 689 (“[I]n light of the number of victims and the *geographical scope* of the attack, the Chamber finds beyond reasonable doubt that the attack against the civilian population . . . was widespread.” (emphasis added)); Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on Charges, ¶ 102 (Jan. 23, 2012), <https://www.legal-tools.org/doc/4972c0/> [<https://perma.cc/4SQ9-GQ3U>] (“The Prosecutor asserts that ‘[t]he attacks affected a large number of civilian victims over a *large geographical area*.’” (emphasis added)).

130. See Situation in Afghanistan, ICC-02/17 OA4, Judgment on Appeal Against Decision on Authorization of an Investigation, ¶ 62 (Mar. 5, 2020), <https://www.>

A potentially instructive framework for the larger contextual umbrella of “widespread or systematic attack,” more expansive than the typical ICC approach, derives initially from *Kunarac* (the Foča case), a successful International Criminal Tribunal for the Former Yugoslavia (“ICTY”) prosecution in which enslavement—there, repeated rape in a brothel-like setting—was prosecuted in the Bosnian conflict.¹³¹ The Appeals Chamber held that the trier of fact should “first identify the population which is the object of the attack,” then, in light of the (i) means, (ii) methods, (iii) resources, and (iv) result of the attack, “ascertain whether the attack was indeed widespread or systematic” or both.¹³² Factors that “*could* be taken into account” included, among other things, (a) the “consequences of the attack upon the targeted population;” (b) “the number of victims;” (c) “the nature of the acts;” (d) “the possible participation of officials or authorities;” (e) “or any identifiable patterns of crimes.”¹³³ This more comprehensive evocation of potential collective factors affecting a targeted population could be appropriate to some settings—as here, where the population, serially raped while held in a house, was targeted based on religion/ethnicity as well as sex—even where the numbers in the specific

legal-tools.org/doc/x7kl12 [https://perma.cc/EG28-72C6] (noting that the Pre-Trial Chamber accepted reasonable evidence of “large scale commission of multiple crimes against humanity and war crimes[,]” which began prior to “17 July 2002 and continues to the present day.”); *Blé Goudé*, Decision on Charges, *supra* note 126, ¶¶ 115–19, 122, 131 (finding substantial grounds for believing that during more than four months, pro-Gbagbo forces killed at least 284 people, raped at least 38 women and girls, and injured at least 126 persons); Prosecutor v. Ntaganda, ICC-01/04-02/06-309, Decision on Charges, ¶ 24 (June 9, 2014), <https://www.legal-tools.org/doc/5686c6/> [https://perma.cc/E9VG-V5AX] (finding the attacks widespread in part as they “resulted in a large number of civilian victims, in a broad geographical area, over the period between on or about 6 August 2002 and on or about 27 May 2003”).

131. The ICTY Statute enumerated rape and enslavement as crimes against humanity, required to be committed in armed conflict, but did not specify sexual slavery. Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, art. 5(c)(g) (May 25, 1993).

132. See, e.g., Prosecutor v. Kunarac, IT-96-23 & 23/1-A, Appeals Judgment, ¶ 95 (ICTY, June 12, 2002), <https://www.legal-tools.org/doc/029a09/> [https://perma.cc/G8JL-XQXH] (quoting IT-96-23-T & 23/1-T, Trial Judgment, ¶ 430 (ICTY, Feb. 22, 2001), <https://www.legal-tools.org/doc/fd881d/> [https://perma.cc/E9BD-4H3D]); accord Prosecutor v. Radić, X-KR-05/139, Second-Instance Verdict, ¶ 166 (BiH Cr., App. Div., Mar. 9, 2011), <https://www.legal-tools.org/doc/fb2c82/> [https://perma.cc/7HM6-LT7D].

133. *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 95 (emphasis added); accord *Radić*, Second-Instance Verdict, *supra* note 132, ¶ 166.

case were small, yet the atrocities were great and the arrangement and participation official.

The term systematic is often used in international criminal jurisprudence to evoke the broad context within which alleged atrocities occur. Some ICC chambers say that “the adjective ‘systematic’ allows the nature of the attack, understood in a broad sense, to be characterised and to bring to the fore the existence of a *pattern* of repeated conduct or the recurring or continuous perpetration of interlinked, non-random acts of violence that establish the existence of a crime against humanity.”¹³⁴ The early definition in the *Akayesu* judgment on mass rape as a crime against humanity required that attacks, to be systematic, must be “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources,” involving “some kind of preconceived plan or policy.”¹³⁵ In *Situation in Kenya*, for a more recent ICC example, pursuant to the campaign of crimes against humanity committed in post-election violence alleged against political leaders and governmental officials, Pre-Trial Chamber II enumerated the factors in *Akayesu*’s definition of “systematic” as “(i) being thoroughly organised, (ii) following a regular pattern, (iii) on the basis of a common policy, and (iv) involving substantial public or private resources.”¹³⁶

Along similar lines, ICC chambers have specified that “[a]n attack’s systematic nature can often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”¹³⁷ Citing the ICTY, other chambers emphasize simply that “‘systematic’ refers to ‘the organised nature of the acts of violence and the improbability of their random occurrence.’”¹³⁸ Consistent with these

134. *Katanga*, Judgment, *supra* note 120, ¶ 1113; *quoted by Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 52; *see Ntaganda*, Decision on Charges, *supra* note 130, ¶ 24 (finding that “the attack was systematic, following a regular pattern”).

135. *Akayesu*, Judgment, *supra* note 123, ¶ 580.

136. *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 96 (majority opinion) (citing *Akayesu*, Judgment, *supra* note 123, ¶ 580).

137. *Côte d’Ivoire*, Authorization of Investigation, *supra* note 125, ¶ 54; *quoted by Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 52; *Ntaganda*, Judgment, *supra* note 125, ¶ 692; *Katanga*, Judgment, *supra* note 120, ¶ 1123; *Katanga*, Decision on Charges, *supra* note 124, ¶ 397; *see also* Prosecutor v. Nahimana, ICTR-99-52A, Appeals Judgment, ¶ 920 (Nov. 28, 2007), <https://www.legal-tools.org/doc/4ad5eb/> [<https://perma.cc/84WC-TKHD>]; *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 95 (quoting *Kunarac*, Trial Judgment, *supra* note 132, ¶ 429).

138. *Harun*, Summons Application, *supra* note 124, ¶ 62 (footnotes omitted); *quoted by Ntaganda*, Judgment, *supra* note 125, ¶ 692; Prosecutor v. Al Bashir,

formulations, taken together, recognition is growing that attacks on civilians committed on consistent patterned social grounds may be considered “organized” in the sense that makes attacks “systematic” for purposes of alleged crimes against humanity, in particular where a policy is also involved.¹³⁹ In *Al Hassan*, for example, Pre-Trial Chamber I noted, among other factors, “the general pattern of the way in which the crimes were committed, and especially the harassment and systematic gender-based violence perpetrated against women and girls”¹⁴⁰ in finding the allegations of sufficient gravity to be admissible as crimes against humanity.

Consistent with these formulations, recognition is increasing that committing crimes against civilians on discriminatory social grounds could render them organized in the social sense, thus contributing to attacks being “systematic,” particularly where official leadership or policy is also involved. In *Situation in Kenya*, Pre-Trial Chamber II, facing a political conflagration orchestrated substantially by officials, referred to an ICTY test stating that “systematic” requires, *inter alia*, “the implication of high-level political and/or military authorities.”¹⁴¹ *Al Hassan*’s arrest warrant was permitted for official rulers under which acts carried out by others deprived civilian women and girls of equality

ICC-02/05-01/09-3, Decision on Warrant of Arrest, ¶ 81 (Mar. 4, 2009), <https://www.legal-tools.org/doc/e26cf4/> [<https://perma.cc/U2JY-FJ8D>]; Prosecutor v. Bemba, ICC-01/05-01/08-14-tENG, Decision on Warrant of Arrest, ¶ 33 (June 10, 2008), <https://www.legal-tools.org/doc/fb80c6/> [<https://perma.cc/HC7L-D2PU>]. Some overlap in proof of the “organized nature” of such crimes against humanity may occur, given that the Statute’s requirement that the crimes be committed pursuant to a “policy” includes “organization.” See Rome Statute, *supra* note 9, art. 7(2)(a). For the policy element under ICC, see *infra* Section II.D.

139. *Ntaganda*, Judgment, *supra* note 125, ¶ 692; *Gbagbo*, Decision on Charges, ¶ 223; Prosecutor v. Gbagbo, ICC-02/11-01/11-9-Red, Decision on the Application for a Warrant of Arrest, ¶ 49 (Nov. 30, 2011), <https://www.legal-tools.org/doc/f8bdcb> [<https://perma.cc/FU3L-7GVV>]; *Al Bashir*, Decision on Arrest, *supra* note 138, ¶ 81; *Bemba*, Decision on Arrest, *supra* note 138, ¶ 33; *Harun*, Summons Application, ¶ 62.

140. *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 38.

141. See *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 96 (citing Prosecutor v. Blaškić, IT-95-14-T, Trial Judgment, ¶ 203 (ICTY, Mar. 3, 2000), <https://www.legal-tools.org/doc/e1ae55/> [<https://perma.cc/C5PR-BXMG>]). The Kenya case was withdrawn due to witness interference, refusal of governmental cooperation, and political meddling. See, e.g., *Kenyatta*, Decision on Withdrawal of Charges, *supra* note 119.

rights on gender grounds through torture, rape, and sexual slavery, among other acts.¹⁴²

Considering crimes against humanity as like genocide without the specific intent requirement, the “systematic” element highlights its central focus on situations of mass discrimination. In the context of prostitution, this recognition comports with the requirement in the Rome Statute, Article 21(3), that its provisions be interpreted consistent with international human rights principles¹⁴³—here, for example, as articulated in the requirement that state parties act to eliminate the “exploitation of prostitution of women” in Article 6 of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women.¹⁴⁴ Prohibition of gender-based violence, of which sex trafficking and exploitation of prostitution are recognized forms, has evolved into a principle of customary international law.¹⁴⁵ Exploitation of prostitution and sex trafficking are recognized as rooted in structural sex-based discrimination and constitute gender-based violence, often intersecting with indigenous, racial and ethnic inequality and marginalization, and refugee status, among other forms of enhanced vulnerability.¹⁴⁶ Similarly, while the systematic nature of enforced prostitution and sexual slavery is generally underpinned by these structural factors, legalized and decriminalized prostitution theorized as persecution is centrally defined by them.

142. *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 95. See *id.* ¶ 63 (“As to whether the attack was systematic, the material before the Chamber shows that the subjection of the population to these rules and prohibitions took the form of a campaign of crimes and persecution.”); *id.* ¶ 57 (“[T]he target was the civilian population, and especially women and girls within the civilian population.”); see also *Ntaganda*, Judgment, *supra* note 125, ¶ 818 (discussing “organization” under indirect co-perpetration, finding females “regularly raped or subjected to sexual violence” by male soldiers and commanders under defendant’s command as military chief of staff of armed group, the assaults going largely unpunished).

143. Art. 21(3) of the Rome Statute, *supra* note 9, states: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”

144. Convention on the Elimination of All Forms of Discrimination against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13.

145. Comm. on the Elimination of Discrimination against Women [hereinafter CEDAW], General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration, ¶ 10, U.N. Doc. CEDAW/C/GC/38 (Nov. 20, 2020).

146. *Id.* ¶ 20.

B. Directed Against Any Civilian Population

In addition to being widespread or systematic, to constitute a campaign of crimes against humanity, an attack must be “directed against any civilian population.”¹⁴⁷ Article 7(2) of the Rome Statute defines this as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population”¹⁴⁸ Prostituted people are generally civilians. To qualify under this rubric, everyone in the civilian population under attack does not have to be affected equally, or even at all.¹⁴⁹ In addition to relevant acts specified under Article 7, such as enforced prostitution and sexual slavery, additional enumerated crimes against humanity under Article 7(1)(a–k) committed daily in prostitution—for example, rape, torture, other sexual violence of comparable gravity—can also be considered. And crimes not listed in the statute can be part of the evidence in a case.¹⁵⁰ The attacks are directed by the institution of prostitution itself and further targeted at prostituted people when made official by legalization and decriminalizing their exploiters.

Numerous chambers of the ICC have embraced the position articulated in *The Elements of Crimes*, which allows that these acts “need not constitute a military attack.”¹⁵¹ Consistent with this, the ad hoc tribunals

147. Rome Statute, *supra* note 9, art. 7(1).

148. The complete definition in Article 7(2)(a) of the Rome Statute, *supra* note 9, states: “For the purpose of paragraph 1: (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

149. *Cf. Katanga*, Judgment, *supra* note 120, ¶ 1105 (“[I]t suffices for the Prosecution to establish, . . . that the civilians were targeted during the attack in sufficient number or in such a manner that the attack was effectively directed against the civilian population, without it being necessary for the Prosecution to prove that the entire population of a geographic area was targeted at the time of the attack.”) (citations omitted); *accord Kunarac*, Appeals Judgment, *supra* note 132, ¶ 90.

150. For example, Trial Chamber VI permitted evidence of pillaging, firing on civilians, and destroying their homes, none of which is listed as a crime against humanity, to be added to evidence of murders and rapes as “factors” that, with other evidence, supported the Chamber’s conclusion “beyond reasonable doubt that the attack was directed against a civilian population.” *Ntaganda*, Judgment, *supra* note 125, ¶¶ 671–72.

151. Assembly of States Parties to the Rome Statute of the International Criminal Court, Official Records, 1st Sess. part II.B, art. 7 (introduction) (3), U.N. Doc. ICC-ASP/1/3 (Sept. 3–10, 2002) [hereinafter ICC Elements of Crimes]; *accord Ntaganda*, Judgment, *supra* note 125, ¶ 662 (“An ‘attack’ for the purpose of crimes against humanity . . . may be, but need not be, part of a military operation.”);

have held that, unlike war crimes, an “attack” of crimes against humanity is not limited to violence but can include “any mistreatment of the civilian population,” which has been so held, *inter alia*, in a case involving facts that amount to prostitution during an armed conflict.¹⁵² What constitutes a course of conduct has been less specified, perhaps because it has not needed to be. Clearly, Article 7(1) “is not designed to capture single isolated acts.”¹⁵³ For multiple acts to constitute “a course of conduct,” Pre-Trial Chamber I in *Gbagbo* looked for “a systemic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts.”¹⁵⁴ Why or whether acts that are systematic should also have to be systemic is unclear, although they may be.¹⁵⁵ Prostitution is arguably both, to which legalization by policy would definitively contribute.

Al Hassan, Decision on Arrest, *supra* note 125, ¶ 44 (noting that crimes against humanity “need not constitute a military attack”); Situation in Georgia, ICC-01/15-4-Corr2, Request for Authorization of Investigation, ¶ 221 (Nov. 17, 2015), <https://www.legal-tools.org/doc/eca741/> [<https://perma.cc/PUD9-VBNY>]; *Katanga*, Judgment, *supra* note 120, ¶ 1101; *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 80 (majority opinion) (“An attack is not restricted to a ‘military attack.’”); *Bemba*, Decision on Charges *supra* note 121, ¶ 75; cf. Christopher K. Hall & Kai Ambos, *Article 7: Crimes Against Humanity*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 166, mn. 15 (Otto Triffterer & Kai Ambos eds., 3rd ed. 2016) (“[T]he attack need not even involve military force, or armed hostilities, or any violent force at all. It can involve any mistreatment of the civilian population.”) (citations omitted).

152. *Kumarac*, Appeals Judgment, *supra* note 132, ¶¶ 5–22, 32 (holding defendants committed crimes against humanity by enslaving, repeatedly raping, aiding and abetting gang-rapes and torture, and violated laws or customs of war, specifically outrages upon personal dignity, by selling women for sexual use during armed conflict); *accord Nabimana*, Appeals Judgment, *supra* note 137, ¶ 918 (noting an attack may consist of violence or “of the kind of mistreatment” defined as crimes against humanity under the Court’s jurisdiction); *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence, ¶ 327 (May 15, 2003), <https://www.legal-tools.org/doc/7e668a/> [<https://perma.cc/GA5J-DH2M>] (“An ‘attack’ does not necessarily require the use of armed force, it could also involve other forms of inhumane mistreatment of the civilian population”); *Akayesu*, Judgment, *supra* note 123, ¶ 581.

153. *Bemba*, Judgment, *supra* note 125, ¶ 150 (holding at trial that [Art. 7(1)] indicates a quantitative threshold requiring “more than a few,” “several” or “many” acts,” an interpretation not challenged on appeal); *see also Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 43; *Côte d’Ivoire*, Authorization of Investigation, *supra* note 125, ¶ 33; *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 82.

154. *Ntaganda*, Judgment, *supra* note 125, ¶ 662 (quoting, approvingly, *Gbagbo*, Decision on Charges, *supra* note 125, ¶ 209).

155. “Systemic” and “systematic” are distinct concepts in our view. Systemic refers to qualities of social, legal, or political systems that interconnect structurally as parts of the whole; systematic refers to a discernible regularity in patterned facts. Systematic

Much of the same evidence that shows that prostitution is systematic will also document those civilians against whom it—the attack itself, and the attacks within it—is “directed.” Most prostituted people are women or girls, as well as trans people, many (not all) prostituting as women, or young boys.¹⁵⁶ Most pimps, traffickers, and buyers of people in prostitution are men.¹⁵⁷ Prostitution is systematically gendered,

facts may be a product of, or reveal, systemic structures. Many systematic atrocities are also systemic, but they need not be. The two can overlap in evidence; each may be demonstrated using some of the same facts, particularly when considering multiple atrocities committed pursuant to a policy, which would be a clear product of a system of some kind. See *Gbagbo*, Decision on Charges, *supra* note 125, ¶ 208 (noting that the “definition of ‘attack’” under the Statute, including “a course of conduct” involving multiple acts pursuant to a policy, “already involves—although to a lesser extent—quantitative and qualitative aspects that may also be relevant for the establishment of the ‘widespread’ or ‘systematic’ nature of the attack.”); see also METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 227–28; *id.* at 227 n.151 (citing *Katanga*, Judgment, *supra* note 120, ¶¶ 1138, 1158) (noting the Court used the scale of destruction to support the finding both of an attack and its systematic nature).

156. See, e.g., DEMAND ABOLITION, WHO BUYS SEX? UNDERSTANDING AND DISRUPTING ILLICIT MARKET DEMAND 7–8, 15 (Mar. 2019) (surveying 8,201 men across the United States of which 6.2% reported buying sex within the last year and 20.6% within their lifetime, their responses further indicating that although most bought female persons, approximately one fifth among the high-frequency buyers most recently bought a male person for sex); Charles Hounmenou, *Issues of Sexually Transmitted Infections and Violence among Children in Prostitution in West Africa*, 34 CHILD & ADOLESCENT SOC. WORK J. 479, 481–83 (2017) (reporting that less than 2% (13) of all respondents in a convenience sample of 709 prostituted children in four cities in Benin, Burkina Faso, and Niger, respectively, were male, all of whom were found in Niamey (6.3%), the capital of Niger); Farley et al., *Nine Countries*, *supra* note 32, at 39 (reporting that 14% (10) of South African sample of prostituted persons interviewed were men and one was transgender, 25% (28) of the Thai sample were transgender, and 13% (18) of the U.S. sample interviewed were men while 12% (15) were transgender). In Sweden in 2007, it was estimated that there were 300 prostituted women on the streets as well as 300 prostituted women and 50 male prostituted persons advertised online. Holmström, *supra* note 56, at 314. In 2019, 177 individuals were reported to have been impacted by human trafficking, 140 of whom were potential legal victims of human trafficking, of whom 126 were female, 13 male, and 1 “preferred not to say,” the majority being trafficked for sex. PLATFORM SWEDISH CIVIL SOCIETY AGAINST TRAFFICKING IN HUMAN BEINGS, ANNUAL STATISTICS 2019 at 1–2 (2020), available at <https://perma.cc/9WEZ-3RC4>.

157. See, e.g., MEREDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 14, 132 (2014) (interviewing seventy-three respondents convicted of pimping or trafficking-related charges among which 62 (84.9%) identified as male, 9 (12.3%) identified as female, and 2 (2.7%) identified as transgender); SWEDISH COUNCIL FOR CRIME PREVENTION [BRÅ], THE ORGANISATION OF HUMAN TRAFFICKING: A STUDY OF

that is, unequal on the basis of sex and of social sex, that is, gender.¹⁵⁸ Racial and ethnic groups that are systematically discriminated against in white supremacist and postcolonial societies, as well as by their former colonizers abroad, are disproportionately likely to be found in prostitution, intersectionally with gender.¹⁵⁹ On this basis, it is directed. African American women and girls, formerly enslaved, are overrepresented in U.S. prostitution;¹⁶⁰ First Nations women and girls are exceptionally overrepresented in Canada;¹⁶¹ in Europe, the Roma population is “grossly

CRIMINAL INVOLVEMENT IN SEXUAL EXPLOITATION IN SWEDEN, FINLAND, AND ESTONIA 155 (2008) (finding that although the majority of traffickers in their study of Sweden were male, there were “quite a number of female organizers in the cases” studied); FOLKHÄLSOMYNDIGHETEN, *supra* note 50, at 26, 192 (surveying 50,000 individuals aged 16–84, yielding a 31% response rate that with weighted estimates indicates 9.4% of all men but only 0.4% of women in Sweden have bought sex at least once).

158. Cf. European Parliament Resolution on Implementation of the Directive 2011/36/Eu of April 5, 2011, on Preventing and Combating Trafficking in Human Beings and Protecting its Victims From a Gender Perspective, ¶ J, 2018 O.J. (C 76) 61, 64 (May 12, 2016) (noting that “recent statistics show that most of the victims of THB [Trafficking in Human Beings] are women”); Spec. Rapporteur on VAW & Girls, *supra* note 22, ¶ 52 (concluding, *inter alia*, prostitution “is a system of exploitation and an aggregated form of male violence against women and girls that intersects with other forms of structural discrimination,” ignorance of its “devastating causes and consequences” is precipitated by the normalization of “women’s stereotyped role” and “commodification” of female sexual “capacities,” and societies that accept that the most marginalized women and girls are overrepresented in prostitution are legitimizing “violence against them and their exploitation by normalizing the prostitution system as a means of livelihood and survival”).

159. See *infra* notes 160–77 and accompanying text.

160. See, e.g., DEMAND ABOLITION, *supra* note at 156, at 7–8, 15 (surveying 8,201 men across the U.S. of which 6.2% reported buying sex within the last year and 20.6% within their lifetime, their responses further suggesting that the people they buy for sex in the United States are “overwhelming[ly] young females, and disproportionately Black”); JENNIFER JAMES, ENTRANCE INTO JUVENILE PROSTITUTION: FINAL REPORT 17, 19 (1980), available at <https://perma.cc/A9M7-PXBZ> (finding that African American girls constituted 25% of sample ($n=136$) of prostituted girls interviewed in the Seattle area, where only 4.2% of the population was Black). Interviews conducted with over 3,000 “streetwalking prostitutes” for an outreach project in New York City found approximately half were African American, one-quarter Hispanic, and the remaining quarter white. Barbara Goldsmith, *Women on the Edge*, NEW YORKER, Apr. 26, 1993, at 65 [<https://perma.cc/A5CG-3DRU>]; cf. Vednita Nelson, *Prostitution: Where Racism and Sexism Intersect*, 1 MICH. J. GENDER & L. 81, 83 (1993) (concluding that “[r]acism makes Black women and girls especially vulnerable to sexual exploitation and keeps them trapped in the sex industry.”).

161. See, e.g., Andrea Krüsi et al., *Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study*, 102 AM.

over-represented” among sex trafficking victims.¹⁶² The sex trade is racist as well as sexist. It overwhelmingly preys on the destitute, who are often kept poor based on their sex, ethnicity, and nationality combined.

The vicious exploitation in prostitution and sex trafficking of indigenous women of various Native nations in what is now called the United States, even where laws purport to make such violation illegal, illustrates. In the context of settler colonialism and genocidal acts and policies resulting in extreme poverty, disproportionate incarceration, and deprivation of law enforcement, education, and housing, Native women “exist in a revolving door of homelessness, domestic violence, rape, abduction, stalking, sexual exploitation, and torture in prostitution and sex trafficking.”¹⁶³ Investigating Minnesota in particular, researchers found prostitution and sex trafficking of Native women and youth to be “institutionalized” in Duluth, where “multiple sources state that Native women, teenage girls and boys, and babies have been bought and sold on the ships.”¹⁶⁴ As a Duluth police officer stated:

J. PUB. HEALTH 1154, 1155 (2012); CHERRY KINGSLEY & MELANIE MARK, SACRED LIVES: NATIONAL ABORIGINAL CONSULTATION PROJECT 4, 8 (2010) (noting that Aboriginal children and youth comprise over 90% of “visible sex trade” in some areas of Canada where the Aboriginal population constitutes less than 10% of the whole); Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 TRANSCULTURAL PSYCHIATRY 242, 242, 249 (2005) [hereinafter *Prostitution in Vancouver*] (finding that 52% of 100 prostituted women were of First Nations Aboriginal descent, a group making up only 1.7–7% of Vancouver’s total population); JULIE COOL, PROSTITUTION IN CANADA: AN OVERVIEW 3 & n.5 (Parl. Info. & Res. Service, 2004) (citing CONSEIL DU STATUT DE LA FEMME, LA PROSTITUTION: PROFESSION OU EXPLOITATION? UNE RÉFLEXION À POURSUIVRE 69 (Gouvernement du Québec, 2002) (observing an overrepresentation of First Nations Aboriginal and other ethnic minority women in Montréal prostitution); Cecilia Benoit et al., *In Search of a Healing Place: Aboriginal Women in Vancouver’s Downtown Eastside*, 56 SOC. SCI. & MED. 821, 824 (2003): 824; Leonard Cler-Cunningham & Christine Christenson, *Studying Violence to Stop It: Canadian Research on Violence Against Women in Vancouver’s Street Level Sex Trade*, 4 RES. FOR SEX WORK 25, 26 (June, 2001). On the prostitution and sex trafficking of Native women as part of colonialization historically to the present, focusing on Duluth, Minnesota and Thunder Bay, Ontario, see Stark, *supra* note 34.

162. O.S.C.E., Parliamentary Assembly, Resolution on Protecting Vulnerable Populations from Human Trafficking ¶ 4 (July 5–9, 2012), available at <https://perma.cc/4NEX-XP42>.

163. STARK & HUDON, *supra* note 21.

164. Stark, *supra* note 34, at 1228. See generally MELISSA FARLEY ET AL., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA (2011) [hereinafter GARDEN OF TRUTH] [<https://perma.cc/8LDG-4VJ7>]; MARTIN ROGERS & PENDLETON, *supra* note 34; CAROLINE LAPORTE, NATIONAL WORKGROUP

What we have found with the Native girls from the reservations is there is quite a bit of recruitment, enticement, and I look at it as basically kidnapping from pimps. A girl, who was sixteen at the time, was literally sold to the crew of a boat [in Duluth port] and she was held captive on board this vessel as it made its way up and down the Great Lakes. They're [pimps] identifying the disenfranchised segment of a population and in this area, they choose to focus on the reservations.¹⁶⁵

The Duluth port system involves the “complicity, perpetration, and collaboration of traffickers and third party facilitators . . . including ship captains, sailors, taxi cab drivers, hotels, bars, foster care providers, brothels, street pimps, dockworkers, dock security workers, organized crime, gangs, professionals in the criminal justice system, and others.”¹⁶⁶ The basic structure of this sexual abuse has been in place, with law enforcement documented to be aware and involved, for at least 200 years.¹⁶⁷ This is the civilian population against which prostitution is systematically directed. Legalization or decriminalization would explicitly grant this arrangement the official seal of approval.

The overrepresentation of First Nations women in prostitution in the territory now called Canada is similarly contextualized by the forcible devastation of its indigenous peoples.¹⁶⁸ A 2005 study of 100 prostituted women in Vancouver found 52% were of First Nations descent, despite this group being only 1.7–7% of Vancouver's population.¹⁶⁹ Canada's Royal Commission on Aboriginal Peoples (1996) concluded that, due to exposure to disease in colonization, settler appropriation of lands, and cultural

ON SAFE HOUSING FOR AMERICAN INDIAN AND ALASKAN NATIVE SURVIVORS OF GENDER BASED VIOLENCE: LESSONS LEARNED (Gwendolyn Packard, contributing ed., 2020).

165. Officer Scott Drewlo, quoted in Stark, *supra* note 34, at 1228 (quoting him from g3nerations, *Native American Trafficking*, YOUTUBE (produced Feb. 9, 2012, Cut 1), <https://youtu.be/VjeDTTw8tco> [<https://perma.cc/KP6W-4QUF>]).

166. Stark, *supra* note 34, at 1228; *see also* FARLEY ET AL., GARDEN OF TRUTH, *supra* note 164.

167. Stark, *supra* note 34, at 1225.

168. CANADA, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, VOL. 3 GATHERING STRENGTH, at 113 (1996), *available at* <https://publications.gc.ca/site/eng/9.819025/publication.html> [<https://perma.cc/FQ6S-82HA>]; *see supra* note 161 (providing figures of First Nations overrepresentation in Canadian prostitution relative to their size of the population).

169. Farley et al., *Prostitution in Vancouver*, *supra* note 161, at 242, 247 (sampling through snowball technique).

devastation, the treatment of original peoples there “is often described as genocide or a holocaust”¹⁷⁰ with “long-standing norms, values, social systems and spiritual practices . . . undermined or outlawed.”¹⁷¹ Prostitution is commonly, as in this group, imposed on peoples forced to forgo bodily integrity and trust at an early age.¹⁷² These women reported forms of torture that could become lethal any day.¹⁷³ Their physical health problems were staggering—95% said they wanted to leave prostitution, while only 32% wanted it legalized; 67% called instead for job training, 66% called for “a home or safe place,” and 49% for self-defense training, among other real options.¹⁷⁴

Similarly in Sweden, the Council for Crime Prevention found that poverty and discrimination against minorities of non-Scandinavian ethnicities are key structural factors facilitating recruitment into sex trafficking to Sweden, Finland, and Estonia.¹⁷⁵ There, many women and girls from the Baltic Russian-speaking minority and Roma people in Eastern Europe predominate, most coming from the lowest socioeconomic strata.¹⁷⁶ Those victimized by prostitution belong disproportionately to vulnerable multiply discriminated-against populations, making them systematically more exploitable in prostitution.

The European Commission in 2016 acknowledged that traffickers in human beings for sexual and other purposes “exploit people’s

170. CANADA, *supra* note 168 at 112.

171. *Id.* at 113.

172. See Farley et al., *supra* note 161, at 249 (reporting 82% of the 100 respondents in Vancouver reported being sexually abused as children by, on average, at least four perpetrators (several couldn’t keep count); 72% reported being hit or beaten by caregivers resulting in bruises or injuries); see also *infra* notes 190–192 and accompanying text.

173. *Id.* at 250–51 (reporting pimps and johns “regularly” perpetrated extreme violence upon this population if they refused specific sex acts; 90% of the 100 respondents reported physical assault in prostitution; 78% reported being raped, of which 67% were raped more than five times; 75% of 100 reported physical injuries due to violence in prostitution, of which many were stabbed and beaten, with concussions, broken bones, and cuts; 50% of 100 had been violently assaulted with, for instance, baseball bats and crowbars, or by someone slamming their heads against walls or car dashboards.)

174. *Id.* at 249–53. Health problems included, inter alia, aching muscles (78%), joint pain (60%), memory problems (66%), shortness of breath (60%), headaches (56%), pain/numbness in hands/feet (49%), vision problems (45%), dizziness (44%), chest pain (43%), balance problems (41%), hearing problems (40%), jaw pain (38%), swelling of limbs (33%), irregular heartbeat (33%), and asthma (32%). *Id.* at 250.

175. BRÅ, *supra* note 157, at 8, 36–43.

176. *Id.*

vulnerabilities, which may be exacerbated by factors such as poverty, discrimination, gender inequality, violence against women, lack of access to education, ethnic conflict, and natural disasters.”¹⁷⁷ Those who exploit people in prostitution—the destination of sex trafficking—especially the buyers, tend to lack comparative victimization by such systemic forces. This reality makes prostitution both systematic and directed.

Prostitution, in other words, is anything but random. Its forces all operate by and against specific peoples, in one direction. In any given setting, it is a series of events that are provably not isolated from each other or from the social, economic, and cultural regularities, which operate as forces, that systemically and systematically select some people to be used in prostitution, others to exploit and use them. This differential system forms a precise pattern in prostitution that parallels, reflects, and exacerbates patterns of inequality in each society that directs the attack that is prostitution against these particular people.

Those who are preyed upon typically have little choice; those who prey upon them do. Decriminalization that includes pimps and johns, as with legalization, pyramids on this pattern rather than counters it; requisite evidence can prove this fact in specific settings.¹⁷⁸ The onslaught against younger, poorer, considered nonwhite females or anyone feminized for the pleasure and profit of older, richer, whiter masculine/males could not be less random. The attacks that survivors refer to as serial rape are the stock in trade of the sex industry; they are what is sold and bought. The tortures committed within it become official when not criminal. When prostitution is legal, these patterns, far from diminishing, are incentivized by becoming permitted, encouraged, socially accepted, and exonerated by state policy. They increase exponentially when decriminalized or legalized.¹⁷⁹

Depending upon how many prostituted people a given pimp or trafficker has (for instance) sold, even the fact that people in prostitution are usually sold to multiple sex purchasers raises the prospect of describing legal prostitution as “a course of conduct involving the multiple

177. European Commission, *Report on the Progress Made in the Fight Against Trafficking in Human Beings*, at 2, COM (2016) 267 final (May 19, 2016).

178. See *supra* notes 5–7, 30–31, 41–47, 56–105, and *infra* notes 181, 198–99, 285–86 and accompanying text.

179. See *supra* notes 5–7, 30–31, 41, 56–105, 181 and *infra* notes 198–99, 285–86 and accompanying text.

commission of acts.”¹⁸⁰ For instance, a study from 1996 reported that in London legal apartment prostitution, prostituted women had to sexually service about ten johns per day to even break even, the average number of johns per week being seventy-six, many seeing between twenty and thirty men a day, some up to fifty.¹⁸¹ Such conditions constitute a course of conduct that, in a flow, expose prostituted persons to a distinctive pattern of severe physical abuse, psychological mistreatment, and economic exploitation with distinctive patterns of consequences. Prostitution is clearly a social practice consisting of “a series or overall flow of events as opposed to a mere aggregate of random acts.”¹⁸² In any sense, prostitution as an organized institution directs attacks against those prostituted in it.

C. Prohibited Acts

Many acts prohibited by Article 7(1) are integral to prostitution, including enforced prostitution, rape, torture, sexual slavery, trafficking, enslavement, persecution, and other sexual violence. They are not exceptional, but rather endemic, to it. At least one crime in Article 7(1), and only those listed, can comprise a prosecutable attack for crimes against

180. In ICC jurisprudence, it is occasionally said that when the term “attack” does not refer to a military attack, it refers instead to “a campaign or operation carried out against the civilian population.” See, e.g., *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 44; *Bemba*, Judgment, *supra* note 125, ¶ 149; *Ruto*, Decision on Charges, *supra* note 127, ¶ 164 (“campaign or operation”); *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 80; *Bemba*, Decision on Charges, *supra* note 121, ¶ 75. The relationship between the terms “campaign or operation” and “attack” have been discussed, as in the Pre-Trial Chamber I in *Gbagbo* (2014): “[t]he expression ‘course of conduct’ . . . implies the existence of a certain pattern as the ‘attack’ refers to a ‘campaign or operation carried out against the civilian population,’ which involves the multiple commission of acts referred to in article 7(1) of the Statute.” *Gbagbo*, Decision on Charges, *supra* note 125, ¶ 209; see also ROBERT DUBLER SC & MATTHEW KALYK, CRIMES AGAINST HUMANITY IN THE 21ST CENTURY 648 (2018) [hereinafter DUBLER & KALYK]; Hall & Ambos, *supra* note 151, at 166, mn. 15 n.88. For specific applications of the terms with different results in particularized settings, see, e.g., OFFICE OF THE PROSECUTOR OF THE ICC, SITUATION IN HONDURAS: ARTICLE 5 REPORT ¶ 125 (October 2015), <https://www.legal-tools.org/doc/54755a/> [<https://perma.cc/V7QX-F77N>]; *Georgia*, Request for Investigation, *supra* note 151, ¶ 225.

181. Whittaker & Hart, *supra* note 22, 404–05. In other instances of prostitution and sex trafficking, the numbers of men per day have been reported as high as between 80 and 120. See Vorenberg & Vorenberg, *supra* note 22; BARRY, *supra* note 22, at 70–71, 78, 80, 129.

182. *Gbagbo*, Decision on Charges, *supra* note 125, ¶ 209; accord *Bemba*, Judgment, *supra* note 125, ¶ 149.

humanity under Article 7(2)(a) of the Rome Statute.¹⁸³ Here, the focus is on “enforced prostitution” (7)(1)(g), “enslavement” (c), “sexual slavery” (g), and trafficking to illustrate the link between the enumerated acts and the wider attack that legal prostitution constitutes, where these acts proliferate under regimes that eliminate criminal sanctions for buyers and sellers of other people in prostitution.¹⁸⁴

1. Enforced Prostitution

Elements of Crimes defines “enforced prostitution” as, inter alia, making people have sex “by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.”¹⁸⁵ It further posits that “[t]he perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.”¹⁸⁶ Regardless of its legal status, a “coercive environment” that negates genuine consent is present in most prostituted peoples’ lives through severe poverty, which is the principal reason people enter prostitution in both industrialized and developing nations.¹⁸⁷

183. *Accord ICC Elements of Crimes*, *supra* note 151, art. 7 (Introduction) (3); *Ntaganda*, Judgment, *supra* note 125, ¶ 663; *Bemba*, Judgment, *supra* note 125, ¶ 151 (noting “the multiple commission of acts can only include acts referred to in Article 7(1)”). Customary law only requires that the perpetrators’ acts be crimes against humanity—not that the acts that constitute the wider attack are. *See, e.g.*, Prosecutor v. Kaing (*alias* Duch), 001/18-07-2007/ECCC/TC, Judgment, ¶ 298 (Extraordinary Chambers in the Courts of Cambodia [hereinafter ECCC], July 26, 2010), <https://www.legal-tools.org/doc/dbdb62/> [https://perma.cc/V3PP-LBJD]; *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 86 (“Under customary international law, . . . the attack in the context of a crime against humanity . . . encompasses any mistreatment of the civilian population.”); METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 209–10.

184. Persecution will be discussed in the legalization/decriminalization context in a subsequent article by the authors, *Legalized Prostitution as Persecution*. Rape and torture, also crimes against humanity well-documented within prostitution, depending upon proof, could be part of a prosecution for its legalization or full decriminalization.

185. ICC Elements of Crimes, *supra* note 151, art. 7(1)(g)-3(1).

186. *Id.* art. 7(1)(g)-3(2).

187. *See, e.g.*, Alice Cepeda, *Prevalence and Levels of Severity of Childhood Trauma Among Mexican Female Sex Workers*, 20 J. AGGRESSION, MALTREATMENT & TRAUMA 669, 671–72 (2011) (citing research from industrialized and developing regions highlighting poverty-related socioeconomic predictors of entry into prostitution); CECILIA KJELLGREN ET AL., UTVÄRDERING AV SAMTALSBEHANDLING MED FÖRSÄLJARE AV SEXUELLA TJÄNSTER (FAST) 21 (2012), (finding that, among thirty-four prostituted persons surveyed in Swedish exit programs, the most commonly stated reason for entry was need for money to survive ($n=14$), with money for drugs second ($n=10$)); CHANDRÉ GOULD, SELLING SEX IN CAPE TOWN 115 (2008) (finding the majority of respondents entered

Almost no one escapes poverty through prostitution; they often leave it older, destitute, and in debt.¹⁸⁸ Further negating genuine consent and substantiating a coercive environment is the robust and uncontested association between childhood sexual and physical abuse and entering prostitution.¹⁸⁹ Studies in industrialized and developing countries alike repeatedly find that most prostituted people were subjected to physical and sexual abuse in childhood, with figures ranging from 60% to 90%.¹⁹⁰ For comparison, the prevalence of childhood sexual abuse among

prostitution due to “financial need”); MIKE DOTTRIDGE, KIDS AS COMMODITIES? CHILD TRAFFICKING AND WHAT TO DO ABOUT IT 28 (2004) (“The principal reason why children, as well as adults, from particular communities end up being trafficked is the lack of alternative ways of earning a living”); SPECIAL COMM. CANADA, *supra* note 35, at 376 (“Overwhelmingly, prostitutes cite economic causes as the reason they are on the streets.”); Mimi H. Silbert & Ayala M. Pines, *Entrance Into Prostitution*, 13 YOUTH & SOC’Y 471, 486 (1982) (finding among 200 females prostituted in San Francisco that “[b]asic financial survival was mentioned by three-quarters of all subjects, by over 80% of the current prostitutes, and by close to 90% of the juveniles” as the reason for initial involvement); see also *What Prostitution Hides*, COALITION AGAINST PROSTITUTION (CAP) (last visited May 8, 2023), <http://www.cap-international.org/activity/what-prostitution-hides-2/> [<https://perma.cc/EQ89-6RWN>] (discussing the social, economic, and physical evidence of coercion underlying prostitution).

188. See, e.g., Statens Offentliga Utredningar [SOU] 1995:15 Könshandeln [government report series] 106–07 (Swed.) (noting that prostituted women usually experienced money disappearing as quickly as gained and rarely had anything left when exiting but large debts); Dorchon Leidholdt, *Prostitution: A Violation of Women’s Human Rights*, 1 CARDOZO WOMEN’S L. J. 133, 142 (1993); Cynthia Mayer, *The Last Trick: Prostitutes Who Want to Get Out Find That Someone Does Care*, CHI. TRIB., May 30, 1993, at 12 (“It’s a myth that women get rich doing this . . . I know of no one who is retired with a pension, sitting by a pool.”).

189. For recent studies, see, e.g., Edelyn Verona et al., *Gendered Pathways: Violent Childhood Maltreatment, Sex Exchange and Drug Use*, 6 PSYCH. OF VIOLENCE 124, 131 (2016); Sarah E. Ullman & Amanda L. Vasquez, *Mediators of Sexual Revictimization Risk in Adult Sexual Assault Victims*, 24 J. CHILD SEXUAL ABUSE 300, 302, 305, 307 (2015) (finding “exchanging sex for money” was the only sexual risk behavior that was significantly associated with both childhood sexual assault and revictimization among 1,094 sexual assault survivors in Chicago who had sex in the past year); Cepeda, *supra* note 187, at 683; see also *What Prostitution Hides*, CAP, *supra* note 187.

190. See, e.g., Elena Argento, Kate Shannon et al., *Prevalence and Correlates of Non-medical Prescription Opioid Use Among a Cohort of Sex Workers in Vancouver, Canada*, 26 INT’L J. DRUG POLY 59, 61 (2015) (finding 71.2% of 692 prostituted persons reported physical or sexual childhood abuse before age 18 years). Farley et al., *Nine Countries*, *supra* note 32, at 37–39, 42, 57; Steven P. Kurtz et al., *Sex Work and “Date” Violence*, 10 VIOLENCE AGAINST WOMEN 357, 365 (2004); Chris Bagley & Loretta Young, *Juvenile Prostitution and Child Sexual Abuse: A Controlled Study*, 6 CANADIAN J. COMMUNITY MENTAL HEALTH 5, 12–14 tbl.2 (1987); Silbert & Pines, *Entrance Into Prostitution*, *supra*

all women in the United States has been found to be a third to a half of the total.¹⁹¹ Studies also indicate that the childhood sexual abuse suffered by prostituted women is, on average, more severe than that experienced

note 187, at 479. In-depth studies of survivors show higher frequencies of abuse. *See, e.g.,* Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in *LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS* 120, 123 (Alison M. Jaggar ed., 1994) (referring to the organization WHISPER's survivor interviews in Minneapolis, where 90% reported battery and 74% reported sexual abuse at some time between ages three and fourteen); Hunter, *supra* note 26, at 92 n.2, 99 (1993) (finding that, among 123 prostitution survivors, 85% reported childhood incest, 90% physical abuse, and 98% emotional abuse). In 1985, the Mary Magdalene Project in Reseda, California, reported 80% of the prostituted women with whom it worked had been "sexually abused" during childhood, while Genesis House in Chicago reported "abuse" for 94%. Giobbe, *supra*, 126 n.10; *cf.* INES VANWESENBEECK, *PROSTITUTES' WELL-BEING AND RISK* 21–24 (1994) (summarizing early studies on childhood victimization as a predictor for entry into prostitution). However, not defining or offering illustrative examples of child sexual abuse forces respondents to define their own experiences as abusive or not, which risks underreporting. *Cf.* Dean G. Kilpatrick et al., *Drug-facilitated, Incapacitated, and Forcible Rape: A National Study* 24–25 (2007). Thus, it has been noted that their "123 female indoor sex workers" were given examples such as "[s]omeone molested me" and "I believe that I was physically abused" as definitions of child sexual and physical abuse, respectively, with no definition or examples of such acts. Even so, the rates were substantial: 24% and 20%, respectively, experienced "severe to extreme;" 9% and 10%, respectively, "moderate to severe;" 9% and 10%, respectively, "low to moderate;" and 59% and 67%, respectively, "none or minimal" sexual and/or physical abuse during their childhood. Annelies L. Daalder & Stefan Bogaerts, *Measuring Childhood Abuse and Neglect in a Group of Female Indoor Sex Workers in The Netherlands: A Confirmatory Factor Analysis of the Dutch Version of the Childhood Trauma Questionnaire—Short Form*, 108 *PSYCH. REP.* 856, 858, 859 tbl.1. How much abuse was "minimal" relative to "none" is unclear. The well-documented effects of dissociation, denial, or repression, as well as desensitization, were also not controlled for, or at least not described to the reader. *See id.* at 858 (noting that "[t]hree additional items assess tendencies of respondents to minimize or deny abusive experiences," yet nowhere are the results of those three items reported).

191. *See, e.g.,* John Briere & Diana M. Elliott, *Prevalence and Psychological Sequelae of Self-Reported Childhood Physical and Sexual Abuse in a General Population Sample of Men and Women*, 27 *CHILD ABUSE & NEGLECT* 1205, 1209–10 (2003); Nancy D. Vogeltanz et al., *Prevalence and Risk Factors for Childhood Sexual Abuse in Women: National Survey Findings*, 23 *CHILD ABUSE & NEGLECT* 579, 583 (1999); DIANA E.H. RUSSELL, *SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* 34, 183 (1984) (interviewing 930 randomly selected adult females in San Francisco, finding that 38% (357) reported one or more experiences of sexual abuse before age 18 and 28% (258) reported one or more such experiences before age 14). All these percentages, with those of prostituted women, are likely significant undercounts. *See* Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 *J. CONSULTING & CLIN. PSYCH.* 1167 (1994) (interviewing 129 adult women subjected to *documented* childhood sexual abuse, finding 38% did not

by women generally.¹⁹² Besides poverty, it is one of the strongest factors facilitating entry into prostitution; a majority of prostituted persons report that being sexually abused as children contributed to their entry into prostitution.¹⁹³ Sexual abuse in childhood is unquestionably a coercive circumstance that decriminalization and legalization of prostitution whitewash and effectively exonerate, permitting the sex industry to take enhanced and uncontrolled advantage of it. It enforces their entry and captivity in prostitution.

The privations of destitution and the dependencies of childhood contraindicate the real options that could make consent genuine or an environment noncoercive. Many prostituted persons were young runaways, often from sexual abuse at home.¹⁹⁴ The industry's recruitment structure, with many entering prostitution long before they grow up, vitiates genuine consent. A study conducted with 854 prostituted persons in nine countries with varying laws, engaging in various forms of prostitution

recall the abuse of seventeen years earlier, especially women who were younger during the abuse or were abused by someone they knew).

192. See, e.g., KJELLGREN ET AL., *supra* note 187, at 27 & tbl.10.5; Bagley & Young, *supra* note 190, at 14–16 & tbl.3 (finding that the sexual abuse sustained by prostitution survivors started earlier, occurred with much greater frequency and over a longer time period, involved many more perpetrators, and demonstrated a “dramatic” variety and severity of assaults compared to the abuse experienced by women in a demographically matched control group that had not been prostituted).

193. See, e.g., Mimi H. Silbert & Ayala M. Pines, *Sexual Child Abuse as an Antecedent to Prostitution*, 5 CHILD ABUSE & NEGLECT 407, 410 (1981) (finding that 70% of the sample's child sexual abuse victims reported that it definitely affected their entry into prostitution, and a greater number strongly suggested as much in open-ended responses); Bagley & Young, *supra* note 190, at 17 tbl.4.; cf. Ronald L. Simons & Les B. Whitbeck, *Sexual Abuse as a Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women*, 12 J. FAM. ISSUES 361, 365, 375, 377 (1991). A Korean study found that women subjected to child sexual abuse by “a significant other” reported entering prostitution significantly earlier than other prostituted women. Hyunjung Choi et al., *Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse*, 15 VIOLENCE AGAINST WOMEN 933, 942 (2009).

194. See, e.g., Silbert & Pines, *Entrance Into Prostitution*, *supra* note 187, at 485 (reporting over half of 200 juvenile and adult, current and former, prostituted females in San Francisco were runaways when entering prostitution; over two-thirds of those prostituted at the time were runaways, and 96% of the prostituted juveniles were runaways); Bagley & Young, *supra* note 190, at 14 (reporting three-quarters of forty-five prostitution survivors left homes “riven by strife, drunkenness, and abuse” by age sixteen, compared to none of forty-five women in a community control group by that age, and that sexual abuse was the reason most frequently given for leaving home).

(house and street), found 47% reported entering prostitution before the age of eighteen.¹⁹⁵ As adults, many prostituted persons report they find themselves trapped in the sex trade, without an education or job training, lacking alternatives for survival. Eighty-nine percent of the prostituted persons in the nine-country study volunteered that their greatest need was to leave prostitution, but they did not know how; 76% reported a need for job training.¹⁹⁶ Considering the lack of alternatives and the presence of coercive social forces, individuals who buy and sell people in prostitution for sex take “advantage” of the “coercive environment” and their victims’ “incapacity to give genuine consent.”¹⁹⁷ For example, women in Nevada legal brothels can rarely refuse a john, no matter how repulsive, sick, insulting, or threatening he is.¹⁹⁸ A woman in a legal brothel reported that even if the women “insist” on condoms, such johns would complain via bedroom phones to the management, who would then instruct the women to “comply.”¹⁹⁹ Where such facts pertain, legalizing prostitution legalizes enforced prostitution by official policy.

2. *Enslavement, Sexual Slavery, Trafficking*

“‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”²⁰⁰ This provision of the Rome Statute incorporates the 1926 Slavery Convention definition of enslavement as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”²⁰¹ An average of 84% of prostituted women around the world are estimated to be controlled by a third-party profiteer, who sells or rents them to others and collects a cut of the proceeds

195. Farley et al., *Nine Countries*, *supra* note 32, at 40; accord JODY RAPHAEL & DEBORAH L. SHAPIRO, *SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO* 13 (2002), <https://perma.cc/LH6K-N566> (finding 61% entering prostitution before age eighteen); Silbert & Pines, *Sexual Child Abuse as Antecedent*, *supra* note 193, at 410 (finding 78%); Bagley & Young, *supra* note 190, at 11 tbl.1 (51.1% began at age fifteen or younger).

196. Farley et al., *Nine Countries*, *supra* note 32, at 51 tbl.8.

197. ICC Elements of Crimes, *supra* note 151, art. 7(1)(g)-3(1).

198. FARLEY, *supra* note 31, at 18; KUO, *supra* note 31, at 84 (2002).

199. FARLEY, *supra* note 31, at 44 (2007).

200. Rome Statute, *supra* note 9, art. 7(2)(c) states this, for purposes of art. 7(1)(c).

201. Convention to Suppress the Slave Trade and Slavery art. 1(1), Sept. 25, 1926, 212 U.N.T.S. 17 (entered into force Mar. 9, 1927).

of their sexual use.²⁰² Renting a person to others who buy their use is a form of owning them. The ownership powers over these persons are exercised by the pimps, madams, and other third parties who sell or otherwise profit from their sale or rent, and by the johns who buy them for sexual use. Legalizing prostitution where these facts are operative makes the exercise of these powers of ownership over others for sex into de jure rights, legalizing enslavement by definition.²⁰³

The second part of the definition of enslavement refers to “trafficking in persons, in particular women and children.” Enslavement and sexual slavery, in *Elements of Crimes*, includes trafficking.²⁰⁴ The widely-ratified Palermo Protocol,²⁰⁵ with 182 current parties,²⁰⁶ provides an agreed-upon legally binding international definition of trafficking.²⁰⁷ The Palermo Protocol’s trafficking definition includes, among other things, “the abuse

202. Farley et al., *Online Prostitution*, *supra* note 31, at 1041–42 & n.14.

203. Slavery based on race was once legal in the United States. Enslaved people prior to the Civil War were by state law either personal property, “merchandize,” or, more rarely, real estate, although courts were not necessarily consistent in their treatment under each rubric. The Civil Code of the State of Louisiana §35 of 1825 defined “slave” as “one who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry and his labor; he can do nothing, possess nothing, nor acquire anything but what must belong to his master.” *See generally* KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY AND THE ANTE-BELLUM SOUTH* 192–236 (1972); William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q. 258, esp. 264 & n. 13 (1977).

204. The ICC Elements of Crimes states that it is “understood that the conduct described” as enslavement in Article 7(1)(c) “includes trafficking in persons, in particular women and children.” ICC Elements of Crimes, *supra* note 151, art. 7(1)(c)(1)(n.11). Similarly, “sexual slavery” under the Statute is “also understood” to include “trafficking in persons, in particular women and children.” *Id.* art. 7(1)(g)-2(1)(n.18).

205. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol]. The Commentaries to the ILC Draft Convention (2019), defining “enslavement,” also explicitly refers in part to the Palermo Protocol. Draft Convention, *supra* note 120, art. 2(2)(c), commentary 40, n.156.

206. *See* United Nation’s Treaty Collection, Chapter XVIII Penal Matters, 12a, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en [https://perma.cc/PH24-RA3B] (visited Apr. 28, 2023).

207. The Palermo Protocol forms a benchmark for regional anti-trafficking instruments as well. *See, e.g.*, Directive 2011/36 of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, art. 2(1), 2011 O.J. (L 101), 1 (EC) [hereinafter EU Trafficking Directive 2011/36]; Council of Europe, Council of Europe Convention on Action Against Trafficking in

of power or of a position of vulnerability . . . for the purpose of exploitation” of the prostitution of another by any third party.²⁰⁸ In the Protocol’s *travaux préparatoires*, a position of vulnerability is defined as “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”²⁰⁹ Consent is declared irrelevant in all such situations, and when children are used, even if no force, coercion, fraud, or other abuse occurs.²¹⁰ In other words, third party involvement renders prostitution trafficking when power or vulnerability is abused for sexual exploitation.

The situation of the so-called “comfort women” of World War II provides a forerunner that legally remains unresolved. Their situation of prostitution was effectively legalized when the Japanese military made their sexual slavery official. Crimes against them were explicitly excluded from the charges in the Tokyo Trial.²¹¹ Women from South Korea, China, Taiwan, Hainan Island, and the Netherlands have brought civil suits in Japanese courts seeking formal apologies and compensation for their treatment, some claiming their sexual enslavement constituted a crime against humanity.²¹² No conclusive outcome acceptable to the women has been achieved.

Human Beings, art. 4(a), May 16, 2005, C.E.T.S. No. 197 [hereinafter *European Convention Against Trafficking*].

208. Palermo Protocol, *supra* note 205, art. 3(a) (emphasis added); *accord* European Convention Against Trafficking, *supra* note 207, art. 4(a); EU Trafficking Directive 2011/36, *supra* note 207, art. 2(1).

209. Report of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions, Addendum, Interpretative Notes for the Official Records (*Travaux préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, ¶ 63, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000) (emphasis added) [hereinafter *Travaux*, Palermo]; *accord* EU Trafficking Directive 2011/36, *supra* note 207, art. 2(2) (“A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.”).

210. Palermo Protocol, *supra* note 205, arts. 3(b)–(c); *accord* EU Trafficking Directive 2011/36, *supra* note 207, arts. 4–5.

211. NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL—A REAPPRAISAL* 64 (2008).

212. A group of “comfort women”—“a euphemism for sex slaves,” Hwang Geum Joo v. Japan, 332 F.3d 679, 680–81 (D.C. Cir. 2003)—sued Japan for being “abducted, coerced, or deceived,” *id.* at 680, into sexual slavery, with thousands of other women and girls, stating they had been “routinely raped, tortured, beaten, mutilated, and in some cases murdered” *id.* at 681, by the occupying Japanese army, “which charged

Given the empirical evidence that an overwhelming majority of prostituted persons are pimped, enter prostitution in childhood, and want to escape but cannot,²¹³ prostitution entails trafficking where such facts are shown—which is most of the time. As the UN Special Trafficking Rapporteur reasoned in 2006:

For the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty. Put simply, the road to prostitution and life within 'the life' is rarely one marked by empowerment or adequate options.²¹⁴

Legalizing prostitution thus essentially legalizes sex trafficking, as does fully decriminalizing all actors in prostitution, even where sex trafficking is purported to remain a crime. As Judge Robert F. Goldstein of the Ontario Superior Court of Justice put the point: "I find that the attempt by the Applicants to separate sex work and human trafficking is artificial

soldiers a fee for access to the women." The facts, even given the wartime context, resemble situations under prostitution's legalization. The U.S. civil case was decided against them on sovereign immunity and political question grounds. *Hwang Geum Joo v. Japan*, 413 F.3d 45, 46–48, 52–53 (D.C. Cir. 2005); *see also* Center for Korean Legal Studies, *Lawsuits Brought Against Japan by Former Korean "Comfort Women,"* COLUM. L. SCH. (last visited July 29, 2021) [<https://perma.cc/CAU2-478V>]. For lawsuits brought against Japan by women of other Asian jurisdictions and The Netherlands, *see* Center for Korean Legal Studies, *Lawsuits Brought Against Japan by Women of Asian Nations Other than Korea, including The Netherlands*, COLUM. L. SCH. (last visited July 29, 2021) [<https://perma.cc/2YDT-3Q4X>]. Concerning crimes against humanity in this context, in the cases *Song Shin-do* (3 April 1993), the phrase (人道に対する罪 (*jindo ni tait-suru tsuni* meaning crimes against humanity)) appears in the opinion issued by the Tokyo District Court, *at* <https://perma.cc/2BG8-NKJH> (last visited Apr. 28, 2023) and in the opinion issued by the Tokyo High Court, *at* <https://perma.cc/7TCF-AEV4> (last visited Apr. 28, 2023).

213. *See supra* notes 187–202 and accompanying text.

214. Sigma Huda (Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children), *Integration of the Human Rights of Women and a Gender Perspective*, ¶ 42, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006).

and unrealistic considering the strong evidence to support Parliament's view that they often go together."²¹⁵

As most prostitution, therefore, meets the international definition of trafficking, it also falls within the ambit of the definition of "enslavement" and "sexual slavery" under Article 7(1) of the Rome Statute.²¹⁶ Notably, sexual slavery includes "purchase" among the actions for purposes of imposing sexual acts that the *Elements of Crimes* recognizes as constituting crime against humanity.²¹⁷ Legalizing prostitution legalizes these two crimes against humanity while legalization's usual regulations, far from softening their impact, evidence shows, exacerbates its harmful effects on the prostituted, that is enslaved, population.²¹⁸

D. State Policy

The Rome Statute requires that an "attack," to constitute a campaign of crimes against humanity, be "pursuant to or in furtherance of a State or organizational policy to commit such attack."²¹⁹ Decriminalization and legalization are usually without question accomplished by express state policy. They *are* state policies. Legal prostitution policies typically eliminate or dramatically undermine enforcement of laws that previously aimed to prevent third parties—prominently pimps, traffickers, brothel owners and operators, and johns—from exploiting the coercive environment that propels people into prostitution, permits their abuse within it,

215. Canadian Alliance for Sex Work Law Reform v. Attorney General, 2023 ONSC 5197 ¶ 153 (CanLII) (Ont. Super. Ct., Sept. 18, 2023) (Goldstein, J., delivering the opinion of the court).

216. See also Draft Convention, *supra* note 120, art. 2(2)(c), commentary 40, n.156 (defining "enslavement" with reference in part to the Palermo Protocol's definition of trafficking).

217. ICC Elements of Crimes, *supra* note 151, art. 7 (1)(g)2(1).

218. See *infra* Sections II.D & II.E and *supra* note 47.

219. Rome Statute, *supra* note 9, art. 7(2)(a). Customary law often does not contain such a requirement. Since the Rome Statute, U.N. regulations that established the Special Panels for Dili in East Timor omitted it, as did the Statute of the Special Court for Sierra Leone. See Hall & Ambos, *supra* note 151, at 164, mn. 11. National legislation has "often" omitted the policy requirement. *Id.*; METTRAUX, TRIBUNALS, *supra* note 116, at 172 (citing cases); METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 285–87 (quoting extensively from cases). Other legal scholars argue against eliminating the policy requirement. See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION at xxxiv (2011); William A. Schabas, *State Policy as an Element of International Crimes*, 8 J. CRIM. L. & CRIMINOLOGY 953, 981–82 (2008).

and prevents their exit. Legalization policies permit, encourage, promote, and often cash in on such abuse and exploitation. Moreover, as various ICC chambers have repeatedly held, “[t]here is no requirement that perpetrators be motivated by the policy, or that they themselves be members of the State or organization.”²²⁰ Thus the attack that is prostitution can be produced or aggravated by a policy legalizing it, while being carried out on the ground in the form of enforced prostitution, sexual enslavement, trafficking, and/or persecution by pimps, traffickers, and johns with impunity, whether or not those individuals are also politicians or legislators.

Legalization is a state policy that exonerates many acts that formerly were crimes, results in increases in many of the violations that routinely occur in prostitution through official impunity, and eviscerates law enforcement against constitutive acts that remain illegal, such as sex trafficking or rape of prostituted individuals, that might previously have been prosecuted effectively.²²¹ The attack prostitution constitutes on women and girls and all feminized people in particular metastasizes under express legalization policy. The ICC’s evidentiary approach to the attack that legalization by policy propitiates, and the constituent attacks that comprise it, readily applies to the prostitution context. Although legalization has typically been an explicit legal policy, often legislated, variations in its effectuation are possible going forward. It is therefore useful to be aware that policy has been more broadly defined in terms of pattern and results as well. This jurisprudence also helps evade disingenuous motivational dodges.

When assessing whether the attack directed at civilians in the form of escalated harmful acts of prostitution that otherwise qualify under the chapeau and specific listed acts is “pursuant to or in furtherance of” a policy, the ICC *Elements of Crimes* provides that the state or organization behind the policy must “actively promote or encourage such an attack.”²²² A footnote explains that such policies “would be implemented by State or organizational action,” and “may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed

220. *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 50; *accord Bemba*, Judgment, *supra* note 125, ¶ 161; *cf. Gbagbo*, Decision on Charges, *supra* note 125, ¶ 214; *Katanga*, Judgment, *supra* note 120, ¶ 1115.

221. See, e.g., *supra* notes 47–105, 181, 198–218 and accompanying text.

222. ICC *Elements of Crimes*, *supra* note 151, art. 7 (introduction) (3).

at encouraging such attack.”²²³ Yet the “existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”²²⁴ Under the ICC framework, then, respecting the *Elements* even as they are not as precisely binding as the statute is, the issue becomes whether states that legalize prostitution by policy are “promoting or encouraging” an attack, made up of specific crimes against humanity, that is directed at people in prostitution and as prostituted. Arguably, if a policy actively promotes or encourages the attack, admittedly or not, its sponsors (subject to criminal responsibility standards²²⁵) do so.

Guénaël Mettraux considers that the ICC adopts “a notion” of a policy that “revolves around four main features given different weight and importance by different Chambers.”²²⁶ In this analysis, a “policy” should be (1) “thoroughly organised and follow a regular pattern;” (2) “conducted in furtherance of a common policy involving public or private resources;” and (3) “implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population.”²²⁷ A policy (4) “need not be explicitly defined or formalized.”²²⁸ In ICC jurisprudence, “an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this [fourth] criterion.”²²⁹

As to whether a policy can be deduced rather than explicit, in *Al Hassan* (2018), for example, Pre-Trial Chamber I found the terms “follow a

223. *Id.* art. 7 (introduction) (3), n. 6.

224. *Id.*

225. See subsequent article *Criminal Responsibility*, *supra* note 10.

226. METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 298. Guénaël Mettraux, as of publication, is a trial panel judge of the Kosovo Specialist Chambers, having previously represented numerous high-ranking military and civilian defendants accused of international crime, acted as a consultant before the ICC, the ICTY, and the ECCC, advised numerous NGOs and international organizations, including the United Nations, and published extensively on international criminal law.

227. *Gbagbo*, Decision on Arrest, *supra* note 139, ¶ 37; *accord Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 48; *Côte d'Ivoire*, Authorization of Investigation, *supra* note 125, ¶ 43; *Katanga*, Decision on Charges, *supra* note 124, ¶ 396; *cf. Bemba*, Decision on Charges, *supra* note 121, ¶ 81.

228. *Gbagbo*, Decision on Arrest, *supra* note 139, ¶ 37; *Côte d'Ivoire*, Authorization of an Investigation, *supra* note 125, ¶ 43; *accord Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 48; *Bemba*, Decision on Charges, *supra* note 121, ¶ 81 (“The policy need not be formalized.” (footnote omitted)).

229. *Bemba*, Decision on Charges, *supra* note 121, ¶ 81; *Katanga*, Decision on Charges, *supra* note 124, ¶ 396; *accord Gbagbo*, Decision on Charges, *supra* note 125, ¶ 215.

regular pattern” useful as a feature of “policy.”²³⁰ Mettraux’s fourth feature²³¹ originates from the ICTY, which in *Tadić* (1997) noted that crimes against humanity are condemned because they “result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.”²³² A similar view was expressed by ICC Trial Chamber II in *Katanga* (2014), in which the requisites for sexual slavery as a crime against humanity were found.²³³ There, it was stated that the Rome Statute “does not require that a formal design exist, since explicitly advanced motivations are ultimately of little importance.”²³⁴ The Court reasoned that although it “cannot be wholly excluded,” states that seek to “encourage an attack” against civilians will rarely ever “adopt and disseminate a pre-established design or plan to that effect.”²³⁵ In fact, when prostitution is legalized or decriminalized, this is precisely what they do. Providing latitude for less clear situations, such a policy must usually “be inferred by discernment” of, “inter alia,” repetitive actions occurring according to a similar sequence, or state-orchestrated preparations and mobilizations.²³⁶ It has

230. *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 48 (“With regard to the term ‘policy,’ . . . ‘it must be thoroughly organised and follow a regular pattern.’” (footnote omitted)); *id.* ¶ 60 (“The policy followed a regular pattern in that it involved strict rules, prohibitions and punishments and was calculated to oppress anyone who failed to demonstrate the required religiosity, in particular women and girls.” (footnotes omitted)).

231. While some ICC decisions spell out these four features, others approach the policy issue without referring to them explicitly. See, e.g., *Ntaganda*, Judgment, *supra* note 125, ¶¶ 673–89; *Kenya*, Authorization of Investigation, *supra* note 119, ¶¶ 83–93 (majority opinion). Hence, rather than comprising a test or a set of requirements, they may be closer to heuristic devices.

232. Prosecutor v. Tadić, IT-94-I-T, Trial Judgment, ¶ 653 (ICTY, May 7, 1997), <https://www.legal-tools.org/doc/0a90ae/> [<https://perma.cc/V9YX-8P3J>]. After this quote, *Tadić* equates the policy requirement with the widespread or systematic element, stating that “if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.”

233. *Katanga*, Judgment, *supra* note 120, ¶ 1023. Note, however, that the defendant himself was found not liable. *Id.* ¶ 1693.

234. *Id.* ¶ 1108.

235. *Id.* ¶ 1109.

236. *Id.*; accord Prosecutor v. Said, Case No. ICC-01/14-01/21-218-Red, Decision on Charges, ¶ 64 (Dec. 9, 2021), <https://www.legal-tools.org/doc/j6h5jc/> [<https://perma.cc/3JEL-AV3S>].

been stressed “that in the majority of situations amenable to the Court, some aspects of the policy . . . will only crystallise and develop as actions are set in train and undertaken by the perpetrators.”²³⁷ The policy “may therefore become clear to the perpetrators, as regards its modalities, only in the course of its implementation, such that definition of the overall policy is possible only in *retrospect*”²³⁸—in other words, when law enforcement effectively evaporates.

As to the motivation element as well, following Trial Chamber II in *Katanga* (2014), several other ICC chambers have found “no requirement that perpetrators be motivated by the policy.”²³⁹ While the actors in the sex industry are highly likely to be aware of a change in the legal status of their practices, expressed motives and official aims may be misleading or disingenuous. In *Ntaganda* (2019), for instance, in which the defendant pled guilty to sexual slavery as a crime against humanity, noting the “stated aim” of his group—“to ‘defend the population’ as a whole,”²⁴⁰—Trial Chamber VI found that “[t]his stated aim was directly contradicted by the planning and unfolding of the group’s military operations,”²⁴¹ which “took place pursuant to a policy” to attack those who were, in fact, attacked.²⁴² Hence, the ICC framework, like customary international law, has allowed a policy of attacking civilians to be inferred from evidence of conditions on the ground, rather than exclusively from smoking-gun evidence like secret memos, official statements, or legislation that may not reveal true intentions or even always awareness of inevitable consequences. The judicial ability to infer or deduce a policy to attack civilians was upheld on appeal in 2021, for instance, when the Appeals Chamber observed that “[t]he fact that the official documents issued by the UPC/FPLC did not expressly articulate a policy to attack the civilian population does not negate the existence of such a policy,” thus

237. *Katanga*, Judgment, *supra* note 120, ¶ 1110.

238. *Id.* (emphasis in original).

239. *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 50; *Bemba*, Judgment, *supra* note 125, ¶ 161; *accord Gbagbo*, Decision on Charges, *supra* note 125, ¶ 214 (“The Chamber observes that neither the Statute nor the Elements of Crimes include a certain rationale or motivations of the policy as a requirement of the definition.”).

240. *Ntaganda*, Judgment, *supra* note 125, ¶ 687.

241. *Id.*

242. *Id.* ¶ 689.

permitting the conclusion that “the existence of an organisational policy was reasonable.”²⁴³

Legalization policies never claim to promote the attack that prostitution constitutes. On the contrary, the stated purposes of contemporary legalization typically deny the intrinsically abusive reality of the sex trade, in naïve long disproven posturing²⁴⁴ that coexists—in a dissonance not typically officially noted—with admissions that prostitution is a form of second-class citizenship.²⁴⁵ Legalization policies are also often justified on the defeatist view that prostitution is inevitable—a rationale never advanced to support the legalization of other practices of discriminatory abuse, targeted persecution, and violation of human rights, far less violence that also targets privileged groups, such as murder or terrorism.²⁴⁶

Where an interest in concealment exists—one that recognition of legalization as a crime against humanity would provide—the fact that prostitution being made legal or fully decriminalized constitutes an

243. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2666-Red, Appeals Judgment, ¶¶ 386, 394 (Mar. 30, 2021), <https://www.legal-tools.org/doc/zy5pmd/> [<https://perma.cc/SEB6-2W3D>]. Evidence going to common plan and to policy may or may not overlap.

244. See *supra* notes 41–105, 181, 198–218 and accompanying text for proof that legalization/decriminalization does the opposite of what its proponents claim. It increases prostitution’s abuse, violence, health problems, and sex trafficking with other associated crimes as well as makes prostitution more widespread than previously, and does nothing to reduce its stigma or lifelong discriminatory impact.

245. In New Zealand, the “purpose” of legalization is officially “to decriminalize prostitution (while *not* endorsing or morally sanctioning prostitution or its use).” Prostitution Reform Act 2003, s 3 (N.Z.) (emphasis added). Such statements could illustrate what the ICC Trial Chamber III in *Bemba* (2016) considered to be “a variety of factors which, taken together, establish that a policy existed,” namely: “statements, instructions or documentation attributable to the State or the organization *condoning or encouraging* the commission of crimes,” *Bemba*, Judgment, *supra* note 125, ¶ 160 (emphasis added), such as sex trafficking or prostitution of minors. When pimps, johns, and traffickers know they will not be criminalized, and in fact are not, they are “encouraged” to continue, despite parenthetical virtue signalling official disclaimers.

246. In contrast with the shifty policy statements in more recent legalization elsewhere, an Amsterdam bylaw from 1413 reportedly stated that brothels “would not be banned because ‘whores are necessary in big cities and especially in cities of commerce such as ours.’” Dan Gardner, *Coffee? Prayers? Sex?: Part One: Church and Brothel Make for Odd Bedmates in Amsterdam, But Tolerance is the Key in the Liberated Dutch Society That Threw Out the Rule Books the Rest of Us Follow*, OTTAWA CITIZEN, Feb. 23, 2003, at C3, available in 2003 WLNR 9544893. Men in close quarters, Amsterdam appears to have supposed, must be permitted to buy women for sex when buying other things. And are to this day.

attack on a civilian population cannot be expected to be explicitly stated. And it is not required to be.

E. Nexus: Part of the Attack, With Knowledge

International law requires a nexus, both in the world and in the mind of the accused, between the individual crimes and the larger attack against the civilian population.²⁴⁷ In the Rome Statute's chapeau, Article 7(1) provides that one or more of the enumerated acts from (a) to (k) must be perpetrated "as part of" a broader attack²⁴⁸ and committed "with knowledge of the attack."²⁴⁹ This nexus is objective and subjective: The accused's act(s) must be proven to be empirically linked to the larger claimed attack as well as having been committed with knowledge of it.²⁵⁰ Numerous ad hoc tribunals have stated that for the perpetrators' conduct to be considered "as part of" a wider attack, "the acts in question must by

247. For useful background, see METTRAUX, *CRIMES AGAINST HUMANITY*, *supra* note 116, at 327–28; DUBLER & KALYK, *supra* note 180, at 725.

248. For applications, see *Bemba*, Decision on Charges, *supra* note 121, ¶ 84; *accord Ntaganda*, Judgment, *supra* note 125, ¶ 696; *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 53; *Bemba*, Judgment, *supra* note 125, ¶¶ 164–65; *Katanga*, Judgment, *supra* note 120, ¶ 1124; *cf. Gbagbo*, Decision on Charges, *supra* note 125, ¶ 212 (finding "substantial grounds to believe" that the acts of pro-Gbagbo forces were "satisfying the required nexus" and therefore "considered 'as part of' the relevant course of conduct that targeted perceived Ouattara supporters, within the meaning of article 7(1) of the Statute."). The defendant was later acquitted, partially because of failure to "demonstrate that the crimes as alleged in the charges were committed pursuant to or in furtherance of a State or organizational policy." *Prosecutor v. Gbagbo*, ICC-02/11-01/15-1263, Reasons for Oral Decision of 15 January 2019, ¶ 28 (TC 1, July 16, 2019), <https://www.legal-tools.org/doc/440017/> [<https://perma.cc/5WA3-3T7D>]. This should not be a problem for legalization of prostitution prosecutions if properly brought on official policy grounds.

249. *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 54; *Bemba*, Judgment, *supra* note 125, ¶ 166; *Katanga*, Judgment, *supra* note 120, ¶ 1125; *Bemba*, Decision on Charges, *supra* note 121, ¶ 87; *cf. Katanga*, Decision on Charges, *supra* note 124, ¶ 417 (finding "substantial grounds to believe" that the accused "knew that their actions were an essential part of the attack" on civilians). The literature observes that the term nexus "often" only refers to the objective requirement, with the subjective part referred to as *mens rea* or knowledge. DUBLER & KALYK, *supra* note 180, at 725.

250. See, e.g., *Prosecutor v. Mrkšić* (Vukovar Hospital Decision), IT-95-13/1-A, Appeals Judgment, ¶ 41 (ICTY, May 5, 2009), <https://www.legal-tools.org/doc/40bc41/> [<https://perma.cc/ESSF-2DEF>]; see also *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 99; *Prosecutor v. Tadić*, IT-94-1-A, Appeals Judgment, ¶ 271 (ICTY, July 15, 1999), <https://www.legal-tools.org/doc/8efc3a/> [<https://perma.cc/97DJ-LM9N>].

their very nature or consequences be objectively part of the attack.”²⁵¹ In the ICC, Trial Chamber VI in *Ntaganda* (2019) considered that the “nexus will be determined on the basis of an objective assessment of the characteristics, aims, nature, and/or consequences of the acts concerned.”²⁵² Similar statements occur in many other ICC cases.²⁵³ Additional factors to be considered could include whether the perpetrators’ conduct is “consistent” with the “general motives and *modus operandi*” of the attack, and whether a link can be shown between the conduct and the underlying policy.²⁵⁴ It could also be considered whether the conduct “share[s] common features” in terms of the “targets and alleged perpetrators, as well as times and locations,” with the other acts forming part of the attack.²⁵⁵ In *Brima* (2007) and *Taylor* (2012), the Special Court for Sierra Leone additionally considered “the nature and extent of the perpetrator’s knowledge of the attack when he commits the acts.”²⁵⁶

251. Prosecutor v. Nuon, 002/19-09-2007/ECCC/TC, Judgment, ¶ 190 (Aug. 7, 2014), <https://www.legal-tools.org/doc/4888de/> [<https://perma.cc/T5WJ-UK37>]; accord *Mrkšić*, Appeals Judgment, *supra* note 250, ¶ 41; Prosecutor v. Sesay, SCSL-04-15-T-1234, Judgment, ¶ 89 (Mar. 2, 2009), <https://www.legal-tools.org/doc/c059e3/> [<https://perma.cc/QU9P-XBYL>]; *Kumarac*, Appeals Judgment, *supra* note 132, ¶ 99; cf. *Semanza*, Judgment and Sentence, *supra* note 152, ¶ 326 (noting that although the act need not mirror all of the attack’s “features,” it “must, by its characteristics, aims, nature, or consequence objectively form part” of the attack); METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 328–29 n.572 (citing cases); DUBLER & KALYK, *supra* note 180, at 727 (citing cases).

252. *Ntaganda*, Judgment, *supra* note 125, ¶ 696 (footnotes omitted).

253. See, e.g., *Bemba*, Decision on Charges, *supra* note 121, ¶ 86 (considering “the characteristics, the aims, the nature or consequences of the act”); accord *Al Hassan*, Decision on Arrest, *supra* note 125, ¶ 53; *Bemba*, Judgment, *supra* note 125, ¶ 165; *Georgia*, Request for Investigation, *supra* note 151, ¶ 256; see also *Katanga*, Judgment, *supra* note 120, ¶ 1124; see also *Kenya*, Authorization of Investigation, *supra* note 119, ¶ 135 (majority opinion).

254. *Bemba*, Judgment, *supra* note 125, ¶ 690; accord Indep. Fact-Finding Mission on Libya, Detailed Findings On The Situation In Tarhuna, ¶ 253, U.N. Doc. A/HRC/50/CRP.3 (July 1, 2022) (citing *Bemba*, Judgment, *supra* note 125).

255. Prosecutor v. Ongwen, ICC-02/04-01/15, Decision on Charges, ¶ 63 (Mar. 23, 2016), <https://www.legal-tools.org/doc/74fc6e/> [<https://perma.cc/2LYK-ENK3>]; *Gbagbo*, Decision on Charges, *supra* note 125, ¶ 212; cf. *Georgia*, Request for Investigation, *supra* note 151, ¶ 258 (considering, inter alia, “the geographical and temporal overlap between the attack and the crimes” and the “consistent” criminal “pattern of conduct” over time); *Katanga*, Judgment, *supra* note 120, ¶ 1124 (considering whether the pattern of crimes and types of victims are the same for the perpetrator’s crimes and those in the attack).

256. *Taylor*, Judgment, *supra* note 122, ¶ 512; accord Prosecutor v. Brima, Case No. SCSL-03-01-T, Judgment, ¶ 220 (June 20, 2007), <https://www.legal-tools.org/>

As to the objective element, the ICTY Trial Chamber, in a frequently cited passage from *Milutinović* (2009), clarified the application of the objective nexus requirement in situations in which those physically perpetrating the underlying crimes (here, pimps, madams, johns, and others) are not the same persons as those who are charged with responsibility for the crimes (here, the accused who legalize prostitution).²⁵⁷ Actually, in international criminal prosecutions, the accused, often a leader of some kind, has seldom committed the physical acts that make up the crimes, responsibility for which overall attack the leader is accused. As to the subjective requirement, the Chamber clarified that underlying offenses “qualify” as crimes against humanity when “the physical perpetrator lacks knowledge of the context in which his conduct occurs,” insofar as “the planner, orderer, instigator of that conduct, or member of the joint criminal enterprise knows that it forms part of the attack.”²⁵⁸ Put another way, the nexus requirements would be satisfied under the ICC framework if any of the sex trafficking, enslavement, enforced prostitution, or other acts enumerated in Article 7(1) (a)–(k) are objectively “part of” the attack on people in prostitution shown to exist under legalization/decriminalization, and those charged with responsibility subjectively know that they are part of a sex trade that is no longer criminal.

Legalizing prostitution steeply increases underlying crimes enumerated in Article 7(1) of the Rome Statute, producing a widespread and systematic “attack directed against” prostituted persons. Any individual crime of prostitution perpetrated against a prostituted person by a trafficker, john, or third party in this context has the same “characteristics, aims, nature, and consequences”²⁵⁹ as the wider attack the acts constitute.

doc/87ef08/ [https://perma.cc/59X5-U8GV]. Various judicial bodies have considered other evidentiary factors. See, e.g., METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 334–40 (discussing jurisprudence).

257. Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, Vol. 1 of 4, ¶¶ 152–62 (ICTY Feb. 26, 2009), <https://www.legal-tools.org/doc/9eb7c3/> [https://perma.cc/5X5A-GGJP]. An approving discussion of this passage can be found in the Appeals Chamber’s judgment. *Sub nom.* Prosecutor v. Šainović, Case No. IT-05-87-A, Appeals Judgment, ¶¶ 264–82 (ICTY Jan. 23, 2014), <https://www.legal-tools.org/doc/81ac8c/> [https://perma.cc/LN4J-DTWK]. The passage is also discussed extensively in DUBLER & KALYK, *supra* note 180, at 728, 733–36, and Mettraux describes its conclusions as being based on “an in-depth analysis of Tribunal jurisprudence[.]” METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 347 n.638.

258. *Milutinović*, Judgment, *supra* note 257, ¶ 158; see, e.g., *Sainovic*, Appeals Judgment, *supra* note 257, ¶¶ 272–81.

259. See *supra* notes 251–253 for multiple citations to relevant jurisprudence.

An underlying specific crime such as sex trafficking is “consistent” with the “general motives and *modus operandi*”²⁶⁰ of the attack, such as profiting from the sexual exploitation of people being prostituted. When the evidence shows that sex trafficking is encouraged by policy that makes it not criminal, a “link” can be found between the two.²⁶¹ The individual crimes “share common features” with the wider attack in terms of “targets and alleged perpetrators” and “times and locations.”²⁶²

Indeed, the individual crimes, taken together, constitute the wider attack. Most “targets” are impoverished women or girls, typically sexually abused during childhood and members of intersectionally disadvantaged groups based on class, race, gender, ethnicity, nationality, and sexuality, and are often refugees or other migrants in desperate situations.²⁶³ The “alleged perpetrators” are usually (although not always) men—largely the pimps and traffickers are; virtually always, the johns are, among whom relatively wealthy men are overrepresented.²⁶⁴ Individual johns and third parties generally buy or trade in sex with prostituted persons during

260. *Bemba*, Judgment, *supra* note 125, ¶ 690; *accord* Indep. Fact-Finding Mission on Libya, *supra* note 254, ¶ 253.

261. See, e.g., by analogy *Bemba*, Judgment, *supra* note 125, ¶ 690 (“Emphasising that the perpetrators’ acts were consistent with evidence of general motives and a *modus operandi*, and recalling its findings concerning the link between the course of conduct and the organizational policy, . . . the acts of murder and rape set out above were committed . . . as ‘part of’ a widespread attack against the civilian population[.]”).

262. *Ongwen*, Decision on Charges, *supra* note 255, ¶ 63; *Gbagbo*, Decision on Charges, *supra* note 125, ¶ 212; cf. *Georgia*, Request for Investigation, *supra* note 151, ¶ 258; *Katanga*, Judgment, *supra* note 120, ¶ 1124.

263. See, e.g., CEDAW, General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration, ¶ 20, U.N. Doc. CEDAW/C/GC/38 (Nov. 20, 2020) (“The women and girls who are most vulnerable to being trafficked are those belonging to marginalized groups”).

264. See DEMAND ABOLITION, *supra* note 156, at 17, 19 (surveying 8,201 men across the U.S. of whom 6.2% reported buying sex within the last year and 20.6% within their lifetime, noting that “active high-frequency buyers are much more likely than other men to make \$100,000 or more annually,” and finding that while active high-frequency buyers comprise about one-fourth of all active sex buyers, their activity accounts for nearly three-fourths of all U.S. sex purchases); GISELA PRIEBE AND CARL GÖRAN SVEDIN, SÄLJA OCH KÖPA SEX I SVERIGE 2011: FÖREKOMST, HÄLSA OCH ATTITYDER 49 & tbl.1.25 (2012) (reporting Swedish population-based survey finding that 33.2% of johns and 24.4% of non-johns earned over 35,000 SEK per month, 6.7% of johns and 12.3% of non-johns earned under 15,000 SEK per month, and 42.9% of johns buying sex less than twelve months ago earned over 35,000 SEK per month (vs. 24.4% of non-johns)). For rough estimates of the proportion of men vs. women among pimps/traffickers and johns, see sources cited in *supra* note 157 and accompanying text.

similar “times and locations”²⁶⁵ as the other perpetrators do—during evenings or lunch breaks,²⁶⁶ in rented hotel rooms on convention circuits,²⁶⁷

265. *Ongwen*, Decision on Charges, *supra* note 255, ¶ 63; *Gbagbo*, Decision on Charges, *supra* note 125, ¶ 212; cf. *Georgia*, Request for Investigation, *supra* note 151; *Katanga*, Judgment, *supra* note 120, ¶ 1124.

266. See, e.g., Tisha Thompson & Rick Yarborough, *Lunchtime is Primetime for Prostitution: New Prince George's County Vice Unit Cracks Down on Lunch-Hour Prostitution*, NBC4 WASHINGTON (May 1, 2013) [<https://perma.cc/C7LH-7U95>] (“Sgt. Coleman says lunchtime is primetime for prostitution. ‘Many of the men we arrest are married, so they need an excuse to tell their families. It’s a little bit easier during lunchtime and when they’re at work to slide out for a little while.’”); *Hookers’ Rates Soar As They Get Lunch-Time Rush*, IRISH INDEPENDENT (Oct. 8, 2006) [<https://perma.cc/CD2U-SHEW>] (“Officers have discovered that there is also a lunchtime rush with executives and businessmen pouring into brothels all over the city. ‘The busiest times are still Friday and Saturday night but lunch-hour during the week is extremely busy as well,’ said the detective superintendent. ‘They usually open up around 11am on time for lunch and will close up around midnight or keep going until the early hours if the punters keep coming.’ ‘It is hard to estimate how much they are pulling in per day but the pimps earn 50 percent of the takings.’”); Thaddeus Gregory Blanchette & Ana Paula da Silva, *Prostitution in Contemporary Rio de Janeiro*, in *POLICING PLEASURE SEX WORK, POLICY, AND THE STATE IN GLOBAL PERSPECTIVE* 130, 130–32 (eds. Susan Dewey & Patty Kelly, 2011) (“Crossing over Av. Rio Branco, the ‘Wall Street’ of Rio . . . one finds small *privés* and massage parlors—rented apartments or offices in which two to six women offer forty to sixty minutes of sexual services for about 55–150R\$. The clients are middle-management and skilled workers looking for sex on their lunch break or after work. . . . Unlike downtown, [Vila Mimosa] comes alive in the evening, frequented by men looking for cheap entertainment. Prices are around 25R\$ for fifteen to twenty minutes of sex in tiny cubicles, with 5–10R\$ of this going to the bar or club owner for a rental fee and a condom. . . . But Vila Mimosa is not the last stop for commercial sex. . . . [N]ear the Quinta da Boa Vista, streetwalkers converge in the early evening to meet the needs of taxi drivers and long-distance truckers. . . . Though tricks can be bought for 30R\$, women can charge as much as 100R\$ for an hour in nearby hotels.”).

267. See, e.g., *UN General Assembly Brings ‘Hooker Convention’ to NYC: Report*, TIMES OF INDIA (Sept. 21, 2023) [<https://perma.cc/VWZ8-XWQH>] (“High-priced escorts are flocking to the city from as far away as Las Vegas and Europe to meet the increased demand during the diplomatic meetings The sources suggest that diplomats . . . indulge in such activities [M]any choose to visit hotels rather than strip clubs or public venues to avoid drawing attention.”); *Sex Trade Spikes During Conventions: Online Ads for Erotic Services Offer “Entertainment” Off The Convention Floor*, ABC NEWS (Aug. 21, 2008) [<https://perma.cc/Q4BA-SAP6>] (documenting hotel prostitution in Denver via Craigslist); ATT’Y GEN’S COMM., FINAL REPORT OF THE ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY 204 (Michael J. McManus ed., Rutledge Hill Press 1986) (quoting survivor testimony: “My pimp also made me work ‘stag’ parties attended by an average of ten to twenty men in catering halls, bars and union halls. I was also forced to work conventions . . . held at major hotels in New York attended by hundreds of professional men.”).

in homeless encampments,²⁶⁸ in brothels, in cars, and on the streets.²⁶⁹ A “geographical and temporal”²⁷⁰ overlap also exists between the individual crimes and the attack; the attack occurs where and largely because buying sex is de jure permitted, where individual acts of sex trafficking, rape, and other enumerated crimes skyrocket, with impunity that can be counted upon, demonstrating nexus.

Ad hoc tribunals and various ICC chambers underline that the nexus exists as long as each perpetrator’s crime is not an “isolated act, i.e. so far removed from the attack that, having considered the context and circumstances in which it was committed, the acts cannot be said to have been part of the attack.”²⁷¹ Individual acts in legal prostitution are no

268. See, e.g., Mark J. Kiss & Todd G. Morrison, *Eroticizing Desperation: Poverty Gay-for-Pay Porn*, 25 *SEXUALITY & CULTURE* 1509, 1515, 1520 (2021) (describing a gay male pornographer’s “modus operandi” that included “systematic targeting of homeless men as the primary source of the studio’s performers,” *id.* at 1520, finding them at tent camps, homeless shelters, and a bus depot); Katherine Donlevy, *Denver Homeless Camp Features Pop-Up Bar With Rentable Prostitution Tents*, *NEW YORK POST* (Sept. 14, 2023) [<https://perma.cc/6PMZ-VSHD>] (“There have been complaints that the couches at the streetside bar and surrounding tents are being rented out for prostitution”); Jeff Landfield, *Drugs, Violence, And Prostitution: A Glimpse Inside Anchorage’s Largest Homeless Camp*, *ALASKA LANDMINE* (Aug. 20, 2023) [<https://perma.cc/TR57-UYUV>] (“Anchorage is not a poor city, and Alaska is not a poor state. Third Avenue is third-world horror in a community with first-world resources Prostitution is clearly happening. Sanitary conditions are appalling We tolerate open public drug usage and prostitution. We allow the victimizers to operate openly and by doing so we demonstrate our indifference to the victimized.”).

269. For brothels, see, e.g., *supra* notes 30, 31, 35, 41, 103, 105, 267, and 285. For street prostitution, see, e.g., *supra* notes 32, 33, 46, 47, 56, 107, 156, 166, 195, and 266. Typically, in street prostitution, johns in their own cars pick up prostituted persons, as also occurred right before Sweden’s 1999 Equality Model Law. See Statens Offentliga Utredningar [SOU] 1995:15 *Könshandeln* [government report series] 116 (Swed.) (“The most common place where the service is performed is the man’s car [or] the women have trailers, campers, or premises at their disposal to which they can bring buyers.”); *but see id.* at 77 (interviewing one 45-year-old prostituted woman, an apparent exception: “I use my own car and select my customers. If someone appears weird, he will have to step out of the car.”).

270. *Georgia*, Request for Investigation, *supra* note 151, ¶ 258; *see also Taylor*, Judgment, *supra* note 122, ¶ 512; *Brima*, Judgment, *supra* note 256, ¶ 220.

271. *Nuon*, Judgment, *supra* note 251, ¶ 190; *accord Bemba*, Judgment, *supra* note 125, ¶ 165 (“In determining whether the requisite nexus exists . . . [i]solated acts that clearly differ in their context and circumstances from other acts that occur during an attack fall outside the scope of Article 7(1).”); *Georgia*, Request for Investigation, *supra* note 151, ¶ 245 (“The reference to a widespread or systematic attack excludes isolated or random acts from the concept of crimes against humanity”); *Katanga*, Judgment, *supra* note 120, ¶ 1124; *Karadžić*, Judgment, *supra* note 122, ¶ 478; *Mrkšić*, Appeals

less isolated from the broader attack than, for instance, “a single act” of denouncing a Jewish neighbor to Nazi authorities—an act occurring in the nexus to “widespread persecution.”²⁷² Without the official acts that legalize prostitution, no attack as widespread and systematic as occurs under fully legalized or decriminalized prostitution regimes can be committed. Where prostitution is legalized or fully decriminalized, with its usual third-party exploitation, the nexus between the perpetrators’ conduct and the ensuing attack is provided precisely by the policy that declares open season on purchasing people for sexual use.

For a crime against humanity to occur, either the physical perpetrator of the constituent acts, or the authority at whose behest or under whose encouragement the acts are committed, must commit the crime “with knowledge” that their conduct forms part of the widespread or systematic attack.²⁷³ As the ICTY’s Appeals Chambers found, this condition is “only relevant to the question of whether a crime against humanity” has been “committed;” it “should not be confused with the question of whether the accused” bears “criminal responsibility for such a crime.”²⁷⁴ Under Article 7(1) of the Rome Statute, the terms “when committed . . . with knowledge of the attack” only concern the contextual requirement.

Judgment, *supra* note 250, ¶ 41; *Sesay*, Judgment, *supra* note 251, ¶ 89; *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 100.

272. *Kupreškić*, Judgment, *supra* note 120, ¶ 550 (mentioning the denunciation cases while noting that an “isolated act” that “did not occur within such a context” cannot be deemed a crime against humanity). It is not even required that the perpetrators’ acts are “committed in the midst of that attack.” *Karadžić*, Judgment, ¶ 478; *accord Sesay*, Judgment, *supra* note 251, ¶ 89; *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 100; *Mrkšić*, Appeals Judgment, *supra* note 250, ¶ 41; METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 329 n.573 (citing cases). Thus, the ICC Trial Chamber VI held that “[t]he temporal and geographical proximity of the acts are relevant, but acts that are committed before or after the core of the attack against the civilian population may also, if sufficiently connected, be considered as part of that attack.” *Ntaganda*, Judgment, *supra* note 125, ¶ 696 (footnotes omitted). Likewise, the ICTY Trial Chamber held that “[a]n offence which is committed before or after the attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack.” *Karadžić*, Judgment, *supra* note 122, ¶ 478 (footnote omitted); *accord Nuon*, Judgment, *supra* note 251, ¶ 190; *Mrkšić*, Appeals Judgment, *supra* note 250, ¶ 41; *Sesay*, Judgment, *supra* note 251, ¶ 89; *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 100.

273. Rome Statute, *supra* note 9, art. 7(1). For the distinction between perpetrators and others accused of a crime, see *Milutinović*, Judgment, *supra* note 257, ¶¶ 152–62; *accord sub nom. Šainović*, Appeals Judgment, *supra* note 257, ¶¶ 264–82.

274. *Šainović*, Appeals Judgment, *supra* note 257, ¶ 277. See *Criminal Responsibility*, *supra* note 10 for responsibility discussion.

As long as either the physical perpetrator or another intermediary or a superior perpetrator knows about the attack—here, the fact that prostitution has become legal or no longer criminal and the underlying acts are the typical acts of prostitution—the chapeau’s knowledge element is satisfied.²⁷⁵

The ICC *Elements of Crimes* clarify that the contextual requirement of “knowledge . . . should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”²⁷⁶ In considering legal responsibility of governmental actors for legalization of prostitution, knowledge of the plan or policy is a foregone conclusion, since these actors created, championed, enacted, or ratified the policy. Their knowledge of the characteristics of the attack, that is, the consequences of legalization, is a separate matter, although it should not prove difficult to show. For instance, ICC Pre-Trial Chamber I noted in *Al Bashir* (2009)²⁷⁷ that there were “reasonable grounds” to conclude that the requirement of contextual knowledge was satisfied based on the fact that the attack had “affected at least hundreds of thousands” over five years, while plentiful information about the situation was disseminated and “widely published” by the United Nations, including the Security Council.²⁷⁸ Survivors of prostitution, when exited, typically make the consequences of legalizing their former abuse vividly clear.²⁷⁹

275. Criminal responsibility for any of these accused is dealt with separately under Articles 23–33 of the Rome Statute, *supra* note 9. Regarding criminal responsibility, the absence of the official actor at the apex of the policy chain knowing what acts had been induced, promoted, or encouraged by the policy, hence knowing the likelihood of their occurrence, as well as that person’s power to prevent them—the lacks that caused Bemba to be acquitted on appeal on a command responsibility charge (*Bemba*, Appeals Decision, *supra* note 121, ¶ 171–73)—would not occur in most prosecutions envisioned here, if properly pleaded. See *Criminal Responsibility*, *supra* note 10.

276. ICC *Elements of Crimes*, *supra* note 151 art. 7 (introduction) (2).

277. *Al Bashir*, Decision on Arrest, *supra* note 138, ¶ 87 (noting that it had “previously understood” the *Elements of Crimes*’ contextual knowledge requirement under art. 7 (introduction) (2) “to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack.”) (footnote omitted) (citing ICC and ad hoc tribunal cases); accord *Katanga*, Decision on Charges, *supra* note 124, ¶ 401; Hall & Ambos, *supra* note 151 at 175, mn. 26 (citing international cases while noting that the perpetrator needs to know that their conduct is either part of or intended to be part of such an attack).

278. *Al Bashir*, Decision on Arrest, *supra* note 138, ¶ 88 (footnotes omitted).

279. See, e.g., Luba Fein, *The Voices of Prostitution Survivors Must Be Heard—Including at the UN*, MORNING STAR (June 19, 2024) [<https://perma.cc/SR8H-4DFH>]; Survivors

As to knowledge by immediate perpetrators of underlying acts, certainly they know they are participating in prostitution, and will usually be highly aware of the status—legal or illegal—of the acts in which they engage. As to knowledge of the attacking nature of their acts, should that be required, in the case of the johns, research shows that they usually know that prostitution tends to involve victimization of the people they use by conduct that can amount to crimes against humanity, such as sex trafficking.²⁸⁰ Regarding “the nature and extent of the perpetrator’s knowledge of the attack when he commits the acts,”²⁸¹ johns are generally well aware of much of prostituted people’s real situation.²⁸² There is no reason to think that this would disappear with legalization. Despite acknowledging the hardships that signify the nature and characteristics of sex trafficking, such as lack of real alternatives, johns generally persist in pursuing the women for sex acts that most other partners resist or reject²⁸³—and they know this as well.²⁸⁴

of Prostitution Abuse Calling for Enlightenment (SPACE), *Home* (last visited Sept. 1, 2024) [<https://perma.cc/82FK-DHVK>]; Spec. Rapporteur on VAW & Girls, *supra* note 22 et passim (referencing survivor knowledge); Aphiwe Ngalo, *Reflections from a Parliamentary Summit: Sex Work vs Prostitution—Time to Get the Difference*, DAILY MAVERICK (Mar. 8, 2018) [<https://perma.cc/FL4M-V7WF>] (reporting on South African survivor network Kwanele, which includes members who are or have been prostituted). All these sources oppose legalization/decriminalization and support the Nordic/Equality Model, as does Mickey Meji, *ANC Resolution to Decriminalise Prostitution Fails Black Women*, NEWS24 (Jan. 26, 2018) [<https://perma.cc/E9ZG-H5SW>] (addressing South African situation).

280. See *infra* notes 282–86 and accompanying text.

281. *Taylor*, Judgment, *supra* note 122, ¶ 512; *Brima*, Judgment, *supra* note 256, ¶ 220.

282. Among 110 johns interviewed in Scotland, for example, 50% recognized that prostituted persons “are victimized by pimps,” 73% acknowledged that “women prostitute strictly out of economic necessity,” and 85% admitted that women “did not enjoy the sex of prostitution.” Farley et al., *Men Who Buy Sex in Scotland*, *supra* note 32, at 372–73, 376. In Boston, 66% of the 101 johns interviewed believed that “a majority of women are lured, tricked, or trafficked into prostitution.” Farley et al., *Comparing Sex Buyers*, *supra* note 32, at 3614. In London, 55% of 103 johns in a similar study believed the same. MELISSA FARLEY ET AL., *MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW* 16 (2009). Similar responses came from 113 johns in Chicago, where 57% felt most prostituted persons had experienced childhood sexual abuse. DURCHSLAG & GOSWAMI, *supra* note 32, at 20.

283. See *supra* note 32 and accompanying text.

284. See, e.g., Andrea Di Nicola & Paolo Ruspini, *Learning from Clients*, in *PROSTITUTION AND HUMAN TRAFFICKING: FOCUS ON CLIENTS* 232 (A. Di Nicola et al. eds., 2009) (“[S]triking is the shared . . . awareness [among johns] of exploitation and the related neutralization techniques. . . . ‘If I could differentiate [between forced and

It is highly unlikely that pimps—who often sexually use the women they themselves prostitute, and who frequently set quotas of men or money their prostituting persons must meet—or madams in brothels, many of whom were formerly prostituted, are uninformed on its realities.²⁸⁵ Consider a legal brothel owner's comment on German national public television that it would be “unthinkable,” “[u]nimaginable,” he does “[not] even want to think about” his daughters being prostituted.²⁸⁶ The physical perpetrators of the immediate acts thus generally know the conduct that is decriminalized and legalized when legitimated by policy amounts to atrocities, certainly undignified inhumane outrages, at least an undesirable life for a human being. They may minimize their role and contribution, believe they are less brutal or exploitative than others, think that throwing money at victims transforms their violation into work (even though they know prostituted people may usually keep little of the money). Denials do not mean that actions are not part of an overall attack or that these immediate perpetrators, far less an accused higher up, are not aware that their actions form part of it. Pimps and traffickers being territorial, their profits dependent on organizing their control over turf or areas or spheres without being poached or invaded, means that they have every incentive to keep themselves well aware of the overall practices and organizational structure of the industry within which they operate. This nexus element, with the others, would, of course, have to be proven on a case-by-case basis.

It is not required that the physical perpetrators act with knowledge of the overall attack, if someone else—say the one charged with legalization—has the required knowledge. Certainly, the proponents of

voluntary, DZ/RS], it would probably not influence my choice It is totally wrong of course.’ (Dutch Client)” (brackets in original)); Martin A. Monto, *Female Prostitution, Customers, and Violence*, 10 VIOLENCE AGAINST WOMEN 160, 177 (2004) (stating of johns, “though they may not acknowledge their part in the system, many are aware that prostitutes are victimized in the course of their activities.”).

285. See, e.g., Diu, *Paradise*, *supra* note 105 (describing a documentary aired on German public TV in which a business partner in the *Paradise* brothel chain is interviewed: “Would he be happy for either of his two daughters to work at Paradise, the interviewer asks. Rudloff turns puce. ‘Unthinkable, unthinkable,’ he says. ‘The question alone is brutal. I don’t mean to offend the prostitutes but I try to raise my children so that they have professional opportunities. Most prostitutes don’t have those options. That’s why they’re doing that job.’ He pauses and looks away. ‘Unimaginable,’ he repeats. ‘I don’t even want to think about it.’”).

286. Diu, *Paradise*, *supra* note 105.

legalization know that this policy frees prostitution as a whole from legal encumbrance, with the resulting attack—the expansion and exacerbation of the sex industry let loose—being that outcome. Even if legislators or heads of state do not personally participate in the ensuing attack that proliferates upon legalization, the Statute “pre-emptively rebuts any suggestion that the accused or the perpetrator could not have known of something that did not yet quite exist.”²⁸⁷ Virtually always, prostitution pre-exists its legalization, which provides knowledge of its constituent acts, predictably multiplied exponentially upon legalization.

Under customary international law—of possible use when an element is being construed under facts that have not previously been decided—cases on crimes against humanity have held that “knowledge” includes a calculated risk on the part of the accused that their conduct would be part of or contribute to the attack.²⁸⁸ So is knowledge often understood unless a statute provides otherwise.²⁸⁹ Legislators and heads of states who legalize prostitution today are arguably—and depending on the specifics of the charges—not just taking a calculated risk, hoping that legal

287. METTRAUX, CRIMES AGAINST HUMANITY, *supra* note 116, at 350.

288. See, e.g., *Kunarac*, Appeals Judgment, *supra* note 132, ¶ 102 (“[T]he accused . . . must have known ‘. . . at least [that he took] the risk that his acts were part of the attack.’” (brackets in original) (quoting Trial Judgment, *supra* note 132, ¶ 434)); *accord Šainović*, Appeals Judgment, *supra* note 257, ¶ 271 (noting that the “Appeals Chamber’s subsequent jurisprudence” was “adhering to the ‘taking the risk’ standard endorsed in” *Kunarac*); *Blaškić*, Appeals Judgment, *supra* note 141, ¶ 251 (“[H]e knowingly took the risk”); *Tadić*, Appeals Judgment, *supra* note 250, ¶ 228 (defining mens rea within a Joint Criminal Enterprise (JCE) as including knowledge that “(i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*” (emphasis in original)); METTRAUX, TRIBUNALS, *supra* note 116, at 173 (citing cases); cf. *R. v. Finta*, [1994] 1 S.C.R. 701, 706 (Can.) (“[T]he accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity.” (emphasis added)). But see Mark A. Summers, *The Problem of Risk in International Criminal Law*, 13 WASH.U.GLOB. STUD. L.R. 667, 674–82 (2014) (analyzing inconsistencies in the *Tadić Appeals Judgment* and how they clouded subsequent ICTY and ICC jurisprudence). See also *Bemba*, Decision on Charges, *supra* note 121, ¶ 362–63, in which the Chamber considered that the drafters could have used the words “may occur” or “might occur” instead of “will occur” to “convey mere eventuality or possibility, rather than near inevitability or virtual certainty.” *Id.* ¶ 363.

289. “Unless otherwise provided” is Article 30 language. Rome Statute, *supra* note 9, art. 30(1). An example otherwise is Article 28(a), which includes that commanders or other superiors “should have known” if forces under their command were committing crimes against humanity. *Id.* at art. 28(1)(a); see also ICC Elements of Crimes, *supra* note 151, General Introduction (2).

prostitution does not intensify injury; they are knowingly pursuing a policy that empirical evidence shows leads to a widespread and systematic attack on prostituted persons under normal circumstances.

Relevant information includes the fact that, even in diverse settings, comparing legal prostitution with the abolitionist approach (that is, the Nordic or Equality Model), legal prostitution led to egregious outcomes.²⁹⁰ Comparative analysis illuminates that decriminalizing sellers (pimps, traffickers) and legalizing buyers increases prostitution exponentially, making it far more exploitative and dangerous than under abolitionist policy, without achieving any of the allegedly beneficial outcomes said, in some instances, to have motivated the policy. In other words, except for events that are “out of the ordinary”—unknown, so far,²⁹¹ given that prostitution is ordinary—it is well known that legal prostitution leads to a far more widespread and systematic attack on prostituted people than when it was illegal, exhibiting heightened scope and severity of constituent crimes. Not knowing this inevitable eventuality, given common factual situations and proper charges, is not credible for today’s governmental officials.

CONCLUSION

Despite a widespread tendency to trivialize prostitution, its gravity is far from marginal.²⁹² Prostitution under legalization meets the standards articulated by the ICC to guide sentencing, extended to assessment of gravity, which includes the extent of damage to victims and their families, “the commission of crimes with particular cruelty or where there are multiple victims, and the commission of crimes for any

290. See *supra* notes 56–105, 198–99 and accompanying text.

291. Although the contextual knowledge requirement would not be challenging to satisfy today, considering existing knowledge, it would be more challenging against charges of legalizing prostitution twenty years ago, when research and other information was less complete and systematic.

292. See *Prosecutor v. Al Hassan*, ICC-01/12-01/18-601-Red, Judgment on the Appeal of Mr Al Hassan Against the Decision of Pre-Trial Chamber I Entitled “Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense,” ¶¶ 53, 54 (Feb. 19, 2020), <https://www.legal-tools.org/doc/sywdid/> [<https://perma.cc/76RW-BU8W>] (“of marginal gravity only,” “goes to the exercise, as distinct from the existence, of jurisdiction.” ¶¶ 53, 54.).

motive involving discrimination.”²⁹³ Similarly convergent facts constituting aggravating circumstances going to sentencing in *Samardžić*—a case involving rape, sexual slavery, and persecution in impoundment—might well be extended to considerations of prostitution’s gravity:

[T]he accused repeated the acts . . . [with] particular brutality which caused extremely severe physical and mental pain to the injured parties. [S]ome of the injured parties were very young girls, even little girls, whilst the traumatic experience . . . left lasting and far-reaching effects on their mental and physical health, and it also carries particular gravity from the psychological, moral, religious, customary and other points of view of lives of both the victims and their families.²⁹⁴

As shown, prostitution’s constituent acts commonly entail behaviors that are recognized as crimes against humanity. These are common acts of savagery committed against women, notoriously permitted. When prostitution is enforced, when trafficked, when those in it are enslaved, it meets international statutory standards for these specific acts. Such crimes become “attacks” in the sense of the international criminal jurisprudence when its other requirements are met. Prostitution is always directed against specific civilian populations—based on gender and generally also race and ethnicity including indigenous status, aggravated by class and poverty and frequently age, hence persecutory. When prostitution is decriminalized for all actors and when it is legalized, its constituent acts become state policy. Prostitution is frequently widespread and systematic. When legal—its constituent crimes legally exonerated and no longer sanctioned—it becomes more widespread and systemic,

293. ICC, *Rules of Procedure and Evidence*, r. 145(1)(c) & 145(2)(b), U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000); see also *Al Hassan*, Judgment on the Appeal, *supra* note 292, ¶ 89 (noting that rule 145(1)(c) and 145(2)(b) factors could guide the assessment of gravity pursuant to Article 17(1)(d) sentencing); *id.* ¶ 102 (noting that the Pre-Trial Chamber not only considered the numerosity of victims but also “nature and extent” and “repercussions” on the direct victims and Timbuktu population, “in particular the victims of rape, sexual slavery,” and “the discriminatory motive of the crimes” committed on “religious and/or gender-based grounds”); Rome Statute, *supra* note 9, art. 17(1)(d).

294. Prosecution v. Samardžić, X-KRŽ 05/49, Appellate Panel Verdict, 24–25 (Ct. Bosn. & Herz. Dec. 13, 2006), <https://www.legal-tools.org/doc/6460c6/> [<https://perma.cc/N52Y-ETVK>].

metastasizing along structural lines, spreading geographically and increasing numerically according to social cleavages of inequality. Whatever prostitution was before its official embrace, it becomes not a series of unrelated attacks but an overall attack of crimes against humanity when legalized or decriminalized by policy. The legalization of prostitution, made up of many previously recognized crimes against humanity, should be recognized as a crime against humanity in itself.