The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction

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Universal jurisdiction is a doctrine by which States can assert jurisdiction over certain clearly circumscribed offenses that occur outside their territory and without any nexus to the nationality of the victim or the alleged perpetrator. The doctrine was originally developed to address piracy that occurred on the high seas. Because piracy occurred across international borders, thus impacting international navigation and commerce, it was seen as a threat to many, if not all nations. The justification for asserting universal jurisdiction over piracy was primarily based on the locus of the crime, its effect on many States, and its alleged heinous nature. The last rationale has led to the extension of the universal jurisdiction doctrine beyond piracy to human rights offenses, such as war crimes and genocide. By expanding the jurisdictional reach of the States, universal jurisdiction operates as a tool to secure greater accountability of perpetrators. The current difficulties faced in prosecuting human trafficking offenders raises significant concerns. The low risk of prosecution coupled with the high profits trafficking generates have contributed to its rapid global expansion. In this paper, I argue that the nature of human trafficking is analogous to that of piracy, and therefore universal jurisdiction should apply. Like pirates, human traffickers often operate across international borders and the widespread impact of their activities has the potential to harm all States. Furthermore, the analogy between these
two criminal enterprises is supported by the gravity of the crime rationale—a rationale that has formed the basis for expanding the universal jurisdiction doctrine to other crimes of universal concern.

The recent increase in transnational criminal activity, encouraged by globalization and open borders, has added to the challenges we face in fighting against impunity for such abuses. Trafficking of persons, and of women and children specifically, is an issue of particular concern to my Office. These disturbing trends have given me cause to reflect on the possibilities for alternative means of securing justice and accountability.¹

Mary Robinson, High Commissioner for Human Rights, 1997-2002

INTRODUCTION

Human trafficking is a transnational criminal enterprise involving diverse and widespread criminal activities that create significant challenges in holding offenders accountable. These activities such as forced labor and sexual exploitation among others, often involve heinous human rights violations.² Acts of trafficking occur domestically as well as across international

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² In this paper, I will primarily use a definition of human trafficking contained in a multilateral international convention to help illustrate the forms it may take. See U.N. Off. on Drugs & Crime, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a), G.A. Res. 55/25 Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Trafficking Protocol] (“Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”). To date, 117 countries have signed and 124 States have ratified the Trafficking Protocol. See U.N. Off. on Drugs & Crime, Signatories to the U.N. Convention
frontiers—affecting victims, communities and nations across the globe. The complex nature of trafficking, the failure of certain States to prosecute offenders, and the high mobility of offenders reveal the need to expand the jurisdictional reach of States to suppress this phenomenon.

The traditional jurisdictional principles under international law — based on territoriality, nationality of the offender or the victim, or the essential interests of the State — may not always be the most effective approach to apprehend traffickers who operate in many States and relocate often. In this prism, universal jurisdiction can become a useful tool to suppress a growing enterprise that “shames us all.”

Under universal jurisdiction, any nation can prosecute foreign offenders for certain heinous acts committed abroad against non-nationals. The doctrine was originally devised as a means to repress piracy. Because piracy occurred on the high seas, it was seen as outside the territory or traditional jurisdictional reach of the States. Pirates indiscriminately attacked vessels, imperiling international navigational commerce, thus creat-
ing both a physical and economic threat to all nations.\textsuperscript{7} In addition, these attacks were universally viewed as “grave” crimes because they involved heinous and wicked acts.\textsuperscript{8} These features formed the basis for the claim that any State would be justified in exercising jurisdiction over pirates.

The rationales behind applying universal jurisdiction to piracy have supported expanding the application of the doctrine in new contexts.\textsuperscript{9} While the rationale based on piracy’s occurrence on the high seas separates it from many other offenses, the rationale relying upon its widespread impact on all States (“the international impact rationale”) has been under-theorized.\textsuperscript{10} Ac-

\textsuperscript{7} See United States v. Brig Malek Adhel, 43 U.S. 210, 232 (1844) ("A pirate is deemed, and properly deemed hostis humani generis . . . [b]ecause he commits hostilities upon the subjects and properties of any or all nations without any regard to right or duty . . . "). See also Eugene Kontorovich, Implementing Sosa v. Alvarrez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute, 80 Notre Dame L. Rev. 111, 152-54 (2004) (contending that piracy directly threatens or potentially harms many, if not all, nations).

\textsuperscript{8} See Bonnet’s Trial, 15 State Trials (Howell) 1231, 1235 (Am. Vice Adm. 1718) (“As to the heinousness or wickedness of the offence, it needs no aggravation, it being evident to the reason of all men.”). See also Butler, supra note 6, at 355; Christopher C. Joyner, Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability, 59 Law & Contemp. Probs. 153, 166-167 (1996) (noting the generally heinous nature of piratical acts); Randall, supra note 6, at 794 (noting that pirates committed “wicked acts of violence or depredation.”).

\textsuperscript{9} See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 44 (2007) (discussing rationales supporting universal jurisdiction); MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 50-52 (2005) (discussing two rationales supporting universal jurisdiction over piracy); Joshua Michael Goodwin, Universal Jurisdiction and the Pirate: Time for an Old Couple to Part, 39 Vand. J. Transnat’l L. 973, 987-1001 (2006) (the author discusses and critiques various rationales that supported the application of universal jurisdiction over piracy); Kontorovich, supra note 7, at 152-54 (providing a detailed analysis of different rationales for universal jurisdiction). See also JOHN RAWLS, THE LAW OF PEOPLES 81-94 (1999) (using the natural law theory to support universal jurisdiction); CHANDRA LEKHA SRIRAM, GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY 13-14 (2005) (focusing on the grave nature of crimes including piracy, crimes against humanity, genocide, and war crimes to support the exercise of universal jurisdiction).

\textsuperscript{10} See INAZUMI, supra note 9, at 106-07 (“Many of the arguments to establish universal jurisdiction for crimes other than piracy show a tendency to concentrate on the first rationale—the seriousness of the crime in question—while ignoring the
According to this latter rationale, piracy harms all States because pirates imperil international navigation, which all States have an interest to protect. As Justice Story explained two centuries ago, a pirate "commits hostilities upon the subjects and properties of any or all nations." Because all States are affected, it was reasoned that all States should have the ability to prosecute offenders.

Conversely, the grave nature of piracy has been heavily relied upon as a basis for expanding universal jurisdiction to other offenses. According to the "gravity of the crime rationale," certain crimes are viewed as so heinous as to constitute an attack upon the international order, and therefore, States are justified in prosecuting alleged offenders in the interests of the international community. This rationale has been invoked to expand the application of universal jurisdiction by analogizing the heinous nature of piracy with that of modern human rights violations. Relying on both the gravity of the crime rationale and the international impact rationale as a second. Many scholars determine whether or not a crime is subject to universal jurisdiction based solely on the gravity of the crime.

References:

12 See Harvard Research in Int'l Law, Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. 439, 566 (Supp. 1935) [hereinafter Harvard Research] (noting that all States "have an interest in the safety of commerce."); see also Kontorovich, supra note 7, at 152-53; Randall, supra note 6, at 794-95.
13 See Harvard Research in Int'l Law, Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. 439, 566 (Supp. 1935) [hereinafter Harvard Research] (noting that all States "have an interest in the safety of commerce."); see also Kontorovich, supra note 7, at 152-53; Randall, supra note 6, at 794-95.
15 See Rosalyn Higgins, Problems and Process: International Law and How We Use it 58 (1994); Sriram, supra note 9, at 49; see also Henry J. Steiner, Three Cheers for Universal Jurisdiction — Or is it only two?, 5 THEORETICAL INQUIRIES L. 199, 223 (2004) (noting that universal jurisdiction for human rights offenses is used as a means to "advance a community interest in punishing the commission of serious international crimes, promoting accountability and dissuading others from threatening peace and world order.").
16 See M. Cheriff Bassiouni, The History of Universal Jurisdiction and Its Place in International Law, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND PROSE-
theoretical framework, I argue that universal jurisdiction should be applied to human trafficking.

This essay departs from a trend of efforts to reclassify human trafficking as a species of other international crimes, such as slavery or a crime against humanity. Reclassifying human trafficking in this manner is problematic due to its inherent assumptions and limitations. Instead, I argue that universal jurisdiction should apply to human trafficking as a self-standing international criminal enterprise, and not simply because it may take the form of another recognized universal jurisdiction crime. As a self-standing criminal enterprise, human trafficking is closely analogous to piracy. Similar to piracy, trafficking is a global phenomenon that harms all States. As Condolezza Rice declared in the 2008 Trafficking in Persons Report “[t]rafficking and exploitation plague all nations, and no country . . . is immune.” This analogy is strengthened by the fact that human traffickers, like pirates, are highly mobile individuals who act as part of a transnational criminal organization to evade prosecution and maximize their profits.

Under the gravity of the crime rationale, I claim that human trafficking is intuitively a heinous crime, and as such, is analogous to piracy.

18 See, e.g., Tavakoli, supra note 2, at 85.
20 The problems regarding reclassifying human trafficking will be addressed in Part II infra.
22 See Tavakoli, supra note 2, at 92.
23 See, e.g., Anne Gallagher, Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced La-
The objective in this analysis is not to compare which crime is of greater concern and gravity. Rather I will draw on the criteria that have been used in international law to determine the gravity of the crime for universal jurisdiction offenses to claim that classifying human trafficking as a grave crime is well supported. I will refer to international conventions, statements made by countries, scholarly-writings and State practice to demonstrate that a nation moving forward to assert universal jurisdiction over trafficking could justifiably contend that its view on the grave nature of human trafficking is well founded.

Under the international impact rationale, trafficking is further analogous to piracy. In this portion of my analysis, I depart from a tendency to focus solely on the gravity prong of the “piracy analogy” when arguing for universal jurisdiction over an offense. I claim that the economic and physical threat piracy poses to all nations, as displayed in recent piratical attacks off the coast of Somalia, closely aligns it with the modern threat posed by human trafficking.

Presently there is no international convention expressly establishing universal jurisdiction for human trafficking, and domestic laws alone are insufficient to establish universal jurisdiction for trafficking. However, the gravity of piracy and the modern threat it poses to international maritime traffic and navigation are well established in international law. In recent years, areas of concern related to piracy have expanded to include the safety of commercial traffic, the delivery of humanitarian aid to Somalia, and the protection of international navigation. The provisions of international law related to piracy are thus closely aligned with the modern threat posed by human trafficking.


24 See infra Part (I)(C)(2).
25 See INAZUMI, supra note 9, at 106 (claiming that arguments to establish universal jurisdiction for crimes other than piracy show a tendency to focus on the seriousness of the crime); Kontorovich, supra note 14, at 184-85 (claiming that the development of universal jurisdiction was mainly based on the analogizing the gravity of piracy with other crimes).
27 See United Nations Convention Against Transnational Organized Crime, art. 15, U.N. GAOR, 55th Session, UN Doc.A/55/383 (Nov. 2, 2000) (does not establish universal jurisdiction for human trafficking but it also does not preclude States from establishing universal jurisdiction according to their domestic law under article 15(6)). I will not presently analyze whether there is an emerging trend in treating human trafficking as a universal jurisdiction crime under domestic laws.
often inadequate to combat this transnational enterprise. In addition, many human trafficking crimes have gone unchecked because some States are unwilling or unable to prosecute perpetrators.\textsuperscript{28} Corrupt officials who facilitate trafficking, inadequate legislation which underestimates the extent of trafficking, and a lack of political will or resources are just some of the reasons for the under-prosecution and expansion of the phenomenon.\textsuperscript{29} Universal jurisdiction could help fill in the gaps where domestic responses fall short. Applying universal jurisdiction to traffickers operating in concert across nations would allow for their prosecution anywhere they are found, regardless of whether any interconnected criminal act occurred within the territory of the prosecuting State.

Furthermore, classifying human trafficking as a universal jurisdiction crime would serve the symbolic purpose of emphasizing its seriousness,\textsuperscript{30} and would avoid oversimplifying the nature of trafficking by categorizing it within other crimes of universal concern. It would also move the debate away from considering human trafficking as a form of prostitution.\textsuperscript{31}

From the outset, it should be noted that this essay is not aimed at providing a thorough study of the phenomenon of human trafficking (if such an enterprise is even possible), nor do I undertake an in-depth analysis of current State practices to determine whether they support or undermine applying universal jurisdiction to trafficking.

In this context, I review the foundations and rationales that supported applying universal jurisdiction to piracy. Then, I apply that same analytical framework to trafficking.\textsuperscript{32} I first overview the nature of trafficking to claim that it is analogous to piracy under the rationales described

\textsuperscript{28} See Merzon, supra note 17, at 898-900; see generally Martina Vandenberg, Complicity, Corruption, and Human Rights: Trafficking in Human Beings, 34 CASE W. RES. J. INT’L 323, 326 (2002).
\textsuperscript{29} Merzon, supra note 17, at 898-900.
\textsuperscript{30} See Tavakoli, supra note 2, at 97 (claiming that the political temperature surrounding this crime “has to date been sidelined as a ‘women’s issue.’”).
\textsuperscript{32} Although, in this paper the application is limited to human trafficking, I develop a theoretical and normative framework which could be used for deciding whether to extend universal jurisdiction to other crimes. For a similar enterprise with regards to terrorism as a universal jurisdiction crime see Fry, supra note 17. See also Geraghty, supra note 17 (concerning drug trafficking).
above, and then I explain the benefits to be gained from classifying human trafficking as a universal jurisdiction crime. I conclude by arguing that universal jurisdiction can become a useful mechanism in the international effort to repress human trafficking.

I. PIRACY AND THE SCOPE OF UNIVERSAL JURISDICTION

The principle that States can punish foreigners for crimes committed outside their territorial boundaries is a concept that has its roots in the Middle Ages. The genesis of this doctrine can be traced to the crime of piracy, and universal jurisdiction has primarily been developed through analogy to other crimes to piracy. There are competing rationales supporting the exercise of universal jurisdiction over piracy. These rationales will be discussed in detail below.

A. Conceptualizing Universal Jurisdiction

Jurisdiction under international law can be asserted on various grounds. The primary principles for establishing jurisdiction over a certain criminal act are based on: (a) the place where the crime occurred — the territoriality principle; (b) the nationality of the offender—the nationality principle; (c) the nationality of the victim—the passive personality princi-

33 See Harvard Research, supra note 14, at 563-72; Randall, supra note 6, at 791-95. See also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66 (1962) (supporting the claim that the common law origins of universal jurisdiction over piracy can be traced to the Middle Ages).

34 See PRINCETON PRINCIPLES, supra note 5, at 45 (claiming piracy is the “paradigmatic” crime subject to universal jurisdiction); Bassiouni, supra note 14, at 108-09 (contending that piracy is the basis of universal criminal jurisdiction); Susan Waltz, Prosecuting Dictators: International Law and the Pinochet Case, 18 WORLD POL’Y J. 101, 105 (2001) (contending that piracy on the high seas is the classic inspiration for universal jurisdiction).

35 See Louis Sohn, Introduction to BENJAMIN B. FERENZCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980) (claiming that the doctrine of universal jurisdiction was developed by analogy between piracy and other crimes); Randall, supra note 6, at 798. For a view that the analogy between piracy and other universal jurisdiction crimes based on the gravity of the crime is not a solid foundation for the development of universal jurisdiction, see Kontorovich, supra note 14.

36 See, e.g., Butler, supra note 6, at 355-56 (“[T]wo rationales have been offered for universal jurisdiction over piracy. The first rationale is that piracy occurs in places where no state has jurisdiction . . . The second rationale focuses on the nature of the offence, rather than its locale.”).
ple; and (d) protecting the States' vital interests — the protective principle.37

Universal jurisdiction provides an additional, yet more controversial mechanism for exercising jurisdiction in international law.38 As one commentator explains, universal jurisdiction

... refers to jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State. It is a principle of jurisdiction limited to specific crimes.39

Customary international law and treaty law provide the two main sources of authority for the exercise of universal jurisdiction.40 There also exists a category of fundamental peremptory norms, or jus cogens norms,41 to which universal jurisdiction applies. In this essay, I do not focus on whether a given crime is under the auspices of universal jurisdiction through customary international law or treaty law.42

38 Although it is a controversial principle, it is well accepted that universal jurisdiction exists in juxtaposition with other principles of jurisdiction, see Restatement (Third) of Foreign Relations Law of the United States § 404 (1987).
39 Cryer et al., supra note 9, at 46-47. See also Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives 220 (2003).
40 See Restatement (Third) § 404 cmt. a. Customary international law derives from "a general and consistent practice of states followed by them from a sense of legal obligation," id. at § 102(2). A thorough study of whether a certain crime is a universal jurisdiction crime under treaty law or customary international law is outside the scope of this paper, see Reydams, supra note 39, for a thorough study of treaties and state practice regarding universal jurisdiction. See also Jon B. Jordan, Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crimes, 9 Mich. St. U.-DCL J. Int'l L. 1, 9 (2000) (noting that treaties themselves can become customary international law if they are accepted by a great number of countries — the treaty will become customary international law and will be binding upon all nations, even those that are non-signatories).
42 See Reydams, supra note 39 (providing a thorough analysis of domestic legislation supporting universal jurisdiction and an examination of treaties establishing universal jurisdiction).
The practical operation of universal jurisdiction is best demonstrated through a renowned example. In 1993, the Belgian Parliament passed a law allowing Belgium to prosecute genocide, war crimes, and crimes against humanity occurring outside Belgium and without any nexus between the victim or the accused and Belgium. Relying upon this law, Belgium tried to convict several alleged perpetrators of the Rwandan genocide. In 2000, a Belgian judge issued an international arrest warrant for Mr. Abdoulaye Yerodia Ndombasi, the then Minister of Foreign Affairs of the Democratic Republic of the Congo ("DRC") for war crimes and crimes against humanity that he had allegedly committed in the DRC. In response, the DRC brought a case against Belgium to the International Court of Justice challenging the legality of the arrest warrant. Although the case was decided on the basis of immunity of State officials, Separate Opinions discussed the legality and scope of the universal jurisdiction doctrine.

The Belgian’s application of universal jurisdiction fell under the category of “pure universal jurisdiction.” Universal jurisdiction is exercised under two sub-categories: jurisdiction over offenses when the accused is present in the territory of the State asserting jurisdiction; and jurisdiction regardless of the offender’s whereabouts. The latter is commonly referred

47 CRYER ET AL., supra note 9, at 45. See also Antonio Cassese, Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction, 1 J. INT’L CRIM. JUST. 589, 595 (2003) (discussing the distinction between the two forms of universal jurisdiction).
to as “pure universal jurisdiction,”\textsuperscript{48} or universal jurisdiction \textit{in absentia}.\textsuperscript{49} The effectiveness of pure universal jurisdiction depends largely upon the cooperation of States to bring the accused to trial in the territory of the forum State.\textsuperscript{50} The controversies surrounding pure universal jurisdiction are complex and outside the scope of this essay.\textsuperscript{51} For the purposes of the present study, I refer to universal jurisdiction generally as a State having jurisdiction over foreigners for crimes committed abroad.

Universal jurisdiction is acclaimed as a tool to fight impunity, secure accountability, and to fill in the gaps international criminal tribunals leave.\textsuperscript{52} It also provides a means for prosecuting crimes occurring outside the traditionally conceived territory of any State (i.e. piracy on the high seas).\textsuperscript{53}

Presently, there is no international convention specifically addressing universal jurisdiction\textsuperscript{54} and the only decision of the International Court

\textsuperscript{48} See CRYER \textit{et al.}, \textit{supra} note 9, at 45.


\textsuperscript{50} See Arrest Warrant, 2002 I.C.J. at 3 (Belgium issued an international arrest warrant in absentia concerning the Congolese Minister of Foreign Affairs for any State to bring him for trial in Belgium). See also Ratner, \textit{supra} note 44, at 889-92 (2003) (concerning the exercise of universal jurisdiction over foreigners found outside of Belgium).

\textsuperscript{51} For an example of some of the controversies raised by the exercise of universal jurisdiction in absentia, see Roger O’Keefe, \textit{Universal Jurisdiction: Clarifying the Basic Concept}, 2 J. INT’L CRIM. JUST. 736, 747-59 (2004). See also REYDAMS, \textit{supra} note 39, at 224.

\textsuperscript{52} See AMNESTY INTERNATIONAL, \textit{Universal Jurisdiction: The Duty of States to Enact and Implement Legislation}, 15-19 (2001) (recognizing the gaps needed to be filled in domestic and international law); INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, \textit{Hard Cases: Bringing Human Rights Violators to Justice Abroad} 38 (1999); Daniel Ntanda Nsereko, \textit{The International Criminal Court: Jurisdictional and Related Issues}, 10 CRIM. L. FORUM 87, 105 (1999) (arguing for an increased role of universal jurisdiction in national courts to fill the gaps international institutions leave in prosecuting egregious crimes). See also Geraghty, \textit{supra} note 17, at 372 (providing an example in Colombia where the government is “unwilling or unable to prosecute the crime of drug trafficking.”).

\textsuperscript{53} See Harvard Research, \textit{supra} note 13, at 739.

\textsuperscript{54} See REYDAMS, \textit{supra} note 39, at 16.
of Justice\textsuperscript{55} concerning universal jurisdiction was, as mentioned above, ultimately decided on the basis of immunity of State officials.\textsuperscript{56} In light of this sparse legislative and judicial history, piracy, as the “traditional” universal jurisdiction crime,\textsuperscript{57} has been used as the benchmark for expanding universal jurisdiction to other crimes that can be analogized with it.\textsuperscript{58}

Various rationales support piracy as the traditional universal jurisdiction crime.\textsuperscript{59} This paper focuses specifically on what I perceive to be the two strongest rationales: the alleged grave nature of piracy,\textsuperscript{60} and the widespread effect the crime has upon many nations.\textsuperscript{61} Because of piracy’s central relevance to the foundation and expansion of universal jurisdiction, this section focuses on conceptualizing piracy, and then outlines the rationales used to justify the exercise of universal jurisdiction over it.\textsuperscript{62}

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\textsuperscript{55} See Arrest Warrant, 2002 I.C.J. 3 (Feb. 14) (universal jurisdiction was examined by the Separate and Dissenting Opinions). See generally O’Keefe, supra note 51 (providing an analysis of these Opinions).
\textsuperscript{57} See Mark W. Janis, An Introduction to International Law 325 (4th ed. 2003) (explaining that piracy is the traditional universal jurisdiction crime); Kontorovich, supra note 14, at 190.
\textsuperscript{58} See, e.g, Arrest Warrant, 2002 I.C.J. 3, at 37 (President Guillaume, separate opinion) (stating that traditionally, customary international law recognized universal jurisdiction over piracy).
\textsuperscript{59} See Inazumi, supra note 9, at 45-60 (discussing the two main rationales for the development of universal jurisdiction); see also Reydams, supra note 39, at 58 (arguing that the locus of the crime on the high seas was an additional rationale for the exercise of universal jurisdiction over piracy).
\textsuperscript{60} United States v Brig Malek Adhel, 43 U.S. 210, 232 (1844) (concluding that pirates are enemies of mankind).
\textsuperscript{61} See Harvard Research, supra note 13, at 440.
\textsuperscript{62} Understanding piracy in international law is not only important because it was the precursor to the doctrine of universality, but also because it was the precursor to the conception of international crimes, see Bassiouni, supra note 16, at 47-49. However important the study of the crime of piracy may be for the understanding of the broad scope of universal jurisdiction in contemporary international law, the majority of the literature concerning universal jurisdiction deals very superficially with piracy. The analogy between piracy and other crimes is done in a very subtle
B. Defining Piracy on the High Seas and the Locus of the Crime

Rationale

Typically, piracy involves acts of robbery and violence committed at sea. Piracy is ancient, and it is the oldest offense that invokes the assertion of universal jurisdiction. It has been a crime of universal concern even before international law, in the modern sense of the term, was in existence. During that period, a pirate was already considered an outlaw, a "hostis humani generis," and scholars and jurists have generally accepted the idea that universal jurisdiction over piracy has been invoked for hundreds of years. Entered into force in 1994, the United Nations Convention on the Law of the Sea officially codified this practice:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

manner in scholarly writings and very few studies have been devoted to an in-depth analysis of this analogy.

63 See Fitfield v Ins. Co. of Pa., 47 Pa. 166, 187 (1864) (concluding that according to most approved definitions, pirates are sea robbers); but see Alfred Rubin, The Law of Piracy 213 (2d ed. 1998) (noting that nations have the freedom to statutorily define what constitutes acts of piracy).

64 See Willard Cowles, Universality of Jurisdiction Over War Crimes, 33 Calif. L. Rev. 177, 181-94 (1945) (noting that jurisdiction over piracy has occurred since the sixteenth century); Goodwin, supra note 9, at 976.


67 See Kontorovich, supra note 14, at 190 (noting that universal jurisdiction over piracy has been recognized by every major maritime nation) (discussing United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820). See also Arrest Warrant, 2002 I.C.J. 3, 42 (Feb. 14) (President Guillaume, separate opinion) (noting that "international law knows only one true case of universal jurisdiction: piracy.").

While oftentimes thought of as a vestige of the past, piratical attacks near the coast of Somalia in 2009 have propelled piracy back into international legal discourse. Recent scholarship evaluating the effectiveness of current attempts at policing piracy reveal the continued need to find non-traditional solutions to combat criminal enterprises that present unique challenges in holding offenders accountable.

One of the distinctive challenges posed by piracy is the locus of the crime: piracy often takes place on the high seas, outside the traditionally conceived jurisdiction of any State. The fact that traditional heads of jurisdiction appear inapplicable is often offered as one rationale for the exercise of universal jurisdiction over piracy. However, this argument is flawed because universal jurisdiction over piracy is not merely a means to fill a jurisdictional gap. As Professor Randall explains, “[p]iracy’s mere occurrence on the high seas does not alone subject the offense to universal jurisdiction.” Professor Kontovorich adds that “traditional jurisdictional

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71 See Kontorovich, supra note 14, at 190.

72 See Sosa v Alvarez-Machain 542 U.S. 692, 749 (2004) (Scalia, J., concurring in part and dissenting in part) (suggesting that the norm for piracy was developed because pirates were beyond all territorial jurisdictions); Lee A. Casey, The Case Against the International Criminal Court, 25 FORDHAM INT’L L.J. 840, 855 (2002) (contending that universal jurisdiction for piracy has been accepted since it takes place “on the high seas, beyond the territorial jurisdiction of any single State.”), cited in Kontorovich, supra note 7, at 151.

73 Randall, supra note 6, at 793.
To help illustrate Professor Kontorovich’s argument—if a piratical attack occurs inside an American vessel on the high seas, the United States would be able to exercise other principles of jurisdiction besides universality to prosecute the offenders. Those principles include the extended territoriality principle,75 the nationality principle (if the offender is an American national), or the passive personality principle (if the victim is American).76 Consequently, the location of the crime on the high seas does not make the universality doctrine the only possible exercise of jurisdiction over pirates.77

C. Rationales Underlying the Application of Universal Jurisdiction to Piracy

I argue that universality over piracy developed based primarily on two rationales: (1) the widespread effect piratical attacks have on every nation,78 and (2) the grave nature of the crime.79 In this section, I claim that both rationales exist concomitantly, and can effectively serve as the foundation for expanding universal jurisdiction to other crimes. The examination of both rationales support the analogy between human trafficking and piracy provided in Part II of this essay.

1. The Effect of Piracy on International Navigation and its Effect on all Nations

Piratical attacks pose a physical threat to all States’ vessels, and their impact on international commerce and navigation further harms all

74 Kontorovich, supra note 7, at 151.
75 See Oscar Schachter, International Law in Theory and Practice 240-46 (1991) (explaining that a vessel holding the flag of a State is an extension of the territory of that State for purposes of asserting jurisdiction).
76 See Kontorovich, supra note 14, at 190; Randall, supra note 6, at 793. The passive personality principle presupposes, however, that to assert jurisdiction, pirates have attacked the ship of the forum State. Under the universality principle, any State could exercise jurisdiction over pirates regardless of whether pirates have attacked a national ship of the exercising State.
77 See Harvard Research, supra note 13, at 566 (noting that the location of piracy made universal jurisdiction applicable); Kontorovich, supra note 14, at 190-191 (noting that other heads of jurisdiction could be applicable to piracy).
78 See Kontorovich, supra note 7, at 152-54.
79 See Bassiouni, supra note 14, at 153; Butler, supra note 6, at 355; Kontorovich, supra note 14, at 184-85.
States.\textsuperscript{80} Pirates often attack indiscriminately, without regard to the vessel’s flag or the nationality of the victims.\textsuperscript{81} The fact that attacks occur where all States have the freedom to navigate makes it a clear risk to all seafaring States. As Professor Randall explains, “[p]iratical attacks, particularly when viewed cumulatively, may disrupt commerce and navigation on the high seas. Such lawlessness was especially harmful to the world at a time when intercourse among states occurred primarily by way of the high seas, thus making piracy the concern of all states.”\textsuperscript{82}

The nature of pirates as highly mobile criminals who are able to operate across borders\textsuperscript{83} and to strategically attack vessels navigating through particularly vulnerable areas further intensifies piracy’s widespread impact. Recent events in the Suez Canal, where vessels have to navigate through the Gulf of Aden, a narrow straight between the Horn of Africa and the Arabian Peninsula, demonstrate how pirates function in a strategic manner to maximize both the number of vessels attacked and the scope of those attacks.\textsuperscript{84} Piracy not only poses a grave risk to the safety and security of the crews and the vessels involved, but also to the stability of international commerce in those high-traffic areas pirates strategically target.

It follows that States have an interest in eliminating piracy even if pirates have not attacked their own vessels either because the State may be a direct victim in the future, or they may suffer the economic consequences of such attacks. Based on this international impact premise, it was reasoned that all States could exercise universal jurisdiction as a means to suppress piracy.\textsuperscript{85} Universal jurisdiction over piracy signaled the fact that “powerful seafaring nations could literally refer to their concrete and differentiated interests in both punishing the defendant and deterring similar conduct.”\textsuperscript{86}

This rationale centered on piracy’s widespread international impact can logically be extended to other crimes that (i) threaten or harm every

\textsuperscript{80} Kontorovich, \textit{supra} note 7, at 152-54 (contending piracy imperiled international commerce and navigation, which all states had an interest to protect, and arguing that allowing universal jurisdiction over piracy is a form of “national self-defense.”).

\textsuperscript{81} Id. at 153; Goodwin, \textit{supra} note 9, at 1001.

\textsuperscript{82} Randall, \textit{supra} note 6, at 794-95.

\textsuperscript{83} See Tavakoli, \textit{supra} note 2, at 92.

\textsuperscript{84} See Kontorovich (\textit{OPINIO JURIS}, \textit{supra} note 70 (noting that the significant piracy problem in the Gulf of Aden threatens to cripple world commerce because 1/3 of the world’s commerce transits through the Gulf).

\textsuperscript{85} See Kontorovich, \textit{supra} note 7, at 153.

\textsuperscript{86} Steiner, \textit{supra} note 15, at 223.
nation; and (ii) that due to traditional jurisdictional limitations and/or practical concerns demand the application of universal jurisdiction.

2. The “Grave” Nature of Piracy

A second common justification for exercising universal jurisdiction over piracy is based on the serious and heinous nature of the crime. It is argued that piracy is a grave crime due to the inhumane elements in the attacks—specifically the indiscriminate acts of violence against persons and the deprivation of property without any regard to right or duty. Because of its heinous nature, piracy was deemed a crime against the law of nations. Under this rationale, States act against piracy because of the universal need to hold those who engage in such heinous acts accountable. Thus, States exercise universal jurisdiction over pirates in the interests of the international community as a whole.

a. Criteria for Classifying a Crime as “Grave”

Under the gravity of the crime rationale, it is the substantive nature of piracy that makes it subject to universal jurisdiction. Based on this theory, offenses considered the most heinous crimes could also fall under the auspices of universal jurisdiction. The criteria used for determining the

87 See PRINCETON PRINCIPLES, supra note 5, at 23; SCHACHTER, supra note 75, at 270. See also Randall, supra note 6, at 795 (“piracy may comprise particularly heinous and wicked acts of violence and depredation.”); but cf. Kontorovich, supra note 14, at 204-07 (arguing that although the heinous nature of piracy was the basis for the application of universal jurisdiction, this basis was faulty because piracy does not actually constitute a heinous act).

88 See United States v. Brig Malek Adhel, 43 U.S. 210, 232 (1844) (“A pirate is deemed, and properly deemed hostis humani generis ... [b]ecause he commits hostilities upon the subjects and properties of any or all nations without any regard to right or duty ... ”).

89 See PRINCETON PRINCIPLES, supra note 5, at 23.

90 See INAZUMI, supra note 9, at 106.

91 Kontorovich, supra note 14, at 205.

92 See id. at 205-06; Jeffrey Blum & Ralph Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Torts Claim After Filartiga v. Pena-Irala, 22 HARV. INT’L L. J. 53, 60 (1981) (stating that heinousness made piracy universally cognizable and under this principle the doctrine was extended to other offenses); Anne-Marie Slaughter & William Burke White, An International Constitutional Moment, 43 HARV. INT’L L. J. 1, 15 n.72 (2002) (“universal jurisdiction has expanded based on the reprehensibility of specific crimes.”).
gravity of a crime has largely been based upon the universal condemnation of such crimes.\footnote{See \textit{Restatement (Third) of Foreign Relations Law of the United States} \S 404 cmt. a (1987) ("Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them.".).}

Professor Kontorovich explains that "the precise degree of evil necessary to create universal jurisdiction remains unclear."\footnote{Kontorovich, \textit{supra} note 14, at 206 ("[T]he test can only be qualitative and vague.").} The Restatement summarizes that universal jurisdiction is a result of universal condemnation of certain offenses as reflected in widely accepted international agreements and resolutions of international organizations.\footnote{\textit{Restatement (Third) }\S 404 cmt. a.} However, the specific threshold for what constitutes a universally condemned crime remains a rather abstract notion. It has been variously described as a crime that "shock[s] the conscience of humanity,"\footnote{Bassiouni, \textit{supra} note 41, at 69-71.} or a crime of such exceptional gravity that it affects the fundamental interests of the international community as a whole.\footnote{See \textit{Inazumi, supra} note 9, at 106.}

The question of how to classify crimes as "grave" or "heinous" was central to the analysis in \textit{United States v. Yunis}.\footnote{See \textit{U.S. v Yunis}, 681 F. Supp. 896, 900 (D.D.C. 1988), aff'd 924 F.2d 1086 (D.C. Cir. 1991).} The Court concluded that it is the nature and the extent of international condemnation of certain crimes that establishes whether a particular crime is heinous.\footnote{\textit{Id.}} Similar to the understanding in the Restatement, the Court noted that determining whether a crime satisfies this criterion is often a matter of international conventions or treaties.\footnote{\textit{Id.}} The Court then analyzed the extent of international adherence to those conventions condemning and criminalizing the conduct in question—aircraft piracy and hostage taking — along with global efforts in place to punish such conduct.\footnote{\textit{Id.}} Based on these factors, the Court concluded that both were offenses that should be subject to universal jurisdiction.\footnote{\textit{Id.} at 900-01.} Similarly, in \textit{United States v. Yousef} — where the crime in question was conspiracy to bomb an aircraft — the Southern District Court...
of New York concluded that universal jurisdiction applied because of the evidence supporting universal condemnation.\textsuperscript{103} The International Criminal Tribunal for the Former Yugoslavia ("ICTY") took a slightly different route by directly connecting the gravity rationale to the concept of \textit{jus cogens}.\textsuperscript{104} The Tribunal reasoned that "one of the consequences of the \textit{jus cogens} character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture."\textsuperscript{105} In a similar vein, Lord Millet relied upon the notion of \textit{jus cogens} to assert universal jurisdiction in \textit{Ex Parte Pinochet}:

\begin{quote}
[C]rimes prohibited by international law attract universal jurisdiction under international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe \textit{jus cogens}. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.\textsuperscript{106}
\end{quote}

As the concept of heinousness is not concretely defined, States may assess their views regarding the gravity of a crime by moving forward to exercise universal jurisdiction and comparing their positions with those held by other States. A State can ascertain other States' views on a particular crime by considering States' official declarations\textsuperscript{107} (e.g. during the adoption of a convention repressing criminal conduct), and the number of States adhering to an international treaty repressing a particular offense.\textsuperscript{108} Scholarly writings and reports by NGOs concerning the gravity of an offense may also provide checks and balances for States. In addition, crimes over which States have successfully exercised universal jurisdiction provide reli-


\textsuperscript{105} \textit{Furundzija}, IT-95-17 at ¶ 156.


\textsuperscript{108} See Tavakoli, \textit{supra} note 2, at 81-82 (discussing the adoption of international treaties condemning human trafficking which reflect an international consensus on the seriousness and gravity of the offense).
able evidence of their grave nature. A careful assessment by States will help to avoid the unlimited and unilateral expansion of the doctrine.

While it may be argued that the degree of gravity required to trigger the application of universal jurisdiction is not clear-cut — State action, case law, international agreements, and history provide meaningful guideposts for this evaluation. Within these guideposts, the gravity of the crime rationale has been relied upon to expand universal jurisdiction to crimes beyond piracy. In the following part, I use this theoretical framework to argue for extending universal jurisdiction to human trafficking.

II. Extending Universal Jurisdiction to Human Trafficking

In this part of the essay, I provide an overview of human trafficking under the current international legal framework. Then, I use the international impact and gravity of the crime rationales to demonstrate the similarities between piracy and trafficking on a theoretical level. I ultimately argue that human trafficking is intimately analogous to piracy and as such it should be subject to universal jurisdiction.

To support this claim, I demonstrate that in line with piracy and other crimes subject to universal jurisdiction, human trafficking is an offense against the law of nations, and a crime so egregious as to offend the commonly shared values of the world community. Also, similar to piracy, any State may suffer the effects of human trafficking due to its usual occurrence across international borders. Furthermore, I argue that because of the widespread impact human trafficking has on individual victims, the increase in illegal immigration, and the fueling of other criminal activities, all States have a vested interest in globally repressing the crime. I conclude

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110 Kontorovich, supra note 14, at 204-06.


113 See TIP Report, supra note 21, at 5 (noting that trafficking undermines the “health, safety, and security of all nations it touches.”).

114 See id.; Merzon, supra note 17, at 890-91 (commenting on the effects of human trafficking on every nation).
this part of the essay by detailing the reasons it is necessary and desirable to classify human trafficking as a universal jurisdiction crime.

A. An Overview of Human Trafficking

Trafficking is a crime that can happen anywhere, not just “out there somewhere far away” as many in developed nations mistakenly perceive. From the outset, it must be noted that human trafficking is a complex and diffuse phenomenon lacking any uniform definition or conceptualization. In this essay, I examine human trafficking as a whole, not focusing on specific forms of trafficking, such as sexual exploitation or forced labor, nor the adverse impact trafficking has on women and children. For my purposes, I will use a fairly expansive definition of human trafficking that has been internationally recognized.

The heinous nature of human trafficking is perhaps best developed through the story of one of its victims. Lila is a young woman from Romania who was 19-years-old when she was first trafficked to the United Kingdom. An acquaintance introduced her to a man who offered her a job as a housekeeper. However, upon arriving at the destination, the man sold

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116 This paper does not provide a thorough analysis of the political dimensions or legal theories surrounding human trafficking. I do not purport to offer a cure-all solution for such a multifaceted phenomenon, but simply a useful tool to combat the transnational nature of the enterprise and the impunity of perpetrators.

117 Other authors examining human trafficking have similarly focused on trafficking as a whole, rather than focusing on any one particular form. See, e.g., Obokata, supra note 19; Tavakoli, supra note 2.


119 I will refer to the definition provided in the Trafficking Protocol, supra note 2, at art. 3(a). Despite its breadth, I recognize that this definition bears some inherent limitations, and certain forms of trafficking may not included be therein. See Tavakoli, supra note 2, at 80-83 (discussing some critiques of this definition).

120 TIP REPORT, supra note 21, at 5.

121 Id.

122 Id.
her to a group of traffickers, and she was forced into prostitution. She was repeatedly abused and constantly threatened with death. After a frustrated attempt at escape, the physical violence became more brutal and more frequent. During this period, she was trafficked several times across international borders, and was finally freed in a police raid and sent back to Romania. After only two months back in Romania, she fled from a shelter and her whereabouts are still unknown.

Unfortunately, Lila’s story is not an isolated narrative. Human trafficking affects more than 800,000 men, women, and children annually, and unlike other crimes of grave concern, such as genocide, trafficking occurs across all cultures, races, and nationalities. It is a growing criminal enterprise fueled by deception, coercion, and lucrative financial gain. Globalization, open borders and expanding global markets have provided an ideal environment for trafficking networks to maximize their scope. These networks are often highly organized, sophisticated mobile enterprises capable of relocating often to diversify their markets or to avoid detection and prosecution. In response, successfully combating traffick-

123 Id.
124 Id.
125 Id.
126 TIP REPORT, supra note 21, at 5.
127 Id.
128 Id. at 7 (according to research completed in 2006, 800,000 people are trafficked across borders annually. This number does not include the millions trafficked within their own countries).
129 See id. at 8.
130 See id. at 34 (stating that the trafficking industry is not only thriving, but growing); see also Kara C. Ryf, The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000, 34 CASE W. RES. J. INT’L. L. 45, 45-47 (claiming that at that time human trafficking was the fastest growing criminal activity in the world and ranked third as the most profitable criminal trade behind only drug and arms trafficking).
132 See Robinson, supra note 1, at 15
133 See Hauber, supra note 131, at 185.
134 See Tavakoli, supra note 2, at 92.
ing will require, *inter alia*, integrated prevention strategies, the successful prosecution of offenders, deterrence, and programs that assist victims reintegrate into society after the crime has occurred.135

B. Conceptual Framework for Applying Universal Jurisdiction to Human Trafficking

I should note from the outset that this essay does not consider whether human trafficking is an international crime136 (a classification that would lead to the application of universal jurisdiction)137 or a transnational crime.138 The distinction between international crimes and transnational crimes is emerging in international criminal law.139 Professor Robert Cryer contends that transnational crimes include “crimes which are the subject of international suppression Conventions but for which there is not yet international criminal jurisdiction.”140 He further notes that these are crimes that “have actual or potential transboundary effect and crimes which are intra-state but which offend a fundamental value of the international community.”141 For the purposes of this essay, I do not consider the legitimacy, or nature of the distinction between international and transnational crimes.

135 See TIP REPORT, *supra* note 22, at 3.

136 See generally Antonio Cassese, *International Criminal Law* 11 (2d ed. 2008) (classifying international crimes as “violations of international customary rules . . . intended to protect values considered important by the whole international community and consequently binding on all States and individuals.”). See also Bassiouni, *supra* note 112, at 32-33 (examining the concept of international crimes and devising a list of crimes that fall under this classification).

137 See generally Gallagher, *supra* note 112 (claiming that human trafficking should be reclassified as an international crime which in turn encompasses the application of universal jurisdiction. Also distinguishing “transnational crimes” from “international crimes” claiming that only the latter falls under the scope of universal jurisdiction).

138 This distinction is not widely accepted in international law. See, e.g., Neil Boister, *Transnational Criminal Law?*, 14 EUR. J. Int’l L. 953, 953 (2003), (noting that international law does not recognize transnational criminal law as a division of international criminal law).


140 Cryer Et Al., *supra* note 9, at 281.

141 Id.
The trend in the literature concerning the extension of universal jurisdiction is to argue that a certain offense is another form of an already recognized universal jurisdiction crime—such as slavery, a crime against humanity, or genocide. Following this trend, it has been argued that human trafficking is a form of slavery or a crime against humanity. I depart from this trend and claim that even in cases where human trafficking does not meet the threshold of slavery or a crime against humanity, it should still be subject to universal jurisdiction. My analysis is based on the premise that only human trafficking crimes involving grave human rights violations (e.g. sexual slavery, forced labor) should be subject to universal jurisdiction. This would clearly not encompass every criminal act committed in furtherance of trafficking. Before any State exercises universal jurisdiction, it should be assured that the particular criminal act meets the gravity of the crime threshold discussed above.

The claim that human trafficking is a form of slavery has received support in legal scholarship. Doctrinally, if human trafficking is classified as a form of slavery, it becomes an international crime subject to universal jurisdiction. While ostensibly this may appear to be a desirable outcome, I submit that attempting to squeeze human trafficking within the conception of slavery is a form of reverse engineering. Furthermore, this reclassification—

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142 See, e.g., Tavakoli, supra note 2 (claiming that human trafficking should be reconceptualized as a form of slavery).

143 See, e.g., Fry, supra note 17 (claiming that universal jurisdiction should apply to terrorism because it can be conceptualized as a crime against humanity or genocide); Obokata, supra note 19 (claiming that human trafficking is a form of a crime against humanity).

144 See Tavakoli, supra note 2 (concluding that human trafficking is akin to the international crime of slavery, and thus it should follow the application of universal jurisdiction).

145 See Obokata, supra note 19.


147 See Tavakoli, supra note 2, at 77-79.

148 Some key differences separate the practice of slavery in previous centuries (old slavery) from modern practices such as human trafficking (new slavery) where many argue slave-like relationships exist. For example, in new slavery: legal ownership is avoided, there is a very low purchase price, and the relationship between
tion would likely have the counterproductive effect of contracting the scope of human trafficking by excluding other recognized forms of trafficking.149

Similarly, if human trafficking is treated as a crime against humanity,150 this categorization would severely restrict the potential application of universal jurisdiction.151 For example, the Rome Statute of the International Criminal Court currently includes the practice of trafficking as a crime against humanity, in the form of enslavement.152 Furthermore, a crime against humanity under the Rome Statute must be “committed as part of a widespread and systematic attack directed against any civilian population” in furtherance of a State or organizational policy to commit such attack.153 This high threshold would exclude many trafficking cases that do not rise to the level of a widespread or systematic attack.

In line with this analysis, the ICTY concluded that human trafficking fit within the definition of enslavement, and therefore could be considered a crime against humanity under the ICTY Statute.154 The key element the Court considered to reach this conclusion was the continued exploitation of victims.155 While the ICTY’s conception may be effective in combating a small number of human trafficking cases, to constitute a crime against humanity under the ICTY Statute, the enslavement must be committed in an armed conflict directed against the civilian population.156

It follows from the above that categorizing human trafficking as part of another recognized universal jurisdiction crime fails to capture the

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149 See Trafficking Protocol, supra note 2, at art. 3(a) (slavery is just one of the many enumerated forms of human trafficking).
150 See Bassiouni, supra note 16, at 40.
151 See, e.g., M. Chief Bassiouni, Crimes Against Humanity, in INTERNATIONAL CRIMINAL LAW 521 (M. Cherif Bassiouni ed., 2d ed. 1999)
153 Id. at arts. 7(1)(c), 7(2)(a).
155 Kunarac, IT-96-23-T & IT-96-23/1-T, at ¶ 543.
essence and peculiarities of the offense, and greatly limits the potential impact universal jurisdiction could have on suppressing the enterprise.

C. Applying Universal Jurisdiction: The Analogy Between Human Trafficking and Piracy

In this part of the essay, I analyze the analogy between human trafficking and piracy to argue that universal jurisdiction should apply to trafficking as a self-standing criminal enterprise. The analogy relies on two pillars. First, the heinous nature of a large number of human trafficking acts satisfy the gravity of the crime rationale. Second, the occurrence of human trafficking across international borders and in numerous States makes it a threat to every State and satisfies the international impact rationale. Relying upon both rationales departs from many conventional arguments for the extension of universal jurisdiction that primarily rely upon the gravity rationale. Because what constitutes a grave crime in international law is not perfectly defined, an analogy based on both prongs provides a more stable argument for the exercise of universal jurisdiction.


Under the gravity of the crime rationale, the heinous nature of certain crimes abstractly offends the community of nations and is an attack upon the international legal order regardless of where the crime occurs. As Professor Malcolm Shaw states, each and every State has jurisdiction over certain offenses on the basis that "the crimes involved are regarded as particularly offensive to the international community as a whole." Thus, if it can be established that human trafficking reaches a certain gravity threshold, universal jurisdiction should apply.

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157 See Higgins, supra note 15, at 58 (claiming that certain crimes are an "attack upon international order."); Bassiouni, supra note 17, at 42 (claiming that the violation of certain core values shared by the international community warrants overriding usual territorial limits on jurisdiction).


159 See generally U.S. v Yunis, 924 F.2d 1086, 1092 (D.C. Cir. 1991) (concluding that because of the heinousness and wide condemnation of hijacking, the offense is universally repressible); Restatement (Third) of Foreign Relations Law of the United States § 404 (1987) (discussing the notion of crimes of universal concern); Princeton Principles, supra note 5, at 23 (noting that universal jurisdiction applies to "crimes of such exceptional gravity that they affect the fundamental interests of the international community as a whole.").
As displayed by the tragic plight of Lila, the heinous nature of human trafficking should be self-evident.\textsuperscript{160} Trafficking constitutes a serious and clear violation of fundamental human rights.\textsuperscript{161} It affects men, women, children and the elderly, while having a disparate impact on women and children.\textsuperscript{162} Its heinous nature is magnified by the fact that its harmful physical and emotional effects are not short-term.\textsuperscript{163} Victims lose their fundamental rights and freedoms, including the liberty to make personal choices and to decide the course of one’s life. They are bought and sold as if they were objects, and even if ultimately freed, victims frequently endure the physical and psychological consequences for the rest of their lives.\textsuperscript{164} Generally, for a crime to be subject to universal jurisdiction, its heinousness must be extraordinary or aggravated.\textsuperscript{165} The enduring violations against each individual victim’s autonomy, liberty and basic human rights underscore the aggravated heinousness of human trafficking.\textsuperscript{166} Therefore, trafficking in human beings is a clear example of a criminal enterprise that shocks the conscience of mankind.\textsuperscript{167}

\textsuperscript{161} For commentators examining trafficking as a serious violation of human rights see \textit{id.} at 659-69; Rumpf, \textit{supra} note 146; Vandenberg, \textit{supra} note 29.
\textsuperscript{162} See UNODC \textit{Global Report}, \textit{supra} note 4, at 6 (noting that a much greater percentage of women and children are affected by trafficking); Tavakoli, \textit{supra} note 3, at 78-80. \textit{See also} Gallagher, \textit{supra} note 119, at 488 (discussing the impact of trafficking in women and how it perpetuates power relations).
\textsuperscript{164} See Merzon, \textit{supra} note 17, at 890-91.
\textsuperscript{165} See Kontorovich, \textit{supra} note 14, at 207.
\textsuperscript{166} Taking sexual exploitation as an example, the continued violation of the victim’s human dignity results from the fact that victims are not only repeatedly raped but are also subject to threats to their lives and to those of their families.
\textsuperscript{167} See Bassiouni, \textit{supra} note 41, at 70-71 (discussing crimes that “shock mankind’s conscience.”).
From a moral perspective, inflicting continuous human suffering to gain profit increases the crime's abhorrence.\textsuperscript{168} The lucrative financial gains available through trafficking suggest that as long as there are victims to exploit, the crime will perpetuate.\textsuperscript{169} The profit motive behind trafficking reminds one of slavery as both involve the assertion of ownership by one individual over another. This premise is directly contrary to the fundamental principle that all individuals are free and equal.\textsuperscript{170}

A State wishing to assert universal jurisdiction over human traffickers may assess whether other States share its position on the heinousness of the crime by comparing reports from various countries on trafficking.\textsuperscript{171} Many States have indicated a desire to combat human trafficking by referring to its abhorrence and noting the special need for cooperation in preventing and prosecuting perpetrators.\textsuperscript{172} In addition, many nations have included human trafficking as a universal jurisdiction offense under their domestic laws.\textsuperscript{173} The adoption of the UN Trafficking Protocol\textsuperscript{174} evidences a widely accepted view that human trafficking is a grave crime, and the

\begin{itemize}
  \item \textsuperscript{168} See generally Martti Koskenniemi, Between Impunity and Show Trials, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 8 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2002) ("[T]he atrocities of the 20th century have not emerged from criminal intent but as offshoots from a desire to do good . . . [E]ven the worst Nazi nightmares were connected to a project to create a better world."). In contrast, the objective of human traffickers is purely to make as much profit as possible.
  \item \textsuperscript{169} See TIP REPORT, supra note 21, at 34 (discussing the lucrative nature of human trafficking).
  \item \textsuperscript{171} See e.g., TIP REPORT, supra note 21 (analyzing the domestic attempts of 170 countries to prosecute and abolish the crime of human trafficking); THE HOME OFFICE, UK ACTION PLAN ON TACKLING HUMAN TRAFFICKING 2 (March 2007), http://www.homeoffice.gov.uk/documents/human-traffick-action-plan [hereinafter UK ACTION PLAN] (discussing the United Kingdom's domestic response to trafficking).
  \item \textsuperscript{172} See UNODC Global Report, supra note 5 (discussing measures taken in 155 countries to prevent and suppress human trafficking); TIP REPORT, supra note 22 (discussing the impact of trafficking on 170 States). See also UK ACTION PLAN, supra note 171, at 2 (noting the United Kingdom's dedication to work with international partners to combat this abhorrent crime).
  \item \textsuperscript{173} See TIP REPORT, supra note 21 (analyzing the domestic legislation used in 170 States to combat human trafficking); REDRESS TRUST, supra note 109, at i ("Universal jurisdiction has been used in numerous European countries to ensure that perpetrators of serious crimes under international law, including war crimes, crimes

inclusion of human trafficking as a form of a crime against humanity under the Rome and ICTY Statutes further supports this view. The foregoing commentary leads to the conclusion that human trafficking, like piracy and other crimes of universal concern, is a grave offense.

2. The Impact of Human Trafficking on Every State

Human trafficking is often transnational in its scope and reach. It frequently occurs across international borders, involving a web of perpetrators recruiting and transporting victims from one State to be exploited in another. Trafficking typically encompasses numerous criminal activities in multiple countries that contribute to the overall offense, and the enterprise involves direct perpetrators as well as an intricate web of aiders and abettors. The transnational nature exacerbates the threat it poses to all nations — thus strengthening the analogy between human trafficking and piracy.

Human trafficking has global effects on most, if not all nations. Similar to piracy, any State may bear the consequences of trafficking. As Nina Tavakoli explains:

People traffickers, like pirates before them, are highly mobile individuals who operate predominantly across international borders. By merging or forming co-operative relationships, traffickers have expanded the geographical scope of their activities to explore new markets. Therefore, as with piracy, the locus of the crime itself demands the application of universal jurisdiction.

against humanity, genocide, torture, terrorism, human trafficking and others, do not evade justice.”).

174 See Trafficking Protocol, supra note 3; Signatories to the Trafficking Protocol, supra note 3.

175 See UNODC Global Report, supra note 4, at 11. I will focus on the study of human trafficking as a transnational phenomenon for the purposes of the application of universal jurisdiction. However, it should be noted that a sizable portion of human trafficking occurs within domestic borders, but is more likely to go undetected due to restrictive definitions of trafficking, id.

176 See CRYER ET AL., supra note 9, at 281-99.

177 See Merzon, supra note 17, at 891-92 (describing different activities involved in the criminal web of human trafficking, from recruiting victims to issuing fake passports).

178 See Obokata, supra note 19, at 445; Ryf, supra note 131, at 47 (claiming that human trafficking has the potential to affect every State).

179 Tavakoli, supra note 2, at 92.
While piracy has an international reach (as often is the case for human trafficking), it normally occurs on the high seas. In the case of human trafficking, it may take place entirely within the territory of a State. At first glance, this fact seems to provide a disanalogy between trafficking and piracy. However, as discussed above, although pirate attacks may occur on the high seas, they do not take place “in the water on the high seas—they [are] committed onboard ships.” Hence, under international jurisdictional principles, human trafficking and piracy both occur within the broadly defined territory of a State.

Because human trafficking affects or threatens all States, it stands to reason that all States should be motivated to combat it. The effects of trafficking on States are multifaceted. First, the global spread of trafficking threatens States’ nationals wherever they are. Additionally, human trafficking bears an economic impact on States due to the costs involved in trafficking prevention and reparation measures. Also, trafficking adds to the increasing economic costs of preventing illegal immigration, and raises serious national security concerns because trafficking proceeds are often used to help fuel other criminal activities such as the drugs and arms trade. Finally, as detailed above, from a moral perspective, the reprehensible nature of trafficking abstractly offends all States and individuals.

Hence, human trafficking affects all States to varying degrees. States' interests to combat human trafficking may be economic, national security related, sovereignty related, or based on humanitarian con-

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180 See Tavakoli, supra note 2, at 82 (discussing the fact that trafficking does not always occur transnationally).
181 Kontorovich, supra note 7, at 151 (noting that “maritime vessels have always been considered within the territorial jurisdiction of their flag State.”).
182 But see Christine Chinkin et al., Feminist Approaches to International Law, 85 Am. J. Int’l L. 613, 630 (1991) (arguing that the prevention of trafficking in women is unlikely to occur unless it has impact on economic interests).
183 Tavakoli, supra note 2, at 97.
184 Merzon, supra note 17, at 891 (“In terms of societal costs, human trafficking significantly affects even those who are not its direct victims: profits from human trafficking fuel global criminal organizations, thus financing other transnational crimes such as drug trafficking and human smuggling. Trafficking also stunts global development by suppressing growth of human resources and reinforcing the cycle of poverty. It leads to the breakdown of social structures such as families and communities. Finally, trafficking undermines the rule of law and leads to the perpetuation of crime and corruption.”).
185 Chinkin, supra note 182, at 630.
186 Merzon, supra note 17, at 891.
cerns. The purpose of this essay is not to examine the scope of human trafficking's effect on each State, but to argue that because trafficking threatens all nations to varying degrees, it is a concern to all States.\textsuperscript{188}

This argument raises a critical question: if all States are affected and thus have an interest in combating human trafficking, why is the application of universal jurisdiction necessary? It seems reasonable to conclude that if States wanted to eliminate human trafficking they would each take initiatives to police the enterprise. However, in practice there is a clear discrepancy among nations regarding prevention and prosecution.\textsuperscript{189} Corruption, specifically the involvement of police and law enforcement agents,\textsuperscript{190} has helped contribute to the impunity of perpetrators and the continued expansion of this global phenomenon.\textsuperscript{191} Against this backdrop, the following section explains why applying universal jurisdiction is necessary and desirable.

\textbf{D. The Desirability of Applying Universal Jurisdiction to Human Trafficking}

Human trafficking ranks among the "most serious crimes of concern to the international community as a whole."\textsuperscript{192} The profits trafficking generates combined with the remote likelihood of prosecution will possibly lead to continued expansion unless met with a strong international re-

\textsuperscript{187} Tavakoli, supra note 2, at 83.

\textsuperscript{189} See TIP Report, supra note 21 (analyzing the varied prevention and prosecution measures used in 170 States to combat human trafficking).

\textsuperscript{190} See id. at 35 ("Too often, victims seeking protection under the law from police, judges and immigration officials, find that those who should be their advocates are in fact furthering their degradation."); Tavakoli, supra note 3, at 190 (discussing the high level of official complicity in the crime).

\textsuperscript{191} See Tavakoli, supra note 2, at 190 ("The involvement of law enforcement officials in trafficking breeds a culture of impunity.").

\textsuperscript{192} Obokata, supra note 19, at 445.
sponse. As Conny Rijken contends, the transnational nature of trafficking calls for transnational solutions.

When trafficking occurs across national borders, some criminal acts still take place within the borders of at least one State. Thus, the principles of jurisdiction based on territoriality, nationality or passive personality could apply. Be that as it may, extending universal jurisdiction to human trafficking is supported by pragmatic and normative considerations. By extending universal jurisdiction to human trafficking, any State would be able to prosecute traffickers, regardless of where the acts occurred or the nationality of the offender or the victim.

As discussed above, in certain States, corrupt officials further fuel the industry by assisting human trafficking practices and hindering prosecutions. It has been suggested that "universal jurisdiction would be a useful tool in the fight against the impunity that such corruption induces." However, in certain States it is not only corruption that impedes prosecution, but rather the scarceness of resources. Procedural difficulties, such as a lack of coordination between prosecutors and law enforcement agents is another common problem in the international community. Low prosecution num-

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195 For example, victims may be recruited in one country and exploited in another State, thus both nations have jurisdiction over traffickers based on the nationality, territorial or passive personality principles.
196 See supra notes 75-77 and accompanying text.
197 See TIP REPORT, supra note 21 passim (discussing concerns about officials in numerous countries facilitating human trafficking, and the failure of certain States to prosecute corrupt officials); Tavakoli, supra note 3, at 91-92 (claiming that the involvement of local governmental officials is extensive and arguing that international organizations, such as the UN peacekeeping operations, also play a role in the facilitation of human trafficking). See also HUMAN RIGHTS WATCH, MEMORANDUM OF CONCERN: TRAFFICKING OF MIGRANT WOMEN FOR FORCED PROSTITUTION INTO GREECE 19 (2001), available at http://www.hrw.org/backgrounder/eca/greece/greece_memo_all.pdf (discussing that many believe the trafficking in women for forced prostitution could not exist at any level in Greece without the involvement of local officials facilitating the phenomenon).
198 Tavakoli, supra note 2, at 92.
199 See, e.g., Merzon, supra note 17, at 899 (citing resource constraints in Albania, Gambia, Belize and Cameroon as a reason for under-prosecution of traffickers).
200 See, e.g., id. (citing a lack of coordination in East Timor and Panama).
bers in certain countries also stem from domestic legislation—either because domestic laws do not criminalize trafficking at all or the laws in place do not provide a strong deterrent message.\textsuperscript{201} Universal jurisdiction can be used to help fill the gaps these deficiencies leave.

In addition to the fight against impunity, there is also a symbolic motivation for recognizing human trafficking as a universal jurisdiction crime. If human trafficking is treated as a crime of universal concern, it will become part of a category of serious crimes viewed with such abhorrence that they warrant universal condemnation.\textsuperscript{202} This treatment would avoid the common problem of oversimplifying the gravity of trafficking by equating it to prostitution or other less serious offenses. Recognizing human trafficking as a universal jurisdiction crime would also provide additional political capital to combat the practice by underlining the international community’s strong desire to prevent and punish it.\textsuperscript{203} This is pivotal because it would encourage States to strengthen their human trafficking laws, and would be a step towards increasing the political will needed to effectively tackle the problem.\textsuperscript{204}

The practical impact of applying universal jurisdiction coupled with the symbolic message of classifying human trafficking as a crime of universal concern strongly support the extension of universal jurisdiction to this criminal enterprise.

**Conclusion**

This paper analyzed the genesis of universal jurisdiction through its application to piracy, and argued that the doctrine can logically be extended to a human trafficking enterprise that has reached “epidemic proportions.”\textsuperscript{205}

In a globalized world, traffickers operate across nations. Just as pirates who operate on the high seas, traffickers do not limit themselves to territorial boundaries. They pose a threat to every nation, and their criminal activity has a widespread global effect—impacting even those States where no part of their operations are based. This close analogy with piracy pro-

\textsuperscript{201} See, e.g., id. (citing the criminal code of Qatar which only prohibits forced prostitution and sets a maximum punishment of three years in prison).

\textsuperscript{202} See Linder v Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992) (discussing the standard for asserting universal jurisdiction of crimes that are viewed with universal abhorrence).

\textsuperscript{203} Tavakoli, *supra* note 2, at 94.

\textsuperscript{204} See id.

\textsuperscript{205} Id. at 79.
vides the sturdy foundation upon which the rationale for applying universal jurisdiction rests.

Trafficking offends the most basic principles of human dignity, freedom and equality. Like piracy and other universal jurisdiction crimes, human trafficking is a crime of aggravated heinousness.

Further, I have argued that classifying human trafficking as a universal jurisdiction crime can be useful tool for holding offenders accountable. In addition, it can help to unravel the multifaceted and organized network of traffickers. It is an enterprise that relies on aiders and abettors in a global criminal network, and traditional principles of jurisdiction alone are not always effective. As one author notes:

States and the international community must take a holistic approach which addresses multi-faceted problems pertinent to trafficking, including its causes and the consequences. If such an approach is taken at the national, regional, and international levels with effective cooperation and coordination, then the fight against trafficking may be won sooner rather than later.206

Prevention measures by States, greater opportunities for victims, and social and political awareness are a few measures needed to successfully combat this enterprise. These initiatives must exist alongside robust prosecution of traffickers through the assertion of universal jurisdiction in order to fight impunity for traffickers and to eradicate an inhumane enterprise that shames us all.

206 Obokata, supra note 19, at 457.