Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity

Siller, Nicole

Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity

Nicole Jean Siller

Cover design and Layout: Trics Media – www.trics-media.nl
Printing: Off Page – www.offpage.nl

university of groningen

Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity

PhD Thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. E. Sterken
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 23 February 2017 at 14.30 hours

by

Nicole Jean Siller

born on 25 June 1984
in Colorado, USA

Supervisors
Prof. C.I. Fournet
Prof. H.D. Wolswijk

Assessment committee
Prof. A.L. Smeulers
Prof. H.G. van der Wilt
Prof. C. Stahn

For my grandparents,
Frank and Lily.

Acknowledgements

I am truly grateful for all of the help and support that I received throughout my doctoral studies.

First and foremost, I must express my deepest gratitude to my supervisor, Professor Caroline Fournet. I will be forever grateful for your continuous support of my Ph.D. study and related research, for your patience, encouragement, cocoscopes, and immense knowledge. We have shared many laughs and made so many great memories throughout the last four years together. I could not have imagined having a better advisor and mentor.

I also wish to express appreciation to my second supervisor, Professor Hein Wolswijk. Your critical eye and legal insight motivated me to improve the quality of the arguments that this thesis attempts to make. Besides my supervisors, I would like to thank the members of my thesis committee: Professor Alette Smeulers, Professor Carsten Stahn and Professor Harmen van der Wilt, for their insightful comments and feedback, and for taking the time to read my manuscript.

In addition to those mentioned above, I would like to thank Dr. Kai Lindenberg, Dr. Panos Merkouris, Tiffany Oldfield, Leigh Siller, Jude Jarvis, Kate van Doore and Dr. Jelena Golubović for thoughtful feedback given on various portions of this research and words of encouragement.

On a practical level, I would like to thank the University of Groningen and Rosalin Franklin Fellowship program for funding my research. Many thanks also to the great team at Trics Media for designing the cover, layout and getting this book printed.

I would like to thank my paranymphs. Dr. Laura 'AL' Peters, you are not only a colleague, but a great friend. Many thanks for facilitating a steady stream of 'good vibes' between our offices. Thank you Tiffany Oldfield for always believing in me and encouraging me. You are one-of-a-kind and I am beyond grateful for our friendship. And to my sister Heather: words will never be able to express how thankful I am to have you in my life. I am proud to be your sister. Our weekly chats and yearly excursions throughout this period were some of the high points of my time spent in Europe.

I am also grateful to so many friends who have supported me throughout this journey. I am one of the lucky few to have so many friends that I consider family. To my expat group in Groningen, thank you for taking me in and providing many much-needed distractions from the Ph.D. process, most notably in the form of coffee and lunch dates, 'FFFs' nights and pub quiz. To my friends back in the USA, thank you for your words of encouragement, cards and care packages. So many of you also came to visit and spend time with me in Europe. Your friendships mean the world to me.

I must express my very profound gratitude to my grandparents to whom this book is dedicated. Any achievements attributed to me are owed to the two of you. I would also like to thank the Jansmas and de Jongs for welcoming me into their beautiful Dutch family. Finally, to Jelmer—thank you for encouraging me every step of the way. You have made me smile every day since we met. I love you and I cannot wait to begin our next adventure together in Australia.

Nicole Siller
Groningen, 9 January 2017

Table of Contents

Table of Abbreviations

1899 Congress	International Congress on the White Slave Trade
1902 Conference	Conférence Internationale Pour La Répression De La Traite Des Blanches
1902 Conference Proceedings	Documents Diplomatiques Conférence Internationale Pour La Répression De La Traite Des Blanches
1902 Draft Convention	Projet de Convention
1904 Draft Agreement	Projet d'Arrangement
1904 Agreement	The International Agreement for the Suppression of the 'White Slave Traffic'
1910 Conference	Deuxième Conférence Internationale Pour La Répression De La Traite Des Blanches
1910 Conference Proceedings	Documents Diplomatiques Deuxième Conférence Internationale Pour La Répression De La Traite Des Blanches
1910 Convention	The International Convention for the Suppression of the 'White Slave Traffic'
1921 Conference	Records of the International Conference on Traffic in Women and Proceedings Children' League of Nations Diplomatic Conference on the Establishment of the International Convention for the Suppression of Traffic in Women and Children
1921 Convention	The International Convention for the Suppression of Traffic in Women and Children
1933 Conference	Records of the Diplomatic Conference concerning the Suppression Proceedings of Traffic in Women of Full Age' League of Nations Diplomatic Conference on the Establishment of the International Convention for the Suppression of Traffic in Women of Full Age
1933 Convention	The International Convention for the Suppression of the Traffic in Women of Full Age
1937 Draft Convention	International Convention for Suppressing the Exploitation of the Prostitution of Others

1937 Draft Convention Report	Report of the Sub-Committee entrusted with drawing up the Second Draft of a Convention for Suppressing the Exploitation of the Prostitution of Others
1937 Draft Convention Memo	UN Economic and Social Council 'Draft Convention of 1937 for the Suppressing the Exploitation of the Prostitution of Others'
1949 Convention	The Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others
1953 Report	Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude
1996 Draft Code	Draft Code of Crimes against the Peace and Security of Mankind 1996
AFRC	Armed Forces Revolutionary Council
A Ch	Appeals Chamber
AJ	Appeals Judgment
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts
APOV	Abuse of a Position of Vulnerability
Bellagio-Harvard Guidelines	2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery
CCL No.10	Allied Council Control Law No. 10
CATW	Coalition Against Trafficking in Women
CDF	Civil Defence Forces
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CICC	Coalition for the International Criminal Court
COE	Council of Europe

CoE Trafficking Convention	Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report
CETS	Council of Europe Treaty Series
CoE/UN Joint Study	Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs
Commentary	A Commentary on the UN Conventions on its Protocols
Consent Issue Paper	Issue Paper: The Role of 'Consent' in the Trafficking in Persons Protocol
CRC	Convention on the Rights of the Child
Doc	Document
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Statute	Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
EU 2011 Directive	Directive 2011/36/EU 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
Exploitation Issue Paper	Issue Paper: The Concept of "Exploitation" in the Trafficking in Persons Protocol
Final Act	Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court
GA	General Assembly
GAATW	Global Alliance Against Trafficking in Women

GA Res.	General Assembly Resolution
GRETA	Group of experts on action against trafficking in human beings
Guidance Note	UNODC Guidance Note on "abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
HRC	Human Rights Caucus
HRW	Human Rights Watch
IAF	International Abolitionist Federation
IB	International Bureau
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTRSt.	Statute of the International Criminal Tribunal for Rwanda, *in* Security Council Resolution 955
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia, *in* Security Council Resolution 808
ILC	International Law Commission
ILC Draft Statute	International Law Commission Draft Statute for and International Criminal Court
ILO	International Labor Organization
IMT	International Military Tribunal at Nuremberg

IMTFE	International Military Tribunal for the Far East
International Framework	International Framework for Action: To Implement the Trafficking in Persons Protocol
IOM	International Organization for Migration
KLA	Kosovo Liberation Army
KP Dom	Kazneno-Popravin Detention Center
Legislative Guides	Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto
LRA	Lord's Resistance Army
LNTS	League of Nations Treaty Series
LoN	League of Nations
Marty Report	Inhuman Treatment of people and illicit trafficking in human organs in Kosovo
n.d	No date
NGO	Non-Governmental Organization
No.	Number
NVA	National Vigilance Association
McDougall Report	Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict
OAS	Organization of American States
OED	Oxford English Dictionary
OHCHR	Office of the High Commissioner for Human Rights
Optional Protocol	The Optional Protocol to the Convention on the Rights of the Child on the sale of children
OSCE	Organization for Security and Co-operation in Europe

OSCE Organ Removal Report	Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings
OTP	Office of the Prosecutor
'Powers'	Powers attaching to the right of ownership
Palermo Protocol	The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
Parliamentarian Handbook	Combatting Trafficking in Persons: A Handbook for Parliamentarians
PrepCom	Preparatory Committee
PTC	Pre-Trial Chamber
Recruitment Fees Report	The Role of Recruitment fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons
Rome Conference	United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court
Rome Statute	Rome Statute of the International Criminal Court
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SCSLSt.	Statute of the Special Court for Sierra Leone, *in* Security Council 1315
SC	Specialist Chambers of Kosovo
SD	Sicherheltsdienst or Security Service
SFRY	Socialist Federal Republic of Yugoslavia
SITF	Special Investigative Task Force
Slavery Convention	Convention to Suppress the Slave Trade and Slavery
SPO	Specialist Prosecutor's Office
Sup Ct Ch	Supreme Court Chamber

Supplementary Slavery	Supplementary Convention on the Abolition of Slavery, the Slave Convention Trade, and Institutions and Practices Similar to Slavery
T Ch	Trial Chamber
TJ	Trial Judgment
UN	United Nations
UNGA	United Nations General Assembly
UN.GIFT	UN Global Initiative to Fight Human Trafficking
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNMIK	United Nations Mission in Kosovo
UNODC	United Nations Office on Drugs and Crime
UNODC Module 1	Anti-human trafficking manual for criminal justice practitioners, Module 1: Definitions of trafficking in persons and smuggling of migrants
UNODC Module 4	Anti-human trafficking for criminal justice practitioners, Module 4: Control methods in trafficking in persons
UNODC Model Law	Model Law Against Trafficking in Persons
UNODC Toolkit	Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings
UNSC	United Nations Security Council
UNTOC	United Nations Convention against Transnational Organized Crime
UNTS	United Nations Treaty Series
USA	United States of America
US NMT(s)	Subsequent Nuremberg trials held by the United States
VCLT	Vienna Convention on the Law of Treaties
Vol. II	UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume II.

Vol. III	UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume III.
Women's Tribunal	The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery

The citation style used in this thesis complies with the Oxford Standard for the Citation of Legal Authorities (OSCOLA). The OSCOLA referencing guide can be found using the following link: https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf.

Preface

In an era when hyper globalization coincides with times of armed conflict and civil unrest, the opportunity to capitalize off of the backs and bodies of the vulnerable is one that many have shamelessly seized. While the commodification of human beings is a practice almost as old as time itself, the way in which international law has sought to address practices and crimes involving human commodification – most notably– human trafficking, has evolved throughout the last 120 years.

At the first official international human trafficking[1] conference in 1902, many state delegates did not believe that international law should concern itself with addressing the practice. The Spanish delegate confronted this opposition stating that international law should not be used as a shield to prevent state action, but rather, as a sword in 'slaying the hydra of procurement'[2] –referencing anti-trafficking efforts.

More than a century after that first trafficking conference, international law now knows several international anti-trafficking instruments which have triggered, among other things, state action against the practice in national jurisdictions. At the international level, a permanent international criminal court now exists to hold individuals to account for the commission of international crimes. This court's statute even references human trafficking within its codification of enslavement as a crime against humanity. It appears that the legislative tools necessary to address human trafficking exist. It is the aim of this project to ensure that they are comprehensively understood to enable the enhancement of their effectiveness in legal practice; and identify to what extent they may even be used to effectuate international criminal justice.

The research for this project ended in September 2016.

1 Human trafficking was referred to as 'white slavery' or the 'white slave traffic' from the mid-1800s until around 1920.

2 Ministère Des Affaires Étrangères, *Documents Diplomatiques. Conférence Internationale Pour La Répression De La Traite Des Blanches* (Imprimerie Nationale 1902) 66. Translation by the author. The original reads as follows: 'M. Cuartero ne comprendrait pas que quelques objections tirées du droit international pussent empêcher les Gouvernements de « terrasser l'hydre du proxénétisme ».'

1 Introduction

1.1 Problem, Context and Research Questions

The international phenomenon commonly known as 'human trafficking'[3] affects a variety of realms including: criminal justice, migration, human rights, labor and global economics.[4] Since the turn of the century, widespread national and global attention has concentrated on the human trade's impact with good reason. It is estimated that as many as 800,000 people are trafficked in between international borders each year.[5] After the drug trade, trafficking in human beings is said to be the second most profitable crime[6] affecting 'virtually every country in every region of the world.'[7] For example, the estimated annual global aggregated profits generated from this industry for 2016 is valued at 150 billion USD.[8]

In 2000, the United Nations Office on Drugs and Crime (UNODC) introduced the Convention against Transnational Organized Crime (CTNOC) in an effort to facilitate a criminal justice response via the worldwide domestic criminalization of organized criminal activities.[9] Supplemented by three protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) officially identified and legally defined the offense of 'trafficking in persons' in its Article 3(a) as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[10]

---

3 The following terms will be used interchangeably throughout this thesis: human trafficking, trafficking in persons, trafficking, trafficking in human beings and human trade.

4 V Roth (ed), *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers 2012) 77; J Elliott, *The Role of Consent in Human Trafficking* (Routledge 2015) 15-16.

5 Roth (n 4) 4-5. Figures come from the United States Department of State. When adding the domestically trafficked figures, numbers are even larger. However, it should be noted that these estimates vary among reporting mechanisms including the United States State Department, United Nations Population Fund, International Labor Organization, Global Slavery Index, International Organization for Migration and the UNODC.

6 L Shelly, *Human Trafficking: A Global Perspective* (CUP 2010) 7.

7 UNODC, Global Report on Trafficking in Persons (2014) <https://www.unodc.org/documents/human-trafficking/2014/GLOTIP_2014_full_report.pdf> accessed 15 January 2016, 7 (2014 UNODC TIP Report).

8 United States Department of State, Trafficking in Persons Report (2016) <https://www.state.gov/documents/organization/258876.pdf> accessed 20 July 2016 (2016 US TIP Report). These figures are increasing. For example, in 2014, the value was at just over 100 billion USD. See also, B Luscombe, 'Inside the Scarily Lucrative Business Model of Human Trafficking' *Time Magazine* (New York, 20 May 2014) <http://time.com/105360/inside-the-scarily-lucrative-business-model-of-human-trafficking/> accessed 15 January 2016.

9 UNGA, UN Convention against Transnational Organized Crime (adopted by GA Res A/RES/55/25 on 8 January 2001, entered into force 29 September 2003) (2000) UN Doc A/55/383 (CTNOC). Other crimes addressed in these instruments include: human smuggling, arms trade and money laundering.

10 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3 (Palermo Protocol).

Since the Palermo Protocol's international debut, over 90% of states around the world have enacted domestic legislature criminalizing human trafficking.[11] Nevertheless, conviction rates around the globe are abysmal.[12] For example, the 2016 United States' Trafficking in Persons' Report (US TIP Report) estimates that since 2010, less than 50% of the reported trafficking prosecutions happening worldwide result in a conviction.[13] Evidently, criminalization in and of itself cannot ensure justice through law.

Explanations for this prosecutorial deficiency range from issues concerning the crime's codification to difficulties in detection, investigation and victim cooperation.[14] Concerning criminal codification, neither the Palermo Protocol nor its *travaux préparatoires* do little to assist with interpreting the offense as all terms were left undefined therein. An inadequate understanding of the legal definition of trafficking in persons and its scope of practical application is repeatedly cited as contributing to offender impunity.[15] For example, McCarthy reports that:

> Definitional confusion is also an issue in trafficking trials, as judges struggle to apply the laws on the books to actual situations. Research on court cases in jurisdictions diverse as Norway, Ukraine, and Russia have shown how judges have struggled to apply abstract

11 2014 UNODC TIP Report (n 7) 1. The Palermo Protocol has been the source of legislative inspiration for these national laws, as well as European coalitions. See also, Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (adopted 3 May 2005, entered into force 1 February 2008) Warsaw, 16.V.2005, CETS No. 197, Art 4 (CoE Trafficking Convention). See also, Directive 2011/36/EU 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 [2001] OJ L 101/1, Art 2 (EU 2011 Directive).

12 2014 UNODC TIP Report (n 7) 1; United States Department of State, Trafficking in Persons Report (2015) <http://www.state.gov/j/tip/rls/tiprpt/2015/243364.htm> accessed 15 January 2016 (2015 US TIP Report).

13 2016 US TIP Report (n 8) <http://www.state.gov/j/tip/rls/tiprpt/2016/258694.htm> accessed 20 July 2016. Since 2010, 289,017 victims of trafficking have been identified around the world resulting in 60,072 criminal prosecutions and of those prosecutions, 29,162 convictions. The 2016 US TIP Report, however, qualifies these statistics stating that they 'are estimates only, given the lack of uniformity in national reporting structures… The number of victims identified includes information from foreign governments and other sources. Prosecution and victim identification data reported this year are higher than in previous years, in large part due to increased information sharing and better data quality from several governments.' See also, LR Grundell, 'EU Anti-Trafficking Policies: from Migration and Crime Control to Prevention and Protection (May 2015 Policy Brief) <http://cadmus.eui.eu/bitstream/handle/1814/35745/MPC_PB_2015_09.pdf?sequence=1> accessed 15 January 2016: which reported that of the 7,704 prosecutions for trafficking throughout Europe between 2010 and 2012, only 2,700 resulted in a conviction.

14 Roth (n 4) 7; H van der Wilt, 'Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?' (2014) Amsterdam Center for International Law Research Paper 2014-07, 2 <http://dare.uva.nl/document/2/155748> accessed 22 September 2016.

15 See eg, A Farrell *et al*., 'Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases (2012) <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf> accessed 17 September 2015: Key reasons identified in this research included a lack of precedent, local prosecutors (USA) not understanding the crime and thinking it was a federal prosecutorial matter, as opposed to a state prosecutorial concern; and a lack of training and knowledge as to the codification itself.

concepts such as exploitation and vulnerability to real-life situations.[16]

Similarly, the United Nations Working Group on Trafficking in Persons has also 'identified a lack of conceptual clarity with respect to the definition of trafficking as an obstacle to the effective implementation of the international legal framework around trafficking persons, and its national equivalents.'[17]

This problem is further compounded by rhetoric used in and outside of the law. For example, the global anti-trafficking campaign's influential power and reach within the last twenty years has increasingly frustrated the discernibility of trafficking from various forms of human exploitation.[18] Gallagher explains that the '[o]verly broad interpretations of the definition of trafficking, designed to take advantage of the political and legal momentum around this issue for purposes of advancing a particular policy agenda' is especially worrying.[19] In illustrating this issue, she states, that '[w]hile many would accept that trafficking is fundamentally different to its identified end purposes, that view is no longer a consensus one.'[20] And indeed, Gallagher is correct. Because of this rhetorical contamination, terms including, but not limited to: human trafficking, slavery, modern slavery, enslavement, forced labor, (enforced) prostitution, servitude and slave trade, are used as synonyms, without any regard to the legal disorder this characterization may cause.[21]

Many of these terms have their own distinct legal definitions under international law, while others do not. In fact, 'modern slavery' is not presently a legal term of art under international law.[22]

16 LA McCarthy, 'Human Trafficking and the New Slavery' (2014) 10 Annual Review of Law and Social Science 221, 234; UNODC, 'The Concept of "Exploitation" in the Trafficking in Persons Protocol' (2015) Issue Paper <https://www.unodc.org/documents/human-trafficking/2015/UNODC_IP_Exploitation_2015.pdf> accessed 19 May 2016 (Exploitation Issue Paper): This study found that 'the exploitation element of the definition is often not well or uniformly understood and this obstructs investigations and prosecutions' (114). See also, C Rijken (ed), *Combatting Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011) 396; J Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 14 Albany Government Law Review 1, 6-15.

17 UNODC, 'The Role of "Consent" in the Trafficking in Persons Protocol' (2014) Issue Paper, 16 <https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf> accessed 15 January 2016 (Consent Issue Paper).

18 See, R Plant, 'Modern Slavery: The concepts and their practical implications' (2014) ILO Working Paper Series, 1 <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_355052.pdf> accessed 8 April 2016: As Plant explains, the Palermo Protocol's entry into force was the basis for most states to reevaluate their laws, adopt new laws, plans and/or policies as it concerns human exploitation. See also, N Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (2015) European Journal of Comparative Law and Governance 236.

19 AT Gallagher, *The International Law of Human Trafficking* (CUP 2010) 50.

20 ibid.

21 See also, N Siller '"Modern Slavery": The Legal Tug-of-War between Globalization and Fragmentation' in M van der Linden and M Rodríguez García (eds), *On Coerced Labor: Work and Compulsion after Chattel Slavery* (Brill Publishers 2016). This issue is also present in human rights law jurisprudence. See for example, *Rantsev v Cyprus and Russia* (Judgment) European Court of Human Rights, First Section No 25965/04 (7 January 2010) [281]-[282].

22 This is not to say, however, that the phrase is absent from all sources of law. Both Brazil and most recently, the United Kingdom, have enacted legislature criminalizing 'modern slavery'.

That fact, however, has not inhibited academics, practitioners or institutions from its usage.[23] As O'Connell Davidson describes, governments and various establishments create 'action plans' to combat or research 'modern slavery', presupposing that this term identifies a 'particular phenomenon. And yet closer attention to the ways in which the term is employed by the many and various actors involved in the fight against "modern slavery" will not assist in identifying what, exactly, that phenomenon is.'[24] For example, the 2016 Global Slavery Index, a study attempting to ascertain the number of 'modern slaves' living in the world, addresses terminology issues explaining:

> Different countries use different terminology to describe modern forms of slavery, including the term slavery itself, but also other concepts such as human trafficking, forced labour, debt bondage, forced or servile marriage, and the sale and exploitation of children. While definitions vary, in this report, modern slavery refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, abuse of power or deception, with treatment akin to a farm animal.[25]

The practice of using terms interchangeably blurs the conceptual borders of these concepts and prevents legal clarity in practical applications.[26]

23 On this point, see van der Wilt 'Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?' (n 14) 1; R Vijeyarasa and JM Bello y Villarino, 'Modern-Day Slavery: A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev' (2012) 9 Journal of International Law and International Relations 38, 39. See also, Siller, 'The Prosecution of Human Traffickers?' (n 18) 238.

24 J O'Connell Davidson, *Modern Slavery: The Margins of Freedom* (Palgrave McMillian 2015) 2.

25 Walk Free Foundation, Global Slavery Index (2016) 12 <http://assets.globalslaveryindex.org/downloads/Global+Slavery+Index+2016.pdf> accessed 20 July 2016.

26 On this observation JA Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 The American Journal of International Law 609.

While widespread, this discursive practice is not uniform. Many scholars and institutions in this field have engaged in, and advocate for, the consolidation of legal concepts including slavery, slave trade and enslavement with trafficking.[27] Alternatively, a smaller group rejects this practice.[28] As it concerns this rhetorical phenomenon, Gallagher avers that the current practice of those working in international law equating 'trafficking as slavery' is presently 'in a state of flux'.[29] Designating the increasing prevalence and proliferation of such cross-over rhetoric as 'exploitation creep', Chuang underscores the potential for doctrinal implications.[30] The need for definitional clarity is evident.

---

27 This list is by no means exhaustive. See for example, J Aston and V Paranjape, 'Human Trafficking and its Prosecution: Challenges of the ICC' Social Sciences Research Network <http://dx.doi.org/10.2139/ssrn.2203711> accessed 26 October 2015, 1; I Atak and JC Simeon, 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' (2014) 12 Journal of International Criminal Justice 1019, 1020; K Bales, *Ending Slavery: How we Free Today's Slaves* (University of California Press 2007); J Kim, 'Prosecuting human trafficking as a crime against humanity under the Rome Statute' (2011) Columbia Law School Gender and Sexuality Online <http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf> accessed 26 October 2015, 1-2; MY Mattar, 'The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case?' (The Protection Project, 2002) <http://www.protectionproject.org/wp-content/uploads/2010/09/icc.pdf> accessed 26 October 2015, 1; T Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) 54 International and Comparative Law Quarterly 445, 445-446; M O'Brien, 'Prosecuting Peacekeepers in the ICC for Human Trafficking' (2006) 1 Intercultural Human Rights Law Review 28. F Pocar, 'Human Trafficking: A Crime Against Humanity' in EU Savona and S Stefanizzi (eds), *Measuring Human Trafficking* (Springer 2007) 5-12; AY Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law' (1999) 39 Virginia Journal of International Law 303, 305; S Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008) 80; N Tavakoli, 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime' (2009) 9 International Criminal Law Review 77, 85. In terms of rhetoric from the UN, see for example, *Abolishing slavery and its contemporary forms*, UN Doc. HR/PUB/02/4, 2002; Statement by the Special Rapporteur on contemporary forms of slavery, including its causes and consequences at the 30th session of the United Nations Human Rights Council, 14 September 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16440&LangID=E> accessed 26 October 2015. Curiously, Werle and Jessberger describe trafficking in persons as a 'practice similar to enslavement.' G Werle and F Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 356, [938]. This is an interesting characterization considering the only other international instrument in this realm, the Supplementary Slavery Convention, uses that exact same phrase of art, but identifies practices other than trafficking. See also, R Plant, 'Forced Labour, Slavery and Human Trafficking: When do definitions matter?' (2015) 5 Anti-Trafficking Review 153.

28 J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013) 272-289; Chuang 'Exploitation Creep' (n 26) 609; JA Chuang, 'The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"' (2015) 5 Anti-Trafficking Review 146; H van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 Chinese Journal of International Law. See also, A Cassese et al., *Cassese's International Criminal Law* (3rd edn, OUP 2013) 37: On different grounds (mental element of international crimes), Cassese points out that crimes including the 'slave trade' and 'trade in women or children' lack 'the international element' thus differing from international crimes such as enslavement as a crime against humanity.

29 Gallagher, *The International Law of Human Trafficking* (n 19) 191. See also, UN Economic and Social Council 'Report of the Ad Hoc Committee on Slavery (Second Session) (4 May 1951) UN Doc E/1988, 5 [8]: This observation was made with regards to slavery as early as 1951 by the UN Economic and Social Council which recounted 'that the rather loose present-day usage of the term "slavery"…arises in part from the fact that the nature of the institution, the conditions which surround it, and the public attitudes toward it, are undergoing constant change.'

30 Chuang 'Exploitation Creep' (n 26) 629-635.

Many states have used the Palermo Protocol's construct or some variation of its Article 3 to define their national trafficking offense.[31] However, all the terms contained in the international definition of 'trafficking in persons' are left undefined– an omission which has found its way into domestic trafficking law and likely contributes to the 'definitional confusion' of this offense. Therefore, the first research inquiry discerns a thorough, elemental and critical understanding of the international definition of 'trafficking in persons'.[32]

After clarifying the Palermo Protocol's definitional contours, the second aim of this study pertains to understanding the applicability of this offense within international criminal law (ICL). The actual criminalization of trafficking is domestic. Trafficking in persons is classified (by way of the CTNOC) as a transnational organized crime. Nevertheless, there is an ever-growing camp of practitioners and scholars discussing the future prosecution of human traffickers before the International Criminal Court (ICC).[33] Those who aver that the ICC can and should hear trafficking cases primarily base their claim on the fact that the Rome Statute references 'trafficking in persons' within its definition of 'enslavement' as a crime against humanity. Specifically, Article 7(2)(c) states:

> '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*.[34]

The context of Article 7(2)(c)'s reference to trafficking is, however, an underexplored area of the law. As leading legal trafficking scholar Gallagher explains, the Rome Statute's 'reference to trafficking in persons … has attracted very little comment or analysis but appears to have caused considerable confusion.'[35] Scholars are divided on the role trafficking plays within Article 7. The ICC itself has yet to comment.

The Office of the Prosecutor (OTP) has, however, made conflicting statements regarding the ability to prosecute traffickers before the ICC. In its 'strategic plan' for 2016-2018, the OTP remarked that 'ICC crimes usually do not occur in isolation from other types of criminality, such as ordinary opportunistic crimes or transnational organised criminal activity.'[36] Included among the 'other types of criminality', the OTP listed trafficking in human beings, thereby distinguishing trafficking from 'ICC crimes'.[37] However in June 2016, the OTP released its 'Draft Policy on

31 2014 UNODC TIP Report (n 7) 1.

32 There is also a confusion as to the legal differences between the crimes of 'smuggling' and 'trafficking'. However, this issue has been widely addressed and is not the subject of this study. On distinguishing trafficking and smuggling, see (and this list is by no means exhaustive), K Abramson, 'Beyond Consent: Towards Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' (2003) 44 Harvard International Law Journal 473; AA Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets that Drive It and The Organisations that Promote It' (2001) 9 European Journal on Criminal Policy and Research 163; Atak and Simeon (n 27) 1019; Gallagher, *The International Law of Human Trafficking* (n 19) 89-94; Roth (n 4) 77-105; Elliott (n 4) 20-28.

33 Among others, these scholars include: Allain, Gallagher, Obokata and van der Wilt. See also, Siller, 'The Prosecution of Human Traffickers?' (n 18) 236, note 4.

34 UNGA Rome Statute of the International Criminal Court (17 July 1998) (Rome Statute). Emphasis added.

35 Gallagher, *The International Law of Human Trafficking* (n 19) 215-216.

36 OTP, Strategic Plan 2016-2018 (6 July 2015), [30] <http://www.pgaction.org/pdf/OTP-Draft-Strategic-Plan-2016-2018.pdf> accessed 22 September 2015.

37 ibid.

Children' which states that the 'regulatory framework' (Rome Statute) recognizes the 'trafficking of children as a form of enslavement'.[38]

The blanket inclusion of trafficking within enslavement as a crime against humanity may prove to be problematic. First, the phrase 'trafficking in persons' in the Rome Statute is left undefined. If the Palermo Protocol's definition of trafficking is adopted, it includes a wide variety of exploitative purposes, many of which are outside of the legal scope of enslavement and may therefore frustrate clarity of this concept.[39] Second, none of those discussing the prosecution of traffickers before the ICC have, to date, critically examined the Rome Statute's definition of 'enslavement' with specific reference to the inclusion of trafficking. Upon first glance, the language in the definition of enslavement (ie, 'in the course of…') appears to conditionally qualify trafficking's inclusion only if it is the mechanism that leads to enslavement. It also seems that while the phrase 'trafficking in persons' is included in the definition, the perpetration of enslavement[40] is nevertheless required to satisfy the material elements of the offense. In turn, this requirement would then essentially nullify the ability to prosecute traffickers who are not enslavers.

This is not to say that the prosecution of traffickers before international courts and tribunals is a meritless assertion. Rather, it is a notion in need of further legal clarification. Trafficking rhetoric is abundant in international legal discourse. The criminal essence of trafficking is the *deviant procurement* of another for their exploitation which has been the focus of several international criminal convictions of enslavement as a crime against humanity dating as far back as Nuremberg. The contemporary international judgments are no different. Additionally, the International Criminal Tribunal for the former Yugoslavia (ICTY) has even held that 'contemporary forms of slavery' fit within the international crime against humanity of enslavement, as well as the fact that human trafficking can be 'an indicator' of this offense.[41]

It is important to recognize, however, that human trafficking is not codified as its own offense *within* the Rome Statute, or in any other statute of the current or previously operating international criminal institutions. It is only mentioned within the Rome Statute's definition of 'enslavement' as a crime against humanity. Consequently, the second research question posed in this project cannot isolate the role of trafficking within ICL. Rather, it must inquire whether the international crime against humanity of enslavement has, in fact, incorporated the crime of 'trafficking in persons' within its legal framework.

1.2 Research Structure, Scope and Methodology

The scope of this study concentrates on international law. With this focus in mind, the sources and perspectives used are predominantly limited to those designed for international legal discourse and analysis.[42] It is nevertheless vital to recognize that trafficking is 'a societal problem that emerges

38 OTP, 'Draft Policy on Children' (June 2016), 19 < https://www.icc-cpi.int/iccdocs/otp/22.06.2016-Draft-Policy-on-Children_ENG.pdf> accessed 19 July 2016.

39 Palermo Protocol (n 10) Art 3.

40 Or some 'similar form of deprivation' which will be discussed in chapter 4.

41 *Prosecutor v Dragolijb Kunarac, Radomir Kovač, and Zoran Vuković* (Judgment) IT-96-23-T and IT-9623/1, T Ch (22 February 2001) [542] (*Kunarac* TJ).

42 In attempting to answer the questions posed, this research engages in a systematic textual analysis through ordained sources of international law including Art 38 of the Statute of the International Court of Justice (ICJ) and as prescribed, by the Vienna Convention on the Law of Treaties (VCLT).

from complex social and economic challenges, which cannot be resolved or abolished solely by legislative measures.'[43] A failure to acknowledge this condition would be a failure to recognize the real world in which these laws must operate.

To answer the research questions posed, this thesis is divided into two parts. Part I engages with the codified definition(s) of trafficking found under international law and attempts to define any other potential elements or legal limitations that manifest as a result of the Palermo Protocol's relationship to the CTNOC (Chapters 2-3). The intended result of this doctrinal study is a clear understanding of 'trafficking in persons' fit to be used in practice. It is also the framework used in ascertaining the crime's standing and operability, under ICL in Part II.

Part II endeavors to determine whether the crime of 'trafficking in persons' is incorporated within the international crime against humanity of enslavement. In an effort to answer this question, this research examines the legal relationship between these offenses: 1) as codified in their respective international instruments; 2) within statutes of international judicial institutions (focusing on the ICC) and; 3) via an examination of enslavement and sexual slavery jurisprudence from international and hybrid criminal courts and tribunals.

1.2.1 Part I: Defining Human Trafficking Under International Law

The Palermo Protocol is credited for codifying the first international definition of trafficking, but this contention discounts over a century's worth of international trafficking instruments.[44] Understanding this crime and its construction under international law requires a thorough examination of all relevant international instruments and accompanying *travaux préparatoires*. Upon locating this material, some of the preparatory documents had not yet been translated into English and several other relevant ancillary sources of law have been grossly overlooked.

In addressing this gap in research,[45] Chapter 2 provides for a comprehensive account of the legal history of international trafficking instruments and their interpretation throughout the last 120 years. The product of this research identifies and charts the definitional evolution of trafficking throughout time. Specifically, this examination uncovers valuable information as to previous definitions and meanings of terms contained within the formative international trafficking instruments, giving due consideration to the historical and political contexts of the time. This exercise also exposes a long and contentious drafting history which primarily manifested because of conflicting state perspectives on prostitution. Identifying and understanding the essence of these previous drafting issues is also important before examining the Palermo Protocol considering its creation encountered most of the precursory instruments' drafting issues.[46]

Chapter 3 is wholly concentrated on the current international definition of 'trafficking in persons' as enshrined in the Palermo Protocol. Generally understood, the crime of trafficking is comprised of three elements: (1) an 'act' (recruitment, transportation, transfer, harboring or

43 Roth (n 4) 15. See also, Gallagher, *The International Law of Human Trafficking* (n 19) 5: All efforts in this research will be made to 'be a part of the journey of discovery and resist the temptation to accept simplistic responses to complex, perhaps intractable problems.'

44 This concept was originally referred to as 'white slavery' or 'white slave traffic'. The formative international anti-trafficking instruments will be discussed at length in chapter 2.

45 I refer to this as a 'gap in research' as opposed to knowledge because the general findings made by scholars is not contested by the results of this research. Rather, my study forms a legitimate basis in law for the conclusions made.

46 J Allain, 'White Slave Traffic in International Law' (2017) 1 Journal of Trafficking and Human Exploitation 1.

receipt of persons); (2) a 'means' (via 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); both committed, (3) for the purpose of exploitation.

The Palermo Protocol's codification is ultimately a rather long list of undefined terms. A combination of at least one term from each element amounts to the legal qualification of trafficking. It is this statutory construction which has created numerous interpretive issues for legislators, practitioners and judicial institutions. For example, undefined terms, phrases and concepts within the definition, including 'abuse of a position of vulnerability', 'exploitation' and 'consent', have caused so many interpretational issues in practice that the UNODC has even attempted 'to assist [national] criminal justice officers in penal proceedings' via the publication of a series of issue papers. The UNODC's reasoning for this output is that 'it has become evident that questions remain about certain aspects of the definition – most particularly those aspects that are not elsewhere defined'.[47]

These issue papers, like the UNODC's many other legislative guides and manuals, have all continuously failed to precisely define any of the terms contained within the Palermo Protocol.[48] Therefore, through a meticulous evaluation of the current trafficking literature in combination with a textual analysis of Article 3(a)'s terms, Chapter 3 attempts to carefully define each term in the definition of 'trafficking in persons' and contextualize its practical application. This exercise is necessary considering that these terms were left undefined in the instrument itself and its *travaux préparatoires*; and that definitions have yet to uniformly manifest in other scholarly works or international legislative guides.

Assigning meaning to each term of the Palermo Protocol's definition of 'trafficking in persons' is not a complete understanding of the crime.[49] Chapter 3 also endeavors to clarify any obligations imposed in light of the instrumental relationship between the Palermo Protocol and the CTNOC. It is an unclear and contentious issue in scholarship whether the CTNOC imposes any additional requirements that constrict the scope of trafficking's legal application under international law. These considerations include whether a transnational component also exists to statutorily satisfy the offense and/or whether perpetration must involve an organized criminal group. In sum, Part I aims to provide a comprehensive and clear understanding of the definition of 'trafficking in persons' as defined under international law.

1.2.2 Part II: Determining Trafficking's Incorporation within Enslavement as a Crime Against Humanity

Understanding trafficking as a criminal offense constructed in Part I is evaluated primarily in the context of ICL in Part II. Chapter 4 addresses the issue that human trafficking is often not legally distinguished from other associated concepts and offenses commonly grouped together

47 Consent Issue Paper (n 17) 14; Exploitation Issue Paper (n 16) 6.

48 Consent Issue Paper (n 17) 14; Exploitation Issue Paper (n 16) 6. Instead, the 'methodology' employed by the UNODC in its issue papers is described as follows: '(i) a desk review of relevant literature including legislation and case law; (ii) a survey of States representing different regions and legal traditions through legislative and case review as well as interviews with practitioners; (iii) preparation of a draft issue paper; (iii) review of the draft issue paper and development of additional guidance at an international expert group meeting; and (v) finalization of the Issue paper and any associated guidance.'

49 Palermo Protocol (n 10) Art 3(b)-(d).

with trafficking and called 'modern slavery'. A severely intertwined relationship includes the crimes of trafficking, enslavement, sexual slavery and the international codified concepts of slavery and slave trade.

The universally recognized definition of 'slavery' can be found in the 1926 Convention to Suppress the Slave Trade and Slavery (Slavery Convention). Article 1(1) defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[50] This definition also serves as the basis for definitions of enslavement and sexual slavery under ICL. Moreover, slavery is statutorily identified within the Palermo Protocol's definition of trafficking as one of the several potential exploitative outcomes in its third element.

Trafficking and slave trade can be understood as referring to mechanisms which deliver a person to a state of exploitation. The focus is therefore on the *process* of acquiring someone and securing them for exploitative purposes. Slavery, however, is concerned with determining one's *condition of subjugation and often subjection to exploitation*. As for the concepts of enslavement and sexual slavery, it is unclear considering that these international crimes have been interpreted to be broader than the exercise of 'powers attaching to the right of ownership' over another to also include actions involved in the process of acquiring someone for their subjection to enslavement or sexual slavery.

While distinctions can be made, trafficking is often referred to as 'slavery', 'modern slavery' or a 'new' or 'contemporary form of slavery'.[51] As legal slavery scholar Jean Allain asserts, '"trafficking is persons" cannot, in law, be a new form of slavery. That would require the snake to swallow its own tail.'[52] Not only used by the media or interest groups, but the transposition of trafficking with slavery, enslavement or sexual slavery in discourse is also repeatedly practiced by legal scholars, practitioners, legislators and politicians. Thus, the precise meaning of these concepts becomes lost- a precarious and potentially fatal problem in law. For example, trafficking expert Gallagher explains: 'as the concept of slavery expands to fit the needs of scholar-activists, its legal worth diminishes.'[53] In using their internationally codified definitions, Chapter 4 attempts to statutorily delineate trafficking from slavery, slave trade, enslavement, sexual slavery and to distinguish these concepts from each other.

With this definitional clarification in mind, Chapter 5 focuses on the Rome Statute of the ICC. As mentioned earlier, Article 7(2)(c) defines 'enslavement' as a crime against humanity. This definition includes the phrase 'trafficking in persons'. Via a textual analysis of this codification as well as a review of the *chapeau* elements of crimes against humanity, Chapter 5 attempts to ascertain any legitimacy in the argument that the crime of trafficking has been incorporated into the Rome Statute's codification of enslavement.

---

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

51 See, Reports of the Working Group on Contemporary Forms of Slavery, UN Docs E/CN.4/Sub.2/1995/28/Add.1 (13 June 1995), E/CN.4/Sub.2/1999/17 (20 July 1999), and E/CN.4/Sub.2/2001/30 (16 July 2001). See also, JC Hathaway, 'The Human Rights Quagmire of "Human Trafficking"'(2008) 49 Virginia Journal of International Law 1, 7.

52 J Allain, 'Book Review of Trafficking in Human Beings: Modern Slavery by Silvia Scarpa' (2009) 20 European Journal of International Law 447, 454.

53 AT Gallagher, 'Human Rights and Human Trafficking: Quagmire of Firm Ground? A Response to James Hathaway' (2009) 49 Virginia Journal of International Law 789, 799. Portions of Chapter 4 was published as: N Siller, '"Modern Slavery": Does International Law Distinguish between Slavery, Enslavement and Trafficking?' (2016) 14 Journal of International Criminal Justice 405.

Afterwards, Chapter 6 turns to examine international criminal jurisprudence. The Rome Statute's definition of enslavement includes 'trafficking in persons', but, the ICC has yet to rule on the substance of this inclusion. Other international criminal tribunals and courts have adjudicated cases charging the crime of enslavement. However, none of the other international judicial institutions have a codified definition of 'enslavement' as a crime against humanity in their respective statutes. And while each international judgment (post those issued for the crimes committed during World War II) has also defined 'enslavement' using the Slavery Convention's definition of 'slavery' as its foundation, none of them included trafficking, as found in the Rome Statute's Article 7(2)(c).

Evaluating the way the international judiciary interprets the international crime of enslavement reveals interesting findings as it concerns the legal relationship between this crime and trafficking. As the international crime of 'sexual slavery' has been held to be a more specific form of enslavement, these judgments are also examined. Remarkably, elements of 'trafficking in persons' as defined in the Palermo Protocol, as well as attributes of the charged offense (enslavement and sexual slavery) are often jointly and indistinguishably relied upon in determining a defendant's guilt. As a result of the findings in Part II, the author concludes that trafficking's material incorporation within the crime against humanity of enslavement may have, in fact already happened under international criminal law.[54]

54 The conclusion that trafficking in incorporated within the international crime of enslavement is of course conditioned upon certain circumstances. Most importantly, when the contextual elements of crimes against humanity are met.

Part I:
Defining Human Trafficking Under International Law

2 A Statutory Evolution of Human Trafficking in International Law before the Palermo Protocol

2.1 Introduction

Since the beginning of the twentieth century, international law has undergone an 'evolutionary process' resulting in an influential– if not to say inescapable– presence impacting on the daily life of state and non-state actors and on the adoption of laws and policies.[55] International law related to the traffic in human beings is in this respect highly symptomatic of the increasing significance of international law. From its inception in the last years of the nineteenth century and throughout the twentieth century, a steady stream of trafficking conventions has indeed flooded the international legal landscape. Among such international instruments are the following:

1. The International Agreement for the Suppression of the 'White Slave Traffic' of 1904;
2. The International Convention for the Suppression of the 'White Slave Traffic' of 1910;
3. The International Convention for the Suppression of Traffic in Women and Children of 1921;
4. The International Convention for the Suppression of the Traffic in Women of Full Age of 1933; and
5. The Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949.[56]

The most recent instrument, the Palermo Protocol, entered into force in 2003 and will be discussed in the following Chapter.

Whether the inundation of international law can be considered as *progress* is a matter of perspective and opinion; but objectivity requires one to admit that each of these instruments sheds light on the legal construct of human trafficking as an international legal concept. As Gallagher explains, an

> examination of the evolution of an international legal definition provides important insights into the ideas, beliefs, and assumptions that have informed and constructed the way in which individuals, states, and the international community have thought about and responded to trafficking.[57]

---

55 M Sterio, 'The Evolution of International Law' (2008) 31 Boston College International and Comparative Law Review 213.

56 International Agreement for the Suppression of the 'White Slave Traffic,' (adopted 18 May 1904, entered into force 18 July 1905) 1 LNTS 83 (1904 Agreement); International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1910, entered into force 8 August 1912) 3 LNTS 278 (1910 Convention). These two instruments were amended by protocol (30 UNTS 23) and approved by the UNGA on 4 May 1949. International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415 (1921 Convention); International Convention for the Suppression of the Traffic in Women on Full Age (adopted 11 October 1933, entered into force 24 August 1934) 150 LNTS 431 (1933 Convention). These two instruments were amended by protocol (53 UNTS 13) and approved UNGA on 12 November 1947. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951) 96 UNTS 271 (1949 Convention). This list does not include several ancillary international agreements whose primary purpose is not human trafficking, but whose contents still address and/or identify this international concept/offense.

57 AT Gallagher, *The International Law of Human Trafficking* (CUP 2010) 13.

Although these international instruments generally *recognize* the criminality of trafficking in persons, they consistently appear to have failed in explicitly *defining* 'human trafficking' as a criminal offense.

In this context, how is human trafficking as codified under international law to be understood? The legal history of trafficking is well documented in scholarly works.[58] Widespread research reports the content of relevant trafficking treaties, explores interest group involvement, and reveals political motivations underlying state participation in legislating international anti-trafficking efforts.[59] However, scholarship identifying and isolating the legal definition of 'human trafficking' in each of these early international conventions, extracting the elements contained within, and contextualizing the substance from a criminal justice perspective is scarce.

Surprisingly, an in-depth and legally critical analysis of these formative international legal instruments, in combination with their corresponding preparatory works, has largely escaped academic scrutiny. This Chapter therefore examines the twentieth century trafficking conventions to ascertain whether previous definitions of 'human trafficking' existed and the extent, if any, with which the legal construction of 'human trafficking' as a crime of international concern has evolved over time. Reviewing the breadth of international law as it pertains to the traffic of human beings from its legal inception onward enables a greater sense of understanding of this phenomenon. As such, this exercise is a practical place to start researching the meaning of trafficking law and the ability to prosecute human traffickers under international criminal law (ICL).

2.2 The Origins of a Movement: The Campaign to End State Regulated Prostitution Transforms into the Fight against White Slavery

A comprehensive understanding of international anti-trafficking legislation must begin with a brief examination of the origins of the movement within its historical context. As Limoncelli explains, the nineteenth century was

> part of a period characterized by economic globalization; by the consolidation of Western European nation-states, their increasing infrastructural development, and the creation of the international state system; by the rise of women's activism as they struggled to define new positions within nation-states; by ongoing but embattled colonialism; and by the rise of ethnonationalism.[60]

58 ibid 54-67. See also, J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013); SS Rao, *Trafficking of Children for Sexual Exploitation: Public International Law 1864-1950* (OUP 2013); NV Demleitner, 'Forced Prostitution: Naming an International Offense' (1994) 18 Fordham International Law Journal 163.

59 For discussions concerning interest group and state involvement in the early anti-trafficking movement, see: SA Limoncelli, *The Politics of Trafficking, The First International Movement to Combat the Sexual Exploitation of Women* (Stanford University Press 2010); SA Limoncelli, 'International Voluntary Associations, Local Social Movement on State Paths to the Abolition of Regulated Prostitution in Europe, 1875-1950' (2006) 21 International Sociology 31; H Fischer-Tiné, 'White women degrading themselves to the lowest depths: European networks of prostitution and colonial anxieties in British India and Ceylon ca. 1880-1914', (2003) 40 The Indian Economic and Social History Review 163.

60 Limoncelli, *The Politics of Trafficking* (n 59) 3.

Technological advances in transportation during this time enabled a greater ease in mobility and international travel. An increase of female migration was fueled by the industrial revolution;[61] and an unintended consequence of these mobility improvements included an international rotation of prostitutes and the reported spread of venereal diseases.[62]

During the nineteenth century, laws regulating the institution of prostitution ranged from a regulatory to a criminalization approach. Several state officials in charge of 'nation-building projects…saw prostitution as both a necessity and a potential danger for nation and empire.'[63] Prostitution was seen as a vital institution to facilitate 'sexual outlets for military men and laborers in metropolitan and colonial areas'.[64] However, governing bodies believed that this industry was in need of governmental oversight 'in order to prevent the spread of venereal disease and the potentially negative consequences of uncontrolled sexual activity.'[65] As such,

> By registering brothels and women who engaged in prostitution, placing requirements on them (such as compulsory health checks), and ensuring police oversight of brothel areas, state officials and their supporters believed they could provide for men's presumed sexual needs, maintain public health and social order, and control unwanted sexual activity, including interracial sexual relations and miscegenation, as well as the potential for homosexuality.[66]

State regulation of prostitution in Europe can be traced as far back as 1802 in the city of Paris.[67] A 'global spread of regulated prostitution' followed throughout the century.

Beginning in the mid-nineteenth century, condemnation and cries for the suppression of prostitution as a state regulated institution gained muscle and momentum from various grass-roots British organizations, comprised of moral reformers, slavery abolitionists, and religious and feminist groups.[68]

In 1869, a national organization formed in England for the purpose of abolishing state regulated prostitution.[69] This cause spread as states all over Europe instituted various governmental regulatory systems of prostitution involving licensing schemes, compulsory prostitute registration, obligatory medical examinations and enforced medical treatment in confinement.[70] As of 1875,

61 J Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books Ltd. 2010) 54; Allain, *Of Human Exploitation and Trafficking* (n 58) 341.

62 Allain, *Of Human Exploitation and Trafficking* (n 58) 341. See also, J Allain, 'White Slave Traffic in International Law' (2017) 1 Journal of Trafficking and Human Exploitation 1.

63 Limoncelli, *The Politics of Trafficking* (n 59) 7. See also, Rao (n 58) 1.

64 Limoncelli, *The Politics of Trafficking* (n 59) 7.

65 ibid 7. See also, V Roth (ed), *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers 2012) 30; Allain, *Of Human Exploitation and Trafficking* (n 58) 340-341; L Reanda, 'Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action' (1991) 13 Human Rights Quarterly 202, 207; Fischer-Tiné, (n 59) 164: Supplying European women for European colonizers was of great interest to European states as children born from a native and European union 'threaten[ed] to undermine colonial hierarchies of race and class'.

66 Limoncelli, *The Politics of Trafficking* (n 59) 3.

67 ibid 23.

68 ibid 6. See also, Fischer-Tiné (n 59) 167; Doezema, *Sex Slaves and Discourse Masters* (n 61) 109.

69 Rao (n 58) 8.

70 Limoncelli, *The Politics of Trafficking* (n 59) chapter 2. Rao (n 58) 1-7.

this grassroots association transformed into an international collective, formally called the British, Continental and General Federation for the Abolition of the Government Regulation of Prostitution; better known as the International Abolitionist Federation (IAF).[71]

The IAF and various other interest groups (some called 'protection societies') were motivated by different philosophies as to why state regulation of prostitution should cease to exist. Some interest groups desired the abolition of prostitution as an immoral institution, whereas other womens' interest groups were concerned with the double standard imposed on women (focusing in this instance on prostitutes) regarding bodily autonomy and sexuality.[72] A shared goal of abolishing the exploitation of women and children (or at least, their bodies) in prostitution is what united this unlikely collective front.[73] Politically empowering this organizational unity, however, required consensus and specificity regarding the cause of action. Eventually, a strategy emphasizing the protection of the honor and virtue of women prevailed.[74]

With respect to Europe, the subsequent table (2.1) lists those countries which regulated prostitution and identifies the approximate dates of their state regulation of the practice.[75]

Table 2.1 Dates of State Regulated Prostitution in European States

State	Approximate Dates of State Regulated Prostitution
Austria/Hungary	Regulation abolished 1921 in Vienna, 1926 in Graz
Belgium	1844-1947
Denmark	Regulation abolished 1906
France	1802-1946
Germany	1830-1871, 1891-1927, reinstated 1933
Great Britain	1864-1888
Hungary	Regulation abolished 1950
Italy	1860-1958
Netherlands	1852-1913
Poland	Abolished brothels 1922 and registration 1956

71 Rao (n 58) 8.

72 Limoncelli, *The Politics of Trafficking* (n 59) 7-8: Not all associations actively protested against state regulation. As Limoncelli writes: 'The International Bureau, seeking to increase the state's ability to control various sexual activities that they believed were immoral, chose to sidestep the issue of regulation in favor of working with state officials.'

73 Limoncelli, *The Politics of Trafficking* (n 59) chapter 2.

74 ibid 7-8.

75 ibid 24. Information in Table 2.1 was extracted from Limoncelli's Table 2.1. Limoncelli also identifies other non-European states as well as 'colonial holdings/mandates/protectorates' and their periods of stated regulated prostitution. See also, Roth (n 65) 30.

State	Approximate Dates of State Regulated Prostitution
Spain	Regulation abolished 1956
Sweden	1859-1925
Switzerland (Geneva)	1896-1925

Reformation and/or abolition of state regulated prostitution was not as publicly (or governmentally) popular as a subsection of related discourse which focused on a seditious private market of transported women and girls for their sale to, and use in, brothels. Accounts of this practice often took advantage of sensationalized stories regarding the deceptive, oppressive, and/or forced international transportation of European females by procurers into prostitution throughout the world.[76] For example, at the fifth International Penitentiary Congress in 1895, the issue was framed as follows:

> Would it not be desirable for an understanding to be arrived to preventing the prostitution of young women living abroad…? What would be the repressive measures to be adopted against those who, by means of dishonest devices, persuade young women to go abroad with a view to forcing them to become prostitutes?[77]

Opposition against the deviant interstate transportation of prostitutes was unanimously agreed upon from these various groups (without public opposition from their respective governments), and became the common impetus to act.

Using tactics to incite a demonstrative and emotionally charged connection within the public at large, terminology was borrowed from the abolitionist movement and the fight to end 'white slavery' was born.[78] Attention-grabbing rhetoric was consistently used by various organizations to gain support for the cause. For example, the 'White Slave Traffic' was described as 'the worst, most tyrannical and degrading form of slavery the world has known.'[79]

'[A]rousing the attention of the authorities of the countries mostly concerned to the enormity of the evil caused by the Traffic'[80] was a central aim of an anti-white slavery organization known

76 Often referred to as 'the myth of white slavery'. There is a variety of scholarship alleging the actual trade in women barely existed, if at all, and was merely a combination of 'moral panic', political agenda, and a societal evolution in coping with women working, the era of industrialization and sexuality. Whether or not 'white slavery' actually existed is irrelevant in ascertaining and dissecting the actual international law created from this political and social cause. Discussions on the 'myth of white slavery' are plentiful. For example, see Doezema, *Sex Slaves and Discourse Masters* (n 61) and MA Irwin, '"White Slavery" as metaphor: anatomy of a moral panic' (1996) Ex Post Facto: The History Journal 5.

77 WM Hepburn, 'International Legislation on Social Questions' (1931) 9 New York University Law Quarterly Review 203, 208, citing Compte Rendu des Séances, Cinquième Congrès Pénitentiaire International (1895) 740 *et. seq*. Interestingly, this same passage was recited by the president of the 1921 International Conference on Traffic in Women in Child, see *infra* subsection 2.3.3.

78 Limoncelli, *The Politics of Trafficking* (n 59) 8; Doezema, *Sex Slaves and Discourse Masters* (n 61) 54, 82.

79 International Bureau, 'For the Suppression of the White Slave Traffic' 1911 (located at the Women's Library at the LSE- ref No. 4IBS/3/1/06) 1 (IB Pamphlet).

80 Limoncelli, *The Politics of Trafficking* (n 59) 2.

as the National Vigilance Association (NVA).[81] In pursuit of this aim, the NVA's secretary, W.A. Coote, visited several European capitals in 1899 advocating for the creation of an international coalition against white slavery. The visits were such a success that the NVA hosted an unofficial congress[82] of 'distinguished government officials' in London that same year.[83]

The focus of this international meeting of delegates and interest group leaders was two-fold: 'the creation of an International Committee to carry out the views of the Congress in the intervals of its meetings; and the presentation of a modest programme for immediate legal and diplomatic reform by the improvement of codes and extradition treaties.'[84] As such, the formation of a permanent and investigative organization operating at both the national and the international levels was launched and called the 'International Bureau'.[85] Its tasks included addressing issues related to traffic, locating and aiding victims in need and assisting local authorities in the detection of white slave traders.

Prior to the International Congress on the White Slave Trade (1899 Congress), the NVA requested each state to provide a report identifying their applicable domestic legislation which existed 'to cope with the evils found' in each country.[86] Delegates from Russia, Belgium, France, Germany, the United Kingdom, Norway, Sweden, Austria-Hungary, Switzerland and the Netherlands all responded, detailing their existing national legislation and enumerating extradition agreements believed to be applicable tools to combat white slavery as they understood it.[87] The 1899 Congress organizers framed the concept of the 'White Slave Trade' as 'the procuring of women or girls by violence, fraud, abuse of authority, or any other method of constraint, to give themselves to debauchery, or to continue in it.'[88] It should be mentioned that contextualizing white

81 See Rao (n 58) 9-12; Limoncelli, *The Politics of Trafficking* (n 59) 56: Another one of the early white slavery NGOs, the NVA was established in 1885 as a result of the Criminal Law Amendment Act of 1885 in England 'which raised the age of consent to sixteen; criminalized the procurement of girls for prostitution by administering drugs, intimidation, fraud; criminalized the abduction of girls under eighteen for sexual purposes; allowed magistrates to issue warrants to find missing girls; provided for summary proceedings to be taken against brothels; and provided language under which homosexuality could be prosecuted.'

82 See Allain, 'White Slave Traffic in International Law' (n 62) citing Annex 3, 'Memorandum on the Origin and Evolution of the Movement for the Suppression of the White Slave Traffic', Correspondence respecting the International Conference on the White Slave Traffic, held in Paris, October 1906, House of Commons Parliamentary Papers (United Kingdom), Miscellaneous No.2 (1907), Cd.3453, 15: Allain explains that the British Foreign Office refrained from giving the 1899 Congress an 'official character' because it 'might prove embarassing'.

83 See Rao (n 58) 2-3. The Congress was held in London on 21-23 June 1899 at the invitation of the NVA.

84 The National Vigilance Association, '*The White Slave Trade: Transactions of the International Congress On the White Slave Trade, Held in London On the 21st, 22nd, and 23rd of June, 1899 at the invitation of the National Vigilance Association*' (first published prior to 1923, Amazon.co.uk, Ltd./Marston Gate, no reprint date given) 11 (1899 Congress Proceedings).

85 ibid 10-11, 15-16, 22-176. Note, the NVA essentially became the International Bureau. See also, Limoncelli, *The Politics of Trafficking* (n 59) 56.

86 1899 Congress Proceedings (n 84) 19.

87 ibid 22-176: The United States also submitted a report only relating to the second part of the questionnaire addressing domestic responses to moral and social 'uplifting of men and women' (20).

88 ibid 16. See also, Fischer-Tiné, (n 59) 169: Fischer-Tiné writes that the agreed upon definition of 'white slave trade' at the 1899 Congress was: 'the purchase and transfer from place to place of women for immoral purposes, who are in the first place inveigled into a vile life by the promise of employment in a foreign country and, thereafter are practically prisoners, and who, if they really desire to escape from a life of shame cannot do so.' Fischer-Tiné obtained this quotation in The Shield [The official Organ of the British Committee of the International Federation for the Abolition of State Regulation of Vice], July 1899, 42.

slavery in this manner conveniently excluded this fight as applying to states who transported or facilitated the transport of *willing*[89] females to other states and colonial type lands for the purpose of prostitution.

Upon completion of this informal congress, the delegates 'resolved to work towards an international agreement whose signatories would take uniform action – first, a prosecution regime to deal with traffickers; and second, a protection regime for potential and actual victims.'[90] It was believed that trafficker impunity existed due to 'the absence of a specific offense and penalty, the difference in legislation applicable to such infraction of the law, and most importantly, the impossible situation which States find themselves in without extradition procedures to deal with authors of acts committed outside their own territory.'[91]

Soon after the 1899 Congress, addressing 'white slavery' progressed from its grass-roots, interest group origins, to a matter of 'international high politics.'[92] This topic acquired so much attention that regular conferences were held throughout Europe in the decades that followed the 1899 Congress.[93] The first official congress was held in 1902 and hosted by the French government.[94]

2.3 Legislating International Responses to Human Trafficking

The French Ministry of Affairs hosted the 'conférence internationale pour la répression de la traite des blanches'[95] (1902 Conference) in Paris. Prior to its commencement, the French delegation distributed an invitation to countries, explaining that the purpose of the conference was four-fold:

1. To punish, and as far as possible through similar criminal penalties, the act of soliciting of women or girls by violence, fraud, abuse of authority, or any other coercive means to engage them in debauchery, and the act of maintaining them in this situation through identical means;
2. To ensure that the simultaneous research of the offense, when its qualifying elements occur in different countries, happens through a concerted agreement in each of these states;
3. To ensure that the precise determination of the place of judgment puts a halt to any possibility of conflict;

89 It is not the purpose of this research to question or engage in a discussion of the ability of persons to consent/express informed consent and/or a willingness to engage in prostitution. This debate has been long running and will appear in several of the discussions relating to trafficking legislation in chapters 2 and 3. On the topic of consent and prostitution, see for example, K Barry, *Female Sexual Slavery* (New York University Press 1979); Doezema, *Sex Slaves and Discourse Masters* (n 61); J Elliot, *The Role of Consent in Human Trafficking* (Routledge 2015).

90 Rao (n 58) 15.

91 Allain, 'White Slave Traffic in International Law' (n 62) citing 1902 Conference Proceedings (n 94) 13.

92 Fischer-Tiné, (n 59) 170: For example, the King of Spain and the German Empress became actively involved in their respective national White Slavery Committees. See also, IB Pamphlet (n 79) 2-3.

93 For information concerning these many conferences, see Limoncelli, *The Politics of Trafficking* (n 59) 58-59; Hepburn (n 77). A significant repository of primary sources pertaining to these early conferences can also be found at the Women's Library at the London School of Economics.

94 Ministère Des Affaires Étrangères, *Documents Diplomatiques. Conférence Internationale Pour La Répression De La Traite Des Blanches* (Imprimerie Nationale 1902) 11-12 (1902 Conference Proceedings). See also, Hepburn (n 77) 203.

95 Translation by the author: 'international conference on the suppression of the trade in whites'

4. To ensure that international treaties be used to allow for the extradition of accused individuals.[96]

The first purpose of the 1902 Conference aimed to spark a comparative discussion of national legislation (and penalties) among states that criminalized the act of soliciting women or girls by using various means to engage and/or maintain them in a situation of debauchery. The second purpose of the conference outlined the desire to create a system of interstate cooperation and detection of this offense when it occurred on a transnational level. The third ambition of the conference centered on the establishment of an international consensus regarding venue of criminal prosecutions and punishment of apprehended offenders. Finally, the conference sought to establish international consensus and creation of extradition agreements for offenders between states as it concerned this cause.

The French host acknowledged the criminality of trafficking and its transnational criminal character.[97] As such, the 1902 Conference's invitation called on states to continue the work begun at the 1899 Congress and to 'study the issues in question and propose the solution.'[98] At the instigation of the Conference's president, M. Bérenger, delegates were divided into four commissions (administrative action and legislative action, issues involving jurisdiction and procedure, and the drafting of an international diplomatic instrument) in order to consider various aspects of the white slave traffic.[99]

Conclusions of the Legislative Commission recommended that states adopt the following measures domestically, as a minimum yardstick of legislative reform:

---

96 1902 Conference Proceedings (n 94) 11-12. These four purposes were included in the invitation sent to Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Netherlands, Norway, Portugal, Russia, Sweden, and Switzerland on 7 March 1902. Argentina and Brazil were invited on 24 April 1902. Translation by the author. The original version reads as follows:

1. Pour punir de peines, autant que possible du même degré, le fait de racoler des femmes ou des filles par violence, fraude, abus d'autorité, ou par tout autre moyen de contrainte pour les livrer à la débauche, et celui de les y maintenir par les mêmes moyens;
2. Pour que la recherche simultanée du délit, lorsque les circonstances qui le caractérisent se produisent dans des pays différents, ait lieu par un accord concerté dans chacun des pays;
3. Pour que la détermination précise du lieu où doit être rendu le jugement coupe court à toute éventualité de conflit;
4. Pour que des traités internationaux interviennent afin de permettre l'extradition des inculpés.

97 ibid. Translation by the author. The original version reads as follows: 'Ces propositions ont été inspirées au Congrès précité par la constatation que si l'odieux trafic qu'il s'agit d'atteindre échappe , le plus souvent, à toute répression, cela tient - soit à l'absence d'une qualification et d'une pénalité spéciales, - soit à la différence des législations, et, plus encore, à l'impossibilité où se trouve chaque État, faute d'autorité et de moyen d'extradition avec les États voisins, de constater les divers éléments du délit généralement constitué par des actes commis en partie hors de son territoire et d'en atteindre les auteurs principaux que leur résidence hors de ses frontières soustrait le plus souvent à son action.'

98 ibid 12. Translation by the author and paraphrased above. The original version reads as follows: 'Le Congrès en question avait laissé à la Commission internationale instituée par lui à Londres le soin de désigner parmi les Gouvernements des pays adhérents au Congrès, celui qui devrait être sollicité de prendre l'initiative de la convocation d'une Conférence internationale de délégués officiels qui seraient chargés d'étudier les questions dont il s'agit et d'en proposer la solution.'

99 ibid 60. Translation by the author. This division of labor was at the suggestion of the president of the 1902 Congress. The original version reads as follows: '… que la Conférence se divise ensuite en 4 Commissions. La première serait chargée des mesures administratives à prendre; La seconde, des mesures législatives; La troisième s'occuperait des questions de compétence et de procédure; La quatrième, des questions diplomatiques, c'est-à-dire de la rédaction de l'instrument diplomatique á présenter aux différents Gouvernements.' See also, Allain, 'White Slave Traffic' (n 62).

1. The punishment through severe penalties of whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a girl under age for immoral purposes.
2. The punishment of whoever, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes.
3. The punishment through more severe penalties of anyone who held a woman or a girl in a house of debauchery, delivered her for debauchery or made her travel abroad for debauchery.[100]

Additionally, these recommendations included a collective desire of imposing an obligation on states to communicate among themselves regarding any judicial action for white slave trafficking when the offense had an international dimension.

The legislative commission also indicated that the above referenced offenses should be punished regardless of whether their qualifying elements occurred in different countries; and that domestic judicial or administrative authorities should have the right to ensure, through various measures, the protection of victims.[101] However, it is noteworthy that the 1902 Conference delegates refrained from codifying an actual international legislative response to that, or any, effect.[102] As such, the 1902 conference did not create international law which would impose obligations on states to criminalize particular actions and/or potentially force states to refrain from engaging in particular forms of conduct, for example, regulating prostitution.

White slavery, as understood at the time, focused on females obtained for prostitution, a regulatory matter several states compartmentalized as wholly domestic, thereby refusing to create

100 1902 Conference Proceedings (n 94) 102. Translation by the author and paraphrased (in part) above. The original version reads as follows: 'Conclusions de la Commission Législative. Dans le but de donner le plus d'efficacité possible à la répression de la traite des blanches, la Conférence *indique et recommande* aux États représentés, à titre de minimum de réformes législatives, les dispositions suivantes:
   1. Sera puni de peines rigoureuses quiconque, pour satisfaire les passions d'autrui, aura embauché, entraîné ou détourné, même avec son consentement, une fille mineure en vue de la débauche.
   2. Sera également puni quiconque, à l'aide de violences, menaces abus d'autorité , contrainte ou fraude, aura embauché, entraîné ou détourné une femme ou fille majeure en vue de la débauche.
   3. Sont punissables les délits susvisés alors même que les divers actes qui en sont les éléments constitutifs ont été accomplis dans des pays différents.
   4. Sera puni de peines plus rigoureuses quiconque, soit aura retenu une femme ou fille dans une maison de débauche, soit, suivant les distinctions prévues aux paragraphes 1 et 2, aura livré ladite femme ou fille ou l'aura transportée à l'étranger en vue de la débauche.
   5. Les autorités judiciaires ou administratives seront investies du droit d'assurer par des mesures provisoires la protection des victimes du délit et notamment de les confier, s'il y a lieu, soit à des institutions d'assistance publique ou privée, soit à des personnes offrant toutes les garanties nécessaires.
   6. Les États représentés se communiqueront réciproquement les notices des condamnations prononcées par les tribunaux de chaque pays de chef du délit de traite des blanches quand le délit aura un caractère international.
   7. La condamnation aux frais judiciaires pourra s'étendre au remboursement des dépenses de rapatriement des femmes ou filles embauchées, entrainées on détournées. Emphasis in original text.

101 ibid.

102 Hepburn (n 77) 205. At the first meeting, Austrian delegate, M. le chevalier de Schroot, proposed (on behalf of several state delegates), to limit the conference to the creation of administrative, as opposed to legislative measures to internationally address white slavery. This position was not unanimous. For example, the Swiss Delegate believed that without a binding instrument, the 1902 Conference would be 'a veritable failure'. See, Allain, 'White Slave Traffic' (n 62) citing 1902 Conference Proceedings (n 94) 105.

and submit to international law on the matter.[103] This rebuff by several state delegates was largely due to the differing perspectives on prostitution among states. In this respect, the note drafted by the German representative is worth reproducing here as an accurate reflection of the concerns felt by several states in 1902:

> The Imperial Government understands the desirability of trying to modify the relevant legislation in several states, so as to ensure its uniformity; it however remains of the view, already expressed on a precedent occasion, that, considering the considerable legal differences that exist in this domain between the different states, a prompt unification would meet great difficulties. As a consequence, trying to limit the Conference's deliberation to this sole purpose could easily annihilate the results of the debates. This is why there will not be any legislative propositions from the German side.[104]

A substantial number of states also expressed a strong belief that their existing domestic laws were sufficient to repress and punish white slave trafficking. For example, the German delegate observed that German criminal legislation concerning procuring was one of the most severe,[105] the Austrian delegate declared that their 'legislation is sufficient to repress any form of procuring.'[106] Similarly, the Dutch representative stated that his 'Government does not accept that its current laws are not sufficient to repress the abuses generated by white slave trafficking of women'.[107]

Other states, however, readily accepted the flaws in their own legislation. For instance, the Belgian delegate recognized the total lack of protection of women of full age from procuring and expressed the willingness of his Government to amend the domestic legislation.[108] In a similar fashion, the Portuguese delegate expressed his desire to see the 1902 Conference result in legislative propositions which would perfect domestic legislation and could be referred to his Parliament for approval.[109]

Several of the conference delegates also refused to acknowledge any role for international law to play on the issue of white slavery. In response (and previously quoted in the Preface), Spain's

103 Doezema, *Sex Slaves and Discourse Masters* (n 61) 109-110: Doezema describes this as friction between abolitionist countries and regulationist countries relating to their perspectives on white slavery in compromising on the contents of the 1904 Agreement. A few years later, this position manifested itself in the 1910 Convention, Final Protocol, subsection D, see *infra* subsection 2.3.2.

104 1902 Conference Proceedings (n 94) 44. Translated by the author. The original version reads as follows: 'le Gouvernement impérial conçoit, à vrai dire, qu'il serait désirable de chercher à modifier la législation correspondantes dans les divers États, de manière à lui donner un caractère uniforme; il demeure toutefois de l'avis déjà exprimé dans une occasion précédente, qu'en présence des grandes différences juridiques qui existent, dans ce domaine, entre le divers États, une prompte unification rencontrerait de grosses difficultés et que, par suite, essayer de limiter les délibérations de la Conférence sur ce seul objet, pourrait, somme toute, facilement réduire à néant les résultats des débats.'

105 ibid 62.

106 ibid. Translation by the author. The original version reads as follows: 'la législation autrichienne est suffisante pour réprimer toute espèce de proxénétisme.'

107 ibid 76. Translation by the author. The original reads as follows: 'Notre Gouvernement ne saurait, pour le moment, admettre que nos lois actuelles ne sont pas suffisantes pour réprimer les abus auxquels la traite des blanches donne lieu'. See also, the position of the Russian delegate (77), of the Swedish delegate (79) and of the Swiss delegate (79).

108 ibid 63.

109 ibid 77.

delegate, M. Cuartero, diplomatically dismissed this opposition declaring that he could 'not understand that a few objections based on international law could prevent governments from "slaying the hydra of procurement".[110] The Spanish view, however, did not prevail. Even though the result of this ten-day conference produced two draft instruments: A *Projet de Convention* (1902 Draft Convention) and a *Projet d'Arrangement* (1902 Draft Agreement), only the latter of the two documents came into force.[111]

Interestingly, the English translated the term '*arrangement*' to 'agreement' although the French word for agreement is 'accord.' A literal translation of '*arrangement*' in French to English is 'arrangement'. In French, the term '*arrangement*' is typically used as it is in English; either in the composition of music or the organization of something. This word can also be used in French to denote a more unofficial agreement or understanding between the parties involved. It is an interesting, and unexplained decision on the part of the French host to utilize '*arrangement*'. It is also unexplained as to why the English chose to translate the term as 'agreement'.

The French use of '*arrangement*' as opposed to 'accord' is understandable considering that the work of the Administrative Commission at the 1902 Conference was believed to produce 'non-binding recommendations' for States Parties to adopt at will, 'rather than what, in fact, transpired: their transformation, shortly thereafter, into a binding instrument.'[112] As the final English version of the document utilized the word 'agreement,' it will also be used throughout the remainder of this Chapter. The 1902 Draft Agreement's final form was entitled the International Agreement for the Suppression of the 'White Slave Traffic' and opened for signature in 1904 and entered into force the following year.

110 ibid 66. Translation by the author. The original reads as follows: 'M. Cuartero ne comprendrait pas que quelques objections tirées du droit international pussent empêcher les Gouvernements de « terrasser l'hydre du proxénétisme ».'

111 ibid 205-208.

112 Allain, 'White Slave Traffic' (n 62).

2.3.1 1904: The International Agreement for the Suppression of the 'White Slave Traffic'[113]

The 1904 Agreement was establishment due to an international desire for 'effective protection against the criminal traffic known as the "White Slave Traffic."'[114] In reality, the document served administrative functions (eg, an agreement to monitor the phenomena), as opposed to demanding the enactment of legislative measures (eg, requiring domestic criminalization of conduct considered 'white slavery').[115] To that end, the 1904 Agreement focused on committing states to enact measures pertaining to victim identification, the collection of information 'likely to lead to the detection of criminal traffic', the monitoring of 'railway stations, ports of embarkation, and *en route*'[116] as well as to properly train officials so that they may be empowered to detect victims of trafficking.[117] Furthermore, it called on states to provide assistance with repatriation, offering of security, and finding of employment for identified victims.[118]

113 1904 Agreement (n 56). States which ratified the 1904 Agreement at the time of the transfer to the Secretary-General of the depositary functions in respect of the Convention (list provided by the French Government): Belgium, Denmark, France, Germany, Italy, The Netherlands, Portugal, Russia, Spain, Sweden and Norway, Switzerland, and The United Kingdom. States which acceded to the Agreement: Austria-Hungary, Brazil, Bulgaria, Colombia, Czechoslovakia, Lebanon, Luxembourg, Poland, United States of America. Those states which acceded to the Convention of 4 May 1910 by virtue of Article 8 of that convention resulted in an ipso factor accession to the 1904 Convention. Those states include: Chile, Cuba, Egypt, Finland, Irish Free State, Lithuania, Norway, Persia, Siam, Estonia, Newfoundland, Tanganyika, Union of South Africa, Kenya, Nyasaland, Papua and Norfolk, Grenada, St. Lucia, St. Vincent, Isle of Man, Japan, China, Yugoslavia (former), New Guinea, Nauru, Jersey, Guernsey, Falkland Islands (Malvinas), Iraq, Sudan, Turkey, Uruguay, Monaco, Morocco, Tunisia, and Mauritius. Additionally, the agreement was declared applicable to a myriad of colonies, dominions and protectorates including: German colonies, Iceland and Danish West Indies, Australia, Bahamas, Barbados, British Central Africa, British Guinea and Guiana, British Solomon, Islands, Canada, Fiji Islands, Gambia, Gibraltar, Gilbert and Ellice Islands, Gold Coast, Hong Kong, India, Jamaica, Leeward Islands, Malta, Burma, New Zealand, Northern Nigeria, Palestine and Transjordan, St. Helena, Sarawak, Seychelles, Sierra Leone, Somaliland, Southern Rhodesia, Ceylon, Trinidad, Uganda, Wei-hai-wei, Windward Islands, Zanzibar, French colonies, Eritrea, and Netherlands colonies. Those entities which only consented to concur with Article 1 of the 1904 Agreement include: Basutoland, Bechuanaland, Bermuda, British East Africa, British Honduras, Cape Town, Cyprus, Natal, Orange River Colony, Southern Nigeria, Straits Settlements, and Transvaal. Note: Any existing declarations and/or reservations made by states to the 1904 Agreement have not been included in this note. Signatory and ratification Information obtained from the United Nations website <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-8&chapter=7&lang=en> accessed 2 November 2015.

114 1904 Agreement (n 56) Preamble.

115 Demleitner (n 58) 167 citing the UN Department of International Economic and Social Affairs 'Study on Traffic in Persons and Prostitution' (1959) UN Doc ST/SOA/SD/8, 1. See also, IB Pamphlet (n 79) 5: Interestingly, the International Bureau reported that by virtue of the 1904 Agreement, 'it became possible to henceforward for any of the contracting powers to legally proceed against the "procurer," of whatever nationality, upon evidence of his participation in what has not become a legal offence.' See also, UN Economic and Social Council 'Draft Convention of 1937 for the Suppressing the Exploitation of the Prostitution of Others' (4 September 1947) UN Doc E/574 (1937 Draft Convention Memo) 2: A memorandum by the Secretary-General confirmed that '[t]he 1904 Agreement does not contain any provision for punishment.'

116 Allain, 'White Slave Traffic' (n 62) citing 1902 Conference Proceedings (n 94) 38: The French Government noted that while it may be too difficult to identify trafficking victims in the large cities where they are exploited, 'it is not the same on the platforms of arrival and departure, on the trains which carry these unfortunate travelers, in the ports of embracement or on the ships which will transport them beyond the seas. Here there are abundant controls and these can be exercised with success by agents who, with experience, have become very shrewd.'

117 1904 Agreement (n 56) Art 2.

118 ibid Arts 3 and 6.

Although the 1904 Agreement refers to 'criminal traffic' and 'White Slave Traffic', any legal meaning associated with these concepts was not explicitly defined within the instrument or preparatory works. Nevertheless, the first international legal construct of trafficking, or the 'white slave traffic', can be extracted from the instrument which reads:

> Article 1
>
> Each of the contracting Governments undertakes to establish or name some authority charged with the coordination of all information relative to *the procuring of women or girls for immoral purposes abroad*; this authority shall be empowered to correspond direct with the similar department established in each of the other Contracting States.[119]

The aforementioned italicized text initiates the statutory construction and legal framework debate concerning trafficking as a concept under international law.

Article 1 identifies elements of the concept of white slave traffic which I will briefly go into. First, the scope of the 1904 Agreement's edifice exclusively limits trafficking to transnational movement as signified by the term 'abroad.' The 1904 Agreement only included interstate trafficking, excluding intrastate traffic, as well as trafficking between states and colonial type lands.[120] A fundamental issue during the 1902 Conference was balancing the desire to fight against the white slave traffic while still respecting domestic jurisdictions on state sovereignty. This 'fundamental issue' was identified by delegate Renault in the following terms:

> The problem of suppression of this criminal traffic raises both national and international questions. The Governments may consent to come to an understanding and give undertakings in regard to international questions as long as their sovereignty is respected, but they cannot, by an international act, undertake to realize any particular reform of an exclusively national character, because this would involve an encroachment on the domain proper of their internal sovereignty.[121]

Nevertheless, it is of interest to note that while only interstate trafficking was included in the scope of the 1904 Agreement, several state delegates took the position during the 1902 Conference that an international agreement of this nature presupposed the fact that individual nations would also punish cases of domestic white slavery.[122]

Second, those persons qualified or considered 'trafficked,' were restricted to white females. This assertion is unequivocal from the title of the 1904 Agreement itself which embraces the term 'white' and Article 1 applies solely to 'women or girls.'[123] At the 1902 Conference, delegate Paulucci

119 ibid Art 1. Emphasis added.

120 ibid Procès-Verbal of Signature: 'The countries signatories to the Agreement have the right to accede thereto at any time for their Colonies of foreign possessions. They may do this either by a general Declaration comprehending all their Colonies or possessions within the accession, or by special naming those comprised therein, or by simply indicating those which are excluded.'

121 Allain, 'White Slave Traffic' (n 62) citing 1902 Conference Proceedings (94) 180.

122 1902 Conference Proceedings (n 94) 114. See also, Allain, 'White Slave Traffic' (n 62).

123 1904 Agreement (n 56). See also, S Farrior, 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential' (1997) 10 Harvard Human Rights Journal 213, 213-216.

de Calboli argued that the term 'traite des blanches', meaning 'traffic in whites',[124] was inappropriate as it did not encompass protections for women of other skin colors, and should be changed to something akin to 'commerce des femmes', that is, 'trade in women'.[125] This proposed change was however rejected even though other members of the 1902 Conference did acknowledge that the term 'traite des blanches' was undeniably improper.[126] On this issue Allain concludes that,

> While the racialised element of the term 'white' slave traffic was not happenstance, and was evident throughout the deliberation of the 1902 International Conference; it was made most evident in the Report of the Legislative Commission which set out that the harm which was sought to be addressed was only applicable to women of European stock: "The victim procured in a northern country, conveyed across a central country, has been delivered up in a southern country".[127]

As such, the instrument retained the restrictive scope of encompassing protections for 'white'/European females.

---

124 Demleitner (n 58) 166: 'At the 1902 Paris Conference, the delegates employed the term traite des blanches, meaning "trade in whites," to discuss the abolition of the international trafficking in women. The term contrasts with traite des noires, meaning "trade in blacks," which had been used at an earlier international conference on the African Slave trade.' Demleitner reports that the British government translated this term as 'white slave traffic' or 'white slave trade' and in the United States, the term was shortened to 'white slavery'.

125 1902 Conference Proceedings (n 94) 111-112. Translation by the author and paraphrased above. In the minutes from the fourth session of the conference held 21 July, 1902, delegate, Mr. Paulucci de Calboli noted 'trade in whites' does not apply to women generally as it does not encompass 'jaunes' (yellow) or 'noire' (black) females. Voiced opposition from other delegates to Paulucci de Calboli's position resulted in his own withdrawal of the proposed legislative alteration. The original version from Paulucci de Calboli reads as follows: 'M. le marquis Paulucci de Calboli a la parole sur une question préliminaire. Les mots « traite des blanches » lui paraissent tous deux impropres. Le mot « blanches » ne s'applique pas à la généralité des femmes, jaunes, noires, etc. Quant au mot « traite », celui-ci implique toujours une idée d'exportation et d'importation, caractères qui ne paraissent pas se trouver toujours dans le délit en question, puisqu'il résulte de la discussion que les délégués sont unanimes à ne pas viser seulement un délit international. A son avis, d'autres vocables nouveaux pourraient être proposés, « commerce des femmes », par exemple.' The original version of the responses to Paulucci de Calboli's proposal to expand beyond the notion of 'trade in whites' reads as follows: 'M. Louis Renault ne considère pas non plus comme très satisfaisants les termes dont il s'agit et il s'engage, au nom de la Commission de rédaction, à ne les employer dans aucun texte ayant un caractère législatif ou conventionnel. Cependant, cette désignation étant connue et acceptée ne lui semble pas devoir être absolument proscrite: elle pourrait être admise dans le préambule des projets de traité. On a beaucoup parlé du Congrès de la « traite des blanches ». L'abandon complet de cette expression consacrée ne serait pas sans inconvénient. M. Renault espère que cette proposition transactionnelle donnera satisfaction au précédent orateur.' After which, Paulucci de Calboli withdraws his proposal. The original version reads as follows: 'M. le marquis Paulucci de Calboli retire sa proposition. M. de juge Snagge croit également que la question sera mieux comprise si la terminologie ancienne et connue peut être maintenue. Tel est aussi l'avis de M. Bérenger qui pense, d'après l'impression générale, qu'il serait préférable de laisser subsister le texte connu, bien qu'impropre. C'est d'ailleurs un point à renvoyer à la Commission de rédaction.'

126 ibid. Furthermore, it does not appear that the term 'white slavery' was 'established language' or given a 'special meaning' under rules of treaty interpretation permitting an expansive understanding of the concept. From discussions at the 1902 Conference, identified victims were European women. See also, Allain, 'White Slave Traffic' (n 62).

127 Allain, 'White Slave Traffic' (n 62) citing 1902 Conference Proceedings (n 94) 123: 'as translated into English in: Correspondence respecting the International Conference on the "White Slave Traffic", held in Paris, July 1902, House of Commons Parlimentary Papers (United Kingdom), Miscellaneous No. 3 (1905), Cd. 2667, 9.'

Finally, Article 1 of the 1904 Agreement also identifies this offense as comprising of two elements: (1) procurement, and (2) immoral purposes. Neither element is defined or expanded upon within the 1904 Agreement. A complete legal understanding of 'white slavery' therefore boils down to ascertaining what qualifies as 'procurement' and 'immoral purposes'.

Before attempting to define these terms, it should be mentioned that the method of interpretation will follow from prescribed rules of treaty interpretation as codified under international law. Specifically, those rules are codified in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).[128] Article 31 references the primary methods of interpretation which includes: actual language, context and ascertaining the instrument's object and purpose. Secondary or 'supplementary means of interpretation' are codified in Article 32 and refer to (among other things), the instrument's preparatory works. Issues of language in the interpretation of international instruments are addressed in Article 33.

Even though the VCLT post-dates the 1904 Agreement and explicitly contains a non-retroactivity clause in its Article 4 – judicial institutions and scholars posit that Articles 31 and 32 represent customary international law and shall be used when interpreting treaties.[129] Moreover, the International Court of Justice (ICJ) held in *Costa Rica v. Nicaragua*, that a pre-dating treaty does not prevent 'the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention.'[130] As such, these methods of interpretation will be used to aid in interpreting 'procuring' and 'immoral purposes.' Considering the relationship between these articles is hierarchical, this analysis will also attempt to conform to the VCLT's structure.[131]

2.3.1.1 Procuring

In the early 1900s, the definition of 'procure' was understood as: 'to obtain; gain; cause; attract; bring on'; 'procuration' was defined as an 'act or legal power of managing another's affairs; and 'procurer' was defined as 'a pimp; a panderer.'[132] Similarly, a definition from 1903 indicates that 'procure' can be understood as: 'to obtain for one's self or for another; to bring about; to attract…to urge earnestly – *v.i.* to pander, pimp'.[133] Contemporary definitions distinguish 'to procure' as either

128 Vienna Convention on the Law of Treaties (entered into force 23 May 1969) 1155 UNTS 331. See also, MN Shaw, *International Law* (7th edn, CUP 2014) 676.

129 Allain, *Of Human Exploitation and Trafficking* (n 58) 355.

130 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) ICJ Rep 213 [47].

131 U Linderfalk, 'Is the Hierarchal Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting Rules of Interpretation' [2007] Netherlands International Law Review 133, 135-136.

132 N Webster, *Donohue's Webster's Handy American Dictionary: Illustrated* (MA Donohue & Co; Rev. and enl. edn, 1900) 255. As codified in Art 31 of the VCLT and discussed by the ICJ in *Competence of the General Assembly for the Admission of a State to the United Nations Case* (advisory opinion) [1950] ICJ Rep 4, 8, a textual analysis is a form of treaty interpretation which aims to assign a 'natural and ordinary meaning in the context in which they occur'. The 'ordinary meaning' of a word is often chronicled in standard dictionaries and is the starting point in gathering insight and understanding.

133 T Davidson, *Chambers' Twentieth century Dictionary of the English Language* (W&R Chambers 1903) 732.

'to get (something) by some action or effort' or 'to find or provide (a prostitute) for someone',[134] thus linking human acquisition with method. As a transitive verb, 'procuring' is defined as 'to get and make available for promiscuous sexual intercourse.'[135] During the 1902 Conference, the Legislative Commission put forth a definition in its report stating that, 'to "procure" is to invite or lead astray the woman or girl to become a prostitute'.[136]

Consistent with the 1900s definitions of 'procure', Article 1 of the 1904 Agreement does not specify the use of methods to acquire a person. The Preamble however appears to contextualize the term within the 1904 Agreement:

> Being desirous of securing to women of full age who have suffered *abuse or compulsion*, as also to women and girls under age, effective protection against the criminal traffic known as the "White Slave Traffic".[137]

Reading the Preamble in conjunction with Article 1 of the 1904 Agreement, methods of procurement involving 'abuse or compulsion' can be read into the definition of the offense.[138]

The ordinary meaning of procurement as described above, typically, although not uniquely contemplates that the one procuring is doing so for a third party. The third party can be for example, the one to pay for a prostitute's services, but is usually contemplated for the proprietor/manager of a brothel. Although this understanding made its way into the 1902 Conference's invitation as well as the Draft *Convention*, a plain reading of the definition as erected in the 1904 *Agreement*, as well as the one fashioned by the Legislative Commission, potentially extends its scope to those persons procuring and internationally transporting women for personal use as prostitutes as well which also comports with one of the earlier definitions of 'procure.'[139]

The 1899 Congress and the 1902 Conference Proceedings (the preparatory works of the 1904 Agreement), undertook to document state comprehension of trafficking as a domestically

134 'Procure' Merriam-Webster.com. <http://www.merriam-webster.com/dictionary/procure> accessed 25 November 2013. See also, 'procure' OED Online (2013) <http://www.oxforddictionaries.com/definition/english/procure?q=procuring> accessed 25 November 2013: The current OED also defines 'procure' in this manner and subcategorizes procurement as obtaining something or someone as well. In reference to obtaining someone, the definition includes 'obtain[ing] (someone) as a prostitute for another person.'

135 'Procure' Merriam-Webster.com. (n 134). See also, Black's Law Dictionary Free (2nd ed 2013) <http://thelawdictionary.org/procure/#ixzz2lfdMyr5l> accessed 25 November 2013: Black's law dictionary does not distinguish between an object or a person in its definition; rather it states: '[i]n criminal law, and in analogous uses elsewhere, to "procure" is to [i]nitiate a proceeding to cause a thing to be done; to instigate; to contrive; bring about, effect, or cause.'

136 Allain, 'White Slave Traffic' (n 62) citing 1902 Conference Proceedings (n 94). It should be noted however that the Legislative Commission fashioned a different definition of 'white slave traffic' which is: 'any person who, to satisfy the passions of another, has procured, enticed, or led astray a woman or girl, for immoral purposes'.

137 1904 Agreement (n 56) Preamble. Emphasis added.

138 Pursuant to Art 31(2) of the VCLT. See also, D McClean, *Transnational Organized Crime: A Commentary on the UN Conventions on its Protocols* (OUP 2007) 15.

139 See discussion on 'immoral purposes', *infra* subsection 2.3.1.2 which concludes the term means prostitution. Perhaps, the concept also includes the activities of concubines. For case law on this latter understanding, see *United States v. Bitty*, 208 U.S. 393, 401 (1908); *Caminetti v. United States*, 242 U.S. 470 (1917). However, compensation for services rendered was a required element. See also, AR Dubler, 'Immoral Purposes: Marriage and the Genus of Illicit Sex' (2006) 115 The Yale Law Journal 756. Dubler discusses the relationship between concubinage and the concept of 'immoral purposes'.

constructed crime through the distribution of questionnaires on state practice and legislation.[140] Contained within these state responses is a relevant legislative contextualization of the term 'procurement' as understood by States Parties to the 1904 Agreement. As such, these documents can be used to confirm the meaning of terms within the 1904 Agreement.[141]

A review of domestic legislature reveals that a common understanding of 'procurement' in the context of white slavery existed among states. Generally, this term was described as an act undertaken by a person through various means in order to obtain a female for the purpose of prostitution.[142] The only variation within state responses had more to do with the methods used to procure a person for prostitution, than with the understanding of the act itself. Methods referenced by states included: fraud,[143] using criminal acts,[144] incitement or seduction with words,[145] violence,[146] abuse of authority,[147] inducement,[148] recruitment,[149] and enticement.[150] Even the organizers of the 1902 Conference acknowledged several means of procurement in the text of the distributed state questionnaires including the use of violence, threats, abuse of authority, coercion, fraud, enticement, and diversion.[151] Reviewing these 'supplementary means of interpretation' confirms that the meaning of 'procurement' discussed earlier in this Chapter is the one intended when drafting the 1904 Agreement, apparently limited to methods of 'abuse and compulsion' (in the context of trafficking women of 'full age'), as identified in the Preamble.

Within the meaning of procurement, a plain reading of the Preamble also seems to draw some distinction between 'women of full age' and 'women and girls under age', such that those of

140 National legislation was described in greater detail in the 1899 Congress' proceedings. As such, the domestic legislative references will more often relate to and reference that document. This material can be considered as a source of information for purposes of interpretation considering the 1902 Conference Proceedings expressly mentioned its aim as continuing the work began at the 1899 Congress.

141 VCLT (n 128) Art 32.

142 1899 Congress Proceedings (n 84): In the 1899 questionnaires, states described procurement in various ways. For example, Russia described procurement as 'all those acts undertaken… by means of fraud and other criminal acts' (27). Belgium reported, to procure for purposes of trafficking is understood as to incite or seduce a female with words into prostitution (34-35). France's response described the act as obtaining a woman 'by violence, fraud, or abuse of authority' for prostitution (54). Germany defined procuration as 'persons who induce women to become common prostitutes' (56). The United Kingdom explained that people who procure are 'those who induce women to become common prostitutes' via various ways including threats, intimidation, false pretenses, etc. (60-61). The Norwegian report used the word 'procure' without explanation but always in the context of sexual intercourse (73). Switzerland defined procuring (proxénétisme) as 'facilitating of favouring the debauchery of third persons' (89). Sweden described to procure is to recruit or entice (76), and Austria-Hungary did not use the word procure in their questionnaire response, rather referring to those identified persons as agents used to 'decoyed' girls into prostitution (83-84). The Netherlands, in similar fashion to Switzerland, also used the term 'proxénétisme' for procurers and described the actor as 'any person who, for the pursuit of gain causes or facilitates the defilement of any person by a third' (102).

143 ibid 27, 54, 83-84.

144 ibid 27, 54.

145 ibid 34-35, 48-49.

146 ibid 54.

147 ibid 54.

148 ibid 56, 61.

149 ibid 76.

150 ibid 76.

151 1902 Conference Proceedings (n 94) 102. Translation by the author.

'full age' are recognized as victims under the 1904 Agreement, only if they were subjected to 'abuse or compulsion'. This viewpoint is to be cautiously read as it is not uniformly accepted. Gallagher concludes that the 1904 Agreement makes no distinction about age such that evidence of force and deception were required for all women to receive protections under the treaty.[152] Conversely, Rijken observes that evidence of coercion or force would only be required to extend protections listed in the 1904 Agreement to adult women, not to girls.[153]

Rijken's conclusion is likely based on a plain reading of the text. And indeed, a close reading of the text reveals a distinct delineation between those of 'full age' and those 'under age' whose mention is separated both by a comma and the phrase 'and also.' The ICJ has discussed that the value of commas in this context may evidence 'a true conjunctive introducing a category… additional to those already specified.'[154] The relevant portion of the Preamble reads: 'women of full age who have suffered abuse or compulsion, as also to women and girls under age'; therefore distinguishing two groups and the application of the requirement of 'abuse or compulsion'. No other Article 31 sources of interpretation pertain to the apparent age delimitation, but an extensive discussion is documented within the conference proceedings and preparatory works which confirms Rijken's interpretation.

In reviewing these conference proceedings it appears that the most contentious aspect of drafting stemmed from national positions on prostitution among states. The dividing line was drawn between those states that indistinctively punished all forms of procurement, regardless of the age and circumstances of the woman or girl; and those states that operated with the distinction between women over the age of legal majority and women under this age.[155] Those delegates who believed procurement in all of its forms should be outlawed and criminalized did not see the necessity of distinguishing between minors and adults, or between different methods of obtaining a female for prostitution.

152 Gallagher, *The International Law of Human Trafficking* (n 57) 57: 'The earliest agreement in this series, concluded in 1904, covered only situations in which women were forced or deceived into prostitution or "debauchery" in foreign countries.' See also, C Morehouse, 'Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany' (DPhil thesis, Humboldt University 2008) 29: 'The 1904 Anti-Human Trafficking Treaty [referring to the 1904 Agreement] did not differentiate between minor and adult human trafficking victims in granting victim-status. The treaty was therefore not age-specific. In this analysis, age-specificity means that adults and minors face different criteria in determining if they can be considered victims of human trafficking. In its preamble, the 1904 Anti-Human Trafficking treaty secured "to women of full age who have suffered abuse or compulsion, as also to women and girls underage, effective protection against the criminal traffic known as the "white slave traffic"'.

153 C Rijken, *Trafficking in Persons: Prosecution from a European Perspective* (TMC Asser Press 2003) 54.

154 *Aegean Sea Continental Shelf Case* (*Greece v Turkey*) (Merits) [1978] ICJ Rep 3 [53]. However, the ICJ has also held that 'the Court cannot base itself on a purely grammatical interpretation of the text' [55] citing, *Anglo-Iranian Oil Co. Case* (*United Kingdom v Iran*) [1953] ICJ Rep 104.

155 The word, 'procurement' is used here as opposed to prostitution because the 1902 Conference proceedings utilized that terminology as well as the French word, 'l'embauchage.' In English, this terms translates as 'the hiring' of a person. However, this term is not exclusively used to describe the hiring of a prostitute. Rather, it's the context of the conversation which reveals its meaning.

In contrast, those delegates from states which regulated prostitution required a distinguishing feature such as deviant methods of procurement to evidence violence, deception or coercion which would have altered the free consent of the women to engage in prostitution.[156] The distinction between these two groups was included in a report of the Legislative Commission during the 1902 Conference:

> A minor does not have complete exercise over her free will. She is *res sacra*; the law must defend her, even against her own weakness. She who is in the majority can resist, at least in certain times, it is only if her consent by deceit, through force, or vitiated, that the law, less rigorous than morality, intervenes to suppress the procurement.[157]

The consequence of these conflicting perspectives emerged while preparing the 1902 Draft Convention. To avoid addressing the 'delicate issue' of prostitution, further debate on this issue was suspended (and eventually, work on the Draft Convention as well), so as to preserve the continued work of the 1902 delegation.[158] Even the actual age cutoff between minors and adults was unresolved during the conference; however, several delegates expressed the 'desire that the age of majority be as late as possible so as to extend legal protection.'[159]

Using their understanding of civil law, delegates to the 1902 Conference reasoned that females considered as minors could not legally enter into a contract; therefore, minors could not consent to work in the field of prostitution.[160] Utilizing civil law concepts was not limited to the discussion of age. Throughout the conference proceedings, state delegates borrowed language used in contract law. For example, in discussing the relationship between the procurer and the trafficked female, several delegates utilized terminology usually used to qualify the working relationship between an

156 1902 Conference Proceedings (n 94) 113.

157 Allain, 'White Slave Traffic' (n 62).

158 1902 Conference Proceedings (n 94) 113. Translation by the author. The original version reads as follows: 'M. Ferdinand-Dreyfus rappelle que la législation des États représentés à la Conférence se partage en deux groupes distincts: le premier, punissant le proxénétisme sans distinction entre les majeures et les mineures; le second, distinguant entre ces deux catégories de femmes. Le criterium du système présenté par la Commission législative, c'est l'état de minorité: s'il s'agit de mineures, il y a toujours délit, même si celles-ci sont consentantes; mais, quand il s'agit de majeures, l'embauchage n'est puni qui si la violence, la ruse ou la contrainte l'a vicié. Punir le proxénétisme, sans tenir compte de cette distinction, cela eût été soulever la question générale et si délicate de la prostitution. Il a semblé que vouloir la résoudre c'était risquer de ne pas aboutir. Aussi les délégués dont la législation est plus rigoureuse ont-ils accepté la distinction proposée, à titre de minimum: aller plus loin aurait compromis le succès des efforts tentés par les délégués.'

159 ibid 182. Translation by the author. The original version reads as follows: 'Les articles 1 et 2 supposent que l'on doit distinguer les *mineures* et les *majeures*, sans indiquer à quoi l'on s'attachera pour faire la distinction. Cela sera la tâche de chaque législation ou de chaque jurisprudence; il était impossible de se prononcer d'une manière précise sans soulever des difficultés presque inextricables. Tout ce que nous pouvons dire, c'est que le désir de la Conférence est que l'âge de la majorité soit aussi retardé que possible pour que la protection légale soit prolongée; il est surtout que l'on ne s'attache pas à la majorité pénale, mais à la majorité telle que la fixe la loi civile. La fille qui est considérée comme mineure et, par suite, incapable de contracter un engagement pécuniaire valable, doit assez naturellement être considérée comme ayant besoin d'être protégée contre un acte par lequel elle dispose de sa personne. Tout ne sera pas terminé par l'adoption de cette règle, puisque, en présence de la divergence des législations civiles sur l'âge de la majorité, on pourra se demander s'il faut s'attacher à la loi nationale de la victime, à la loi de son domicile ou à la loi de lieu où l'infraction est poursuivie. Il ne nous appartenait pas de trancher ces difficultés.' [Emphasis in original].

160 ibid.

employee and employer.[161] Instead of concluding on the actual determinative factor between age of majority and minority during the conference, delegates suggested that the distinction between minor and adult could be governed by local laws based either on the nationality of the victim, the victim's domicile, or the location of the committed offense, without indicating any preference.[162]

Strangely, points of contention among delegates regarding age considerations and the necessity of including procurement methods in crafting the 1902 Draft Agreement (that became the 1904 Agreement) were non-existent. As mentioned earlier, this could be the result of the perceived belief that the Administrative Commission's work would result in 'non-binding recommendations' as opposed to an international 'binding instrument.'[163] If the only indicator of age-related conditions surfaced in the Preamble, it is however noteworthy that no objections were raised during the discussion of the Draft Preamble.[164] The only further consensus regarding age was contained in the 1902 Draft Convention which concluded that the age of majority would be determined by the civil law of each state.[165]

Even if it never came into force and was deprived of any legal effect, the 1902 Draft Convention was constructed during the same congress as the 1904 Agreement and can thus provide a useful source of information.[166] The 1902 Draft Convention specifically delineated elemental requirements of the offense based on age.[167] Additionally, those provisions were eventually and unanimously accepted by all state parties to the extent that the same language remained intact, unchanged and was inserted verbatim into the following convention at the second official white slavery conference in 1910.

---

161 ibid 112. This is an interesting aspect of the 1902 Conference Proceedings for several reasons. First of all, the choice to use contract law seems peculiar considering white slavery was often viewed and framed as a practice conducted by those who tricked or forced women into a life of prostitution. Perhaps this description exposes the reality of the majority of trafficking cases and mindset of the drafters at the time who understood the white slave traffic predominately as the transportation of consenting prostitutes to new lands. Moreover, the term used during this discussion was not the French word for contract (most likely as women were usually unable to enter into employment contracts) but rather, the French word 'accord' which translates into 'agreement.' Also of interest is the use of the word 'malheureuse' which literally translates into English as 'poor woman', and which reads oddly in an official document – but also demonstrates the inferior image and status of women during the time period. This type of terminology was utilized in several English pieces of the time as well, often concluding that women were unaware of the evils outside of their homes and that they were in need of supervision, guidance, and saving considering that they are often poor, weak, unintelligent, and vulnerable. See also, Ministère Des Affaires Étrangères, *Documents Diplomatiques. Deuxième Conférence Internationale Pour La Répression De La Traite Des Blanches* (Paris Imprimerie Nationale 1910) 42 (1910 Conference Proceedings).

162 1902 Conference Proceedings (n 94) 112.

163 Allain, 'White Slave Traffic' (n 62).

164 1902 Conference Proceedings (n 94) 127. Translation by the author. Original version reads as follows: 'La séance est ouverte à 2 heures trois quarts. Sont présents MM. les Délégués qui assistaient à la quatrième séance. Le procès-verbal de la quatrième séance est adopté. La discussion est ouverte sur les conclusions de rapport de la Commission administrative. Il n'est pas formulé d'observations générales. M. le Président lit le préambule qui ne soulève pas d'objections.'

165 ibid 195 (Draft Convention, Annexe: Projet de Protocole de Clôture, B). Translated by the author. The original versions reads: 'Pour la répression des infractions prévues dans les articles 1 et 2, l'âge de la majorité devrait être celui qu'établit la loi civile.'

166 VCLT (n 128) Art 32.

167 1902 Conference Proceedings (n 94) 193.

2.3.1.2 Immoral Purposes

Ascertaining the meaning of 'immoral purposes' under the 1904 Agreement also requires a spectrum of interpretative considerations. The term 'immoral purposes' is left undefined in the 1904 Agreement. Plain readings of the 1904 Agreement, of the 1902 Conference proceedings and of the 1899 state responses on relevant local legislation unequivocally determine that 'immoral purposes' as contemplated for purposes of the 1904 Agreement solely embraces prostitution. Firstly, as far as the 1904 Agreement is concerned, it is only logical to equate 'immoral purposes' with prostitution when taken in conjunction with the first element of 'procuring' which, as previously discussed, is an action taken to obtain a person for purposes of prostitution.[168] While the acquisition of a person for prostitution was not the only definition of procurement as the time, further credence to this understanding can be found in Article 3 of the 1904 Agreement which discusses the registration of prostitutes at sites of embarkation in order to ascertain whether they are victims of traffic.

Secondly, the preparatory works reveal that throughout the entire 1902 Conference proceedings, delegates focused on two main issues: women and girls obtained or hired for prostitution and the retention of females in brothels.[169] Discussions never deviated to any other 'immoral purpose'. Moreover, delegates acknowledged problematic issues in drafting legislation because the central issue, the legality of prostitution in domestic law drastically differed among states.[170]

Interestingly, even though the fight to end 'white slavery' grew from an anti-prostitution (and the state regulation of prostitution) movement evidencing the 'object and purpose' of this legislation, Bruch contends that 'early agreements on human trafficking reflect some ambiguity towards its relationship to prostitution.'[171] Nevertheless, it is almost uniformly agreed upon by scholars in this field that the 'immoral purpose' of procuring, as referred to in the 1904 Agreement

168 In accordance with VCLT (n 128) Art 31(c)(4).

169 1902 Conference Proceedings (n 94) 114. Translation by the author and paraphrased in the text. The original version reads as follows: 'M. Louis Renault pense que, s'il y a désaccord sur une question de principe, la discussion est nécessaire: s'il s'agit, au contraire, d'une question de rédaction, la Commission demandera à la Conférence un pouvoir presque discrétionnaire. M. de Malewsky-Maléwitch ayant présenté des observations sur ce texte, il faut l'examiner. L'article 4 soulève deux questions distinctes: 1. la question du transport de la femme à l'étranger; 2. celle de sa rétention dans des maisons de débauche. En ce qui concerne la première question, M. de Malewsky-Maléwitch ne juge pas nécessaire de parler du transport à l'étranger dans l'article 4 puisqu'il est déjà mentionné dans les articles 1 et 2 combinés avec l'article 3. Le désaccord qui surgit n'existe qu'au point de vue des principes abstraits. En effet, ces articles 1 et 2 prévoient le cas de l'embauchage pour le pays où il a eu lieu et même pour d'autres pays. Au point de vue législatif il est raisonnable de punir le fait dans les deux cas Mais la difficulté signalée par M. de Malewsky-Maléwitch vient de la compétence internationale. M. de Malewsky-Maléwitch accepte les dispositions des articles 1 et 2 tant qu'il s'agit de faits commencés dans un pays, mais réalisés dans un autre, tandis qu'il les repousse lorsque le fait a été commis dans un seul pays, la loi nationale devant régler le fait dans ce dernier cas. Donc il accepterait qu'on indiquât dans le texte des articles 1 et 2 qu'il s'agit d'un délit international. Mais l'engagement international qui sera pris suppose d'abord que chaque pays entend réprimer l'embauchage sur son territoire.' This position was also explicitly written in the 1902 conference invitation as well.

170 ibid.

171 EM Bruch, 'Models Wanted: The Search for and Effective Response to Human Trafficking' (2004) 40 Stanford Journal of International Law 3. However, later on in the article, Bruch states: 'The early agreements, which were multilateral cooperation agreements signed primarily among European countries, focused on trafficking in women for "immoral purposes" or prostitution' (6). Throughout the article the terms 'prostitution' and 'sexual exploitation' are left undefined and used interchangeably.

is prostitution.[172] It may however be noted here that Gallagher and Jones-Pauly deviate slightly in stating that the 1904 Agreement included situations of both prostitution and 'debauchery'; assertions which find credence in the language of the preparatory works.[173]

While the 1904 Agreement was authenticated in French and English, the 1902 Conference Proceedings was only recorded in the French language. Article 33 of the VCLT pronounces that the meaning of terms corresponds to the language in which it was written. Often utilized to describe the purpose of trafficking during the 1902 Conference proceedings was the word 'débauche', which often translates in English to the word 'debauchery'.[174] Débauche (debauchery) as understood at the time meant 'to lead a disorderly, a corrupt life… to rush into vice'.[175] A contemporary definition of 'debauchery' describes the term to mean excessive and immoral behavior in sensual pleasures including sex, alcohol, and/or drugs.[176] The contemporary definition also explains that the archaic definition of 'debauchery' is more restrictive, focusing solely on 'seduction from virtue or duty'.[177] The archaic understanding coincides with the manner in which the term was utilized during the 1900s. For example, at the 1914 trafficking conference in Portsmouth, the word 'debauchery' was used exclusively and interchangeably with 'prostitution.'[178] In a speech opposing the state regulated system of prostitution in England, an excerpt from the Portsmouth conference proceedings utilizing this term reads as follows:

> That the State, whose duty it is to protect minors and to assist them in the struggle for good, on the contrary incites them to debauchery, facilitating vice by Regulation… That by authorizing centres of debauchery and recognising vice as a legitimate profession, the State sanctions immoral prejudice that debauchery is necessary to man.[179]

Lastly, 'immoral purposes', as understood by states in the context of the international white slave trade, meant prostitution, as demonstrated in their questionnaire responses. Several national immorality laws recognized and criminalized 'immoral purposes' outside of prostitution including:

172 For example, see Rijken, *Trafficking in Persons* (n 153) 54; Allain, *Of Human Exploitation and Trafficking* (n 58) 341; Limoncelli, *The Politics of Trafficking* (n 59) 2; Doezema, *Sex Slaves and Discourse* Masters (n 61) 4; S Louise, *Human Trafficking: A Global Perspective* (CUP 2010) 208; J Winterdyk *et al* (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012) 210; Farrior (n 123) 216.

173 Gallagher, *The International Law of Human Trafficking* (n 57) 57; CC Jones-Pauly, 'Report on Anti-Trafficking Laws in Six Countries (Austria, Belgium, Czech-Republic, Federal Republic of Germany, Italy, Poland) and Compliance with the International Conventions against Trafficking' (1999) <http://zunia.org/sites/default/files/media/node-files/tr/127029_Traffick.pdf> accessed 3 November 2015, 157 [39].

174 JC Tarver, *The Royal Phraseological English-French, French-English Dictionary* (Vol 2, Dulau 1879) 225. See also, J Bellows, Dictionary of French and English, English and French (Longmans Green 1919) 181: The French word, 'débauché' was translated to the English word 'debauch' or 'dissolute'. The same dictionary translates the English word 'debauch' to 'débauché'. See also, IE Wessely *et al*., *Handy Dictionary of the English and French Languages* (McKay n.d.) 52: which translates 'débauché' into English as 'debauchee, profligate, rake.'

175 Tarver (n 161) 225.

176 'Debauchery.' *Merriam-Webster.com*. <http://www.merriam-webster.com/dictionary/debauchery> accessed 4 February 2014.

177 ibid.

178 See, International Federation for the Abolition of State Regulation of Vice, *Report of the Portsmouth Conference, June 15-18, 1914* (British Branch of the International Abolitionist Federation 1914).

179 ibid 41.

Belgium, Germany, France and Switzerland.[180] However, states which attended and participated in the international trafficking questionnaires of 1899 were asked to explain local laws which could be used against white slave traders. For purposes of national legislation relevant to the 'White Slave Trade,' states consistently and exclusively linked the legal concept and identity of the 'immoral purpose' of white slavery with prostitution.[181]

To conclude, a comprehensive review of the relevant material (1899 Conference Proceedings, 1902 Conference Proceedings, 1904 Agreement and 1902 Draft Convention) facilitates the conclusion that the legal construct of the 'white slave traffic' in 1904 included the acquisition of white females for the purpose of prostitution abroad. For those of 'full age', perpetration of 'abuse or compulsion' was also necessary to be considered trafficked under this construct. Several issues of interpretation nevertheless emerge. Failing to clarify central terms including 'women of full age', 'women and girls under age', 'procuring', and 'immoral purposes' within the instrument left it vulnerable to various forms of conflicting interpretation. As such, conclusions regarding these terms can only be drawn through the use of supplementary sources, including the 1902 Conference proceedings (preparatory works) and other ancillary tools of clarification. However, as the 1904 Agreement was created to serve administrative functions, one can also understand and explain a lack of detail (to some extent), in this respect.[182]

180 1899 Conference Proceedings (n 84): Belgium's discussion of morals notes that '[t]here are certain acts which, although they may not be intended as an offence against the purity of a certain person, are nevertheless reprehensible because they offend or may offend the public in general'(32). However, as understood for purposes of the white slave trade, immorality or immoral purposes under Belgium law was entering into prostitution (34). France described offenses against the morals to include incitement into prostitution or corruption, but for purposes of trafficking, it is singularly prostitution (48, 54). Germany also describes immorality using the German word 'unzucht.' Under German law, legal concepts involving immorality are more expansive than the act of prostitution and include, 'carnal intercourse, keeping brothels, and letting houses to prostitutes' (56). Finally, Switzerland associated 'immoral purposes' with debauchery in their questionnaire responses. The Swiss response concluded that trafficking leads victims to 'bad houses' (92); and explained the crime of trafficking as having 3 elements: 'fraudulent contrivance, expatriation, and the immoral object' (93). The 'immoral object' was prostitution (94).

181 ibid. See answers from the following countries: Russia (27), Sweden (77-78), Austria-Hungary (83-84), and the Netherlands (101-102) who all explicitly concluded the concept 'immoral purposes' connotes prostitution. Norway never used the term 'immoral' in their questionnaire response, but always refers to the purpose of traffic as sexual intercourse with a woman, not prostitution (73).

182 While the focus of this chapter is on ascertaining the definition of trafficking (white slavery) within each of the formative instruments, it is interesting to note that the 1904 Agreement also discussed identifying traffickers and the attachment of liability. The 1904 Agreement only encompasses acts of actual procurement. See, 1902 Conference Proceedings (n 94) 112. The criminality of 'attempt' was discussed and contemplated at length during the 1902 Conference. Many delegates believed an attempt to procure for immoral purposes should be punished as well; however, none of that rhetoric made it to the 1904 Agreement. As it was a somewhat contested topic in the drafting process and left out of the 1904 Agreement, it cannot be considered encompassed in the 1904 framework. Of the existing inchoate offenses, Art 2 briefly mentions procurers as 'principals' or 'accomplices'; it reads: '[t]he arrival of persons who clearly appear to be the principals, accomplices in, or victims of, such traffic shall be notified, when it occurs, with to the authorities of the place of destination, or to the diplomatic or consular agents interested, or to any other competent authorities.' It thus appears that extension of these administrative measures to those conspiring or aiding in trafficking was contemplated in the creation of this agreement. Yet, as only procurement is incorporated, it should logically follow that liability (eg, if this were an offense) could only be triggered when the co-conspirator actually engaged in some way to the procurement of a white female.

2.3.2 1910: The International Convention for the Suppression of the 'White Slave Traffic'[183]

Soon after the 1904 Agreement entered into force, states acknowledged the need for an actual international criminal justice response to white slavery. The 1910 Conference was initiated at the suggestion of the German government who sought to take advantage of the coalition of state delegates convening in Paris to attend a conference discussing issues involving the circulation of obscene publications.[184] The French Conference organizers agreed with Germany's proposal and a parallel conference was organized in which thirteen states participated in a series of meetings held from 18 April to 12 May 1910.[185]

State delegates convened specifically to discuss the formation of actual legislative measures to combat the white slave trade and in particular provisions of the 1902 Draft Convention which could not be agreed upon years earlier.[186] The codified fruit of this labor became known as the 1910 International Convention for the Suppression of the 'White Slave Traffic' (1910 Convention).

The 1910 Convention did not conflict with the aims of the 1904 Agreement. To the contrary, during its drafting, the 1910 Conference participants embraced the legal aspirations and work of the previous delegation. Encouraging the domestic criminalization of trafficking was the main objective of this international conference. Specifically, delegates to the 1910 Conference acknowledged that the 1904 Agreement neglected to impose a duty on states to legislate criminal offenses; and that an administrative response (1904 Agreement) was insufficient to combat white slavery.[187] Thus, the language adopted and codified in the 1910 Convention placed an onus on

183 1910 Convention (n 56). States which ratified the Agreement at the time of the transfer to the Secretary-General of the depositary functions in respect of the Convention (list provided by the French Government): Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Great Britain and Northern Ireland, Italy, The Netherlands, Portugal, Russia, Spain, and Sweden. States which acceded to the Convention: Bulgaria, Chile, China, Colombia, Cuba, Czechoslovakia, Egypt, Estonia, Finland, Irish Free State, Japan, Lithuania, Luxembourg, Monaco, Norway, Persia, Poland, Siam, Switzerland, Turkey, Uruguay, and Yugoslavia (former). The Convention was also declared applicable to a myriad of colonies, dominions and protectorates including: German colonies, French colonies, Morocco, Tunisia, Netherlands East and West Indies, Surinam and Curaçao, Canada, Union of South Africa, Newfoundland, New Zealand, Bahamas, Ceylon, Cyprus, Kenya, Fiji Islands, Gibraltar, Hong Kong, Jamaica, Malta, Nyasaland, Southern Rhodesia, Straits Settlements, Trinidad, Australia, Papua and Norfolk, India, Barbados, British Honduras, Grenada, St. Lucia, St. Vincent, Seychelles, British Guiana, Isle of Man, Jersey, Guernsey, Mauritius, Leeward Islands, Falkland Islands, Gold Coast, Iraq, Gambia, Uganda, Tanganyika, Burma, New Guinea, Nauru, Sudan, Sierra Leone, Palestine and Transjordan, Sarawak, Gilbert and Ellice Islands, British Solomon Islands, and Zanzibar. Later succession/accessions to the 1910 Convention subsequent to the assumption of depositary functions by the Secretary-General of the United Nations include: Bahamas, Czech Republic, Fiji, Lebanon, Slovakia, and Zimbabwe. Note: Any existing declarations and/or reservations made by states to the 1910 Convention have not been included in this note. Information obtained from the United Nations website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-10&chapter=7&lang=en> accessed 4 November 2015.

184 1910 Conference Proceedings (n 161) 11, 43.

185 ibid 43. Participating States included: Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, France, Great Britain, Italy, Netherlands, Portugal, Russia, and Sweden.

186 Hepburn (n 77) 206.

187 1910 Conference Proceedings (n 161) 42. Translation by the author. The original version reads as follows: 'Le plus pressé était de venir en aide aux malheureuses qu'une législation imprévoyante avait trop longtemps laissées à la merci des promesses menteuses de la séduction; il restait ensuite à punir les auteurs du mal contre lequel on n'avait pris que d'insuffisantes précautions. C'est afin de permettre cette répression que la Conférence de 1902 avait établi un projet de convention relatif aux pénalités internationales destinées à atteindre universellement les trafiquants.'

states to enact, or at the very least, 'propose to their respective legislatures the necessary steps to punish these offences according to their gravity.'[188]

The first two articles of the 1910 convention were drafted at the 1902 Conference in the 1902 Draft Convention and deemed acceptable provisions without any need for modification at the 1910 Conference.[189] Articles 1 and 2 ultimately illustrate the parameters of trafficking's definition in 1910. Article 1 reads:

> Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

Article 2 continues to define the crime of trafficking as applicable to women of 'full age':

> Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

The 1910 Convention acknowledged that the perpetration of trafficking was often of a transnational criminal nature. The concept of trafficking as defined in the 1910 Convention still required two elements: (1) acquisition (in any of the methods articulated in Articles 1 or 2) for (2) an immoral purpose. The term 'acquisition' is preferred here over 'procurement' in the 1910 Convention's description as the defining articles added language including 'enticed' and 'led away'. It is however noteworthy that definitions of a 'débaucher' during this time period consistently described this role as 'to debauch; to entice…away; to lead…astray' and '[t]o be led away'.[190] As such, the inclusion of these terms appear to serve no other purpose then as synonyms to the concept of procurement.

The 1910 Convention expanded the definitional parameters of trafficking from the 1904 framework. Articles 1 and 2 extended the legally recognized methods and/or means of procurement which were no longer limited to 'abuse and compulsion'.[191] Whereas the 1904 Agreement referenced the difference between adult and younger females in its Preamble, the 1910 Convention codified different elemental conditions between minors and adults to be considered trafficked under international law. The construction of these first two articles also clearly raised the issue of consent and one's ability to negate criminal responsibility. Specifically, Article 1 excludes the defense of consent for girls under age as it reads that the offense of trafficking is committed 'even with her consent'. However, that phrase was not included in Article 2 pertaining to females of 'over age' such that evidence of compulsion, demonstrating the negation of one's consent, was

188 1910 Convention (n 56) Art 3.

189 1910 Conference Proceedings (n 161) 49. Translation by the author. The original version reads as follows: 'Les Articles 1, 2, et 3, non modifiés, reproduisent les articles du projet de 1902.'

190 Bellows (n 174) 181. See also, Tarver (n 174) 225. This dictionary also describes a 'débaucher' as one 'to entice them away'.

191 Gallagher, *The International Law of Human Trafficking* (n 57) 57.

required to fulfill the first element.[192]

Under paragraph B of the Final Protocol, the 1910 Convention clarified that a 'woman or girl underage' includes females 20 years old or younger while a woman 'overage' refers to females of 21 years of age or older. This addition was heavily debated during the 1910 Conference.[193] Before the conference even began, the German delegate proposed that the age of majority, or a 'woman of full age', should be determined by the civil law of the country who would initiate criminal proceedings against the offender.[194] However, the delegate from Hungary argued that the instrument should determine the age of the majority for purposes of uniformity of trafficking laws among states and that it should be 21 years old.[195] After much discussion, Hungary's proposal prevailed.[196]

Although terms like 'procuring', 'enticed', 'led away' and 'immoral purposes' remained undefined in this instrument, the Legislative Commission considered the meaning of these terms during the 1902 Conference. As indicated in their report, 'to "procure" is to invite or lead the woman or girl to become a prostitute; to "entice" is to take her away with or persuade her to follow; to "lead astray" is to remove her illegally from her surroundings.'[197]

An understanding of what constituted 'trade in whites' was consistently described during the Conference. Specifically, white slavery was described as 'women recruited for prostitution abroad'.[198] Additionally, during his speech at the second session, the vice-president of the 1910 Conference stated: '[w]ith respect to White Women Traffic, we are facing a relatively simple fact: the person who, for financial gain, subjects to prostitution a girl or a women, is guilty of white women traffic.'[199] While one can regard it as just a speech, it is interesting to note the addition of 'financial gain' into the description of this crime. While the early literature discussed that the motive of procurers was almost always a financial one, it was never included as an element of the offense.

As the 1910 Convention was a direct result and extension of the unfinished work of the 1902 Draft Convention, it appears that its drafters also exclusively associated 'immoral purpose' with prostitution.[200] This understanding is shared by the United Nations (UN). In reviewing the history of trafficking legislation, the 1910 Convention was described as 'cover[ing] the offence of procuring, enticing or leading away for the purpose of prostitution'.[201]

---

192 ibid.

193 1910 Conference Proceedings (n 161) 61-68, 81-85.

194 ibid 17. Translation by the author. The original version reads: 'Pour la répression des infractions prévues dans les articles 1 et 2, l'âge de la majorité devrait être celui qu'établit la loi civile de l'État dont la loi pénale doit être appliquée.'

195 ibid 61-63.

196 On this discussion, See, Allain, 'White Slave Traffic' (n 62).

197 ibid.

198 1910 Conference Proceedings (n 161) 61. Translation by the author. This description was made by the state delegate from Hungary. The original version reads as follows: 'des femmes embauchées en vue de la prostitution à l'étranger.'

199 ibid 44. Translation by the author. The original version reads as follows: 'Pour la Traite des Blanches, on se trouve en présence d'un fait relativement simple: celui qui, dans un but de lucre, livre à la prostitution une fille ou une femme, se rend coupable de traite des blanches.'

200 The 1910 Convention was essentially, an extension of the discussions and conclusions from the 1902 Conference. However, see also, Jones-Pauly (n 173) 160: who argues that the 1910 Convention not only covers prostitution but includes engagement in 'sexual immorality'. Several domestic interpretations of 'immoral purposes' were far more expansive but outside the scope of this inquiry.

201 1937 Draft Convention Memo (n 115) 2.

It should be noted that the international law of trafficking at this time was wholly concerned with addressing the actual acquisition and transportation of persons, as opposed to the 'immoral purpose' or outcome of such acquisition/transport. This is because the 'immoral purpose' was inextricably linked to the regulation of prostitution, which states claimed infringed on their sovereignty.[202] As such, the legal concept, 'immoral purpose' received little attention. This is evident in the 1902 Conference in which discussions related to prostitution were suspended because of the intense dichotomy of opinion among states. Accordingly, the 1910 Convention only triggered domestic obligations concerning acts associated with the various enumerated forms of victim acquisition for prostitution.

Any actual subjection to prostitution or a female's detention within a brothel after the acquired a woman or girl reached their destination was not included within the scope of the definition. This understanding is blatantly communicated in the 1910 Convention's Final Protocol which reads as follows:

> The case of detention, against her will, of a women or girl in a brothel could not, in spite of Its gravity, be dealt with in the present Convention, seeing that it is governed exclusively by internal legislation.[203]

Drafters of the 1910 Convention preserved their respective state autonomy by limiting international obligations to the acquirement/transportation of females intended for prostitution. Aptly described, it was 'the export of immorality across borders' which captured the attention of international law makers and 'had to be stopped.'[204] However, the 1910 Convention also called for state action regardless of the international character of the traffic, even when the entirety of the crime was committed within the borders of one state. The 1910 Convention also called on states to modify extradition laws to assist in the criminal prosecutions of traffickers.[205]

Consistent with the spirit of the 1904 Agreement, trafficked persons appeared to only encompass white females.[206] As previously discussed, delegates to the conference recognized the need to encompass all females within the concept of 'white slavery' regardless of race.[207]

202 Allain, *Of Human Exploitation and Trafficking* (n 58) 341-342.

203 1910 Convention (n 56) Final Protocol, Section D. On the binding nature of the Final Protocol, see Allain, 'White Slave Traffic' (n 62).

204 Jones-Pauly (n 173) 162.

205 1910 Convention (n 56) Arts 1-2. The English version of the text reads: 'regardless of whether the various acts constitutive of the offense have been committed in different countries'. The original French version of the same text reads as follows: 'alors même que les divers actes qui sont les éléments constitutifs de l'infraction auraient été accomplis dans des pays différents'. This phraseology assumes that domestic trafficking is to be criminalized as well.

206 The 1910 Convention is ultimately a codification of the 1902 Draft Convention. As discussed in the previous subsection, the legitimacy of using 'white' was contested at the 1902 Conference as well. Nevertheless, the label and therefore scope of applicable victims was ultimately retained.

207 See, Allain, 'White Slave Traffic' (n 62) citing the 1902 Conference Proceedings (n 82) 181. For example, delegate Renault noted that while 'it would be difficult to find an alternative' term for the white slave traffic, the conference delegates 'do not, however, pretend that it is not in itself open to criticism, and we have avoided using it in the actual official instrument'.

For example, while discussing 'what remains to be done' after the 1910 Convention, the International Bureau commented that,

> we have spoken only of the White Slave Traffic. In the far East there remains the great Yellow Slave Traffic…In consideration of this International work, it is impossible to leave it out… Then the unsatisfactory condition of the penal code demands immediate attention, and the question of a common code of law applicable to all countries is eminently desirable.[208]

Although the 1910 Convention's definition was not all encompassing in scope or protections, the instrument explicitly stated that these definitions were the *minimum threshold* in terms of who could be considered a trafficked victim or what actions could amount to white slave trafficking; thereby inviting states to increase protections and broaden the scope of domestic criminalization if they so desired.[209]

2.3.3 1921: The International Convention for the Suppression of Traffic in Women and Children[210]

From 1910 until 1914, several international congresses addressed the issue of white slavery and repeatedly associated its perpetration with state regulation of prostitution and the existence

208 IB Pamphlet (n 79) 7.

209 R Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks Ground in *Rantsev v. Cyprus and Russia*' (2011) 45 Boston University International Law Journal 106. See also, 1910 Convention (n 56) Art 3. Art 3 also included sentencing rhetoric positing that traffickers should be punished according to the gravity of their offense. The French version is congruent with its English counterpart. The original French version reads as follows: 'Les Parties Contractantes dont la législation ne serait pas dès à présent suffisante pour réprimer les infractions prévues par les deux articles précédents, s'engagent à prendre ou à proposer à leurs législatures respectives les mesures nécessaires pour que ces infractions soient punies *suivant leur gravité*.' [Emphasis added].

210 1921 Convention (n 56). Ratifications and definitive accessions include: Afghanistan, Albania, Austria, Belgium, Brazil, British Empire (excluding colonies etc.), Bahamas, Barbados, British Honduras, Ceylon, Cyprus, Gibraltar, Grenada, Hong-Kong, Kenya (Colony and Protectorate), Malta, Northern Rhodesia, Nyasaland, Seychelles, St. Lucia, St. Vincent, Southern Rhodesia, Straits Settlements, Trinidad and Tobago, British Guiana and Fiji, Jamaica and Mauritius, Leeward Islands, Falkland Islands and Dependencies, Gold Coast Colony, Sierra Leone (Colony), Gambia (Colony and Protectorate), Tanganyika (Territory), Uganda (Protectorate), British Solomon Islands (Protectorate), Gilbert and Ellice Islands (Colony), Palestine (including Trans-Jordan), Sarawak (Protected State), Zanzibar (Protectorate), Burma, Canada, Australia, Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Union of South Africa, Ireland, India, Bulgaria, Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, Syria and Lebanon, Germany, Greece, Hungary, Iran, Iraq, Italy, Italian Colonies, Japan, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Netherlands, Netherlands Indies, Surinam and Curacao, Nicaragua, Norway, Poland, Portugal, Romania, Spain, Sudan (Anglo-Egyptian Condominium), Sweden, Switzerland, Thailand, Turkey, Uruguay, Yugoslavia (former). Signatures or accessions not yet perfected by ratification: Argentina, Costa Rica, Panama, and Peru. Later succession/accessions to the 1921 Convention subsequent to the assumption of depositary functions by the Secretary-General of the United Nations include: Bahamas, Belarus, Cyprus, Czech Republic, Fiji, Ghana, Jamaica, Malta, Mauritius, Pakistan, Russian Federation, Sierra Leone, Singapore, Slovakia, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Zambia, and Zimbabwe. Note: Any existing declarations and/or reservations made by states to the 1921 Convention have not been included in this note. Information obtained from the United Nations website <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-3&chapter=7&lang=en> last accessed 4 November 2015.

of brothels.[211] Official international and legal discourse involving white slavery did not occur again until 1919.[212] World War I (WWI) most likely delayed international legal collaboration on considerations and responses to the traffic in persons. Nevertheless, international concern over trafficking still existed post WWI to the extent that, 'supervision over the execution of agreements relating to the traffic in women and children was assumed under the responsibility of The League of Nations' as memorialized in Article 23 of the Covenant of the League of Nations.[213] Interestingly, the League of Nations combined supervision of traffic in people with the traffic in narcotics under the same article of its covenant. As Harris noted:

> There is a certain cynical, if unintentional, appropriateness in the coupling of the opium question with the traffic in women and children. They are only associated in this clause as a matter of convenience, but it is impossible to follow the course of the League's activities in either field with any assiduity without being impressed by the extent of the common terminology habitually applied to both evils – traffic in drugs, traffic in human bodies and souls; supply and demand, whether it be a foreign drug or a foreign girl; import and export; markets; middlemen's profits. Even through the colourless language of the general provision in the Covenant something of the implications of the recognized technical term 'commercialised vice' can be discerned.[214]

In 1921, delegates from thirty-four states participated in the third official trafficking conference held between 30 June and 5 July in Geneva.[215] This conference concluded in a meeting called the 'Final Act', in which several resolutions and recommendations were adopted.[216] All state delegates reaffirmed the validity of the 1904 Agreement and the 1910 Convention; and called for ratification from all states not parties to either instrument or, at the very least, adherence to the contents of those international promises.[217] Delegates further agreed that the term 'white slave traffic' should

211 *Report of the Portsmouth Conference* (n 178) 56. At the 1910 conference in Madrid, 'The National Netherlands Committee and the German Committee replied: The white slave traffic is entirely due to the houses of tolerance.' At the 1911 Conference in Brussels, 'Inasmuch as it is admitted that the house of prostitution constitutes the principal market for the traffic, this Congress demands the suppression of public houses of debauchery.' At the 1913 Conference in London: 'The fifth International Congress expresses the wish that the National Committees in every country shall endeavour to abolish licensed houses of ill fame.'

212 Hepburn (n 77) 209.

213 Dubler (n 139) 756.

214 HW Harris, *Human Merchandise: A study of the International Traffic in Women* (Ernest Benn Limited 1928) 26. See also, 'Records of the International Conference on Traffic in Women and Children' League of Nations Diplomatic Conference on the Establishment of the International Convention for the Suppression of Traffic in Women and Children (Geneva 30 June-5 July 1921) 102 (1921 Conference Proceedings). Interestingly, separating drug and human trafficking in the Covenant was proposed. The Conference president's response: '[w]ith all due respect to the distinguished Vice-President, if this Conference begins to ask the League of Nations to consider amendments to the Covenant I do not know where we shall end.'

215 1921 Conference Proceedings (n 214) 5. These states included: Albania, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Czecho-Slovakia, Denmark, Estonia, France, Germany, Great Britain, Greece, Hungary, India, Italy, Japan, Lithuania, Monaco, The Netherlands, Norway, Panama, Poland & Danzig, Portugal, Rumania [sic], Serb-Croat-Slovene, Siam, South Africa, Span, Sweden, Switzerland and Uruguay. As to the agenda and manner of proceedings, see Rao (n 58) 26-52.

216 Hepburn (n 77) 211.

217 1921 Convention (n 56) Art 1; 1921 Conference Proceedings (n 214) 79, 111.

be replaced in the texts of the international instruments with 'traffic in women and children' so as to include and encompass protections for all ethnicities and races falling victim to the crime.[218] The Final Act also modified the age of consent from 21 to 22 years of age, added extradition of traffickers should be sought whenever possible between states, and instructed that employment agencies should be specially supervised to insure greater protections for women and children working in foreign countries.[219]

Upon completion of this conference, the British representative, Mr. H.A.L. Fisher of the League Council, urged that these resolutions reach convention form.[220] After some discussion, the Assembly of the League agreed and adopted a recommendation to memorialize the Final Act of the conference into a Convention.[221] As such, the International Convention for the Suppression of Traffic in Women and Children (1921 Convention) emerged. In the words of Hepburn, the 1921 Convention illustrated a 'reinforcement of previous international agreements on the subject' and stimulated 'new interest and activity' into women trafficking 'through the League as an instrument.'[222]

The 1921 Convention was specifically designed to supplement the two previous international trafficking instruments in order to 'secure more completely the suppression of the Traffic in Women and Children.'[223] Instead of explicitly including a definition of trafficking within the document, the 1921 Convention indicated that accountable persons are those who commit offenses within the meaning of the previously constructed 'definitions' contained in the 1910 Convention. The 1921 Convention thus reaffirmed the previous construct as codified in its Article 2:

> The High Contracting Parties agree to take all measures to discover and prosecute persons who are engaged in the traffic of children of both sexes and who commit offences within the meaning of Article 1 of the Convention of 4 May 1910.[224]

Delegates did not engage in further discussions on the concept of 'traffic' since it was unanimously understood as acquisition for the purpose of prostitution.[225] The 1921 Convention nevertheless reshaped the confines of trafficking as a crime by expanding the scope of its application. Victims, 'whatever their race or colour'[226] and children of both sexes (21 and younger) were

218 Hepburn (n 77) 212; 1921 Conference Proceedings (n 214) 113: 'The British Delegate brings forward a recommendation the at the word "white" shall be omitted from the title of international agreements relating to the traffic' (101).

219 1921 Conference Proceedings (n 214) 211-212. These provisions became Arts 4-6 of the 1921 Convention. See also, McClean, *Commentary* (n 138) 17.

220 1921 Conference Proceedings (n 214) 212.

221 ibid 212, discussing the League of Nations, Plenary Meetings of the Second Assembly (1921) 528.

222 ibid 214.

223 1921 Convention (n 56) Preamble, Arts 1- 3.

224 ibid Art 2.

225 1921 Conference Proceedings (214). See also, GJ Hagar, *The New University Dictionary: Illustrated* (World Syndicate 1920) 691: The plain meaning of 'procure' as indicated from a dictionary dating back to 1920 defines the term to mean, 'to get or obtain; cause.' A 'procurer' was defined as 'one who procures; one who engages in the business of procuration.'

226 1921 Conference Proceedings (n 214) 111.

considered included within this framework.[227] As this instrument was created to expand protections for girls under age and children of both sexes, mention of women of 'full age' was not included in the 1921 Convention. Instead, Article 1 of the 1921 Convention stated that parties to this instrument, 'agree that, in the event of their not being already Parties to the Agreement of May 18, 1904, and the Convention of May 4, 1910, mentioned above, they will transmit with the least possible delay, their ratifications of, or adhesions to, those instruments in the manner laid down therein.'

In an effort to document and measure compliance with the 1921 Convention, States Parties agreed to send periodical reports concerning state action taken in furtherance of the anti-trafficking cause and in an effort to uphold commitments made in Geneva.[228] As a result of these reports, in 1923, the League of Nations advisory committee on the topic requested permission to initiate an investigation to ascertain the following information:

1. whether there is an international traffic in women and girls for purposes of prostitution;
2. between what countries the traffic is being carried on, and the methods used in procuring and transporting women and girls;
3. the effectiveness of national measures undertaken to eliminate the traffic.[229]

Instead of using the codified definition, the term 'international traffic', as understood by the League of Nations, was described as the 'direct or indirect procuration and transportation for gain to a foreign country of women and girls for the sexual gratification of one or more other persons.'[230] Again, mention of 'gain' is included by officials to describe the crime even though it was never codified as an element of the offense. It is also unclear why this description only referenced international trafficking and left out boys.

The investigating committee was described as an expert body assembled by the Council of the League of Nations and instructed 'to engage in fact-finding with regard to the traffic in women and children in selected countries of the Middle East, Europe, and North and South America.'[231] This initiative included investigative missions in 112 cities within 28 countries to obtain information regarding trafficking routes, characteristics of traffickers (including age, sex, alleged profession and social standing) and changes in trafficking since WWI.[232] Over 6,000 interviews were conducted with persons connected to commercialized vice, either as prostitutes or souteneurs.[233] Based on this investigation, the League of Nation's issued a Report on the Traffic in Women and Children (1927 Report). Of interest is the fact that it utilized the term 'prostitution' rather than 'immoral purposes' to describe the purpose of procurers. The 1927 Report also identified and defined persons working in trafficking:

227 Criminal liability was also extended to those who endeavored but failed to traffic and those who engaged in preparatory efforts. On this point, Art 3 reads: 'The High Contracting Parties agree to take the necessary steps to secure punishment of attempts to commit, and, within legal limits, of acts preparatory to the commission of the offences specified in Articles 1 and 2 of the Convention of May 4, 1910.' As a result, the inchoate offense of 'attempt' was now deemed criminal under international law.

228 Harris (n 214) 27.

229 ibid 28. See also, Rao (n 58) 52-54.

230 Harris (n 214) 28.

231 Demleitner (n 58) 170.

232 Harris (n 214) 30-31.

233 ibid 44.

> Among the traffickers there are, broadly speaking, four types which specifically stand out. First, the important individuals who, for the sake of a convenient label may be called 'principals,' and who are generally the owners of brothels; Secondly, the 'mesdames' who manage brothels; Thirdly, the 'souteneurs' who live on the earnings of one or more girls; and Fourthly, the intermediaries who sometimes secure and transport the girl for the 'souteneurs' and 'mesdames.' These four types often play into each other's hands.[234]

The 1927 Report is not only substantively interesting, but it also is one of the first international reports which formally discloses and transcribes an international perspective of what human trafficking really means: a deviant mechanism for the collection and transportation of prostitutes or women and girls for the purpose of prostitution. Moreover, it revealed that the majority of prostitutes interviewed were above the age of majority[235] and thus the issue of trafficking of 'full age' women needed further attention. A continued discussion of the League's work as it relates to this issue and its subsequent instrument, the International Convention for the Suppression of the Traffic in Women of Full Age (1933 Convention) is discussed in the following subsection.

2.3.4 1933: The International Convention for the Suppression of the Traffic in Women of Full Age[236]

The decade following the 1921 Convention's entry into force paid even greater attention to the role of prostitution as it related to trafficking and specifically, the keeping of brothels. This focus encouraged further change in the legislative scope and reach of the international definition of trafficking. The 1927 Report clearly influenced the 1933 Convention, as evidenced in its Preamble which acknowledged 'the recommendations contained in the report of the Council of the League of Nations by the Traffic in Women and Children Committee'. The primary conclusion articulated: 'the existence of licensed houses is undoubtedly an incentive to traffic, both national and international.'[237] A second report authored in 1932 involving a trafficking study conducted in Asia issued similar conclusions stating, 'the principle factor in the promotion of international traffic in women in the East is the brothel.'[238]

---

234 ibid 27.

235 Rao (n 58) 55.

236 Ratifications and definitive accessions include: Afghanistan, Australia (including *Papua* and *Norfolk Island* and the mandated territories of *New Guinea* and *Nauru*), Austria, Union of South Africa, Belgium, Brazil, Bulgaria, Chile, Cuba, Czechoslovakia, Finland, Greece, Hungary, Iran, Ireland, Latvia, Mexico, Netherlands (including the *Netherlands Indies*, *Surinam* and *Curaçao*), Nicaragua, Norway, Poland, Portugal, Romania, *Sudan*, Sweden, Switzerland, Turkey. Signatures or accessions not yet perfected by ratification: Albania, United Kingdom of Great Britain and Northern Ireland and *all parts of the British Empire which are not separate members of the League of Nations,* China, Germany, Lithuania, Monaco, Panama, Spain, and Yugoslavia (former). Later succession/accessions to the 1933 Convention subsequent to the assumption of depositary functions by the Secretary-General of the United Nations include: Belarus, Benin, Cameroon, Central African Republic, Congo, Côte d'Ivoire, Czech Republic, France, Niger, Russian Federation, Senegal, and Slovakia. Note: Any existing declarations and/or reservations made by states to the 1933 Convention have not been included in this note. Information obtained from the United Nations website <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-5&chapter=7&lang=en> accessed 4 November 2015.

237 Demleitner (n 58) 167 citing the United Nations Department of International Economic and Social Affairs, Study on Traffic in Persons and Prostitution (1959) UN Doc ST/SOA/SD/8.U.N.

238 Allain, *Of Human Exploitation and Trafficking* (n 58) 343 citing United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination of Minorities, Working Group on Slavery, Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others: Note of the Secretary-General (16 June 1976) UN Doc E/CN.4/Sub.2/AC.2/5, 3.

However significant a role the League of Nations or states believed brothels to play in human trafficking, the 1933 Convention did not include any language relating to prostitution or brothels. This intentional omission was a consequence of the lasting legal tension and differing domestic positions concerning state autonomy in legislative responses to prostitution.[239] Politics prevented international legislative reach over trafficking's end result (prostitution), but recognition of the vital role of brothels as written in the League's reports did enable an international legislative concession: the removal of language in the definition of trafficking which required the use of compulsion, etc. Removing this requirement thereby eliminated a (negating) consent element of trafficking for women of 'full age'. This alteration became the most legally significant aspect and codified change in the 1933 Convention. Article 1 reads:

> Whoever, in order to satisfy the passions of another person, has procured, enticed, or led away even with her consent, a women or girl of full age for immoral purposes to be carried out in another country, shall be punished not withstanding that the various acts constituting the offence may have been committed in different countries.[240]

A plain reading of the text, however, limits the removal of the consent requirement to instances of international trafficking.[241] Therefore, states were free to require the perpetration of deviant means to acquire victims (eg, force or coercion) thus negating any proposed defense of consent in cases of domestic trafficking.

When drafters fashioned the 1921 Convention, elements of the crime existed for women twenty-two years of age and older (full age), which were not applicable to children of both sexes twenty-one and younger. When drafters removed the requirement that methods of victim acquisition like force or compulsion be used for women of full age, there was no need to delineate the offense on the basis of age in the 1933 Convention. However, in removing this requirement, the drafters also removed any language pertaining to the scope of trafficking extending to boys under twenty-one years of age. While this treaty was not formally identified as a protocol or amending instrument, the 1933 Convention has always been understood to only remove the consent requirement and supplement, not replace the previous trafficking conventions.[242] Therefore, inclusion of males twenty-one years of age and younger within the purview of

239 'Records of the Diplomatic Conference concerning the Suppression of Traffic in Women of Full Age' League of Nations Diplomatic Conference on the Establishment of the International Convention for the Suppression of Traffic in Women of Full Age (Geneva 9-11 October 1933) 6 (1933 Conference Proceedings). See also, Allain, *Of Human Exploitation and Trafficking* (n 58) 343.

240 1933 Conference Proceedings (n 239) 8-9. The preparatory works are compatible with this understanding. Curiously, during this drafting process, the Portuguese delegate commented that he 'would have preferred to see the offences described in the terminology normally used in criminal law'. There is no further comment, however, as to why the construction of proposed Art 1 is abnormal and/or fails to adhere to criminal law terminology (7).

241 Rijken, *Trafficking in Persons* (n 153) 55; Gallagher, *The International Law of Human Trafficking* (n 59) 58.

242 League of Nations, Joint Session of the Traffic in Women and Children Committee and the Child Welfare Committee and Session of the Traffic in Women and Children Committee (19 May 1933) LoN Doc C.306.1933.IV, 4. The draft document of the 1933 Convention however, was referred to as a 'protocol'. See also, Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (adopted 16 May 2005, entered into force 1 February 2008) CETS 197, 16.V.2005 54 (CoE Trafficking Convention).

international trafficking legislation continued.[243]

The other elements of the offense also appear to remain unchanged in the 1933 Convention. During the drafting process, it was confirmed yet again that this crime focused on the process of trafficking and not the end result. As described by the French delegate, 'the Convention was directed against the act of procuring and came into play whether or not immorality was practised later.'[244] Although the term 'immoral purposes', remained the same, Gallagher asserts that the meaning of this phrase expanded to include not only prostitution, but 'all sexual and immoral purposes'.[245] It is unclear as to how or why this assertion is made or what it encompasses. The term 'immoral purposes' was not further expanded upon in the 1933 Convention. As far as the preparatory works are concerned, there was also not much in the way of explanatory substance, other than the belief that the term 'immoral purposes' 'was well understood'.[246] A memorandum issued by the UN more than ten years after the 1933 Convention indicated that it 'covers the offence of procuring, enticing or leading away, even with her consent, a women of full age, for the purpose of prostitution to be carried out in another country.'[247]

2.3.5 1937: Drafting the International Convention for Suppressing the Exploitation of the Prostitution of Others

Due to a lack of consensus in formally addressing prostitution and brothel-keeping in the 1933 Convention, the League prepared a draft convention in 1937 entitled the International Convention for Suppressing the Exploitation of the Prostitution of Others (1937 Draft Convention), which was designed to consolidate all previous treaties and finally address prostitution at the international level.[248] Specifically, the 1937 Draft Convention was intended to 'fill the gap left in the former Conventions by protecting persons of full age and of either sex against procuration for profit, even when they consent and are not taken abroad, and also against any other form of exploitation

243 Although there is no mention of men in this document, as it is only considered to remove the consent consideration, men of full age appear to still be excluded from the scope of this instruments application. See however Rao (n 58) 87: who concludes that 'the provisions of the Convention of 1933 only applied to female children, however, those children could be any race. The Convention of 1933 did not apply to male children whatsoever.'

244 1933 Conference Proceedings (n 239) 7.

245 Gallagher, *The International Law of Human Trafficking* (n 57) 58. It should be noted that my attempt to ascertain the meaning of 'immoral purposes' as drafted in the first four conventions from scholarly input differed among today's scholars. Conclusions diverge regarding what these terms meant and what acts were considered covered under 'immoral purposes.' These scholarly conclusions are often ambiguous as well, referring to 'sexual immorality', 'debauchery', and 'sexual exploitation' as being covered under the umbrella of 'immoral purposes.' However, utilizing the term 'immoral purposes' in connection with the first element of 'procurement' and in conjunction with a meticulous reading of the 1902 and 1910 preparatory works leads to one well founded conclusion: 'immoral purposes' has one meaning and that is prostitution.

246 1933 Conference Proceedings (n 239) 7.

247 1937 Draft Convention Memo (n 115) 2.

248 Demleitner (n 58) 171 (referred to in the article as the 'Consolidated Convention'); 1937 Draft Convention Memo (n 115) 7.

of their prostitution.'[249] In discussing the precise 'formula' or proposed text, an advisory sub-committee assigned to assist in the drafting process introduced the following definition of the offense: '[w]hoever, in order to gratify the passions of another person, procures, entices or leads away, even with consent, a person of full age of either sex, for immoral purposes inside a country shall be punished.'[250]

During this drafting process however some delegates alleged that using the term 'immoral purposes' caused interpretative issues.[251] Specifically, the sub-committee believed that the concept of 'immoral purposes' was 'too-wide' since it 'would punish even a person, who, without purpose of gain, had participated in the manner indicated in the prostitution of a person of full age, with consent.'[252] This consequence conflicted with several states who regulated, as opposed to prohibited prostitution; and as such, the 'Sub-Committee agreed that it is absolutely necessary that the motive of gain should constitute an element in the new offence to be defined in the Convention.'[253] Again, the connection between 'gain' and procurement was identified as an important consideration by those in charge of drafting international legislation.

> The term 'immoral purposes' was further criticized by the Sub-Committee because:
>
> The expression 'immoral purposes' in the above formula goes beyond the intention of the authors of this new draft Convention. The use of the expression 'immoral purposes' in a convention applying to consenting victims of full age would carry the proposed legislation far beyond the limits of traffic in women and children. For this reason, the Sub-Committee considers that the words 'immoral purposes' should be replaced by the word 'prostitution'.[254]

Curiously, none of these committee members acknowledged that this language was already employed in the 1933 Convention which removed the consent requirement for all ages. Perhaps this interpretation explains Gallagher's expanded understanding of 'immoral purposes' (as discussed on page 57) as well.

Conceivably the Sub-Committee's criticisms were well received considering the defining articles of the 1937 Draft Convention read as follows:

> Article 1
>
> Each of the High Contracting Parties agrees to provide for the punishment of the following, namely: whoever, in order to gratify the passions of another and for the purpose of gain, procures, entices or leads away by whatever means, even with consent, a person of either sex of full age for the purpose of exploiting that person's prostitution.

249 League of Nations Advisory Committee on Social Questions, 'Report of the Sub-Committee entrusted with drawing up the Second Draft of a Convention for Suppressing the Exploitation of the Prostitution of Others' (15-19 June 1937) LoN Doc C.331.M.223.1937.IV 3 (LoN 1937 Report). See also, 1937 Draft Convention Memo (n 115) 7.

250 LoN 1937 Report (n 249).

251 ibid.

252 ibid.

253 ibid.

254 ibid.

Article 2

Each of the High Contracting Parties further agrees to provide for the punishment of the following, namely:

a. Whoever keeps or manages a brothel;
b. Whoever, for the purposes of gain exercises control or influence over a person of either sex in such a way as to compel or aid that person's prostitution with another, or
c. Whoever, in any other way, exploits the prostitution of another person of either sex.[255]

The outbreak of World War II (WWII) however prevented continuation of the cause and as a result, the consolidated convention of 1937 was never opened for signature.[256] As such, the 1937 Draft Convention remained a draft without any legal effect. Additionally, WWII also ended the work of the League of Nations. Consequently, official international legislative work on human trafficking did not resume until after the establishment of the UN several years later.

2.3.6 1949: The Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others[257]

After WWII, those working on international anti-trafficking legislation appeared more determined than ever to explicitly address prostitution in an international convention.[258] Throughout the life of the anti-trafficking movement, international legislative measures have always appeared in an effort to combat the deviant acquisition and transportation of prostitutes and/or females intended for a life of prostitution. However, if that is the case, why did previous international conventions refrain from referring to prostitution directly, preferring the terminology, 'immoral purposes' instead? Moreover, if there is only one 'immoral' purpose – prostitution, then why have the previous instruments always referred to 'immoral purposes' in the plural form as if there were multiple end results to which these treaties would apply? While these questions continue to exist without a satisfactory answer, the dilemma their presence brought appeared to have received some attention from the 1937 Draft Convention drafters (as discussed in the preceding subsection), as well as from the international legislators that followed which will be discussed in this subsection.

The inability for certain states to reconcile the call for more intense international anti-trafficking obligations within their domestic regulation regarding prostitution continued after WWII. National laws regarding prostitution continued to range from a regulatory to a criminalization approach. This wide spectrum of domestic law consistently prevented a consensus on the topic internationally, regardless of the recognized and deeply intertwined relationship between prostitution, brothels, and the intended purpose of anti-trafficking laws: 'abolishing systems of

255 1937 Draft Convention Memo (n 115) 8-10.

256 Demleitner (n 58) 172.

257 Ratifications and definitive accessions include: Afghanistan, Albania, Australia, Austria, Belgium, Brazil, Canada, China, Cuba, Czech Republic, Denmark, Egypt, Finland, Germany, Greece, Hungary, India, Ireland, Italy, Jamaica, Lebanon, Luxemburg, Malta, Mexico, Myanmar, The Netherlands, Nicaragua, Norway, Pakistan, Poland, Romania, Russian Federation, Sierra Leone, Singapore, Slovakia, South Africa, Sweden, Syrian Arab Republic, and Turkey. Accession/Succession to the Convention as amended by the Protocol: Algeria, Libya, Madagascar, Malawi, Montenegro, Philippines, and Serbia. Information obtained from the United Nations website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-2&chapter=7&lang=en> accessed 4 November 2015.

258 Doezema, *Sex Slaves and Discourse Masters* (n 61) 112.

regulated prostitution in Europe'.[259]

This perspective changed to a certain extent after WWII. The birth of the UN in the aftermath of the war provided an international forum to facilitate the creation of international anti-human trafficking legislation. Work of the UN essentially picked up right where the League of Nations left off: the 1937 Draft Convention.[260] In response to Article 1 of the 1937 Draft Convention, a memo by the Secretary-General expressed serious reservations about including the element of 'gain' in the definition of trafficking stating that:

> The final aim of the convention should, however, not only be to punish those who make a living or any kind of gain out of the prostitution of others. The aim of the convention should also and mainly be to protect people against being procured or in any way led into prostitution by others. Therefore, the purpose of gain is really irrelevant. It is true that in most cases gain is the main incentive, but this is not necessarily so. And moreover, if the purpose of gain constitutes a necessary element of the offences in question either because it is expressly stated or because it is taken for granted by using the term 'exploitation', it will be very difficult and, in many cases, impossible to punish the offenders for lack of evidence of the gainful intent. The fact that a third party has procured a person for the purpose of prostitution should be sufficient for punishment.[261]

Four separate convention drafts were written before the statutory language of yet another international convention was codified in 1949.[262] The General Assembly of the United Nations approved a resolution to open the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention) for signature which entered into force in 1951.[263] Through its Article 28, the 1904, 1910, 1921, and 1933 international agreements were consolidated and superseded by the 1949 Convention such that upon its ratification, the preceding instruments shall be considered terminated.[264]

The 1949 Convention's construction dramatically changed the scope of former anti-trafficking instruments. It was expansive in the sense that for the first time, gender neutral terms were consistently used to identify trafficked persons.[265] This extended the scope so that all persons could be considered trafficked persons within the context of the treaty regardless of age, sex, or race. Additionally, the 1949 Convention did not distinguish requirements between international and domestic trafficking.

259 Gallagher, *The International Law of Human Trafficking* (n 57) 55.

260 1937 Draft Convention Memo (n 115).

261 ibid 8.

262 MC Brand, 'International Cooperation and the Anti-Trafficking Regime' (2010) Refugee Studies Center, University of Oxford, Working Paper Series No. 71, 12 <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp71-international-cooperation-antitrafficking-regime-2010.pdf> accessed 5 November 2015.

263 1949 Convention (n 56). See also, KE Bravo, 'Exploring the Analogy between Modern Trafficking in Human Beings and the Transatlantic Slave Trade (2007) 25 Boston University International Law Journal 207, 217.

264 1949 Convention (n 56) Art 28. This measure was intended as early as the 1937 Draft Convention. See Brand (n 262) citing UN Doc E/1072 1948.

265 1949 Convention (n 56) Art 1.

With regards to addressing prostitution, 'the main purpose of the Convention was to promote an end to the "regulationist" approach in favor of the "abolitionist" philosophy.'[266] The theory offered by the League of Nations' expert report was that brothels empowered the criminal practice of trafficking. This report was used by abolitionist drafters of the 1949 Convention to finally address prostitution and brothel keeping in an international trafficking instrument. This is evident as the Preamble describes prostitution's companion as the 'accompanying evil of traffic' and acknowledges the desire to 'embody the substance of the 1937 Draft Convention'.

Whereas previous treaties framed the exploitative intentions of traffickers encompassing 'immoral purposes,' the 1949 Convention explicitly limited its applicability to trafficking for prostitution only.[267] Article 1 reads:

> The Parties to the present Convention agree to punish any person who, to gratify the passions of another:
> 1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
> 2. Exploits the prostitution of another person, even with the consent of that person.[268]

The 1949 Convention's primary aims were to address the end purpose of trafficking: prostitution and brothels, which was different from the previous treaties which focused on the acquisition of persons for the purpose of prostitution.[269] The 1949 Convention also shifted focus to exploitative elements and incorporated criminal consequences for various aspects of prostitution as an industry as codified in its Article 2:

> The Parties to the present Convention further agree to punish any person who:
> 1. Keeps or manages, or knowingly finances or takes part in the financing of a brothel;
> 2. Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.[270]

As the 1949 Convention makes clear, new obligations were created for states to codify crimes not before seen in an international instrument. In addition to trafficking, the 1949 Convention included prohibitions on the exploitation of the prostitution of another and the facilitation of prostitution via keeping, managing, or financing of brothels. Even renting or allowing a piece of property to be used as a brothel or place of prostitution was to incur criminal liability in domestic criminal justice systems of States Parties to the 1949 Convention. Although it appears trafficking was defined as the process of obtaining and using persons for purposes of prostitution, prostitution was not defined within the 1949 Convention. Moreover, persons 'procured, enticed, led away, or exploited'[271] for purposes other than prostitution were not considered victims of trafficking as

266 Reanda (n 65) 209.

267 Jones-Pauly (n 173) 172.

268 1949 Convention (n 44) Art 1.

269 Allain, *Of Human Exploitation and Trafficking* (n 58) 341: 'It having been deemed that licensing issues were solely within the domestic jurisdiction of States, and thus not liable to international agreement; attention turned to the cross-border movement of women as addressed in the first instance by the 1904 International Agreement for the Suppression of the White Slave Traffic.'

270 1949 Convention (n 56) Art 2.

271 ibid Art 1.

defined by the 1949 Convention.[272]

Even though the 1949 Convention focuses on prostitution, it still refrains from calling for the criminalization or prohibition of prostitution, only the exploitation of the prostitution of another. Using the phrase 'exploitation of prostitution' as opposed to 'prostitution' itself permitted the recognition of prostitution as a form of work versus the exploitation of sex workers by virtue of their profession which was necessary for states which regulated, as opposed to criminalized prostitution. This strategy was implemented in hopes for an overwhelming number treaty ratifications.[273] However, this tactic ultimately failed as only a minority of countries actually ratified the 1949 Convention.[274]

As the use of compulsion, or abuse in the trafficking process was no longer required, negating one's consent was no longer an issue. Consequently, the 1949 Convention also refrained from distinguishing between consensual and 'non-consensual'[275] prostitution which was an issue for many states.[276] Jones-Pauly states that the 1949 Convention also restricted forms of sexual exploitation outside of prostitution from the purview of this instrument's reach.[277] However, based on an analysis of the previous international agreements, it is difficult to believe that persons trafficked for purposes other than prostitution were ever even included within this framework before.

The 1949 Convention's legal interpretation of trafficking reigned for almost fifty years.[278] This instrument has received the most criticism by states and NGOs on the basis that the terminology of the instrument is too vague, such that it could be interpreted a variety of different ways which hinders international implementation.[279] This is an interesting critique considering it has rarely, if at all been used in reference to the other formative trafficking instruments which included the seemingly more ambiguous term, 'immoral purposes'. As such, it is quite difficult to understand why the 1949 Convention has received so much more criticism for being vague, while the preceding international instruments have not.

The 1949 Convention was the last anti-trafficking instrument until 2000. However, several other international instruments between 1949 and 2000 have tangentially mentioned trafficking. The following subsection will briefly address a couple of the instruments that mentioned human trafficking and interpreted the concept in their instrument.

272 Gallagher, *The International Law of Human Trafficking* (n 57) 61.

273 ibid 59.

274 Encompassing 'voluntary' prostitution within the legal framework and weak enforcement provisions were central to the 1949 Convention's international unpopularity as the first issue was believed to be an infringement of state sovereignty (eg, dictating prostitution policies) and the second demonstrated a lack of perceived legitimacy. See Rijken, *Trafficking in Persons* (n 153) 56; J Doezema, 'Who Gets to Choose? Coercion, Consent and the UN Trafficking Protocol (2002) 10 Gender and Development 20, 21; Gallagher, *The International Law of Human Trafficking* (n 57) 62. See also, B Balos, 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' (2004) 27 Harvard Women's Law Journal 138, 144, 151.

275 I use the term 'non-consenual' to demonstrate the dichotomy of language in the instrument. However, it should be stressed that non-consensual sex is rape.

276 Gallagher, *The International Law of Human Trafficking* (n 57) 61.

277 Jones-Pauly (n 173) 172 [91]. In referring to the 1949 Convention: 'Procurement is now defined under the Convention much more narrowly. It is prohibited only if for purposes of prostitution, for more general immoral purposes.'

278 Gallagher, *The International Law of Human Trafficking* (n 57) 61.

279 Reanda (n 65) 210-211.

2.4 Ancillary Twentieth Century International Legal Developments and Considerations

The second half of the twentieth century did not experience any further international anti-trafficking regime instruments. This is not to say however, that there was an absence of anti-trafficking discourse within international bodies or international law making. In taking a broader view in section 2.4, there are a few ancillary international legal developments and considerations concerning anti-trafficking efforts worth briefly mentioning.

In 1982, a Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others was appointed upon request of the United Nations Economic and Social Council.[280] The post focused on issues consistent in scope with the 1949 Convention (prostitution); however, it defined 'traffic in persons' as 'the exploitation of the prostitution of women and children.'[281] This interpretation is clearly distinguishable from the previous international instruments. First, it determined trafficking to be the exploitation of the prostitution of another, leaving out the process of procurement which was the exclusive meaning of trafficking before the 1949 convention. Secondly, in using the phrase 'exploitation of prostitution' as also employed in the 1949 Convention, this phraseology recognized a dichotomy between prostitution as a form of work versus the exploitation of sex workers. An unequivocal definition of 'prostitution' was however not constructed and an understanding of the 'exploitation of the prostitution of others… was never made explicit or investigated.'[282] Finally, the Special Rapporteur's report refrained from recognizing that adult males could be trafficked.

Years later, discontented voices from an international community of states and interest groups stimulated a recommendation in 1987 from the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to draft a protocol to the 1949 Convention to cover modern forms of prostitution.[283] The Sub-Commission recommended molding this new protocol after the Torture Convention; however, the proposal was rejected by the Commission on Human Rights.[284] The United Nations also changed its position with regard to the failure of the 1949 Convention to distinguish between prostitution as sex work and the exploitation of another's prostitution in 2000.[285] In criticizing the 1949 Convention, the Special Rapporteur on Violence Against Women stated:

> It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the 'evils of prostitution.'[286]

As it concerns actual international instruments, other areas of international law addressing women's rights, children's rights and labor rights have mentioned that the issue of human trafficking

280 Demleitner (n 58) 176.

281 ibid citing the United Nations Department of International Economic and Social Affairs 'Activities for the Advancement of Women: Equality, Development and Peace' (1985) UN Doc ST/ESA/174, 5.

282 Allain, Of Human Exploitation and Trafficking (n 58) 346.

283 Reanda (n 65) 210-211: Reanda writes that modern forms of prostitution have been described as 'sex tourism and forms of traffic disguised as employment abroad, marriage markets, and the like…'

284 ibid.

285 Gallagher, *The International Law of Human Trafficking* (n 57) 61.

286 ibid.

requires state and international legislative action and intervention. Additionally, human trafficking also found its way into various human rights' conventions and the Rome Statute of the International Criminal Court.[287] Whereas several of these instruments mention that freedom from trafficking is a human right or that the prohibition of the traffic in persons should be internationally condemned and criminalized, some actually interpret the scope and/or definition of trafficking differently from the 1949 Convention. It is those international agreements which touch on trafficking with what could be considered definitional or interpretational consequences that are discussed below. These include: The Convention on the Rights of the Child (CRC) and its Optional Protocol, as well as the Inter-American Convention on International Traffic in Minors.[288]

2.4.1 1989: Convention on the Rights of the Child and its Optional Protocol

In 1959, the UN General Assembly (UNGA) adopted Resolution 1386, a Declaration of the Rights of the Child. Principle 9 of the declaration stated, '[t]he child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form'. Using this declaration as its foundation, the Convention on the Rights of the Child (CRC) was drafted and entered into force in 1990.

The CRC refers to the prohibition of trafficking in two forms: drug trafficking[289] and human trafficking. Child trafficking is not defined in the CRC, but the call on states to prevent its occurrence is codified in its Article 35, which reads: 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.' The CRC's language thereby acknowledges that the concept 'human trafficking' is not exclusively linked to prostitution.

In fact, the prohibition of sexual abuse is outlined under a separate article within the CRC which includes language pertaining to the 'exploitation of prostitution.' Article 34 delineates these forms stating:

> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
> a. The inducement or coercion of a child to engage in any unlawful sexual activity;
> b. The exploitative use of children in prostitution or other unlawful sexual practices;
> c. The exploitative use of children in pornographic performances and materials.

287 Discussion of trafficking in statutes of international criminal courts and tribunals will be discussed in Chapters 5 and 6.

288 UNGA Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); UNGA Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); UNGA Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography (opened for signature 16 March 2001, entered into force 18 January 2002) UNGA Res A/RES/54/263 (Optional Protocol); Organization of American States (OAS) Inter-American Convention on International Traffic in Minors (opened for signature 18 March 1994, entered into force 15 August 1997) OASTS 79, 33 ILM 721 (OAS Traffic in Minors Convention).

289 CRC (n 288) Art 33: Specifically, '…to prevent the use of children in the illicit production and trafficking of such substances.'

The UN Commission on Human Rights created an Optional Protocol to the CRC in 2000 called the Optional Protocol to the Convention on the Rights of the Child on the sales of children, child prostitution and child pornography (Optional Protocol). The Optional Protocol's purpose is to expand protections for trafficked children.[290] Entering into force in 2002, it clearly articulates that trafficking can take many forms. Taking a much more aggressive stance, the Optional Protocol calls for the criminalization of accepting, or of delivering children for the purposes of: the sale of children; sexual exploitation of children; and use of children in forced labor as articulated in Articles 1-2, which read as follows:

> Article 1
>
> States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.
>
> Article 2
>
> For the purposes of the present Protocol:
> a. Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;
> b. Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;
> c. Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

The Optional Protocol explicitly defines 'sale of children', 'child prostitution', and 'child pornography', but not trafficking.[291] However, considering that the Preamble states that 'the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography', one could interpret these concepts to fit under an umbrella concept of child trafficking. The obvious framework expansion from the 1949 Convention's construct in this instrument contemplates that transferring a child for reasons other than prostitution could be considered as trafficking.

2.4.2 1994 Inter-American Convention on International Traffic in Minors

The 1994 Inter-American Convention on International Traffic in Minors was drafted with the purpose of guaranteeing civil and penal law related protections to minors.[292] Of interest to the legal evolution of trafficking is the actual definition of 'international traffic in minors' contained within its Article 2. Specifically, the term was defined as 'the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means.'[293] The treaty defined unlawful purpose as 'includ[ing] among others, prostitution,

290 Gallagher, *The International Law of Human Trafficking* (n 57) 67.

291 Optional Protocol (n 288) Art 2.

292 OAS Traffic in Minors Convention (n 288) Preamble, Art 1.

293 ibid Art 2.

sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located…'[294] This treaty once again acknowledged exploitative (or, unlawful) purposes outside of the exploitation of another's prostitution; however, it remained extremely vague with regards to the substance of those other 'unlawful purposes'.

2.5 Concluding Remarks

This Chapter set out to ascertain whether definitions of trafficking existed in the formative trafficking conventions, how they can be understood and whether the legal construct of trafficking changed over time. Even though the instruments did not explicitly state 'the definition is…', legal definitions or descriptions of trafficking clearly existed in each of the formative conventions. After examining the primary and secondary sources of law relative to each of the respective international instruments, identifying the meaning of terms used at the time, and pinpointing the articulated aims of state delegates working on this legislation, it appears that the drafters were in agreement with one another as to what terms like 'procure' and 'immoral purposes' (among others) meant. Nevertheless, political pressure to refrain from drafting international law addressing prostitution in favor of state sovereignty undoubtedly prevented international legislation addressing the actual exploitation of trafficked persons (until 1949), enabled variation in the domestic interpretation of these formative treaties, and relaxed any pressure on states to enact specific national legislation relating to trafficking and the exploitation of trafficked persons in the first half of the twentieth century.

Chapter 2 questioned whether the legal construct of human trafficking as a crime of international concern evolved over time. While the core elements of the offense (procurement and immoral purpose/prostitution) appeared consistently and exclusively present in each of the treaties until 1949, statutory evolution, primarily with regards to the scope of the crime is evident. Persons who could be considered 'trafficked' under the law transformed from white (European) females to include all ages, races, and both sexes. Additionally, the crime began as one that required transcendence of international borders but evolved to encompass all forms of inter and intrastate traffic.

With regards to the material definition of trafficking, the element of procurement retained its general meaning but also expanded such that methods of abuse or compulsion were originally required for women of 'full age' (without their consent), then the age limit was increased, other forms of means were referenced, and then the necessity to negate consent via the use of any method was removed entirely. The 1949 Convention did not alter the meaning of procurement, but expanded the focus of the international anti-trafficking legislative effort so that it was no longer limited to the procurement of a person for the purpose of prostitution, but included other offenses: the exploitation of the prostitution of others and the facilitation of prostitution.

A thorough review of the formative conventions and related preparatory and corresponding works demonstrates the evolution of the concept of trafficking over time. However, it is difficult to conclude where specifically international anti-trafficking law stood at the end of the twentieth century. The 1949 Convention was the last international trafficking instrument of the twentieth century and contained a clause so that it would supersede all preceding trafficking instruments.[295]

294 ibid.

295 1949 Convention (n 56) Art 28.

The 1949 Convention defined trafficking to include the procurement for the purpose of prostitution (irrelevant of the consent of the person) but added additional offenses including the: exploitation of the prostitution of others; managing and/or financing a brothel; and/or letting or renting a premises for the purpose of prostituting others.[296] However, to-date it only has 25 signatories and 82 parties – over 20 of which only committed after 2000. Moreover, other than France, Japan and the Russian Federation, none of the other world's major powers have formally recognized this instrument. As such, the previous anti-trafficking effort which solely addressed the crime of trafficking (as procurement for the purpose of prostitution and irrelevant of the consent of the person) appears to have a greater recognition from states. Nevertheless, as mentioned earlier, the use of trafficking labels in reference to the movement of children for purposes other than prostitution found its way in international instruments during this century as well which is incompatible with the trafficking framework in every formative international trafficking instrument.

Even though the state of international law was left unsettled after a century's worth of international legislation, this exercise was nevertheless useful to those working in the realm of human trafficking law. As Allain explains, these formative instruments enables one to 'better understand the genesis of the regime which today is manifest in the Palermo Protocol'.[297] It is of value to explore and identify issues raised and addressed during the previous century before examining the most recent international trafficking instrument from 2000 considering that (as will be discussed in the following chapter) history has a curious way of repeating itself.

296 1949 Convention (n 56) Arts 1-2.

297 Allain, 'White Slave Traffic' (n 62).

3 The Palermo Protocol

3.1 Introduction

Chapter 2 documented nearly a century's worth of international trafficking instruments. The 1949 Convention, however, was perceived as an international legislative failure due to its ratification status. Among other things, this perception amid states prompted the creation of the most recent international trafficking instrument: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol).[298] The Palermo Protocol is just one of three supplementary instruments to the United Nations Convention Against Transnational Organized Crime (CTNOC).[299] As of 21 July 2016, the Palermo Protocol has 117 signatories and 169 parties making it one of the most internationally accepted instruments.[300] The CTNOC and its protocols are supervised by the United Nations Office on Drugs and Crime (UNODC).[301]

The principal issue among parties involved in drafting the Palermo Protocol concerned the creation of definitions. Defining the crime of trafficking was believed to be of utmost importance in order to internationally standardize the concept and provide for the harmonization of substantive and procedural issues in law as it relates to human trafficking. As discussed in the Commentary on the United Nations Convention and its Protocols (Commentary), the most controversial aspect of negotiating the Palermo Protocol was the codification of an unequivocal definition of 'trafficking in persons'.[302] Ten months of negotiation at eleven separate sessions in which over 100 state

298 K Abramson, 'Beyond Consent: Towards Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' (2003) 44 Harvard International Law Journal 473; EM Bruch, ´Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 Stanford Journal of International Law 1, 11-13; AT Gallagher, *The International Law of Human Trafficking* (CUP 2010) 2, 77-78. Other reasons cited include the 'growing global movement for women's human rights'.

299 UNGA, *United Nations Convention against Transnational Organized Crime: resolution/adopted by the General Assembly*, 8 January 2001 (CTNOC). The other two protocols supplementing the CTNOC include the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

300 Palermo Protocol Ratification Status <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en> accessed 21 July 2016.

301 Gallagher, *The International Law of Human Trafficking* (n 298) 2-4, 77-78. Prior to 2000, human trafficking was primarily confined within the realm of international human rights law. As discussed in chapter 2, crime control aspects of trafficking were also addressed in some of these earlier instruments. As a century of legislation exemplified, an exclusively 'human rights based approach' was internationally deemed insufficient in addressing issues involving the 'crime control' aspects of the offense.

302 D McClean, *Transnational Organized Crime: A Commentary on the UN Conventions on its Protocols* (OUP 2007) 20, 315. In regards to the value of this source, it should be mentioned that this is an academic commentary. Nevertheless, its value can nevertheless be regarded as authoritative. See also, AT Gallagher, 'Human Rights and Human Trafficking: Quagmire of Firm Ground? A Response to James Hathaway' (2009) 49 Virginia Journal of International Law 789, 790; C Rijken (ed), *Combatting Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011) 394. See also, V Roth (ed), *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers 2012) 88. This was also the case for the definition of 'organized criminal group'.

representatives participated,[303] culminated in creating this instrument and solidifying an explicit definition.[304] Article 3 is the defining article which states that,

> For the purposes of this Protocol:
>
> a. 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs;
> b. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
> c. The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
> d. "Child" shall mean any person under eighteen years of age.[305]

Article 3(a) thereby outlines the three elements which constitute trafficking: (1) an act (recruitment, transportation, transfer, harboring or receipt of persons); (2) a means (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); both committed, (3) for a purpose (exploitation).[306]

The Palermo Protocol's definition of 'trafficking in persons' is universally recognized.[307] Furthermore, its statutory construction of trafficking has been the source of legislative inspiration

303 J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, (Martinus Nijhoff Publishers 2013) 355. The finalized definition of trafficking is the product of interaction and negotiations from state representatives, intergovernmental agents and proxies from interested non-governmental organizations. See also, S Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008) 59; JG Raymond, 'The New UN Trafficking Protocol' (2002) 25 Women's Studies International Forum 491, 494; J Kaye and J Winterdyk, 'Explaining Human Trafficking' in J Winterdyk *et al* (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012) 57; DB Jannson, *Modern Slavery: A comparative Study of the Definition of Trafficking in Persons* (Brill 2014) 73-77.

304 For more on the drafting history, see: M Ditmore and M Wijers, 'The negotiations on the UN Protocol on Trafficking in Persons' (2003) 4 NEMESIS 79; Roth (n 302) 82-93.

305 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3 (Palermo Protocol).

306 In the case of minors, the means element does not apply.

307 Allain, *Of Human Exploitation and Trafficking* (n 303) 325; Roth (n 302) 78.

for countless regional and domestic codifications all over the globe.[308] For example, the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings adopted the Palermo Protocol's definition of 'trafficking in persons' verbatim in its instrument.[309]

Nevertheless and as Gallagher points out, '[t]he evolution of consensus on what constitutes trafficking does not necessarily mark the end of definitional controversies.'[310] The issue that persists is that a cohesive (and practical) international understanding of trafficking's three elements, as well as the role consent plays within this construction is still missing.[311] While Article 3(a) identifies numerous qualifying actions, methods and forms of exploitation for each element, all terms are left undefined.[312] As a result, interpretative issues are widespread in trafficking discourse which presents substantial legal issues.[313]

Explanatory omissions can result in uncertainty in legal practice. This consequence is an understandable byproduct of international law-making considering that the Palermo Protocol is first and foremost intended as an instrument triggering the obligation to criminalize trafficking within domestic criminal justice systems. In order to garner as many ratifications as possible, terms and definitions were left open to accommodate for individual domestic interpretation.

However, as discussed in the introductory Chapter, holding traffickers accountable before domestic criminal institutions has proved to be a very difficult task for prosecutors. One of the impediments identified by scholars and practitioners alike, results from a lack of interpretational clarity of the terms contained within the given legal framework. A failure to comprehensively understand the elements of an offense can result in its misuse, in the prosecutorial disuse of the offense,[314] or in the unnecessary acquittal of defendants. As such, the objective of this chapter is rather straightforward: define the terms contained within each element of the definition of

308 J Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 14 Albany Government Law Review 1; Jannson (n 303) 80; UNODC, 'Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons' (2013) Issue Paper, 1 <https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf> accessed 20 May 2016 (APOV Issue Paper).

309 CoE, Action against Trafficking in Human Beings and its Explanatory Report (adopted 16 May 2005, entered into force 1 February 2008) CETS 197, 16.V.2005 (CoE Trafficking Convention).

310 Gallagher, *The International Law of Human Trafficking* (n 298) 47.

311 Jannson (n 303) 63: 'there is as of yet no common understanding of the trafficking phenomenon.' This claim is further evidenced in the various domestic interpretations of trafficking. See also, Allain, 'No Effective Trafficking Definition Exists' (n 308) 1: As Allain writes, 'in their attempt to end this transnational crime, States speak to each other in different languages: both literally and figuratively. Figuratively, as their jurisdictions are not truly compatible with each other, when they speak of 'trafficking,' they are mainly speaking about different things.'

312 S Scarpa, 'The Definition of Trafficking in Adult Persons for Various Forms of Exploitation and the Issue of Consent: A Framework Approach that Respects Peculiarities' (2013) 1 Groningen Journal of International Law 153, 154: As Scarpa explains, the 'definition suffers from the fact that it tries to incorporate various definitions into a single concept'.

313 Jannson (n 303) 80: Jannson describes these issues as a 'conflict between those who support a restrictive interpretation of the crime of trafficking, and those who advocate for its expansion' which can largely be attributed to the 'complex wording' of Art 3 and a lack of definitions.

314 M Wade, 'Prosecution of Trafficking in Human Beings Cases' in J Winterdyk *et al*, (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012) 153, 163.

'trafficking in persons' as codified in Article 3(a) of the Palermo Protocol.[315]

Chapter 3 will begin with an introduction to the Palermo Protocol's parent instrument, the CTNOC. Thereafter, this chapter will examine the Palermo Protocol's legal relationship to the CTNOC. The rest of Chapter 3 will focus on the Palermo Protocol. A detailed examination of each of trafficking's three elements results in a deeper understanding of the offense; and provides definitions of the Article 3(a) terms which can be used to clarify the offense as well as aid in ensuring the codification's workability and further harmonization in legal practice.

3.2 The United Nations Convention Against Transnational Organized Crime (CTNOC)

Towards the end of the twentieth century, the UN formally identified the harmful impacts of transnational organized crime around the globe 'as undermining the foundations of international democratic order by poisoning the business climate, corrupting political leaders, and undermining human rights and public institutions.'[316] In an effort to encourage international governmental discourse on the matter, the UN facilitated several discussions among nations pertaining to the creation of an international instrument addressing 'organized transnational crime'.[317] In 1997, the General Assembly (GA) decided to assemble a group of experts to create a draft convention against organized transnational crime.[318] Various states also mentioned the need to address perceived related phenomena including human trafficking, migrant smuggling and the trafficking of firearms in this international legislative effort.[319] By way of a General Assembly Resolution (GA Res) 53/111, the issue was framed and the decision was made to

> establish an open-ended intergovernmental *ad hoc* committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration, as appropriate, of international instruments addressing trafficking in firearms, their parts and components and ammunition, and illegal trafficking and in the transporting of migrants, including by sea.[320]

315 There are many related ancillary issues and topics on trafficking. This chapter is primarily concerned with clarifying the internationally created framework via defining the terms included in Article 3(a) of the Palermo Protocol (ie, substantive interpretations of the law). As such other issues are outside the scope and will not be addressed. For literature critiquing the framework and/or its implementation, see for example: JC Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 Virginia Journal of International Law 1; Gallagher, 'Quagmire or Firm Ground?' (n 302); Allain, 'No Effective Trafficking Definition Exists' (n 308); M Wijers, 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' (2015) 4 Anti-Trafficking Review 56; K Kangaspunta, 'Was Trafficking in Persons Really Criminalised?" (2015) 4 Anti-Trafficking Review 80; J Bhabha, 'Looking Back, Looking Forward: The UN Trafficking Protocol at Fifteen' (2015) 4 Anti-Trafficking Review 3; MM Dempsey, C Hoyle and M Bosworth, 'Defining Sex Trafficking in International and Domestic Law: Mind the Gaps' (2012) 26 Emory International Law Review 137; F Gold, 'Redefining the Slave Trade: The Current Trends in International Trafficking of Women' (2003) 11 University of Miami International and Comparative Law Review 99.

316 McClean, *Commentary* (n 302) 79.

317 ibid 2-9.

318 ibid 8 citing UNGA Res 52/85 of 12 December 1997.

319 McClean, *Commentary* (n 302) 8-9. There was some discussion of including the traffic of stolen vehicles as well. This suggestion was not included in any of the final instruments.

320 ibid 9 citing UNGA Res 53/111 of 9 December 1998. See also, Roth (n 302) 82-84: Before the 'formal' drafting process begin, several meetings by expert groups convened and prepared draft articles and definitions.

An *ad hoc* committee was thereafter tasked with drafting the proposed convention and its protocols.[321] Representatives from over one hundred nations attended the drafting sessions of this committee.[322] In two years, the CTNOC and its three protocols were drafted culminating with a signing conference held in Palermo, Italy from 12-15 December 2000.[323] The CTNOC entered into force on 29 September 2003.

The CTNOC's purpose 'is to promote cooperation to prevent and combat transnational organized crime more effectively.'[324] As Gallagher explains, 'the Convention seeks to eliminate "safe havens" where organized criminal activities or the concealment of evidence or profits can take place by promoting the adoption of basic minimum measures.'[325] Codified in its Article 3, the CTNOC's 'scope of application' includes the 'participation in an organized criminal group,[326] money laundering,[327] corruption,[328] obstruction of justice[329] and 'serious crimes'.[330]

The inclusion of these offenses under the obligation to criminalize imposed by the CTNOC conditions that their commission be 'transnational in nature' and involve an 'organized criminal group.'[331] As far as an understanding of these terms are concerned, the CTNOC has defined several of these concepts. For example, 'serious crime' is defined as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.[332] A crime is considered 'transnational in nature' if:

a. It is committed in more than one State;
b. It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
c. It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
d. It is committed in one State but has substantial effects in another State.[333]

And, the CTNOC defines 'organized criminal group' as:

> a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.[334]

321 McClean, *Commentary* (n 302) 12.

322 ibid. See also, Roth (n 302) 80.

323 For a comprehensive list of meetings pertaining to this drafting process, see McClean, *Commentary* (n 302) 10.

324 CTNOC (n 299) Art 1.

325 Gallagher, *The International Law of Human Trafficking* (n 298) 74.

326 CTNOC (n 299) Arts 3(1)(a), 5.

327 ibid Arts 3(1)(a), 6.

328 ibid Arts 3(1)(a), 8.

329 ibid Arts 3(1)(a), 23.

330 ibid Art 3(1).

331 ibid Art 3(1).

332 ibid Art 2(b). See also, McClean, *Commentary* (n 302) 42.

333 CTNOC (n 299) Art 3(2). See also, McClean, *Commentary* (n 302) 42.

334 CTNOC (n 299) Art 2(a). See also, McClean, *Commentary* (n 302) 38-41.

Furthermore, 'structured group' is defined in the CTNOC as 'a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'.[335]

In addition to obliging states to criminalize the referenced offenses domestically, ratification of the CTNOC also commits States Parties to other issues relating to transnational organized crime. For example, states are expected to enact measures to confiscate and/or seize the 'proceeds of crime' and 'property, equipment or other instrumentalities' which relate to the covered offenses.[336] States also commit to engage in international cooperation with such measures including confiscation and seizure, extradition and mutual legal assistance relating to the 'investigations, prosecutions and judicial proceedings' of these offenses.[337] Additionally, the CTNOC obliges states to 'take appropriate measures within its means' so that witnesses in related criminal proceedings can enjoy 'effective protection from potential retaliation or intimidation.'[338]

The CTNOC therefore broadly encompasses the creation of standardized definitions, duties to criminalize certain conduct domestically, and calls for action in the realms of witness protection, international cooperation and asset confiscation. Albeit briefly described, a sense of the scope and aims of this Convention is evident. The CTNOC's first supplementary instrument, and focus of this research, is the Palermo Protocol which will be examined at length in the remainder of this chapter.

3.3 The Palermo Protocol

Argentina's proposal to the UN Commission on Crime Prevention spurred UNGA Res 53/111 which permitted the inclusion of trafficking in persons.[339] With similar aspirations as the CTNOC, the Palermo Protocol was created in the context of a global desire to codify international crime control measures for states. Described as producing an 'effective action to prevent and combat trafficking in persons', this concerted desire 'includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking'.[340] As Jannson explains,

> the main purposes of the Palermo Protocol are three. Firstly, state signatories to the document are to criminalize trafficking in human beings in their national legislations and to establish proper penalties for this offence. Secondly, states should promote international cooperation. Thirdly, the signatories are to consider offering protection and assistance to victims of trafficking. The first purpose is expressed in mandatory terms. The other two, however, are facultative.[341]

This research will focus on the Palermo Protocol's first purpose insofar as to examine the instrument's crafted definition of 'trafficking in persons' and determine how the terms contained

335 CTNOC (n 299) Art 2(c).

336 ibid Art 12. This obligation is not absolute but indicates that states should act 'to the greatest extent possible'.

337 ibid Arts 13, 16, 18.

338 ibid Art 24.

339 McClean, *Commentary* (n 302) 18.

340 Palermo Protocol (n 305) Preamble.

341 Jannson (n 303) 77. See also, Gallagher, *The International Law of Human Trafficking* (n 298) 79-80; Roth (n 302) 90.

within it can be understood. Before beginning with Article 3 however, it is important to understand the trafficking-specific sources of law which will be frequently used throughout the remainder of this chapter, as well as clarify the legal relationship between the Palermo Protocol and the CTNOC.

3.3.1 Methodology and Sources Relevant to the Palermo Protocol's Interpretation

As far as methodology is concerned, the VCLT will remain as the preferred interpretative tool.[342] Unfortunately, the Palermo Protocol, its parent instrument and the preparatory works are rather silent on interpreting the terms contained within each element of 'trafficking in persons'. Other than the ordinary meaning of these terms, additional interpretative insight will therefore be extracted, when relevant, from secondary sources of international law.[343]

As the following sections will reveal, besides the instruments preparatory works and the Commentary, the main sources of interpretation actually derive from documents published by the UNODC. The CTNOC and its Protocols were drafted under the auspices of the UNODC. This UN body has labeled itself, 'the guardian' of the CTNOC and its Protocols.[344] In its view, the UNODC has a 'vital role to play in mainstreaming its criminal justice and security mandates into the UN system at large, and in assisting States in translating their commitments into actions.'[345] As such, the UNODC has taken to initiate a plethora of publications on issues of interpretation concerning the Palermo Protocol.

The manifestation of such research emerges via the creation of various UNODC materials including: training materials (such as legislative guides, manuals and so-called toolkits), reports and assessments, technical papers, inter-agency papers, brochures, leaflets and multimedia.[346] In fact, there is so much material that the UNODC has even created its own 'catalogue of materials' to list and describe each contribution.[347] As this chapter seeks to define terms contained within Article 3(a) of the Palermo Protocol so as to clarify the crime's meaning for practical application, and the UNODC has taken to create a myriad of documents to assist with interpretative issues and the Palermo Protocol's domestic implementation, an examination of these 'interpretative' documents is also important to the comprehensiveness of this research.

342 Vienna Convention on the Law of Treaties (entered into force 23 May 1969) 1155 UNTS 331, Art 31 (VCLT); I Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 604-607; DS Jonas and TN Saunders 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43(3) Vanderbilt Journal of Transitional Law 565, 577.

343 UN, Statute of the International Court of Justice (18 April 1946) See also, G Werle and F Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 56 [152]. Additional sources of law used in this study will therefore include: the legislative guides and manuals written by the Palermo Protocol's creating body (UNODC) on the subject of definitional interpretation, other international conventions which have used these terms, judicial decisions (from international institutions) and scholarly works.

344 UNODC Website, <https://www.unodc.org/unodc/en/organized-crime/work-of-unodc-crime.html> accessed 12 January 2016.

345 ibid.

346 See UNODC, 'Catalogue of Materials: Global Programme against Trafficking in Persons & Global Program against Smuggling of Migrants' (last updated November 2015) <https://www.unodc.org/documents/human-trafficking/2015/UNODC_Catalogue_of_Materials.pdf> accessed 12 January 2016.

347 ibid.

3.3.2 Understanding the Legal Relationship between the CTNOC and the Palermo Protocol

Considering the Palermo Protocol supplements the CTNOC, the crime of 'trafficking in persons' may be affected in substantive scope or context by its parent instrument. As such, an examination of the legal relationship between these instruments must be undertaken before discussing the elements contained within Article 3(a) of the Palermo Protocol. The legal intersection between the CTNOC and the Palermo Protocol begins at the Protocol's first article. Entitled, 'Relation with the United Nations Convention against Transnational Organized Crime', Article 1 states:

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 5 of the Palermo Protocol addresses the domestic duty to criminalize 'trafficking in persons' and states:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
   a. Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
   b. Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
   c. Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

Furthermore, the Palermo Protocol's 'scope of application' as it pertains to its obligations is contained in Article 4, which reads:

> This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are *transnational in nature* and involve an *organized criminal group*, as well as to the protection of victims of such offences.[348]

Upon first glance, it appears that the crime of trafficking not only requires perpetration of the elements outlined in Article 3(a) (act, means and for the purpose of exploitation), but also that the commission of trafficking be 'transnational in nature' and 'involve an organized criminal group'.

348 Emphasis added.

An Interpretative Note[349] to the preparatory works however, tried to clarify this misconception: '[t]he *travaux préparatoires* should…indicate unequivocally that the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes.'[350] The Commentary reiterates this point.[351]

Nevertheless, there are those who aver that trafficking in persons, as defined in the Palermo Protocol requires the perpetration which is transnational in nature and involves an organized criminal group. This confusion is likely the result of obscuring the duties and obligations imposed upon states when committing to an international instrument with the instrument's definitional constructs.[352] A plain reading of the Palermo Protocol stipulates that the duty imposed (eg, domestic criminalization) is only required under circumstances outlined in its Article 4: where the trafficking is 'transnational in nature and involves an organized criminal group'. This is quite different from determining that the elements of trafficking require: 1) an act; 2) a means, 3) all committed for the purpose of exploitation; 4) involving an organized criminal group; and 5) that is 'transnational in nature.'[353] In essence, the international obligation placed on states to domestically criminalize this offense is not as demanding.[354]

This is not to say that the Palermo Protocol proffers that states must or should only criminalize trafficking that is 'transnational in nature' and 'involves an organized criminal group'. On the contrary, all of the UNODC literature expressly recommends the adoption of domestic legislature which only embodies the contents of Article 3 of the Palermo Protocol. However, the scope and therefore, the international commitment requiring state action is reduced such that States Parties fulfill their international obligation by domestically criminalizing trafficking that is 'transnational in nature' and involves an organized criminal group.[355]

---

349 McClean, *Commentary* (n 302) 13: Various other writings were created in an effort to assist in the drafting process. One of these was the 'Interpretative Note'. Over one hundred Interpretative Notes were written while drafting the CTNOC and its protocols. As the Commentary explains, Interpretative Notes 'provide a gloss upon phrases and whole paragraphs in particular Articles. The value of such Notes is, of course, that they show the reasoning that led the negotiators to adopt a particular approach and so make for a uniform interpretation of the text.'

350 UNGA 'Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions' (3 November 2000) UN Doc A/55/383/Add.1. [59].

351 McClean, *Commentary* (n 302) 330.

352 N Siller and KE van Doore, Establishing the Constituent Elements of Trafficking in Persons: Conceptualizing 'transnationality' and 'involvement by an organized criminal group' (forthcoming).

353 Allain, *Of Human Exploitation and Trafficking* (n 292) 350-353.

354 See also, Gallagher, 'Quagmire or Firm Ground?' (n 291) 812. Gallagher agrees with my interpretation as to the international cooperation obligation, but appears to disagree when it comes to the obligation to criminalize. She writes: '[t]he central and mandatory obligation of all States Parties to the Protocol is to criminalize trafficking in their domestic legal systems. The Trafficking Protocol's parent instrument…requires that that offense of trafficking be established in the domestic law of every State Party, *independently of its transnational nature* or the involvement of an organized criminal group (citations omitted, emphasis in the original).' The instrumental basis of Gallagher's assertion is CTNOC Art 34(2), which reads: 'The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.'

355 This however, has not encouraged states from limiting their domestic laws. On the contrary, states have primarily legislated based on the definition found in Art 3 of the Palermo Protocol. See also, Gallagher, Quagmire of Firm Ground? (n 302) 813.

The scope and context of a state's pledge however, is different from an understanding of the definition of an offense. This is evidenced in the Palermo Protocol by the wording of Article 5 ('the conduct set forth in article 3 of this Protocol'). It is also reiterated by the UNODC.[356] For example, the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (Legislative Guides) explains that:

a. Non-inclusion of transnationality in domestic offences. The element of transnationality is one of the criteria for applying the Convention and the Protocols (art. 3 of the Convention), but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences;

b. Non-inclusion of an organized criminal group in domestic offences. As with transnationality, the involvement of an organized criminal group must not be required as a proof in a domestic prosecution. Thus, offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organized criminal group and regardless of whether this can be proved or not.[357]

The crime of 'trafficking in persons' can therefore be understood as fully encompassed within Article 3.

Article 3 of the Palermo Protocol outlines three elements (act, means, and purpose of exploitation). Each element is accompanied by a list of terms that qualify the commission of that element. However, none of the terms are defined within Article 3. As such, the following subsections identify these terms, attempt to define them and/or and clarify their respective meaning in the context of trafficking's definition under international law.

3.3.3 The 'Action' Element

The 'action' element is the first of two *actus reus* components of the trafficking offense – essentially referencing the crime's 'main conduct'.[358] The Palermo Protocol specifically itemizes

356 UNODC, Model Law against Trafficking in Persons (2009) V.09-81990 (E) 8 (UNODC Model Law); UNODC *Anti-human trafficking manual for criminal justice practitioners, Module One: Definitions of trafficking in persons and smuggling of migrants* (UNODC Vienna, 2009) 2 (UNODC Module 1); UNODC, *Toolkit to Combat Trafficking in Persons*: *Global Programme against Trafficking in Human Beings* (2nd edn, UNODC 2008) 4-5 (UNODC Toolkit); UNODC, The Role of Recruitment fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons (2015) 19 (Recruitment Fees Report); UNODC, International Framework for Action: To Implement the Trafficking in Persons Protocol (2009) <http://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf> accessed 13 January 2016, 20 (International Framework); Catalogue of Materials (n 346) 2.

357 UNODC, Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2004) <https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf> accessed 13 January 2016, 275-276 [45(a)-(b)] (Legislative Guides). See also, Gallagher, *The International Law of Human Trafficking* (n 286) 73: In reference to the Legislative Guides, Gallagher notes that '[w]hile not intended to be authoritative or otherwise deliver a definitive legal interpretation of these instruments, the Guide is nevertheless a useful source of additional insight, particularly with regard to legislative implementation obligations.'

358 T Obokata, 'Human Trafficking' in N Boister and RJ Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 174: This element has always existed in international trafficking treaties, albeit constrained to the act of 'procuring'.

a finite list of qualifying 'acts' which include: recruitment, transportation, transfer, harboring or receipt of persons.[359] This list was universally agreed upon since the Palermo Protocol's inception and remained unchanged and each term remained undefined throughout the entire drafting process.[360] As the Commentary contends, '[n]one of these terms is to be treated as a term of art.'[361]

An understanding of what is required to prove this element generally, pursuant to its intended meaning, is somewhat difficult considering the wide variety of acts as evidenced by the inclusion of the terms 'harboring' and 'receipt of persons'. On this point, Gallagher contends that these two types of 'acts' may in fact alter the construct of trafficking such that no preceding process is necessary before one is exploited.[362] Even though she concludes that the text of Article 3 does not appear to contemplate this scenario, situations like bonded labor where the person is not moved into a situation of exploitation but rather 'harbored' (via fulfillment of the means element) could be encompassed by this term considering no definitions exist.[363] The criticism Gallagher affords with this example also highlights the misperception among many as to whether trafficking only criminalizes the process of acquiring one for exploitation or also encompasses and requires the end result of exploitation.[364] A plain reading of the text and in the author's view, the Palermo Protocol's definition of trafficking is confined to the process of acquiring someone for exploitation, an issue which will continue to receive attention throughout this research.

It is important to understand that the 'act' does not have to be criminal in and of itself so long as the other elements are also satisfied.[365] The rationale behind this premise recognizes that human trafficking is a multi-step process of which the exploitative intentions of the trafficker may not be apparent to his or her victims. The significance of this element is that it can attach criminal liability to each person intentionally working in the 'trafficking chain'.[366]

359 Palermo Protocol (n 305) Art 3.

360 UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) 349, note 6 (CTNOC and Protocols' *Travaux Préparatoires)*. See also, McClean, *Commentary* (n 302) 323.

361 McClean, *Commentary* (n 302) 323.

362 Gallagher, *The International Law of Human Trafficking* (n 298) 30-31.

363 ibid. See also, Allain, *Of Human Exploitation and Trafficking* (n 303): Allain rejects the possibility of this scenario on the grounds it is completely contrary to Art 31 of the VCLT, among other issues.

364 Gallagher, *The International Law of Human Trafficking* (n 298) 30-31.

365 M Wijers, 'Analysis of the Definition of Trafficking in Human Beings in the Palermo Protocol' (2005) Report upon request of UNDP Belarus, 22 <http://lastradainternational.org/doc-center/1354/analysis-of-the-definition-of-trafficking-in-human-beings-in-the-palermo-protocol> accessed 6 November 2015; C Rijken, *Trafficking in Persons: Prosecution from a European Perspective* (TMC Asser Press 2003) 61.

366 A Jordan, 'UN Trafficking Protocol: An Imperfect Approach' (2010) Issue Paper 1, Center for Human Rights and Humanitarian Law at American University Washington College of Law, 3 <http://salvos.org.au/scribe/sites/justiceunit/files/Trafficking%20outreach%20materials/Research/UN%20Protocol_ImperfectApproach.pdf> accessed 6 November 2015. See also, N Boister, *An Introduction to Transnational Criminal Law* (OUP 2012) 41: '[t]he nature of these actions indicates that the Protocol is a supply control measure.' See also, Gallagher, *The International Law of Human Trafficking* (n 298) 30: As such, criminal liability can be attributed to persons involved with trafficking at its various stages including: recruiters, brokers, transporters, owners, managers, supervisors or controllers. For example: brothel, farm, boat, factory, medical facility, or household.

While the criminal effort perpetrated typically manifests itself within the 'means' element, an in-depth understanding of this initial *actus reus* component is significant. This element is required in all cases of trafficking.[367] Moreover, the commission of this element often produces the best sources of evidence in a criminal case since perpetration of the 'act' often compels the use of commercial enterprises (eg, travel companies, newspapers, etc.), technology and usually cannot function without them.[368] The following subsections will address and define each enumerated 'act' within Article 3.

3.3.3.1 Recruitment

The first type of 'act' listed in the Palermo Protocol is 'recruitment'. As far as the primary sources are concerned, the Palermo Protocol, CTNOC and their *travaux préparatoires* are all silent on defining or interpreting the term. A plain meaning definition of 'recruitment' is 'the act or process of finding new people to join a company, an organization, the armed forces, etc.'[369]

As mentioned earlier, the UNODC has issued or funded the publication of several materials dedicated to assist in interpreting the Palermo Protocol. While the Legislative Guides, International Framework, Model Law Against Trafficking in Persons (UNODC Model Law),[370] Parliamentarian Handbook,[371] and a practitioner Toolkit to Combat Trafficking in Persons (UNODC Toolkit)[372] all embrace the Palermo Protocol's definition of trafficking, these documents all refrain from defining the term 'recruitment'. The UNODC also released a report on 'The Role of Recruitment fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons' (Recruitment Fees Report).[373] While listing several interpretations and/or definitions of the term 'recruitment fees', the report intentionally failed to define 'recruitment', stating:

> Given the complexity of the broader concept of 'recruitment' as one of the 'acts' listed in the definition of trafficking in persons and the various roles 'recruitment' can play in the different forms of trafficking, the report leaves the analysis of this concept to future papers.[374]

---

367 In a case of child trafficking, the means element is inapplicable so the majority of the criminal case will rest on proving this element.

368 K Bales and S Lize, 'Trafficking in Persons in the United States: A report to the National Institute of Justice' Croft Institute for International Studies, University of Mississippi (original May 2004, revised August 2005) 109.

369 'recruitment', *Oxford Dictionaries* (OUP 2015). See also, 'Recruitment' (Merriam-Webster.com 2015) The Merriam-Webster dictionary defines 'recruitment' as follows: 'the process of adding new individuals to a population or subpopulation (as of breeding or legally catchable individuals) by growth, reproduction, immigration, and stocking; *also*: a measure (as in numbers or biomass) of recruitment.'

370 UNODC Model Law (n 356). Furthermore, the UNODC Catalogue of Materials (n 346) 2 states that the Model Law was created 'to assist States in implementing the provisions' of the Palermo Protocol.

371 UNODC, Combatting Trafficking in Persons: A Handbook for Parliamentarians (2009) <https://www.unodc.org/documents/human-trafficking/UN_Handbook_engl_core_low.pdf> accessed 13 January 2016 (Parliamentarian Handbook). The UNODC Catalogue of Materials (n 346) 3, states that the Parliamentarian Handbook was 'intended to inspire' elected officials 'to enact sound laws and adopt good practices that will strengthen national responses to human trafficking.'

372 UNODC Toolkit (n 356) 2. The UNODC Catalogue of Materials (n 346) 3 explains that the UNODC Toolkit, was created 'to offer guidance, recommended resources, and promising practices to policymakers law enforcers, judges, prosecutors, victim service providers and members of civil society who are working in interrelated spheres towards preventing trafficking, protecting and assisting victims, and promoting international cooperation.'

373 Recruitment Fees Report (n 356).

374 ibid 17.

Locatable interpretations of this term in the context of trafficking is scarce. The Commentary describes 'recruitment' as having 'few of the overtones of the use of that word in a military context; it simply means drawing a person into a process.'[375] The only other discussion, albeit in the specific context of trafficking for the purpose of organ removal, is in a co-authored research study conducted by the CoE and UN which states:

> Recruitment is to be understood in a broad sense, meaning any activity leading from the commitment or engagement of another individual to his or her exploitation. It is not confined to the use of certain means and therefore also includes the use of modern information technologies. As the term is described generally, recruitment by one of the means for the purpose of organ removal is regarded as trafficking in human beings for the purpose of organ removal regardless of how the recruitment is performed – whether through personal contact or contact through third persons, newspapers, advertisements or the Internet.[376]

As far as international law is concerned, the term 'recruitment' is used in other international instruments referring to the crimes of child soldiering,[377] the recruitment of mercenaries,[378] and most recently, the recruitment of foreign fighters.[379] However, in each of these instruments, the term 'recruitment' is also left undefined. A definition (in the context of terrorism) can be found in the CoE Convention on the Prevention of Terrorism. Under its Article 6, 'recruitment for terrorism' is defined as, 'to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.'[380]

In the context of child soldiering, the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups defines 'recruitment' as the 'compulsory, forced and voluntary

375 McClean, *Commentary* (n 302) 323.

376 CoE and UN, 'Trafficking in Organs, Tissues and Cells and Trafficking in persons for the Purpose of the Removal of Organs' (2009) 78-79 <https://www.edqm.eu/medias/fichiers/Joint_Council_of_EuropeUnited_Nations_Study_on_tra1.pdf> accessed 20 May 2016 (CoE/UN Joint Study).

377 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) Art 77(2) (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) Art 4(3)(c); Convention on the Rights of the Child, United Nations (adopted and opened for signature, ratification or accession 20 November 1989 by the GA Res 44/25, entry into force 2 September 1990) 1577 UNTS 3, Art 38(3) (CRC); African Charter on the Rights and Welfare of the Child (entered into force 29 November 1999) Organization of African Unity Doc CAB/LEG/24.9/49 (1990), Art. 22(2); ILO Convention on the Worst Forms of Child Labour (17 June 1999) C182, Art 1; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography (opened for signature 16 March 2001, entered into force 18 January 2002) UN Doc A/RES/54/263, Arts 2-4. Note that both the Rome Statute and the SCSL Statute proscribe against the recruitment and/or use of child soldiers. However, the term 'recruitment' is not used. Instead, the statutes speak to 'enlistment' and 'conscription'. See, UNGA Rome Statute of the International Criminal Court (17 July 1998) Art 8 (Rome Statute); UNSC, Statute of the Special Court for Sierra Leone (approved 16 January 2002 by UNSC Res 1315 (2000)) Art 4 (SCSL Statute).

378 UNGA International Convention against the Recruitment, Use, Financing and Training of Mercenaries (4 December 1989) UN Doc A/RES/44/34.

379 UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 (2014).

380 CoE, Convention on the Prevention of Terrorism, (adopted 16 May 2005, entered into force 1 June 2007) ETS No. 196, Art 6.

conscription or enlistment of children into any kind of armed force or armed group.'[381] Although used in their respective specific contexts, when viewed in light of the plain meaning of 'recruitment', all the definitions demonstrate a common understanding of this term.

The relevant contextual meaning of 'recruitment', evidenced by a century's worth of trafficking and white slavery literature points to the understanding that recruitment was framed as an act in which the trafficker (white slaver/procurer) promised or conveyed an opportunity to which the victim acquiesced.[382] Relocation of the victim to pursue the offered opportunity was a typical condition or consequence of accepting the offer (that eventually enabled the trafficker to exploit); but, recruitment occurred before any physical movement. In earlier discourse (1870s-1930s), however, the term 'procurement', as opposed to 'recruitment' was typically used. This terminological preference comports with the singular object and purpose of prior trafficking instruments considering the end result of trafficking was originally limited to the acquirement and transport of women for 'immoral purposes' (ie, prostitution).

In more contemporary literature, recruiters are described as those who advertise and recruit 'through means ranging from the informal (word of mouth) to formal advertisements in the press or internet or the use of travel agencies'.[383] The act of recruitment is concerned exclusively with the ability for one person (the recruiter) to acquire another's acquiesce or commitment, regardless if it be through words or deeds, force or deception. The voluntariness of such acquiesce plays no role in fulfilling the 'act' element, but is left to be considered in the 'means' element. Additionally, the satisfaction of this element via 'recruitment' does not require physical movement or force of the alleged trafficked person to their intended place of exploitation, rather this 'act' hinges on whether the object of recruitment was successfully recruited.[384]

Therefore, based on the common understanding of the term 'recruitment' in light of its contextual interpretations throughout trafficking literature, the proposed definition of recruitment is any activity which induces the commitment or engagement of another individual. This definition encompasses the many processes (eg, personal solicitation, use of media, etc.) that a trafficker is able to utilize to recruit their target. It also does not require more than another's (verbal) commitment to satisfy the act element.[385]

381 UNICEF, The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups (2007). Although there have been several international judgments pertaining to child soldiering, interpretations are in the context of 'enlistment' and/or 'conscription' as opposed to 'recruitment'.

382 See, EA Bell, *War On The White Slave Trade* (The Charles C. Thompson Co. 1909) 31-32: 'It was the old story – the promise of a good situation, or the promise of a suitable marriage, were the means invariable used to entrap and ensnare them.' See also, HW Wilson, *Human Merchandise: A Study of the International Traffic in Women* (Mackays Ltd., 1928) 44. Recruiters during this time period who focused on acquisition for prostitution were responsible for 'securing' and 'transporting' the trafficked girl.

383 Bales and Lize (n 368) 14.

384 See, UNODC Model Law (n 356) 14-15 which explains that voluntariness of the recruited does not affect the applicability of the Palermo Protocol because the 'coercive mechanism' of the offense will come into play in the second element. See also, J Elliott, *The Role of Consent in Human Trafficking* (Routledge 2015) 54: Elliot further explains that the construct of '"recruitment" construct can be elaborated upon, but mainly with direct reference to the "means" aspect of trafficking, as the subjects of trafficking are frequently recruited through, for example, a fraudulent job advertisement or a false promise from someone they trust'.

385 See also, Recruitment Fees Report (n 356) 15.

3.3.3.2 Transportation

The second enumerated 'act' is 'transportation.' This term was also left undefined in the text of the Palermo Protocol and CTNOC. The *travaux préparatoires* as well as the Legislative Guides, UNODC Model Law, UNODC Toolkit, Parliamentarian Handbook and International Framework shed no additional interpretative light, other than indicating that all modes of transportation are included within this type of 'act'.[386]

The plain meaning of 'transportation' is defined as '[t]he action of transporting someone or something or the process of being transported.'[387] However, this definition uses the root word within. A common definition of root word 'transport' is defined as to 'take or carry (people or goods) from one place to another by means of a vehicle, aircraft, or ship'.[388]

The Commentary explains that '"[t]ransportation" seems to cover not merely the acts of someone who is technically a carrier, by land, sea, or air, but the activity of those involved in arranging the transport.'[389] The only other locatable description in the context of trafficking discourse is found in the Trafficking in Organs Report which describes the term 'transportation' as an 'act of transporting a person from one place to another'.[390] Like others, this 'definition' uses the term it needs to define within the definition.

As described, satisfaction of this 'act' only requires the physical movement and/or the facilitation of another person from one place to another. The modes and circumstances of the transport are irrelevant and can range from the use of private vehicles to legitimate transportation companies (eg, commercial airlines, railway companies, motor vehicles and ships). Additionally, it has been noted that other than cases of abduction, violence is seldom used at this stage.[391]

Based on the common understanding of the term in combination with guidance provided from trafficking references, the term 'transportation' in the context of the Palermo Protocol can therefore be defined as to arrange for, take or carry someone from one place to another.

3.3.3.3 Transfer

The third enumerated 'act' within this element is 'transfer'. This term is also left undefined in the Palermo Protocol, CTNOC, UNODC Toolkit and the Legislative Guides. Common definitions of 'transfer' denote two different meanings. The first could lead one to read it synonymously

386 Under international law, the term 'transportation' appears undefined in several instruments, among others these include: Geneva Convention (I) for the Amelioration of the Condition Wounded and Sick in Armed Forces in the Field (12 August 1949) Art 17; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) Art 51 and AP I (n 377) Art 71.

387 'transportation' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/e> accessed 6 November 2015.

388 'transport' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/transport> accessed 6 November 2015.

389 McClean, *Commentary* (n 302) 323.

390 CoE/UN Joint Study (n 376) 78-79.

391 Bales and Lize (n 368) 14.

with the concept of 'transportation', signifying a focus on the physical movement of another.[392] The second definition of 'transfer' designates it as 'a conveyance of property…to another' or to 'make over the possession of (property, a right, or a responsibility) to another.'[393] The Commentary refers to both of these interpretations. Specifically, McClean writes, '"[t]ransfer" could again relate to movement, but also to a handing over of effective control over the person concerned.'[394]

Contextual references of 'transfer' as it relates to the Palermo Protocol seem to comport more to the second common understanding of this concept.[395] For example, in the early stages of the drafting process, Argentina proposed a section which listed the 'purposes' of creating the Palermo Protocol. Among others, one of the drafted 'purposes' was, '[t]o abolish progressively those practices which allow a husband, family or clan to order the *transfer* of a woman to another person for payment or otherwise for the benefit of an international criminal organization.[396] A reading of this text clearly evokes a meaning of 'transfer' more akin to the concept of a reallocation of custody, possession, or perceived (*de facto*) ownership.

A similar usage of the term 'transfer' appears in the UNODC Model Law, albeit as an example of legislation describing forced marriage. It reads: '[t]he husband of a woman, his family or his clan has the right to *transfer* her to another person for value received or otherwise'.[397] Also in line with this understanding, the Trafficking in Organs Report describes this type of 'act' as follows:

> The transfer of a person includes any kind of handing over or transmission of a person to another person. This is particularly important in certain cultural environments where control over individuals (mostly family members) may be handed over to other people. As the term and the scope of the offence are broad, the explicit or implied offering of a person for transfer is sufficient; the offer does not have to be accepted for the offence of trafficking in human beings to be constituted if the other elements are also present.[398]

Considering the predominant use of the this term in trafficking discourse as well as the inclusion of the word 'transportation', the definition of 'transfer' should therefore be understood as the conveyance of a person to another. The legal use of the term 'conveyance' is in line with the contextual meaning of 'transfer' found in the preparatory works. This is based on the fact that the legal usage of 'conveyance' does not focus on physical movement, but rather, on the transference of

392 As a verb, 'transfer' can be defined as 'move from one place to another'. As a noun, its defined as the 'act of moving something or someone to another place, organization, team, etc. See, 'transfer' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/transfer> accessed 6 November 2015.

393 ibid.

394 McClean, *Commentary* (n 302) 323.

395 See however, Elliott (n 384) 54. Elliot appears to contend that these 'acts' are synonymous. She writes: '"[t]ransportation" and "transfer" can take many forms, from legitimate border crossing to the use of totally covert means'.

396 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 334, 336. Emphasis added. The Palermo Protocol's final version of this section (now Art 2) uses broader language. It reads: 'The purposes of this Protocol are:
a. To prevent and combat trafficking in persons, paying particular attention to women and children;
b. To protect and assist the victims of such trafficking, with full respect for their human rights; and
c. To promote cooperation among States Parties in order to meet those objectives.'

397 UNODC Model Law (n 356) 16. Emphasis added.

398 CoE/UN Joint Study (n 376) 78-79.

possession, an interest, ownership, custody, etc.[399] This definition can be criticized considering the legal use of this term is most often used in the context of the transfer of objects and real property. As the transfer of a person (as an object) is a legal impossibility, use of the term 'conveyance' may conflict with a general understanding of the law. However, since the scenario contemplated is the conveyance of the possession of another or a person to another as if she or he was an object of personal property – it is precisely the designated scope of application for this term.

3.3.3.4 Receipt of Persons

The phrase, 'receipt of persons' is left undefined and unaddressed in the Palermo Protocol, CTNOC, preparatory works, UNODC Toolkit, Legislative Guides, UNODC Model Law, Parliamentarian Handbook and the International Framework. Moreover, this phrase is not found in any other source of international law. A common definition of 'receipt' is understood as the 'action of receiving' or to 'take delivery of'.[400]

In relationship to the preceding term, whereas 'transfer' focuses on the one relinquishing their interest to another, 'receipt of persons' could encompass the one accepting the above described transfer. The Commentary explains that "'[r]eceipt" is the correlative of "transfer" in this context.'[401] However, this term also appears to cover anyone receiving persons in a more general sense. In the context of Article 3, the 'receipt of persons' has been described as, 'not limited to receiving them at the place where the exploitation takes place either, but also means meeting victims at agreed places on their journey to give them further information on where to go or what to do.'[402] These offenders are typically understood as those intermediaries working on the trafficking chain.

Based on a common understanding of the term in the context of trafficking, 'receipt of persons' therefore requires the acquirement of a person. This can be in the conveyance sense as the correlative of transfer, but also in the physical sense for offenders at various stages of the trafficking process.

3.3.3.5 Harboring

Like all of the preceding described types of 'acts', a definition of 'harboring' does not exist in the Palermo Protocol, CTNOC or preparatory works. The Legislative Guides, UNODC Toolkit, UNODC Model Law, Parliamentarian Handbook and International Framework are also silent as to the interpretation of this term. In the context of trafficking discourse, 'harboring' has been described as, 'accommodating or housing persons in whatever way, whether during their journey to their final destination or at the place of the exploitation.'[403] As the term, 'whatever way' is inherently broad (and undefinable), a common understanding of harboring clarifies some ambiguity of this

399 See the legal definitions of term: 'conveyance' *Webster's New World Law Dictionary* (Wiley Publishing, Inc. 2010).

400 'receipt' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/receipt> accessed 6 November 2015. See also, 'receive' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/receive> accessed 6 November 2015. Common synonyms include: getting, obtaining, gaining, arrival and delivery.

401 McClean, *Commentary* (n 302) 323.

402 CoE/UN Joint Study (n 376) 78-79.

403 ibid 78-79.

'act', defining it as providing 'a place of refuge' or 'to shelter or hide'.[404] The Commentary explains that this type of 'act' 'will cover the provision of accommodation and perhaps steps taken to conceal someone's whereabouts.'[405]

Harboring therefore focuses on providing accommodations and/or a place of refuge as well as the concealment or hiding of the trafficked person, regardless of how provisional it may be. Satisfaction of this act therefore only requires the accommodation/housing/shelter or concealment of the alleged trafficked person.

To briefly summarize, subsection 3.3.3 reviewed each type of 'act' listed in Article 3(a) of the Palermo Protocol. An examination of each type of 'act' was conducted, taking into account the term's common definition, its usage in trafficking discourse, and when relevant, with other definitions found in international law.

This exercise revealed a rather consistent interchange of meanings amongst the various terms. The only slight discrepancy is in the case of 'transfer' and its relationship with 'transportation'. Nevertheless, an examination of each listed form of 'act' within trafficking's first element permits one to attach a specific meaning to each term.

This exercise was conducted with the aim to specifically identify definitions of these concepts such that the content of each term is clear and discernible from the other listed 'acts'. The production of these definitions can then in due course, provide a greater sense of clarity to those working in this realm whether that be in crafting legislation, conducting investigations, determining criminal charges or building a criminal case fit for criminal prosecution. This same exercise will now take place with respect to the 'means' element of trafficking in the following subsection.

3.3.4 The 'Means' Element

The second element of trafficking centers on identifying the alleged trafficker's distortion or manipulation of their target's personal choice[406] which is often demonstrated by a 'loss of agency'.[407] Essentially, the 'means' element 'follows on from the "action" element, and refers to the manner in which the action is executed'.[408] As the second *actus reus* component of this offense,[409] this element focuses on the circumstances facilitating the action element in a case of trafficking.[410] Qualified 'means' listed within the Palermo Protocol's definition of trafficking include:

> 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.[411]

404 'harbour' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/harbour> accessed 6 November 2015.

405 McClean, *Commentary* (n 302) 323.

406 Wijers, 'Analysis of Definition' (n 365) 23.

407 Allain, *Of Human Exploitation and Trafficking* (n 303) 355.

408 Elliott (n 384) 58.

409 UNODC Module 1 (n 356) 4-5.

410 UNODC Toolkit (n 356) 2.

411 Palermo Protocol (n 305) Art 3.

It is important to reiterate that in an instance where the trafficked person is a child (anyone less than 18 years of age), this element is inapplicable.[412]

All of the 'means' terms were also left undefined in the Palermo Protocol and its preparatory works. Both Gallagher and Aronowitz have each described this element as having 'varying degrees…which can be viewed on a continuum' from direct to 'less direct' methods of placing persons in a state to be exploited.[413] 'Means' employed, such as the use or threat of force, abduction, and the giving of payments or benefits are characterized as 'direct' means. These types of 'means' will typically manifest either through physical contact against the body of the trafficked person, through words which instill fear of bodily harm, or via transactional acquisitions. Indirect 'means' however include: fraud, deception and the abuse of power or of a position of vulnerability, which are almost exclusively employed from a source of masked and calculated deviance, using mental as opposed to physical control tactics.

Before beginning with the legal delineation of the 'means' terms, this section will discuss the role of consent within this offense. Specifically, Article 3(b) states that '[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article [which defines the offense] shall be irrelevant where any of the means set forth in subparagraph (a) have been used'. As discussed in Chapter 2, until 1933, negating consent was a recognized component of the international concept of trafficking (of adults), which disappeared in international law as a result of a paradigm (and/or power shift) among international drafters who framed prostitution as *per se* coercive.[414] The inclusion of consent within the framework statutorily resurfaced almost 70 years later with the Palermo Protocol and must therefore be addressed, as understanding the perpetration of the 'means' element is an integral part in combating any proposed defense of consent to the crime of trafficking in persons.[415]

3.3.4.1 The Role of Consent in Trafficking

A main point of contention in the Palermo Protocol's drafting process, just as it had been in the previous century's worth of trafficking treaties was centered around what role, if any, consent should play within this offense – which ultimately led to a discussion about state policies concerning prostitution.[416] Two competing interest groups on this issue fueled this discursive feud.[417] The Coalition Against Trafficking in Women (CATW) argued that all prostitution is 'inherently exploitative' and in violation of 'human rights in all circumstances.'[418] As such, the CATW claimed that if language such as 'irrespective of the consent of the person' or 'with or without her consent' was *not* included in the definition, traffickers could use the consent of the

412 ibid Art 3(d).

413 AA Aronowitz, 'Smuggling and Trafficking in Human Beings: The phenomenon, the markets that drive it and the organisations that promote it' (2001) 9 European Journal on Criminal Policy and Research 163, 166; Gallagher, *The International Law of Human Trafficking* (n 298) 31. See also, Elliott (n 384) 61-62.

414 Rijken, *Trafficking in Persons* (n 365) 60.

415 Palermo Protocol (n 305) Art 3(b). See also, Rijken, *Trafficking in Persons* (n 365) 60.

416 McClean, *Commentary* (n 302) 321. See also, J Doezema, 'Who Gets to Choose? Coercion, Consent and the UN Trafficking Protocol' (2002) 10 Gender and Development 20, 21; Elliott (n 384) 105-128; Abramson (n 298) 474.

417 McClean, *Commentary* (n 302) 321-322. See also, Abramson (n 298) 485-492; Doezema, 'Who Gets to Choose?' (n 416) 22.

418 Elliott (n 384) 109; Doezema, Who Gets to Choose? (n 416) 20.

trafficked person as a defense, risking impunity or the ability to hold defendants accountable.[419] The opposing viewpoint, defended by the Human Rights Caucus (HRC) was that prostitution is a legitimate form of labor.[420] Thus, as opposed to focusing on the 'nature of work' involved, the HRC argued that the law should focus on the exaction of coercion upon the alleged trafficked person in order to determine whether the 'act' alleged was in fact voluntary.

The importance of addressing consent in the Palermo Protocol was not only identified by interest groups, but the instrument's drafters and the UNODC as well. For example, the UNODC stated, '[t]he way in which consent is understood will inevitably operate to either expand or contract the range of practices identified as trafficking and, thereby, the categories of person identified as having been trafficked or having perpetrated trafficking crimes.'[421] This sentiment was also expressed during the drafting process. As reported in the secretariat's note:

> At the ninth session of the Ad Hoc Committee, there was extensive discussion of whether a reference to the consent of the victims should be made in the definition of 'trafficking in persons' and, if so, how it should be worded. Most delegations agreed that the consent of the victim should not, as a question of fact, be relevant to whether the victim had been 'trafficked'. However, many delegations expressed legal concerns about the effect of expressly excluding consent from a provision in which many of the means listed, by their nature, precluded the consent of the victim. Several expressed concern that an express reference to consent might actually imply that in some circumstances it would be possible to consent to such things as the use or threat of force, or fraud. Several delegations pointed out that proving the lack of consent was difficult because the victim's consent or ability to consent often changed while the offence was ongoing. In trafficking cases, the initial consent of the victim was often withdrawn or vitiated by subsequent changes and circumstance and, in some cases, a victim abducted without consent might subsequently consent to other elements of the trafficking. There was an agreement that both the Protocol and legislation implementing it should reduce this problem for prosecutors and victims as much as possible.[422]

This characterization is an interesting one considering the construction of the Palermo Protocol. Article 3(b) connects consent to the concept of exploitation. As mentioned earlier, Article 3(b) states that '[t]he consent of a victim of trafficking in persons to the intended exploitation… shall be irrelevant where any of the means…have been used'. Accordingly, it is the use of means which make the consent to exploitation irrelevant, not the consent to the 'act' or 'means' elements of the offense.

It is the differing perspectives on prostitution which is believed to have been of extreme significance in shaping the concept of 'consent' in the definition of 'trafficking in persons'. Article 3(b)'s construction resulted from a compromise between the two perspectives on

419 Ditmore and Wijers (n 304) 83.

420 Doezema, Who Gets to Choose? (n 416) 20.

421 UNODC, 'The Role of "Consent" in the Trafficking in Persons Protocol' (2014) Issue Paper, 15-16 <https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf> accessed 15 January 2016 (Consent Issue Paper): 'The way in which consent is understood will inevitably operate to either expand or contract the range of practices identified as trafficking and, thereby, the categories of person identified as having been trafficked or having perpetrated trafficking crimes.'

422 McClean, *Commentary* (n 302) 320-321.

prostitution which attempted 'to draw the line between coercive and voluntary prostitution [423], but it also expands the scope of criminalized activities by broadening the list of coercive means that weaken the weight of the given consent.'[424]

Compromise between these two factions in the drafting process has, to a considerable extent, perpetuated a lack of clarity in understanding the role of consent (among other elements and terms), within the definition of trafficking. In response to this concern, the Working Group on Trafficking requested the preparation of an Issue Paper which was published in 2014 and entitled: 'The Role of "Consent" in the Trafficking in Persons Protocol' (Consent Issue Paper). After reviewing a wide range of international instruments, UNODC publications and state practice, the Consent Issue Paper listed several 'conclusions on the concept of consent in international law and policy' and related them to human trafficking which include:

- The Trafficking in Person's Protocol's statement on consent reflects dangers foreseen by Member States;
- The Protocol distinguishes between trafficking of adults and of children;
- Consent is irrelevant to establishing trafficking in adults when the means are used;
- The requirement to show 'means' affirms that, at least within the Trafficking in Persons Protocol, exploitative conditions alone are insufficient to establish trafficking of adults.[425]

These 'conclusions' however are more like general observations. Additionally, several questions raised within the Issue Paper went unanswered.[426] For example, is consent to exploitation only relevant insofar as the perpetration of one of the 'means' presupposes its absence or, do changes during the trafficking process require continued perpetration of types of 'means' to satisfactorily negate a person's consent throughout the duration of their traffic? Moreover, if you consent to the 'means', how can the use of those 'means' make consent to exploitation irrelevant?

Article 3(b)'s construction of 'consent' is unsatisfactory to some. It has been described as 'flawed owing to the supposition that there are only two situations [referencing consent/coercion]' as opposed to realizing the perpetration of the phenomenon on a continuum.[427] The current framework is therefore criticized for leaving 'the question unanswered as to how severe the

423 This point is addressed in subsection 3.3.6 (Exploitation identified the context of the prostitution of others and sexual exploitation).

424 Roth (n 302) 69. See also, MC Brand, 'International Cooperation and the Anti-Trafficking Regime' (2010) Refugee Studies Center, University of Oxford, Working Paper Series No. 71, 21-22 <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp71-international-cooperation-antitrafficking-regime-2010.pdf> accessed 5 November 2015; UNODC, 'The Concept of "Exploitation" in the Trafficking in Persons Protocol' (2015) Issue Paper, 27 <https://www.unodc.org/documents/human-trafficking/2015/UNODC_IP_Exploitation_2015.pdf> accessed 19 May 2016 (Exploitation Issue Paper). See also, McClean, *Commentary* (n 302) 328: As the Commentary explains, '[a]t first sight [Article 3(b)] has the look of a compromise, building on the point that consent is not a realistic issue when, for example, deception is used. However, the 'means' in paragraph (a) are an essential element in the definition of 'trafficking', so the effect of paragraph (b) is that the consent of the victim is always irrelevant. See also, Abramson (n 298); B Balos, 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' (2004) 27 Harvard Women's Law Journal 138, 161-162.

425 Consent Issue Paper (n 421) 34-35.

426 ibid 92-94.

427 Elliott (n 384) 141. See also, VE Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 Akron Law Review 923.

interference with consent has to be' to negate it and enable criminal liability.[428] This issue remains unresolved. The Commentary only adds that Article 3(b) 'should not be interpreted as imposing any restriction on the right of the accused persons to a full defence and to the presumption of innocence. Nor should it be interpreted as imposing on the victim the burden of proof.'[429]

The built-in inclusion which can negate the defense of consent within the offense is also critiqued for situating the focus of trafficking on the process of acquiring someone for exploitation, as opposed to actual exploitation. This is an interesting criticism considering, as discussed before, consent as described in Article 3(b) refers to exploitation. In any regard, this type of denunciation only serves to demonstrate the conflation of the crime of trafficking which does focus on the *process of acquiring* one for exploitation, with crimes that *exact exploitation*. For example, Elliott writes, '[e]xploiting a person – and profiting from the exploitation – seems to be almost acceptable in terms of the trafficking definition, as long as no one was deceived and the exploitative situation was not enforced or altered from what was agreed.'[430] Elliot appears to miss the purpose or aim of the Palermo Protocol which is to criminalize the facilitation of people to a state of exploitation, not exploitation itself – of which many forms have already been addressed in various international instruments and criminalized in international and domestic jurisdictions.[431]

'Consent' under the law is generally determined valid when it is 'freely' given, informed, the person giving consent has the capacity to do so, and that such consent exists at the time of the act consented to.[432] 'Consent' as fashioned in the Palermo Protocol does not formally engage with this construct.[433] As a matter of framework, consent is considered now 'more a matter of evidence and not of definition' since the defense of consent is negated within the definition, 'rendered meaningless',[434] and therefore cannot legally succeed once perpetration of one of the enumerated 'means' is established.[435] The rationale behind this construction rests on the argument that a person cannot consent to their facilitation into exploitation 'through the use of improper means'.[436] And with regards to children, 'their vulnerable position makes it impossible to consent in the

428 Elliott (n 384) 144; Abramson (n 298) 475: As Abramson explains, '[i]t is easy to deem consent irrelevant when the paradigm of the trafficking narrative is a poor woman from an impoverished country, promised a job as a nanny, but forced into prostitution. However, this example may not represent typical forms of trafficking; it is also problematic due to the paternalistic and Eurocentric attitudes exemplified in the dichotomy it creates between rich and poor, Western and non-Western, male and female, educated and naïve, savior and victim. Yet the other side's paradigm- that of a trafficked person as a free agent who empowers herself by exercising choice in an open market to accept a job of hard labor- is equally problematic in that it ignores the real difference in choices available between rich and poor, male and female, and educated and uneducated' (citations omitted).

429 McClean, *Commentary* (n 302) 329.

430 Elliott (n 384) 131. See also, Abramson (n 298) 477; Consent Issue Paper (n 421) 7.

431 See also, Hathaway (n 315) 7-15: Hathaway also takes issue with what he terms as the 'unjustifiable privileging' of those victims who qualify as trafficked as opposed to looking at the system of exploitation which he claims affects so many more people. See subsection 3.3.6 which addresses the enumerated forms of exploitation.

432 For a full discussion of these factors, see Elliott (n 384) 93-139. See also, McClean, *Commentary* (n 302) 322.

433 *Cf* UNODC Toolkit (n 356) 6: The UNODC claims that the negation of one's consent must validly exist throughout the entire process of trafficking to permit criminal liability. Therefore, consent given to comply at one stage of the trafficking process does not mean that it is given for all stages of the trafficking process.

434 ibid 4.

435 Palermo Protocol (n 305) Art 3(b). See also, Ditmore and Wijers (n 304) 83; Allain, *Of Human Exploitation and Trafficking* (n 303) 354; Elliott (n 384) 129.

436 Gallagher, *The International Law of Human Trafficking* (n 298) 47. See also, UNODC Model Law (n 356) 26.

first place' which is why the 'means' element does not apply in their cases.[437] As such, Article 3(b) proffers that the existence of any one of the 'means' will invalidate – or make 'irrelevant' any consent given by the trafficked person.

The remainder of section 3.3.4 will discuss and attempt to define the enumerated 'means' which make the consent of a person 'irrelevant' and fulfil the second element of 'trafficking in persons.' The construction of the forms of 'means' in trafficking's definition appears to group the terms through the use of commas. Specifically, this part of Article 3(a) reads: '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'. Accordingly, the forms of means will be correspondingly grouped and addressed in the following subsections.

3.3.4.2 Threat or Use of Force or Other forms of Coercion

The term 'coercion' is often used as an umbrella concept in the context of trafficking discourse to describe a range of practices including the use of threats, violence, abduction, and abuse of power or a position of vulnerability.[438] The phrasing of the 'means' element, as codified in the Palermo Protocol however, compartmentalizes '"threats and use of force and other forms of coercion"[439] which clearly links the threat and use of force with coercion, and potentially, signifies a separation between what are often seen to be the direct and less direct means'.[440] In an attempt to legally delineate these terms and concepts from one another, this subsection will therefore address 'threat or use of force or other forms of coercion' together. The other terms contained within the 'means' element will be addressed in separate subsections.

During the drafting process, delegates refrained from defining 'coercion' even though they vocalized concerns regarding the ability to prove this concept in practice.[441] Further insight as to the specific meaning of 'coercion' cannot be gleaned from the *travaux préparatoires* other than the

437 Palermo Protocol (n 305) Arts 3(b)-(c). See also, McClean, *Commentary* (n 302) 329; UNODC Module 1 (n 356) 8.

438 Gallagher, *The International Law of Human Trafficking* (n 298) 31 note 76 citing European Parliament Resolution on trafficking in human beings, Resolution A4-0326/95 of 18 January 1996, OJ C 032, 5 February 1996 ('deceit or and other form of coercion'); CoE 1997 Joint Action on Trafficking ('coercion, in particular violence or threats, or deceit'); 2000 Committee of Ministers Recommendation ('coercion, in particular violence or threats, deceit, abuse of authority or a position of vulnerability'). See also, JA Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 Harvard Human Rights Journal 65, 87 note 81: Coercion as it relates to trafficking has also been expressed by the Global Alliance Against Trafficking in Women (GAATW) which has defined it to include 'the use or threat of force or the abuse of authority'. Furthermore, it has been argued that compliance with Art 6 of CEDAW involves anti-trafficking law adoption of an 'expansive view of what constitutes coercion to include not only physical or legal coercion, but psychological coercion as well'. See also, The Protection Project, 'Reporting on the Status of Trafficking in Women in Accordance with Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women: Guidelines on the Interpretation of the Text of Article 6 of the Convention' (20 July 2012) <http://www.protectionproject.org/wp-content/uploads/2012/07/Guidelines-Art-6-CEDAW_Final1.pdf> accessed 10 November 2015, 13. See also, APOV Issue Paper (n 308) 17.

439 Denoted by the comma which separates this phrase from other types of 'means' listed. Also grouped in this manner by McClean in the *Commentary* (n 302) 324.

440 APOV Issue Paper (n 308) 17.

441 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 352, note 4. See also, McClean, *Commentary* (n 302) 322.

fact that delegates did describe it as a 'broader term than force'.[442] A general definition of 'coercion' is the 'action or practice of persuading someone to do something by using force or threats.'[443] This interpretation has also surfaced in international criminal jurisprudence and is recognized by intergovernmental entities.[444] For example, the CoE has described forms of coercion to 'encompass the fact that not only physical harm to the victim but also psychological pressure can limit a person's free will.'[445] The concept of 'other forms of coercion' was discussed in the Commentary as including 'blackmail, both in its popular sense and as covering any form of unjustified demand.'[446]

While the UNODC Toolkit and UNODC Module 1 refrain from introducing their own definitions of this term, the UNODC Model Law offers the following:

> 'Coercion' shall mean use of force or threat thereof, and some forms of non-violent or psychological use of force or threat thereof, including but not limited to:
> i. Threats of harm or physical restraint of any person;
> ii. Any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;
> iii. Abuse or any threat linked to the legal status of a person;
> iv. Psychological pressure.[447]

A review of these various sources demonstrates a broad, yet consistent interpretation of 'coercion'. In its most basic understanding, 'coercion' can be understood as consisting of two parts: (1) the ability of one person (trafficker) to get another person to act or refrain from acting; (2) as the result of the conduct committed by the trafficker or trafficking organization against the will of the trafficked person. What remains ambiguous is the extent of an overlap between coercion and the other separately identified means (eg, abuse of power) and more importantly, whether it matters in practice. If coercion completely consumes those other forms, then the rationale or utility of separately listing various types of 'means' in this element is unclear.

442 ibid 340, note 8.

443 "coercion". *Oxford Dictionaries*. Oxford University Press, n.d. Web. 11 August 2014. <http://www.oxforddictionaries.com/definition/english/coercion>. 'coercion', Oxford Dictionaries (OUP 2015) <http://www.oxforddictionaries.com/definition/english/coercion> accessed 10 November 2015.

444 *Prosecutor v Kunarac et al* (Judgment) ICTY-96-23 and IT-96-23/1 (22 February 2001) [542]. Note, this discussion was in a case of enslavement, not human trafficking. Signifying the relationship between these concepts, the judgment referred to 'threat or use of force or other forms of coercion' in a charge of enslavement as a criminal against humanity. Additionally, the tribunal held that coercion 'would encompass *most* conduct which negates consent' [459]. The Rome Statute has included the term 'expulsion' as a coercive act. See also, Rome Statute (n 377) Art 7(2)(d).

445 CoE/UN Joint Study (n 376) 78: The report indicates that this type of 'means' 'may include threatening the victim's family, as well as other forms of economic pressure, etc.'

446 McClean, *Commentary* (n 302) 324.

447 UNODC Model Law (n 356) 13: According to the UNODC Model Law, the source of this proposal emanated from the Art 3(d) of the Palermo Protocol, Art 1 of the CRC and Arts 1-2 of the ILO Convention on the Worst Forms of Child Labour. Moreover, the US State Department's Model Law to Combat Trafficking in Persons also grouped force and coercion together, defining it as 'obtaining or maintaining through acts of threat of the labor, service or other activities of a person by physical, legal, psychological or mental coercion, or abuse of authority' (11).

What is evident, however, is that 'coercion' is consistently accepted to encompass 'the threat and use of force.'[448] This concept is perhaps the most well understood type of 'means' among practitioners because it is an element within several common domestic crimes, for example, assault, rape and robbery. As a physical attribute, 'force' is understood as 'strength or energy' but is also commonly defined as 'coercion or compulsion, especially with the use or threat of violence.'[449]

Contemporary discussions of defining 'force' or 'threat of force' are scarce.[450] Even though it has never specifically been defined in trafficking laws throughout the years, it has been a component of international trafficking legislation and dialogue since its inception.[451] As far as the Palermo Protocol is concerned, the Commentary concludes that

> The notion of 'force' needs no elaboration, but it is important to note that nothing is said as to the person (or possibly property) against whom the force is directed. It may be the trafficked person or a third party. That is true, *mutatis mutandis*, of almost all the various means listed.[452]

In the context of trafficking for the purpose of organ removal, the CoE stated that the concept of force does 'not need to be explained explicitly', but the CoE nevertheless described 'force' to include the 'removal [of an organ]…against the individual's will' or through the use of 'fear or harm'.[453] Although described as physical, there appears to be no threshold level of severity in this type of 'means' exacted by the trafficker so long as it involves, at a minimum, the threat of force.[454]

Other clues which may highlight the boundaries of 'force' emanate in the context of international criminal law. For example, the ICTY has held that 'force is given a broad interpretation and includes rendering the victim helpless'.[455] The Rome Statute has codified several crimes against humanity

448 Allain, *Of Human Exploitation and Trafficking* (n 303) 356: Abduction is also described as the use of force but is specific in nature and typically involves violence.

449 'force' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/force> accessed 10 November 2015.

450 The majority of discussions pertaining to the meaning of 'force' is in the context of the third element via various exploitative practices including: 'forced labor', 'forced marriage' and 'forced prostitution'. A full discussion of these terms and their meaning can be found *infra* subsection 3.3.6. For example, 'force' as understood in 'forced labor' incorporates a range of acts which can include: physical, sexual or psychological violence, threats, retention of identity documents, harassment, intimidation isolation, loss of rights or privileges, confinement, and the instilment of fear. A legal discussion of 'forced marriage' or '(en)forced prostitution' typically narrows its focus to whether 'full and free consent' was given. However, a determination of 'full and free consent' is often a qualitative assessment of those items enumerated in the definition of forced labor.

451 As explained in chapter 2 concerning each of the formative trafficking instruments. See also, United States Immigration Commission (1907-1910), *Steerage Conditions, Importation and Harboring of Women for Immoral Purposes, Immigrant Homes and Aid Societies, Immigrant Banks* (digitized by Microsoft corp., HardPress Publishing 2007, original publication 1911) 68.

452 McClean, *Commentary* (n 302) 324.

453 CoE/UN Joint Study (n 376) 78.

454 CTNOC and its Protocols' *Travaux Préparatoires* (n 349) 340 note 8: During the drafting process, 'force and the threat of the use of force' was generally considered as a form of 'coercion'. See also, Allain, *Of Human Exploitation and Trafficking* (n 303) 356.

455 The *Furundžija* case (Judgment) ICTY-95-17/1-T (10 December 1998) [180].

which have a 'force' component including, 'deportation or forcible transfer of a population'[456] and 'forced pregnancy'.[457] In this framework,

> the term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.[458]

A review of the use and threat of force confirms its sweeping inclusion of a range of various practices with varying levels of severity and inextricably links it to the concept of 'coercion'.

3.3.4.3 Abduction

The next type of 'means' is abduction. The use of the term 'abduction' was abundant in white slavery literature and compelled a tremendous amount of social and political support for the fight against the white slave trade in its infancy. Regardless, the term remained undefined in trafficking discourse. Generally understood, it is 'the action of forcibly taking someone away against their will'.[459] Similarly, the Commentary explains that this 'act' will 'refer to the person who is the subject of trafficking; it will very often (except in the case of small children) involve the threat or use of force'.[460] The *travaux préparatoires* however, only discusses replacing the word 'kidnapping' with 'abduction' in the final text of the Palermo Protocol.[461] Consequently, these words are often used synonymously with each other.[462] The UNODC Model Law, Legislative Guides and UNODC Toolkit also refrain from addressing this type of 'means'. Based on discussions of 'abduction' in trafficking discourse in conjunction with a common understanding of this term, 'abduction' can be understood as 1) physically taking someone away (movement); 2) via the use or threat of the use of force.[463] Again, the inclusion of abduction demonstrates more overlapping qualities in some of the various means, most often with coercion.

---

456 Rome Statute (n 377) Art 7(2)(d): '"Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'

457 ibid Art 7(2)(f): '"Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy'. The Rome Statute also codifies the crime of enforced prostitution.

458 See, Elements of Crimes to the International Criminal Court, ICC-ASP/1/3 (part II-B) UN Doc PCNICC/2000/1/Add.2 (2000), 6 note 12.

459 'abduction' *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/abduction> accessed 10 November 2015. Oxford has also defined this term '(In legal use) the illegal removal of a child from its parents or guardians'.

460 McClean, *Commentary* (n 302) 324.

461 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 355 note 15. Several domestic laws use the term kidnapping instead of abduction.

462 Allain, *Of Human Exploitation and Trafficking* (n 303) 356; CoE/UN Joint Study (n 376) 78.

463 Embracing the Elements of Crimes to the Rome Statute's definition of 'forcibly' also permits the inclusion of using threats within the parameters of this types of 'means'.

3.3.4.4 Abuse of Power or of a Position of Vulnerability

The concept of an 'abuse of power' was present as early as the 1910 Convention, but its meaning was left undefined up to, and including its insertion in the Palermo Protocol. An understanding of this phrase comes together through a review of its parts and use in a legal context. 'Abuse' is commonly understood as the 'use [of] (something) to bad effect or for a bad purpose; misuse'.[464] In this context (the 'means' element of trafficking), the 'something' is either power or of a position of vulnerability.

'Power' is traditionally defined as the 'capacity or ability to direct or influence the behavior of others or the course of events'.[465] Combining these definitions looks very similar to descriptions of coercion. However, the focus of this 'means' shifts from the manner of persuasion to the capacity to influence a person by virtue of the actor's position of authority or wealth of power. Therefore, 'power' in this case does not refer to strength or force. Instead, this type of 'means' acknowledges that trafficking occurs via those who capitalize off political power, economic power, or relationships with law enforcement and other sources of power which enable the successful perpetration and/or facilitation of trafficking.[466]

Generally, 'abuse of power' is typically associated with persons who hold public office (eg, elected, selected and/or appointed positions).[467] The Palermo Protocol, *travaux préparatoires*, Commentary and UNODC references are all silent as to this 'means' exact relationship (if any) with public servants. However, the term 'abuse of power' did have a precursory term, 'abuse of authority'.[468] The Interpretative Note reports that the intended meaning of the word 'authority' expanded beyond public officials and 'should be understood to include the power that male family members might have over female family members in some legal systems and the power that parents might have over their children.'[469]

This 'means' is 'especially relevant in cases where an individual has the power to take decisions over other people'.[470] Rijken has described an 'abuse of power' or dominant position to 'range from confiscating personal documents in order to place another person in a dependent position, to abusing one's dominant social position or natural parental authority or abusing the vulnerable position of persons without legal status.'[471] From this understanding, 'power' can therefore originate from any source which a person can wield.

As such, this type of 'means' essentially requires the capability to influence another, that is, in essence, to control them. In the context of trafficking, the UNODC has identified 'control mechanisms' to include: violence and threats of violence, deception, imprisonment,

464 'abuse', *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/abuse> accessed 11 November 2015.

465 'power', *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/power> accessed 11 November 2015.

466 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) ix. It should be mentioned however that in the preparatory works, this reference was made in the context of organized crime.

467 *West's Encyclopedia of American Law* (2nd edn, The Gale Group, Inc, 2008).

468 CTNOC and its Protocols' *Travaux Préparatoires* (n360) 343. Note that this term also existed in the 1910 Convention but was undefined.

469 ibid 343, note 20. See also, APOV Issue Paper (n 308) 17.

470 CoE/UN Joint Study (n 376) 79.

471 Rijken, *Trafficking in Persons* (n 365) 63.

collusion, debt bondage, isolation, religion, culture and belief.[472] But, this list may be broader than sources of power actually encompassed in this type of 'means.' The components of 'abuse of power' can therefore be understood to include: 1) power; and 2) misuse of that power. In the context of human trafficking, it is important to recognize that the abuse of one's power can also be seen to be in direct proportion to the vulnerability of the person trafficked.[473]

The abuse of a position of vulnerability (APOV) was added to the list of 'means' rather late in the drafting process.[474] Even so, it is one of the most discussed 'means' and is generally recognized 'as an integral part of the definition of trafficking'.[475] APOV was left undefined in the Palermo Protocol, but the preparatory works describe APOV to encompass 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.'[476] The preparatory works refrain from clarifying 'real and acceptable alternative.'[477]

Commonly understood, vulnerability is an outgrowth of the word 'vulnerable', and is defined as one 'exposed to the possibility of being attacked or harmed, either physically or emotionally'.[478] The CoE has interpreted this term in a similar fashion as 'any state of hardship in which a human being is impelled to accept being exploited.'[479] The CoE expounded upon the concept of 'vulnerability' stating that it 'may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's immigration status, economic dependence or fragile health.'[480] Again, this framework is reminiscent of the definition of coercion, confirming its link, yet failing to distinguish it from APOV.

Others who have reflected upon the concept of APOV employ a different perspective in understanding this type of 'means'. For example, Clark contends that 'vulnerability is not a static, absolute state, but one that changes according to the context as well as to the capacity for

472 UNODC, *Anti-human trafficking for criminal justice practitioners, Module 4: Control methods in trafficking in persons* (UNODC Vienna, 2009) 1 (UNODC Module 4).

473 See for example, Elliott (n 384) 67 and her discussion of *Larissis and Others v Greece* (App nos 23372/94, 26377/95) [1998] ECHR 13.

474 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 345-346. See also, APOV Issue Paper (n 308) 18 note 31.

475 For example, see APOV Issue Paper (n 308) 2; UNODC, Guidance Note on "abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' <https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf> accessed 11 November 2015 (Guidance Note); MA Clark, 'Vulnerability, prevention and human trafficking: the need for a new paradigm', in UNODC, An Introduction to Human Trafficking: Vulnerability, Impact and Action (UNODC 2008).

476 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 347. See also, Legislative Guides (n 357) 269 [34] citing UN Doc A/55/ 383/Add.1 [63]; UNODC Model Law (n 356) 9-10; Allain, *Of Human Exploitation and Trafficking* (n 303) 356-358; MY Mattar, 'Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention'(2006) 14 Tulane Journal of International and Comparative Law 1, 31, note 157; CoE/UN Joint Study (n 376) 79: Moreover, 'the person in question must be in such a situation that he or she virtually has no choice and has to accept being exploited.' See also, McClean, *Commentary* (n 302) 325.

477 APOV Issue Paper (n 308) 18.

478 'vulnerable', *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/vulnerable> accessed 11 November 2015.

479 CoE Trafficking Convention (n 309) [83].

480 ibid. See also, CoE/UN Joint Study (n 376) 79.

individual response.'[481] Clark therefore defines 'vulnerability' as 'a condition resulting from how individuals negatively experience the complex interaction of social, cultural, economic, political and environmental factors that create the context for their communities'.[482] While Clark does not shed any light on how this definition encompasses vulnerability in the trafficking context, or how it could be used and implemented, she does insist that the key to protecting 'vulnerable' persons begins with the ability to identify them through 'conditions of vulnerability'.[483]

In addition to referencing the interpretation contained in the *travaux préparatoires*, the UNODC Model Law submits that evaluating the 'objective situation or on the situation as perceived by the victim' can establish APOV.[484] In line with Clark, the UNODC Model Law proffers a list of conditions which would qualify a person as being 'vulnerable' under the law, including:

- Having entered the country illegally or without proper documentation;
- Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance;
- Reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability;
- Promises or giving sums of money or other advantages to those having authority over a person;
- Being in a precarious situation from the standpoint of social survival;
- Other relevant factors.[485]

Clark's list is similar, including the following broad range of identifying characteristics: children, gender, poverty, social and cultural exclusion, limited education, political instability, war and conflict, social, cultural and legal frameworks, movement under duress, and demand.[486] Some of these 'vulnerabilities' have been identified in the Palermo Protocol. For example, Article 9(4) reads: 'States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.'[487] Throughout Clark's discussion, identified circumstances that make some of these persons vulnerable is clear, while the rationale in other identified conditions is rather indistinct. For example, with regard to children, the susceptibility to obey (regardless of the request) those in authority (eg, parents, family, teachers, adults), their physical inability to self-protect, inability to negotiate and obliviousness to laws which could protect them are clear and concise factors leading one to conclude a child can be classified as a

481 Clark (n 475) 69.

482 ibid.

483 ibid 71-75.

484 APOV Issue Paper (n 308) 21 citing UNODC Model Law (n 356) 9-11.

485 UNODC Model Law (n 356) 9-10. As reported, this framework has been embraced by several national laws including: Belgium, the Republic of Moldova, Italy (which also requires profiting of the abuser and permits a 'situation of necessity' as one way to qualify someone as vulnerable), Zambia, Liberia, Sierra Leone and the US State Department Model Law to Combat Trafficking in Persons. See also, Gallagher, *The International Law of Human Trafficking* (n 298) 32-33: Additional identified indicators of abuse of vulnerability include, 'the abuse of an individual's precarious financial, psychological, and social situation, as well as on linguistic, physical and social isolation.' See also, APOV Issue Paper (n 308) 16.

486 Clark (n 475) 71-75.

487 See also, Elliott (n 384) 66-67.

'vulnerable' person.[488] Perhaps because childhood so clearly makes one vulnerable, it is why the Palermo Protocol explicitly states in its Article 3(c) that the 'means' element does not apply to children.

The condition of 'poverty' is not as straightforward. The term 'poor' is used when discussing vulnerable persons in risk of being trafficked. Clark explains 'poor' in the trafficking context 'does not refer to lack of want, but rather to exposure and defencelessness.'[489] However, it is unclear as to what particular factors of a 'poor person' could classify them as 'vulnerable' consistent with the Palermo Protocol's definition. This can be said of several conditions on Clark's list (including: gender, political instability, war and conflict, social cultural and legal frameworks and demand), which is not an indication of their unsuitability, but rather, a demonstration of the complex nature of trafficking and the necessity for clarity among terms and their practical implementation.

The UNODC Issue Paper on APOV is skeptical of the current literature addressing vulnerability stating that '[u]nofficial guidance around APOV is of limited usefulness'.[490] On this point the APOV Issue Paper states:

> A number of different tools and documents, including several produced by UNODC and ILO, provide guidance on the concept of APOV. However, much of this unofficial guidance is concerned with identifying those factors that make persons vulnerable to trafficking, and thereby on identifying victims of trafficking. They are not concerned with the more complex and fraught question of whether, from the point of view of criminal law, a particular characteristic of the victim or his / her situation was abused as a means of trafficking him or her. They provide little or no guidance on how the proposed indicators could or should be applied in the context of a criminal investigation or prosecution.[491]

Nevertheless, the UNODC's proposed method in establishing APOV is: 1) the identification of a 'vulnerable person'; 2) followed by identifying the abuse of that vulnerability.[492] As the UNODC explains,

> The mere existence of proven vulnerability is not sufficient to support a prosecution that alleges APOV as the means by which a specific 'act' was undertaken. In such cases both the **existence** of vulnerability and the **abuse** of that vulnerability must be established by credible evidence.'[493]

The UNODC's vulnerability characteristics have been included in several national criminal codes[494] and Clark's additional conditions may find their applicability as well. Either way, establishing the first component of this 'means' element will include a fact-specific and qualitative analysis of the personal characteristics of the alleged trafficked person, as well as the external forces which may lead a fact-finder to classify the person as 'vulnerable' or not. The second component examines to whether the identified position(s) of vulnerability was abused.

488 Clark (n 475) 71-72.

489 ibid 68.

490 APOV Issue Paper (n 308) 3.

491 ibid.

492 Allain, *Of Human Exploitation and Trafficking* (n 303) 357; R Malpani, 'Legal Aspects of Trafficking for Forced Labour Purposes in Europe' (2006) ILO Working Paper WP.48.2006, 5.

493 Guidance Note (n 475) 1. Emphasis in the original text.

494 UNODC Model Law (n 356) 9-10. See also, APOV Issue Paper (n 308) 26-86.

3.3.4.5 Deception and Fraud

While 'deception' was also left undefined during the drafting process,[495] it is identified as the most common type of 'means' used.[496] To 'deceive' is generally defined as to 'deliberately cause (someone) to believe something that is not true, especially for personal gain'.[497]

The UNODC Model Law defines this type of 'means' to include 'any conduct that is intended to deceive a person'. A more detailed proposal in the UNODC Model Law reads:

> 'Deception' shall mean any deception by words or by conduct [as to fact or as to law], [as to]:
> i. The nature of work or services to be provided;
> ii. The conditions of work;
> iii. The extent to which the person will be free to leave his or her place of residence; or
> [iv. Other circumstances involving exploitation of the person.][498]

Other interpretations from the CoE and UN have described 'deception' as encompassing the 'misleading [of] individuals about facts, conveying falsehoods or withholding the truth or relevant information' concluding it is 'closely linked with fraud' but in more of a dishonest fashion than economic cheating.[499]

First of all, the UNODC proposed definitions are inherently flawed as they use the word they want to define within the definition. Secondly, the UNODC's proposal outlines examples of deception as opposed to defining the act itself. The components of this offense, as opposed to its potential manifestations can be understood in line with the common definition: intentionally causing someone to believe something that is not true. As in the case of all of the types of 'means', this must relate to the purpose of trafficking: acquisition of a person for the purpose of their exploitation.

There is no additional insight from the Palermo Protocol or its preparatory works on the meaning of 'fraud'. This form of 'means' was not separately defined in the UNODC Model Law, but actually grouped together with 'deception' and described as the same conduct.[500] This interpretational overlap is consistent with the general concept of fraud, defined as the 'wrongful or criminal deception intended to result in financial or personal gain'[501] which identifies

---

495 Allain, *Of Human Exploitation and Trafficking* (n 303) 356; Rijken, *Trafficking in Persons* (n 365) 63.

496 Gallagher, *The International Law of Human Trafficking* (n 298) 30; Wijers, 'Analysis of a Definition' (n 365) 23.

497 'deceive', *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/deceive> accessed 11 November 2015.

498 UNODC Model Law (n 356) 11-12. See also, Wijers, 'Analysis of a Definition' (n 365) 23. See also, UNODC Module 4 (n 472) 4-6; J Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books Ltd. 2010) 146 citing HRC, Recommendations and Commentary (1999) [6]. See also, APOV Issue Paper (n 308) 17: 'Deception and fraud are examples of less direct means of and will generally relate to the nature of the promised work or service, and/or conditions under which an individual is to undertake that work or perform that service.' See also, Elliott (n 384) 62-65.

499 Allain, *Of Human Exploitation and Trafficking* (n 303) 356, note 83 citing the CoE/UN Joint Study (n 376) 79.

500 UNODC Model Law (n 356) 12.

501 'fraud', *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/fraud> accessed 11 November 2015.

these terms as synonyms.[502] A slight contextual difference on the lawfulness scale emerges between these terms in that deceptive conduct is not inherently described as criminal whereas fraudulent conduct, in and of itself, can be.[503] Indicators of deception and fraud will most clearly manifest in a comparative analysis from what was promised to the victim with what the victim actually experienced/received.

3.3.4.6 The Giving or Receiving of Payments or Benefits to Achieve the Consent of a Person having Control over Another Person

The final enumerated type of 'means' is 'the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, which was also left unclarified in the *travaux préparatoires*. However, several delegates believed that this type of 'means' was already 'covered by the other qualifiers, that is, force, fraud, deception, coercion and inducement'.[504] Regardless and without explanation, it was nevertheless included in Article 3(a). The UNODC Model Law, UNODC Module 1 and UNODC Toolkit also do not define or clarify this concept.

There is some discrepancy among those working in this field as to whether this type of 'means' refers to situations of factual control, legal control or both. For example, in the Commentary, McClean writes:

> The notion of 'having control over another person' is a factual rather than a legal one: there is, for example, no reference to ideas of legal custody. In many trafficking situations, the persons trafficked are de facto under the control of others, and their position of vulnerability creates an overlap with [APOV].[505]

Others however assert that this type of 'means' is generally and primarily understood to cover situations of 'legal control' (as in a parent over a child or the legal guardianship of another) and have questioned whether an omission in defining this conduct also enables its applicability in 'de facto control (such as that which may be exercised by an employer over an employee)' as well.[506] Furthermore, if solely economic forms of 'means' are applicable under the Palermo Protocol, is it then necessary to distinguish between deviant economic methods and economic hardship in order

502 'fraud', *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english-thesaurus/fraud> accessed 11 November 2015. A similar discussion transpires in McClean, *Commentary* (n_) 324-325.

503 This conclusion stems from the way in which these terms are described in trafficking literature as well as from a plain reading of the original definitions and an understanding of the criminal codifications of local laws which criminalize fraud (as opposed to the use of deception). Additionally, merit to this conclusion also exists in the CTNOC and its Protocols' *Travaux Préparatoires* (n 360) which discusses the criminalization of the use, production or presentation of 'fraudulent documents'(464).

504 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 343 note 21. The term 'inducement' was however debated at length and eventually removed from the final definition of trafficking (note 25).

505 McClean, *Commentary* (n 302) 325.

506 APOV Issue Paper (n 308) 18; Gallagher, *The International Law of Human Trafficking* (n 298) 31. See also, Rijken, *Trafficking in Persons* (n 365) 63. See also, CoE/UN Joint Study (n 376) 79: On the first point, the report states that '[t]he giving or receiving of payments or benefits to achieve the consent of a person having control over another person in particular refers to the misuse of a person's authority over another individual, especially with regard to children and persons who are not capable of giving full and valid consent.' Again, another example of the overlap of these terms and concepts.

to preserve the integrity of this criminalized offense?[507] Smith and Kangaspunta draw this bright line in that wherein the alleged victim is 'free to leave', regardless of how difficult the decision is, their economic hardship would not satisfy the coercive nature of this element of trafficking.[508]

To summarize section 3.3.4, a review of trafficking's second element reveals a general lack of drafting precision as all the Palermo Protocol's enumerated 'means' have overlapping characteristics and qualities. It is readily apparent that many of the enumerated 'means' can be used synonymously with one another; or, that they have intertwined definitions – thereby potentially prohibiting legal clarity for these terms.[509] On this point, the International Labour Organization (ILO) has even stated that using these 'means' without further clarification runs the

> risk that interpretations of these terms may continue to diverge widely from one country to another or even within countries, from one researcher or practitioner to another. Without clear operational indicators there is also a risk that researchers and practitioners may not recognize trafficking when they see it – or see trafficking where it does not exist.[510]

As such, the work done in this chapter was to provide for an understanding for each term to be used in practice. While the individual terms are not as clearly definable or delineable as in the 'act' element, an understanding of this element's objective, namely the determination of a 'deprivation of [the] freedom of movement' and/or 'of personal choice' is nevertheless clear and signposts the substantive essence of this element.[511]

3.3.5 Reflections on Intent for the *Actus Reus* Elements

The first two elements of 'trafficking in persons' are the *actus reus* elements of the offense. Before moving to the purpose element of the offense, it is important to identify the level of intent required by the Palermo Protocol for the *actus reus* elements. Under its Article 5(1), the instrument's obligation to criminalize reads: 'each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, *when committed intentionally*.'[512] Other than the amendment to include the above language in Article 5, the Palermo Protocol's *travaux préparatoires* does not further discuss the meaning of 'when committed intentionally.'[513]

---

507 ibid 61-63.

508 CJ Smith and K. Kangaspunta, 'Defining Human Trafficking and Its Nuances in a Cultural Context' in J Winterdyk *et al* (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012) 19-35, 27.

509 APOV Issue Paper (n 308) 17. See also, Elliott (n 384) 59.

510 ILO, 'Operational indicators of trafficking in human beings' (Results from a Delphi survey implemented by the ILO and European Commission 2009) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf> accessed 9 November 2015, 1.

511 Rijken, *Trafficking in Persons* (n 365) 62.

512 Emphasis added. McClean remarks in his *Commentary* (n 302) 332 that, '[t]here are no safeguard clauses, so the Article is fully mandatory.'

513 ibid 331: However, 'the rule that knowledge, intent or purpose may be inferred from objective factual circumstances' contained in Art 5(2) of the CTNOC is also understood as applying to the Palermo Protocol.

As far as international drafting discourse is concerned, a more prolonged exchange took place on the subject of the level of intent required while fashioning the CTNOC. The CTNOC also specifies the language, 'when committed intentionally' in its Article 5 which addresses the duty to criminalize.[514] During drafting discussions concerning the CTNOC's Article 5, Columbia proposed to add 'and acts that by their nature lend themselves to serious negligence', in addition to the 'intentionally' standard, but it was not included the final document.[515]

The article that addresses the duty to criminalize in one of the sister protocols (the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition), also uses the same level of fault description, 'when committed intentionally', which was a point of contention during the drafting process. Several delegates 'supported the deletion of these words on the grounds that the mental element of crime was generally a matter for domestic law and that requiring the intentional commission in an international instrument was unnecessarily restrictive'.[516] Regardless of these concerns (or lack thereof in drafting the Palermo Protocol), the phrase, 'when committed intentionally' remained in all three instruments without any further clarification.

A review of these other related instruments' framework does not provide much additional guidance in interpreting 'when committed intentionally' in the trafficking context. This conclusion is further compounded by the fact that the construction of the crimes in the CTNOC and firearms protocol are dissimilar from trafficking's *actus reus* elements which must be done 'for the purpose of exploitation'.[517]

As far as 'practical' guidance is concerned, the UNODC Module 1 explains that this element is described such that 'the requisite mental element required in a trafficking in persons case is that the person committed the material act(s) with the intention that the victim be "exploited" (as defined by a country's domestic anti-trafficking legislation).'[518] The Legislative Guides confines itself to what is mentioned in Article 5, stating:

> All of the criminalization requirements of the Convention and Protocols require that the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards, such as negligence, need not be criminalized. Such conduct could, however, be made a crime under article 34, paragraph 3, of the Convention, which expressly allows for measures that are 'more strict or severe' than those provided for in the Convention. Drafters should note that the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases, in particular where persons may have been ignorant or unaware of the law establishing the offence.[519]

514 CTNOC (n 299) Art 5. See also, UNODC Model Law (n 356) 23, which describes the criminalization of organized criminal activity (from which Art 5 derives) is a central foundation to criminalizing human trafficking.

515 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 41 note 3.

516 ibid 633, note 12.

517 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 12 note 16: Specifically, whereas the articulated purpose of trafficking is exploitation, the CTNOC's framework looks rather to the criminal acquisition of a financial and/or material benefit. Interestingly, in reference to codifying the stated purpose (financial/material benefit) of organized criminal groups in the drafting process, several delegates favored its deletion 'from the definition on the ground that such an intention might be difficult to prove.'

518 UNODC Module 1 (n 356) 5.

519 Legislative Guides (n 357) 276 [45(d)].

Similarly, the UNODC Module 1 confirms that the Palermo Protocol requires the criminalization of trafficking 'when conducted intentionally' but notes that 'countries are not precluded from allowing the *mens rea* requirement to be established on a lesser standard, ie, via recklessness, willful blindness or even criminal negligence'.[520] Regardless, it is logically impossible to attach the purpose element to a lower mens rea requirement considering its construction in the Palermo Protocol. Confining an understanding of trafficking's *actus reus* elements to the *dolus directus* (both first and second degree) fault levels comports with the construction of the trafficking offense considering its *mens rea* element requires an ulterior intent (that the 'act' and 'means' be committed for the purpose of exploitation).

While states are free to expand the scope of the offense for domestic codification, international law on trafficking is delimited to the 'intentionally' fault level. As Cassese explains, when an international instrument identifies a crime and conditions its actions such that they must be committed 'intentionally', the provision 'thereby automatically exclud[es] any other subjective frame of mind such as recklessness, negligence, etc.'[521] This assertion therefore encompasses *dolus directus* of the first and second degrees. However, it is unclear whether *dolus indirectus* is also permitted.

3.3.6 The 'Purpose' Element

While not defining exploitation outright, Article 3(a) goes on to explain that '[e]xploitation 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'.[522] Whereas the first two elements of trafficking essentially enumerate a finite list of 'actions' and 'means', the third element provides a non-exhaustive list of forms of exploitation.[523] The third element is therefore constructed differently.

The final segments of this chapter will address the 'purpose' element of trafficking which includes discussing the concept of 'exploitation' and its define-ability under international law,

520 UNODC Module 1 (n 356) 5-6. See also, UNODC Model Law (n 356) 38: The UNODC Model Law is silent as to the fault level of trafficking's *actus reus* elements. However, in the context of the inchoate offense of attempt, the UNODC Model Law proffers a potential statutory construction which instructs legislators to exclude criminal culpability of accomplices who lack the requisite level of intent, described as 'the intention/knowledge that the act he or she is committing is part of an offence'. This is also the only specific reference to the 'knowledge' standard within this UNODC instructional trafficking discourse.

521 A Cassese *et al*, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 40. The example given in this context is torture and 1984 Convention on Torture.

522 Palermo Protocol (n 305) Art 3. The Palermo Protocol mentions 'exploitation' in three other places. First, in the Preamble which reads: '*Taking into account* the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons its statement of purpose'. Secondly, in reference to the notion of consent in Art 3(b): '[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used'. And finally, under Art 9 (prevention of trafficking in persons), subsection 5: 'States Parties shall adopt or strengthen legislative or other measure such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.'

523 As such, the Legislative Guides (n 357) [46] therefore instructs, 'in addition to criminalizing the mandatory and central offence of trafficking, national legislatures that have not already done so may wish to consider… the criminalization of other forms of exploitations of persons, especially women and children.'

determining what the exploitative practices actually enumerated within Article 3 encompass, and examining the *mens rea* role of this element of the crime.

3.3.6.1 Can 'Exploitation' (in the context of Trafficking) be defined?

Considering the Palermo Protocol explicitly states that the enumerated forms of exploitation are 'at a minimum' of what can or should be included within the parameters of this concept, it would seem imperative that the term 'exploitation' needs to be defined, or at the very least, its parameters outlined. Whether that can actually be done given the current state of international law is unclear. In search of further clarity on this issue, I have examined the plain meaning of this concept, the Palermo Protocol's preparatory works and Commentary, relevant UNODC documents, international legal instruments and scholarly insight on the subject.

The plain meaning definitions of the exploitation (of people) are rather straightforward. They include: the 'action or fact of treating someone unfairly in order to benefit from their work';[524] the 'unfair, if not illegal, treatment or use of somebody or something, usually for personal gain';[525] and, 'to take advantage of a person (or their characteristics or their situation) for one's own ends.'[526] All three interpretations are consistent in that they acknowledge exploitation is a practice by which someone is treated in such a way that would, at the very least, be considered unfair. Moreover, that unfair treatment is typically perpetrated at the expense of the person for the gain of another (the exploiter).

These definitions, however, were not used while drafting the Palermo Protocol. In fact, defining the term 'exploitation' was not attempted in the Palermo Protocol's drafting sessions. Nevertheless, it has been noted 'that considerations of exploitation were a critical part of the negotiations – not just in terms of the definition but also more broadly in establishing the Protocol's scope of application.'[527]

Attempts to delimit specific forms of exploitation were deliberated. These discussions included excluding sexual exploitation outside of instances of trafficking, excluding the (consensual) removal of children's organs for legitimate purposes, and debating the inclusion/exclusion of illegal adoption within the crime of slavery and/or similar practices.[528] Ultimately, drafters resolved to list the agreed upon forms of exploitation that appear in Article 3(a). They also expressly rejected including that the exploitation perpetrated must be for the gain of another because it was seen as 'unnecessarily restrictive'.[529]

As far as UNODC guidance is concerned, the Working Group on Trafficking in Persons advised the UNODC to examine the concept of 'exploitation' in greater detail considering that

524 'exploitation', *Oxford English Dictionary* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/exploitation> accessed 13 November 2015.

525 RJ Estes and NA Weiner, 'The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico' (2001) University of Pennsylvania School of Social Work. See also, UNGA, 'Traffic in Women and Girls' (23 December 1994) UN Doc A/RES/49/166. The UNGA as also connected 'benefit' as a component of exploitation.

526 Exploitation Issue Paper (n 424) 21-23 citing J Persall and B Trumble (eds), *Oxford English Dictionary* (2nd edn, OUP 1996). Note that other definitions of 'exploitation' exist with regards to objects and resources which can even have 'positive connotations'. See also, Allain, *Of Human Exploitation and Trafficking* (n 303) 2.

527 Allain, *Of Human Exploitation and Trafficking* (n 303) 25.

528 CTNOC and its Protcols' *Travaux Préparatoires* (n 360) 347. See also, Exploitation Issue Paper (n 424) 25-26.

529 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 340 note 6.

ascertaining its meaning was 'identified as problematic.'[530] In 2015, the UNODC released an issue paper entitled: 'The Concept of "Exploitation" in the Trafficking in Persons Protocol' (Exploitation Issue Paper). While addressing the breadth of issues surrounding exploitation, the Exploitation Issue Paper nevertheless refrains from adopting or introducing a definition of 'exploitation' to be used in interpreting the Palermo Protocol.

The Exploitation Issue Paper reported that as far as the law of trafficking is concerned, a lack of consensus amongst states exists as to what 'exploitation' means.[531] Regardless of this fact – or perhaps, because of it, the UNODC reasoned that 'there was no apparent appetite for "exploitation" itself to be defined' in the Palermo Protocol.[532] As such, even after the publication of an Issue Paper on exploitation, the concept's definitional contours remain ambiguous.[533]

Instead, as a result of investigating 'exploitation' in the context of the Palermo Protocol's definition, the Exploitation Issue Paper made several 'conclusions on exploitation in international law and policy' which include:

1. Considerations of exploitation were critical to establishing both the definition and the [Palermo] Protocol's scope of application.
2. Existing international legal definitions of slavery and forced labour are relevant to understanding the [Palermo Protocol].
3. The meaning of terms not subject to international legal definition or understanding may be reasonably inferred from the [Palermo] Protocol's context and drafting history and from supplementary sources of insight.
4. The list of exploitative purposes set out in the Protocol is not exhaustive and may be expanded provided the integrity of the [Palermo] Protocol is retained.[534]

While relevant to the discussion, these 'conclusions' are not helpful in isolating a workable meaning of 'exploitation' for trafficking's definition. The Exploitation Issue Paper also proffered that while a 'threshold of seriousness' should exist in determining forms of exploitation included within trafficking, 'the Protocol does not clearly establish any such threshold.'[535] Curiously, it also

530 Exploitation Issue Paper (n 424) 6: The methodology used in the UNODC's research 'includes (i) a desk review of relevant literature including legislation and case law; (ii) a survey of States representing different regions and legal traditions through legislative and case review as well as interviews with practitioners; (iii) preparation of a draft issue paper; (iii) review of the draft issue paper and development of additional guidance at an international expert group meeting; and (v) finalization of the Issue paper and any associated guidance.'

531 ibid 25-26.

532 ibid 25.

533 ibid 21.

534 ibid 39-40. Each of these points was expounded upon in the text. After a review of national laws and practices, the paper provided 'general findings and issues for practitioners' as well, which were also accompanied by larger explanations. These included:
1. The exploitation element of the definition is often not well or uniformly understood and this obstructs investigations and prosecutions.
2. Practical and evidentiary challenges, which exist in all trafficking cases, are particularly acute to forced labour.
3. Severity is relevant to establishing exploitation in practice.
4. Culture and national context are relevant to determining exploitation
5. There is a need for breadth and flexibility – but also clear parameters (113-116).

535 ibid 8.

concludes that 'attempts to precisely delineate a "threshold of seriousness" would be risky and possibly counterproductive.'[536]

The UNODC Model Law provides a little more guidance in defining and interpreting the concept. It describes exploitation generally as 'associated with particularly harsh and abusive conditions of work, or "conditions of work inconsistent with human dignity"'.[537] This definition is generally consistent with the above referenced common definitions of the term, but does not reference the concept of gain. Other than using the intent to exploit to distinguish trafficking from smuggling, the UNODC Module 1 and UNODC Toolkit do not define or expand upon this concept.[538]

The UNODC reports that 'it has become evident that questions remain about certain aspects of the definition [of 'trafficking in persons']– most particularly those aspects that are not defined elsewhere in international law or commonly known to the world's major legal systems.'[539] A point well made in the context of defining 'exploitation'. Pinpointing an actual definition of 'exploitation' has eluded international law, amongst an array of other disciplines which 'have long been occupied with examining and seeking to establish what exploitation means, or should mean.'[540]

Although left undefined, the term 'exploitation' nevertheless appears in an abundance of international instruments.[541] This is not the case for all concepts one would normally connect with exploitation. For example, while 'exploitation' is often associated with practices such as slavery, forced labor, and servitude, it is noticeably absent from the text of those international conventions.[542]

Peripheral definitions of 'exploitation' in international law do exist, but are used almost exclusively in the contexts of sexual exploitation or the exploitation of children.[543] For example, the

536 ibid 12.

537 UNODC Model Law (n 356) 28; Exploitation Issue Paper (n 424) 26.

538 UNODC Module 1 (n 356) 13; UNODC Toolkit (n 356) 4-5: Interestingly, in reference to smuggling, the government of Austria characterized it as 'a particularly heinous form of transnational exploitation of individuals in distress'. See also, Roth (n 302) 86 citing a letter dated 16 September 1997 from the Permanent Representative of Austria to the United Nations UN Doc A/52/357.

539 UNODC Module 1 (n 356) 15.

540 ibid 21, 23.

541 Palermo Protocol (n 305) Art 3; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 21 March 1950) 96 UNTS 271; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force 30 April 1957) 226 UNTS 3 (Supplementary Slavery Convention); Convention on the Elimination of All Forms of Discrimination Against Women (entered into force 18 December 1979) 1249 UNTS 13 (CEDAW); International Covenant on Economic, Social and Cultural Rights (entered into force 16 December 1966) 993 UNTS 3; CRC (n 366). See also, UNGA, Declaration of the Rights of the Child (20 November 1959) A/RES/1386(XIV).

542 With the exception of the Supplementary Slavery Convention (n 541) and in the context of 'child exploitation'.

543 The ILO has also discussed this term in the context of labor. See, ILO, A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work 2005 (ILO Geneva, 2005) 6 [16], 7 [20]: The ILO contends that the concept of 'forced labor' is typically divided by national laws into labor exploitation and sexual exploitation. While refraining from defining 'exploitation' outright, the ILO contends either situation of exploitation 'is determined by the nature of the relationship between a person and an "employer", and not by the type of activity performed, however hard or hazardous the conditions of work may be.'

UN Secretary-General has defined 'sexual exploitation' to mean 'any actual or attempted abuse of a position of vulnerability [APOV], differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.'[544] Using the term 'sexual exploitation' in its own definition is rather unhelpful. Moreover, this definition characterizes APOV as exploitation, whereas APOV is identified in trafficking in persons as a type of 'means'. It is interesting to note that this definition focuses on exploitation as a mechanism for some form of profit. As mentioned earlier, this interpretation was expressly rejected while drafting the Palermo Protocol because it was seen as 'unnecessarily restrictive'.[545]

As far as regional anti-trafficking legislative efforts are concerned, Europe has seen the CoE Trafficking Convention as well as other policies and directives. For example, on 5 April 2011, the European Parliament issued Directive 2011/36/EU (EU 2011 Directive) on trafficking which specifically touched on the concept of exploitation.[546] Without defining 'exploitation', the EU 2011 Directive did identify an additional form of exploitation: 'the exploitation of criminal activities', and explained that this concept 'should be understood as the exploitation of a person to commit, *inter alia*, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.'[547] Furthermore, the EU 2011 Directive explained that the definition of trafficking could also cover such exploitative practices as trafficking for purpose of organ removal, illegal adoption and forced marriage.[548] Additionally, the EU 2011 Directive stated that the practice of 'forced begging' shall be considered an exploitative practice within forced labor and services.[549]

As far as any additional scholarly insight is concerned, it is unsurprising to discover that 'exploitation' is considered to encompass a wide range in severity of criminal conduct without determining which abuses qualify.[550] Gallagher asserts that the meaning of 'exploitation' as implemented in the context of the Palermo Protocol 'prioritizes an intent to harm'.[551] But she goes no further in defining this concept.

Allain begins his discussion of this topic by borrowing a definition from philosopher Alan Wertheimer. Wertheimer defines an 'exploitative transaction' as 'one in which A takes unfair advantage of B. A engages in *harmful* exploitation when A gains by an action or transaction

544 UN Secretariat, 'Secretary-General's Bulletin on protection from sexual exploitation and abuse' (9 October 2003) UN Doc ST/SGB/2003/13. Additionally, The CoE combined and defined 'sexual exploitation' and 'sexual abuse of children' as including engaging in sexual activities employing coercion, force or threats; or abuse of a position of trust, authority, influence over the child, vulnerability (as in mental or physical disability or a situation of dependence, offenses concerning child prostitution, child pornography or pornographic performances, and corruption (which was described as the witnessing of sexual abuse or sexual activities, even without having to participate.) Arts 3, 18-23, CoE Convention on the Protection of children against sexual exploitation and sexual abuse (entered into force 12 July 2007) CETS 201. See also, Supplementary Slavery Convention (n 541) Art 1(c).

545 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 340 note 6.

546 European Parliament and of the Council, Directive 2011/36/EU of the on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, (5 April 2011) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF> accessed 14 July 2016 (EU 2011 Directive).

547 ibid [11], Art 3(3).

548 ibid [11].

549 ibid [11], Art 3(3).

550 V Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' (2013) 5 Amsterdam Law Forum 64, 68.

551 Gallagher, *The International Law of Human Trafficking* (n 298) 42.

that is harmful to B where we define harm in relation to some appropriate baseline'.[552] Before getting into Allain's discussion, there is an inherent issue with using this definition in this context. The Palermo Protocol does not discuss 'harmful exploitation', but only exploitation. Additionally, as Rodríguez García points out, '[t]he problem with this definition of exploitation is that there are many competing conceptions of what a fair or unfair treatment entails.'[553]

Nevertheless, it is from Wertheimer's definition that Allain asserts the 'appropriate baseline' in which one should determine *harm* in today's society is the legal standard.[554] In this case, 'harm' therefore includes those acts which a society criminalizes. Allain does not engage with the notion that exploitation in the context of the Palermo Protocol needs to be defined. Instead, Allain focuses on Wertheimer's definition insofar as it permits him to compartmentalize 'harms' (eg, forms of exploitation) as already articulated in Article 3(a) of the Palermo Protocol. Allain writes, 'for our purposes that baseline is straightforward. The baseline is the legal standard. Thus, the various types of human exploitation, as set out in [the] Palermo Protocol, have been deemed *in law* to be cases wherein harm is created.'[555]

The adoption of this approach can be problematic considering that different societies may criminalize different types of conduct. This variation among domestic systems may serve to frustrate the harmonization of trafficking law which is one of the Palermo Protocol's aims. Rodríguez García is left unsatisfied by Allain's point of view. She writes:

> But the law does not explain how harm is created, how harm can be measured and more importantly, what harm is. The problem with Allain's reasoning is that is it tautological: slavery, forced labor, serfdom, etc. are deemed exploitation by law, so exploitation means slavery, forced labor, serfdom, etc. The result is a circular definition of exploitation. Furthermore, the law is often *not* straightforward, since it can be interpreted differently by different courts, can be harmful to people or can simply overlook situations which meet the minimum standards set by international organizations but which in practice are highly detrimental to laborers.[556]

I agree with Rodríguez García only insofar as that the law needs to know 'what harm is'. One should seriously consider following Allain's resolution since the need for further legal clarity on this concept will undoubtedly surface (if not already), when a defendant is charged with the crime of human trafficking for an alleged exploitative purpose not listed within the Palermo Protocol's definition. However, Allain's reasoning is not circular. Instead, he takes a positivist legal approach to the law and its application.

Moreover, I think Allain's use of Wertheimer's definition and focus on *harmful* exploitation serves a valid purpose when attempting to understand the scope of the Palermo Protocol's definition of exploitation in 'trafficking in persons'. In general, exploitation encompasses a wide range of conduct and severity in conduct. I think is unreasonable to consider that the Palermo Protocol applies to all types of exploitation. All of the enumerated forms of exploitation in the Palermo

552 A Wertheimer, *Exploitation* (Princeton University Press 1999) 7. Emphasis added.

553 M Rodríguez García, 'On the Legal Boundaries of Coerced Labor' in M van der Linden and M Rodríguez García (eds), *On Coerced Labor: Work and Compulsion after Chattel Slavery* (Brill 2016) 14.

554 Allain, *Of Human Exploitation and Trafficking* (n 303) 2-3. Emphasis added.

555 ibid 2. Emphasis in the original text.

556 Rodríguez García (n 553) 15. Emphasis in the original text.

Protocol do involve harm and can be crimes in their own right. It would therefore appear that the forms of exploitation meeting the level necessary to be considered as fitting within the definition of trafficking in persons must reach a certain severity threshold. Allain uses Wertheimer's definition to reinforce his argument that that level of severity required by the Palermo Protocol is a *harmful* one- a form of exploitation that the law recognizes as being criminal.

An all-inclusive review and examination of the Palermo Protocol, its preparatory works, the Commentary, international legal instruments, UNODC materials and scholarly insight on this subject do not provide for the extraction of a clear definition of 'exploitation'. In this respect, perhaps this portion of Chapter 3 is therefore no more helpful than the UNODC's Issue Paper on Exploitation. This conclusion is one also held by practitioners in this field who were 'divided on the question of whether there could be a universal understanding of what constitutes exploitation for purposes of trafficking.'[557] And yet, no one seems to disagree with the plain meaning understanding of this concept – that exploitation involves taking an unfair advantage of some one. There also seems to be a consensus that exploitation in the context of trafficking includes an aspect of harm. Where the discrepancies seem to manifest is in whether that 'unfair advantage' must be for the (personal) gain of another; and whether is there a certain gravity/severity of harm threshold required to qualify as 'exploitation' in the context of the Palermo Protocol's definition of trafficking in persons.

At this stage, 'exploitation' perhaps may be definable, but its specific contours remain ambiguous. The following subsections are therefore restricted to examining the listed forms of exploitation included within Article 3(a) of the Palermo Protocol. These identified forms of exploitation include: '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.'[558]

3.3.6.2 Defining the Palermo Protocol's Enumerated Forms of Exploitation

Using the international instruments which define the exploitative practices listed in Article 3(a) of the Palermo Protocol instructs as to how these types of exploitation can be understood in a case of trafficking. While no definition of 'exploitation' exists under international law, the same cannot be said for several of the exploitative practices identified in the Palermo Protocol's definition of 'trafficking in persons'. The following subsections therefore engage with the enumerated forms of 'exploitation' and assign definitions based on international law, should they exist.

3.3.6.2.1 The Exploitation of the Prostitution of Others or Other Forms of Sexual Exploitation

The first and most heavily contested and debated forms of exploitation during the drafting process was the 'exploitation of the prostitution of others' and 'sexual exploitation'.[559] Discussing these concepts involved plunging into a century's worth of international political and legislative baggage on the ideologies and positions surrounding prostitution.[560] As previously discussed in

557 Exploitation Issue Paper (n 424) 12.

558 Palermo Protocol (n 305) Art 3.

559 Allain, *Of Human Exploitation and Trafficking* (n 303) 2-3.

560 Ditmore and Wijers (n 304) 79, 84; Bruch (n 298) 14; Exploitation Issue Paper (n 424) 27. See also, JA Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy (2010) 158 University of Pennsylvania Law Review 1655.

the subsection addressing the role of consent, two NGO advocacy factions emerged to dispute which phraseology, and in turn philosophy, the Palermo Protocol should adopt.[561] The first group included those who viewed all sex work as 'trafficking *per se*' and *prostitution as slavery*; while the second focused on the nature of work (inclusive of sex workers) and conditions of sex work that amounted to forced labor, as the applicability standard.[562]

Focusing on the 'fruitless cycle of debate on the role of prostitution' and the 'victimization' of women led some to conclude that definitional issues from treaties past had already tainted drafting discussions of the Palermo Protocol.[563] As little to no headway was being made on this issue, government representatives scheduled daily lunchtime sessions, closed to lobbying groups and NGO representatives in an effort to reach a legislative consensus on this issue.[564] The main inquiries: 1) whether women actually elect to work in the sex industry; and, 2) whether the definition of human trafficking should be dominated by the nature of the work performed or by the 'means' used to engage another in the type of work performed.[565]

The result of these inquiries eventually led to the inclusion of 'the exploitation of the prostitution of others or other forms of sexual exploitation' within trafficking's list of forms of exploitation. This construction favored the more liberal perspective that sex work could be voluntarily entered into considering that the phrasing, 'exploitation of the prostitution of others' presupposes that prostitution is an activity that can be engaged into without exploitation. The ultimate category here is 'sexual exploitation' with the 'exploitation of the prostitution of others' being a subdivision thereof.

Because the term 'sexual exploitation' does not have any corresponding international definitional reference, it was heavily criticized as being too 'imprecise and emotive', destined to cause friction amongst states with differing positions on prostitution,[566] whereas 'exploitation of the prostitution of others' came with an international interpretative contextual reference: the 1949 Convention.[567] These undefined concepts leads one to question what conduct is encompassed within this type of exploitation under international law. At the second drafting session of the Palermo Protocol, some delegates requested a definition for 'sexual exploitation'.[568] During the sixth drafting session, a definition was proposed which read:

> 'Sexual exploitation' shall mean:
> i. Of an adult [forced] prostitution, sexual servitude or participation in the production of pornographic materials for which the person does not offer himself or herself with free and informed consent;

561 See *supra* subsection 3.3.4.1.

562 Ditmore and Wijers (n 304) 79-80; Doezema, *Sex Slaves and Discourse Masters* (n 498) 122, 161-165.

563 Bruch (n 298) 3.

564 Ditmore and Wijers (n 304) 82.

565 ibid 81; McClean, *Commentary* (n 302) 317-318. See also, Roth (n 302) 69; Abramson (n 298) 474-475.

566 Ditmore and Wijers (n 304) 84.

567 Gallagher, *The International Law of Human Trafficking* (n 298) 38. This phrase is also included in CEDAW (n 541) Art 6 which reads: States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

568 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 352, note 6.

ii. Of a child, prostitution, sexual servitude or the use of a child in pornography.[569]

Ultimately the term was left undefined in the Palermo Protocol and various '[p]roposed alternatives such as forced prostitution or the subsuming of sexual exploitation under broader headings such as servitude, slavery and forced labour were discussed but not accepted.'[570] The *travaux préparatoires* highlights the diverging state perspectives on this topic which is worth reproducing in full:

> The Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms 'exploitation of the prostitution of others' or 'other forms of sexual exploitation' are not defined in the protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.[571]

The Exploitation Issue Paper highlights definitions of 'sexual exploitation' found elsewhere in international law.[572] For example, and as discussed in Chapter 2, the CRC characterized the following practices as sexual exploitation and sexual abuse of children:

a. The inducement or coercion of a child to engage in any unlawful sexual activity;
b. The exploitative use of children in prostitution or other unlawful sexual practices;
c. The exploitative use of children in pornographic performances and materials.[573]

The UNODC Model Law proffers the following definition: '"[s]exual exploitation" shall mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials'.[574] This definition appears to encompass all acts included under the 'exploitation of the prostitution of others' and also intersects with 'servitude' and 'forced labour or services' which are separately identified forms of exploitation under Article 3 of

569 UNGA, 'Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Consideration of the additional international legal instrument against trafficking in persons, especially women and children' (4 April 2000) UN Doc A/AC.254/4/Add.3/Rev.6, 3. See also, Gallagher, *The International Law of Human Trafficking* (n 298) 38, note 115.

570 Exploitation Issue Paper (n 424) 29.

571 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 347. See also, Exploitation Issue Paper (n 424) 28: The Exploitation Issue Paper notes similar understandings of these terms exist with respect to the CoE Convention on Action against Trafficking. See also, Ditmore and Wijers (n 304) 84; Scarpa, 'Definition of Trafficking' (n 312) 157: Scarpa contends that these two phrases are the modern manifestation of the former phrase, 'immoral purposes', a contention which I believe has been disproved through an analysis of the first conventions and their preparatory works in chapter 2. Moreover, she refrains from providing any definitions of these terms. See also, Elliott (n 384) 78.

572 Exploitation Issue Paper (n 424) 29-30.

573 CRC (n 541) Art 34. A similar but expansive interpretation of this concept in the context of children was also codified by the CoE. See, Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (25 October 2007, entered into force 1 July 2010) ETS 201, 25.X.2007, Art 3(b), 18-23.

574 UNODC Model Law (n 356) 19. See also Elliott (n 384) 78 citing the proposal for a Council Framework Decision on combatting Trafficking in Human beings [2001] OJ C62 E/324, in which 'sexual exploitation' was described as '…where the purpose is to exploit him or her in prostitution or in pornographic performances or in production of pornographic materials…'

the Palermo Protocol.[575]

Gallagher asserts that the final decision to refrain from defining 'sexual exploitation' should not be underestimated considering its interpretative potential to encompass acts which may go against the drafters' intentions.[576] Stoyanova reiterates this interpretative concern claiming that:

> the phrase 'sexual exploitation' may be interpreted for the convenience of either party to the dispute on prostitution. It could mean that any prostitution per se is exploitation and it could also mean that there should be force and coercion in the prostitution in order to be classified as 'sexual exploitation.' Thus, 'sexual exploitation' is sufficiently elastic to cover different approaches to prostitution. However, this only enables further ambiguity in this field of law and flies in the face of the principle of legal certainty and specificity.[577]

Attempts to clarify these terms also demonstrate the potential difficulty in utilizing an instrument which is designed for individual domestic interpretation. Nevertheless, adopting the UNODC Model Law's definition may serve to sever the wide range of acts associated with 'sexual exploitation' while also preserving the principles of certainty and specificity.

A more specific type of sexual exploitation enumerated in the Palermo Protocol is the 'exploitation of the prostitution of others'. This concept first appeared in the 1949 Convention but it was left undefined in the instrument. Pinpointing an understanding of the 'exploitation of the prostitution of others' is nevertheless a little easier than the concept of 'sexual exploitation'. The chairperson to the Palermo Protocol's drafting committee reasoned that this 'phrase distinguished between individuals who might derive some benefit from their own prostitution

575 Both concepts of 'sexual exploitation' and 'the exploitation of the prostitution of another' have also been deemed by many to fall within the purview and definitional scope of 'forced labor'. On this point, the UNODC Model Law (n 356) 14 explains: '[w]hile the Protocol draws a distinction between exploitation for forced labour or services and sexual exploitation, this should not lead to the conclusion that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking. Coercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour or compulsory labour.' See also, ILO, Eradication of Forced Labour: International Labour Conference (2007) <http://www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-iii-1b.pdf> accessed 13 November 2015, 42 [78] (Report III Part (1B)); UNODC Model Law (n 356) 14 referencing: Report III Part (1B) 42. Note: this report qualifies the inclusion of 'coercive' sexual exploitation and 'forced' prostitution.

576 Gallagher, *The International Law of Human Trafficking* (n 298) 38-39.

577 Stoyanova (n 550) 69. On this point, it is important to acknowledge that the term 'sexual exploitation' is used often in international legal discourse without any definitional reference. See also, Gallagher, *The International Law of Human Trafficking* (n 298) 38-39, note 118. For those definitions that do exist, they are often long-winded and convoluted. For example, see GAATW, 'Definitions of Trafficking' <http://www.bayswan.org/traffick/deftraffickUN.html> accessed 14 September 2016: GAATW defines 'sexual exploitation' as: 'the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage or fraud. Even in the absence of any of these factors, where the person participating in prostitution, sexual servitude or the production of pornographic materials in under the age of 18, sexual exploitation shall be deemed to exist.' See also, DM Hughes, 'A Resolution drafted by Donna M. Hughes, Submitted by the Coalition Against Trafficking in Women to the United Nations Working Group on Contemporary Forms of Slavery' (May 1998) <http://www.uri.edu/artsci/wms/hughes/ppr.htm> accessed 13 November 2015: Hughes defines 'sexual exploitation' as: 'a practice by which a person achieves sexual gratification, financial gain or advancement through the abuse or exploitation of a person's sexuality by abrogating that person's human right to dignity, equality, autonomy, and physical and mental well-being; i.e. trafficking, prostitution, prostitution tourism, mail-order-bride trade, pornography, stripping, battering, incest, rape and sexual harassment.'

and those who derived some benefit from the prostitution of others.'[578] Similarly, on this point the Commentary concludes that 'the debate on prostitution which formed the background to so much of the negotiations was unresolved; only pimping is covered by the express language of the Protocol.'[579]

The UNODC Model Law has offered the following definition of 'the exploitation of the prostitution of others' as 'the unlawful obtaining of financial or other material benefit from the prostitution of another person'.[580] This definition is consistent with the spirit of the 1949 Convention. The UNODC Module 1 and UNODC Toolkit provide no definitional or interpretative insight. The UNODC Issue Paper on Exploitation collectively reproduces and comments on interpretations found in international and domestic law without providing its own.[581]

Considering the 1949 Convention, the desire expressed during the Palermo Protocol's drafting process that the enumerated forms of exploitation should be interpreted based on the existing and relevant international instruments and the chairperson's comments, 'the exploitation of the prostitution of others' could therefore be defined as the unlawful obtaining of financial or other material benefit from the prostitution of another person.

3.3.6.2.2 Forced Labor or Services

Under international law, the concept of forced labor has 'long been defined' by the International Labour Organization (ILO) within its Forced Labour Convention which does not prohibit the practice, but codifies the concept.[582] The internationally recognized definition of 'forced or compulsory labor' includes 'all work or service which is exacted from any person under the menace

578 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 344; See also, Gallagher, *The International Law of Human Trafficking* (n 298) 38; Exploitation Issue Paper (n 424) 28.

579 McClean, *Commentary* (n 302) 326.

580 UNODC Model Law (n 356) 13-14 citing the Trafficking in Human Beings and Peace Support Operations: Trainers Guide, United Nations Interregional Crime and Justice Research Institute (2006) 153. The inclusion of 'unlawful' serves to conform with the domestic perspectives on prostitution.

581 Exploitation Issue Paper (n 424) 27-30.

582 Rijken, *Combatting Trafficking in Human Beings for Labour Exploitation* (n 302) 396-397. See also, McClean, *Commentary* (n 302) 326-327.

of penalty and for which the said person has not offered himself voluntarily'.[583] This definition has been universally used to define this form of exploitation under international law since 1930.[584] This offense is comprised of three elements: (1) any work or service (2) performed under 'menace of penalty', and (3) performed involuntarily.[585]

The first element concerns the performance of 'work or service'. It is understood to encompass 'all types of work, service and employment, regardless of the industry, sector or occupation within which it is found, and encompasses legal and formal employment as well as illegal and informal employment.'[586] Although the rationale for adding 'services' into the text of the Palermo Protocol ('forced labor or services') was not specifically stated, '[i]t is reasonable to speculate that this addition reflected general compromises made during the drafting process in relation to the issue of prostitution.'[587] Moreover, it is understood that the work or service provider can include the state, private persons and corporations.[588]

583 ILO, Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) C29: Under Article 2(2), this convention specifically excludes the following types of labour from this definition:
   a. any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
   b. any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
   c. any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
   d. any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
   e. minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services. See also, Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) C105; Protocol of 2014 to the Forced Labour Convention (adoption 11 June 2014) P029.

584 For example, see: Weissbrodt, D. (Anti-Slavery International) 'Abolishing slavery and its Contemporary Forms' OHCHR (2002) UN Doc HR/PUB/02/4 [38]; Allain, *Of Human Exploitation and Trafficking* (n 302) 218-219; ILO, 'Forced Labour and Trafficking , A Casebook of Court Decisions: A training Manual for Judges, Prosecutors and Legal Practitioners (ILO Geneva, 2009) iii (ILO Training Manual for Judges); Exploitation Issue Paper (n 424) 30.

585 ILO Training Manual for Judges (n 584) iii: Although the ILO recognizes that employment can be 'closely interlinked with civil liberties', the convention was neither intended nor designed 'deal with freedom of thought or expression or other civil liberties.' Furthermore, it does not attempt to 'regulate questions of labour discipline or strikes in general. Its purpose is to ensure that no form of forced or compulsory labour is used in the circumstances specified in the Convention.' For a long list of evidentiary examples which meet these elements, see McClean, *Commentary* (n 302) 327.

586 ILO, Combatting Forced Labour: A Handbook for Employers and Businesses (ILO Geneva 2008) 1 Introduction and Overview, 8 (ILO Employer Handbook Part 1).

587 Exploitation Issue Paper (n 424) 31: On this point the issue paper goes on to explain, 'States disagree on whether prostitution should be recognized as a form of work or labour. The addition of "services" allowed for the possibility of sexual "labour" exacted from "any person under the menace of any penalty, and for which the said person has not offered [him or herself] voluntarily" being included under the umbrella of forced labour in a manner that was acceptable to States holding different opinions on this issue.'

588 Forced Labour Convention (n 583) Art 4(1).

The second element, 'under menace of penalty', is understood as encompassing a range of deviant approaches used by the exploiter to exact continued work or services which can include: threats (in various forms and degrees to the laborer or their next of kin), physical coercion, sexual violence, violence of a psychological nature, physical violence, retention of identity documents, harassment, intimidation isolation, loss of rights or privileges, confinement, and instilment of fear (regardless if it was reasonable).[589] In attaching meaning to the term 'penalty', negotiations during the Forced Labor Convention's drafting process confirmed that such a meaning was not ""in a strict sense to mean punishment inflicted by a court of justice", but instead that it was to mean "any penalty or punishment, inflicted by persons or body whatever"".[590]

The final element of this offense focuses on the issue of consent and the inalienable 'right of workers to free choice of employment'.[591] Specifically, the ILO has determined that work performed against a person's free will or an inability to terminate one's own employment within 'a reasonable period of notice, and without forgoing payment or other entitlements' signifies involuntariness.[592] Although there can be an overlap between the second and third elements of forced labor, a concrete way to differentiate them is that 'menace of penalty' corresponds to the freedom to leave the abusive employer, whereas the involuntariness element relates to the freedom of choice (in work) of the employee.

Overlaps among forms of 'exploitation' is readily apparent. Understandings of sexual exploitation, exploitation of the prostitution of others and forced labor all involve determinations of the performance of some act/service for another. However, where the first two types of exploitation incorporate the act of benefiting another, forced labor does not. Interestingly, without changing the 1930 definition, the 2014 Protocol to the Forced Labour Convention states: '[t]he definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour'.[593] The interconnectedness or intermingling of forms of exploitation are also observable in the following discussions of slavery, practices similar to slavery and servitude.

3.3.6.2.3 Slavery

The universal definition of 'slavery' derives from the 1926 Convention to Suppress the Slave Trade and Slavery (Slavery Convention). Fostered by the League of Nations, this instrument was

589 ILO Employer Handbook Part 1 (n 586) 8; K Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' (2010) Joseph Rowntree Foundation <https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation> accessed 16 November 2015, 6; Allain, *Of Human Exploitation and Trafficking* (n 303) 219-220; Report III Part (1B) (n 575) [270]. Human Rights case law has also focused on these factors; for example, see *Case of the Ituango Massacres v Columbia* (Judgment) Inter-American Court of Human Rights Series C No 148 (1 July 2006) 79 note 50; *Siliadin v France* (Judgment) European Court of Human Rights No 73316/01 (26 July 2005).

590 Allain, *Of Human Exploitation and Trafficking* (n 303) 219 citing International Labour Conference, 14th session, Item I, Report of the Committee on Forced Labour to the Twelfth Session of the Conference, Forced Labour, 11.

591 Report III (1B) (n 575) [271]. See also, Allain, *Of Human Exploitation and Trafficking* (n 303) 221.

592 Exploitation Issue Paper (n 424) 31 citing ILO, Global Estimate of Forced Labour: Results and Methodology (2012) 19. See also, ILO Employer Handbook Part 1(n 586) 8.

593 Forced Labour Convention Protocol (n 583) Art 1(3). As Allain observes, the 2014 Protocol actually solidifies the state's right to use forced labor considering the convention does not prohibit it, but codifies the practice and carves out exceptions for states to use it under particular circumstances.

initially slated to prohibit all 'forms of slavery'.[594] However, this concept was rejected by states on the grounds of infringing on sovereignty.[595] In focusing on pinpointing the legal concept of 'slavery', the term underwent several definitional changes in the drafting process.[596] The agreed – and final – definition of slavery was thus, '[t]he status or condition of a person over whom any or all of the *powers* attaching to the right of ownership are exercised.'[597] Although over eighty years old, the Slavery Convention's definition remains the internationally recognized definition of slavery.[598]

Recognition of the nuances in the Slavery Convention's definition of slavery, namely the difference between *powers* attaching to the right of ownership from the 'right of ownership', is essential when utilizing this definition. A 'right of ownership' is a concept recognized in law. Therefore, abolishing slavery would, under the law, mean no one could hold another in slavery. Defining slavery such that it requires someone to 'exercise powers attached' to the concept is a quite different assessment. As Allain explains, when there is no legal right to own an object, the issue becomes one of possession and whom has the 'greatest interest' in the object.[599] Therefore, in a practical application of the law, 'one should look for the exercise of control over a person tantamount to possession.'[600] This component is so central to the legal establishment of slavery that if 'control tantamount to possession' does not exist, none of the powers attaching to the right of ownership could ever escalate to the condition of slavery.[601] Legally qualifying a case as slavery under international law thereby requires an individual and qualitative case specific analysis to determine whether someone has been reduced to the condition of slavery which occurs via the exercise of 'powers attaching to the right of ownership'.[602]

While drafting the Palermo Protocol, 'very little discussion of "slavery" took place…A proposed definition – which did not survive – tracked the 1926 definition'.[603] In Part II of this research project, great efforts are made in dissecting the Slavery Convention's definition of 'slavery' and determining whether one can legally distinguish between concepts including slavery, sexual slavery, slave trade, enslavement and trafficking under international law. As such, further discussion on slavery is left to Part II of this research.

---

594 The term, 'forms of slavery' is an undefined concept.

595 S Drescher, 'From Consensus to Consensus: Slavery in International Law' in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 99: This is due to various state sanctioned policies and/or cultural practices permitting the use of forced labour, serfdom, debt bondage, etc.

596 J Allain, 'The Legal Definition of Slavery into the Twenty-First Century' in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 199.

597 Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 Art 1.

598 J Allain, 'The Definition of "Slavery" in General International Law and in Crime of Enslavement within the Rome Statute' (26 April 2007) Guest Lecture Series of the Office of the Prosecutor <https://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf> accessed 16 November 2015, 3.

599 J Allain, 'The Definition of Slavery in International Law'(2009) 52(2) Howard Law Journal 257, 239, 275.

600 J Allain and K Bales, 'Slavery and its Definition' (2012) 14(2) Global Dialogue 1. For a practical application by a national judiciary, see for example, *Regina v. Tang*, High Court of Australia (28 August 2008) HCA 39, 13.

601 N Siller, 'Modern Slavery: Does International Law Distinguish Between Slavery, Enslavement and Trafficking' (2016) 14 Journal of International Criminal Justice 405.

602 Gallagher, 'Quagmire Or Firm Ground?' (n 302).

603 Exploitation Issue Paper (n 424) 33 citing the CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 342.

3.3.6.2.4 Practices Similar to Slavery and Servitude

While drafting the Palermo Protocol, 'some delegations objected to the inclusion of servitude in the list of exploitative purpose because of the lack of clarity as to the meaning of the term and the duplication with "slavery or practices similar to slavery"'.[604] An earlier draft of the Palermo Protocol proffered a definition of 'servitude' as 'the status or condition of dependency of a person who is [unjustifiably] compelled by another person to render any service and who reasonably believes that he or she had no reasonable alternative but to perform the service.'[605] However, the proposed definition 'was omitted without explanation from the final text.'[606]

'Servitude' is described generally as a concept more far-reaching than slavery covering 'all conceivable forms of domination and degradation of human beings by human beings.'[607] Judicial institutions and scholars alike, have consistently characterized servitude as a practice whose severity falls just 'short of slavery'.[608] It would seem then that while all slavery could also be considered servitude, not all forms of servitude can be considered to rise to the level of slavery under the law. Unlike slavery, forced labor and trafficking in persons, an instrument explicitly identifying and defining 'servitude' is absent from international conventional law. As such, determining which forms of servitude can rise to the level of slavery pursuant to the law may prove to be difficult.

In 1949, the UN Secretary-General appointed a committee to engage in a study of the problem of slavery and resolve (among other things), whether 'the substantive provisions of the Slavery Convention of 1926 are no longer adequate'.[609] This report observed the difficulty in fashioning an international definition of 'servitude' stating that:

> The Committee…took note of information received from many sources which indicated that other forms of servitude, in addition to slavery and the slave trade, existed to a considerable extent in many portions of the world. When it attempted to define these forms of servitude, it discovered that a great deal of confusion had arisen because different names were applied to these practices in different regions of the world, and even in different countries. It therefore discarded the existing nomenclature for the time being, and instead attempted to describe these forms of servitude by reference to their particular characteristics.[610]

604 Exploitation Issue Paper (n 424) 36.

605 Revised Draft Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Ad Hoc Committee on the Elaboration of Convention against Transnational Organized Crime, ninth session, Vienna, 5-16 June 2000, United Nations document A/AC.254/4/Add.3/Rev.6. See also, *Abolishing slavery and its contemporary forms* (n 584) [74], note 111.

606 Exploitation Issue Paper (n 424) 36. See also, *Abolishing Slavery and its Contemporary Forms* (n 584) [74].

607 A Gallagher, 'Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage' in LN Sadat and MP Scarf (eds), *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008) citing M Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary (NP Engel Publishers 1993) 148.

608 J Allain, 'On the Curious Disappearance of Human Servitude from General International Law' (2009) 11 Journal of the History of International Law 303, 304; Exploitation Issue Paper (n 424) 35.

609 J Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008) 208.

610 UN Economic and Social Council 'Report of the Ad Hoc Committee on Slavery (Second Session) (4 May 1951) UN Doc E/1988, 8 [13].

The *Ad Hoc* Committee concluded that the original definition of slavery should remain but that a supplementary instrument should be created and be 'more precise…in defining the exact forms of servitude'.[611]

A similar sentiment was expressed during the Supplementary Slavery Convention's drafting process. However, several state delegates believed the proposed title for the supplementary instrument, the 'Supplementary Convention on Slavery and Servitude', and more precisely, the term 'servitude', 'presented a linguistic difficulty'.[612] Specifically, the Soviet Delegate explained that the same word in Russian encompasses the English terms of 'slavery' and 'servitude'.[613] In the Arabic language, the terms 'servitude' and 'serfdom' corresponded to one another.[614] As such, the title was changed to the 'Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery' (Supplementary Slavery Convention).[615] In terms of clarifying these added terms, the Soviet Delegate stated that 'institutions and practices meant two different things in law; the former denoted a set of legal rules, whereas the latter denoted social customs.'[616]

Allain, however, perceptively points out that these drafting delegates' so-called "linguistic concerns" were merely pretextual considering the obligations these same States Parties to the Universal Declaration on Human Rights already made in 1948.[617] Specifically, Article 4 of the Universal Declaration on Human Rights states that: 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.' This language is stricter than the Supplementary Slavery Convention which reads that:

> States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention.[618]

Article 1 of the Supplementary Slavery Convention lists these 'institutions and practices' as: debt bondage, serfdom, servile marriage and child exploitation. By using the term, 'institutions and practices similar to slavery', which is something other than 'slavery' or 'servitude', States Parties were then able to claim that they could uphold commitments made in the Universal Declaration of Human Rights.

---

611 ibid 16 [30]. See also, Allain, *The Slavery Conventions* (n 609) 212. As a result, the *Ad Hoc* Committee recommended 'that a drafting committee be established to "prepare the draft of a supplementary international convention on slavery and other forms of servitude"' (213).

612 Allain, *The Slavery Conventions* (n 609) 220-221.

613 ibid 220.

614 ibid.

615 ibid 220-221.

616 ibid citing Economic and Social Council, Committee on the Drafting of a Supplementary Convention on Slavery and Servitude, Summary Record of the Ninth Meeting 23 January 1956 UN Doc E/AC.43/SR.9 (17 February 1956) 4.

617 J Allain, 'Slavery and Human Exploitation: History' lecture given at The Hague Academy of International Law, Advanced Course on International Criminal Law with Special Focus on International Criminal Justice, Migration and Human Trafficking on 2 June 2016.

618 Supplementary Slavery Convention (n 541) Art 1.

It therefore appears that the concept of 'institutions and practices similar to slavery' can actually be understood as synonymous to servitude. This is further evidenced by the fact that without employing the term 'servitude', the Supplementary Slavery Convention nevertheless classifies anyone in the condition or status of 'institutions and practices similar to slavery' as 'a person of servile status'.[619] Instead of defining the concept of 'institutions and practices similar to slavery', this instrument listed practices that fall within this concept and defined those subcategories.[620] The identified 'practices' include: debt bondage, serfdom, servile marriage and child exploitation and are examined in the following subsections.

3.3.6.2.4.1 Debt Bondage

The first enumerated practice is debt bondage. As the previous discussion highlighted, using the term 'institutions and practices similar to slavery' has made distinguishing and/or assimilating concepts more difficult in law. For example, the Supplementary Slavery Convention identifies debt bondage as a 'practice similar to slavery', but the ICCPR encompasses this form of exploitation 'within the prohibition on servitude' without either instrument acknowledging that these terms are synonyms.[621] Regardless, 'debt bondage' is explicitly defined in the Supplementary Slavery Convention as:

> the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.[622]

Bales avers that the confusing nature of this definition fails to clarify how the 'labor power is actually viewed and used within the lender-debtor relationship' since (as the definition reads), it is not applied to the debt.[623] Although no additional statutory guidance pertaining to debt bondage exists in the Supplementary Slavery Convention, the *Ad Hoc* Committee reasoned that in order for debt bondage to 'constitute a form of servitude' (within the committee's concept of the practice), one of the following conditions must be present:

a. if the services rendered by the bondsman or the pawn do not count towards the payment of the debt;
b. if the nature and length of the services to be performed by the bondsman or the pawn are not defined; or
c. if the bondsman or the pawn submits to conditions that do not allow the person pledged to exercise the rights enjoyed by ordinary individuals within the framework of local social customs.[624]

619 ibid Art 7(b).

620 Allain, *Curious Disappearance of Servitude* (n 608) 304. Human Rights institutions however, have used different rhetoric in their interpretation of 'servitude'. For example, see *Siliadin v France* (Judgment) European Court of Human Rights No 73316/01 (26 July 2005) [124]-[126].

621 Exploitation Issue Paper (n 424) 34 citing Nowak (n 607) 148.

622 Supplementary Slavery Convention (n 541) Art 1(a). See also, Allain, *Curious Disappearance of Servitude* (n 608) 317.

623 K Bales, 'Introduction' in A Nowakowski (ed), *Human Rights and Contemporary Slavery* (University of Denver 2008) <http://www.du.edu/korbel/hrhw/researchdigest/slavery/intro.pdf> accessed 17 November 2015.

624 Allain, *Of Human Exploitation and Trafficking* (n 303) 169 citing UN Economic and Social Council, Report of the *Ad Hoc* Committee on Slavery 2nd Session (4 May 1951) UN Doc E/1998, E/AC.33/13, 8. See also, Allain, *The Slavery Conventions* (n 609) 267-68.

Additionally, recommendations of the *Ad Hoc* Committee on Slavery also articulated several principles intended to assist states in the creation of national legislation on the subject. These include:

a. all agreements for labour in consideration of a debt should be held to be legal only if reduced to writing;
b. a procedure should be evolved whereby the correctness of the debt and the value of services to be rendered in payment thereof should be established before a competent official and incorporated in the agreement;
c. the proportion of the value of the service to be paid towards the elimination of the debt should also be prescribed;
d. the debtor should in no circumstances be bound to work for the creditor under the agreement for more than a prescribed maximum number of days;
e. the value of the work undertaken in the agreement should not be less than what is sanctioned by usage in the district;
f. the duty of rendering services in extinguishment of the debt should not be transferable to a third person; and
g. the agreement should not bind the heirs of the debtor.[625]

The elements of this offense are clear: 1) the pledge of personal services (or of the service of another person under the debtor's control); 2) as security for a debt. As articulated in the UNODC's Exploitation Issue Paper, '[u]nlike forced labour, the international legal definition makes no reference to the concept of voluntariness. It would appear, therefore, that international law does not envisage the possibility of an individual being able to consent to debt bondage.'[626]

3.3.6.2.4.2 Serfdom

The second enumerated form of servitude is serfdom. This exploitative practice is also known as 'predial slavery' and is generally described as 'the use of slaves on farms or plantations for agricultural production.'[627] In 1951, the *Ad Hoc* Committee on Slavery classified serfdom as a 'form of servitude'.[628] The codified definition of 'serfdom' (as a 'practice similar to slavery') in the 1956 Supplementary Slavery Convention is attributed in part, after a review of oppressive circumstances which occurred in the 'context of conquest, subjugation of indigenous peoples, and seizure of their lands' in several Latin American countries.[629] Typically after seizure of lands, the new 'landowner' granted a piece of the seized property to a person[630] in exchange for services including:

625 Allain, *Of Human Exploitation and Trafficking* (n 303) 169 citing UN Economic and Social Council, Report of the *Ad Hoc* Committee on Slavery 2nd Session (4 May 1951) UN Doc E/1998, E/AC.33/13, 19.

626 Exploitation Issue Paper (n 424) 34.

627 *Abolishing Slavery and its Contemporary Forms* (n 584) [31]. See also, LoN, Temporary Slavery Commission Report to the Council, LoN Doc A.19.1925.VI (1925) [97].

628 Allain, *Curious Disappearance of Servitude* (n 608) 318 citing the UN Economic and Social Council, Report of the Ad Hoc Committee on Slavery 2nd Session (4 May 1951) UN Doc E/1988, E/AC.33/13, 20.

629 *Abolishing Slavery and its Contemporary Forms* (n 584) [34]. Note, this practice is also referred to as 'peonage'.

630 Also commonly referred to as a 'serf' or 'peon'.

a. providing the landowner with a proportion of the crop at harvest ('share cropping');
b. working for the landowner; or
c. doing other work, for example domestic chores for the landowner's household.[631]

Just as debt bondage is indifferent to the actual type of labor or work performed, the exploitative nature associated with serfdom is less concerned with 'the provision of labour in return for access to land…but the inability of the person of serf status to leave that status.'[632] As such, the Supplementary Slavery Convention defines 'serfdom' as 'the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.'[633]

Accordingly, the elements of 'serfdom' include: (1) the victim is required (bound) to live and labor on the specific land of another; and (2) the victim is not free to change their status.[634] Although these elements are different and more fixed than the concept of slavery, it is unclear how this type of exploitation would also not qualify as slavery under the Slavery Convention's definition of 'slavery'.[635] However, in order to make that definitive determination (since serfdom has the potential to cover a wide gradation of exploitation circumstances), again it appears a qualitative assessment of the treatment exacted upon the serf would be required to determine whether the conduct could also qualify as slavery under the law.

3.3.6.2.4.3 Servile Marriage

The third identified 'practice similar to slavery' in the Supplementary Slavery Convention is servile marriage. Several terms are often used interchangeably with 'servile marriage' including 'forced marriage', 'early marriage', and 'child marriage.'[636] While the latter of these two terms can be easily distinguished based on age, the difference between servile and forced marriage is a different assessment. The Exploitation Issue Paper avers that 'forced marriage is not separately identified as a practice similar to slavery.'[637] On this point, Allain explains that 'forced marriage is generally considered as a marriage where full and free consent has not been forthcoming' whereas 'servile marriage…deals with three specific instances where a woman is "commodified" through marriage.'[638]

631 *Abolishing Slavery and its Contemporary Forms* (n 584) [34].

632 ibid.

633 Supplementary Slavery Convention (n 541) Art 1(b).

634 ibid. See also, Allain, *Of Human Exploitation and Trafficking* (n 303) 183.

635 Allain, *Of Human Exploitation and Trafficking* (n 303) 183-184: Being forced to 'render some determinate service' and being 'bound to live and labour on land belonging to another person' without being able to change one's condition would meet the definitional threshold of slavery as set out in the 1926 Slavery Convention. This is so as the exercise of a number of the powers attaching to the right of ownership would be present in a situation of serfdom, including the exercise of control tantamount to possession (where a person is not free to change their status or condition) and- in such a situation, where 'possession' is in evidence- the individual is used (re: toiling on the land) and profit is gained from such use would be present… in general terms there appears to be little difference in the definition set out in the 1956 Supplementary Slavery Convention, as between serfdom as servitude and between serfdom as slavery.

636 UNHRC, Report of the Special Rapporteur on contemporary slavery (twenty-first Session) (10 July 2012) UN Doc A/HRC/21/41 [13]. See also, *Abolishing Slavery and its Contemporary Forms* (n 584) [113].

637 Exploitation Issue Paper (n 424) 34: The Issue Paper defines this practice as, 'a union of two persons at least one of whom has not given their full and free consent to the marriage.'

638 Allain, *Of Human Exploitation and Trafficking* (n 303) 184.

Those three legally identified instances of 'commodification' are encompassed under the umbrella of 'servile marriage' in the Supplementary Slavery Convention and include: bride purchase,[639] wife transfer, and widow inheritance. Article 1 defines these practices as:

> Any institution or practice whereby:
> i. A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
> ii. The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
> iii. A woman on the death of her husband is liable to be inherited by another person.[640]

The elements of 'bride purchase' include: 1) the purchase of a female; and 2) without their right to refuse. Allain observes that this understanding 'speaks to the exercise of control over her tantamount to the type of control exercised over a thing in the case of possession.'[641] This conclusion appears evident in the practice of 'wife transfer' as well since the elements include: 1) transfer of a wife to another person; (2) for value received or otherwise; which is a clear transactional arrangement covered under the legal parameters of the Slavery Convention's definition of 'slavery'.[642] Thirdly, the central premise in understanding 'widow inheritance' is the fact that a widow is unable to inherit when her husband dies because she is part of the estate and has the same status as a piece of property.[643]

Interestingly, although the rationale is never articulated, the Special Rapporteur on contemporary slavery strayed from the Supplementary Slavery Convention in 2012. Her report articulated a definition of 'servile marriage' as a practice 'which reduce[s] a spouse to a person over whom any or all of the powers attaching to the right of ownership are exercised'.[644] It is evident that this definition is similar to the Slavery Convention's definition of 'slavery'. However, as just explicated, this definition does not appear to conflict with the legal understanding of the practices covered by the concept of 'servile marriage'.

639 Other terms often used in this field include: 'mail-order bride' or 'paper marriage' have no legal standing in international law.

640 Supplementary Slavery Convention (n 541) Art 1(c). This Convention paved the way for several later international instruments which addressed the requirement for consent when entering into marriages, the need to establish a minimum age in marriage practices, and the international recognition of equal standing in a marriage between men and women. These instruments include: UNGA, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) 521 UNTS 231; CEDAW (n 531); UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

641 Allain, *Of Human Exploitation and Trafficking* (n 303) 191.

642 ibid 191-192: So long as 'a background relationship of control tantamount to possession' is present.

643 ibid 193: It therefore appears that this offense is the quintessential reduction of a person to the status of an object to be possessed and like-wise appears to fit under the international definition of 'slavery' thus evidencing further overlap between various forms of exploitation.

644 Report of the Special Rapporteur on contemporary slavery (n 636) [13].

3.3.6.2.4.4 Child Exploitation

The final 'practice similar to slavery' enumerated in the Supplementary Slavery Convention concerns the exploitation of children, defined as:

> Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.[645]

The Exploitation Issue Paper characterizes this form of servitude as the 'sale of children for exploitation'.[646] Allain however classifies this practice as 'child trafficking', not exploitation as he concludes that the real focus of this practice is the *transferring* of the child with the *intent* to exploit without requiring any real exploitation occur.[647] The elements of this practice include: 1) transfer of child (under 18 years of age) by parent/guardian; 2) with the intent to exploit. If the exploitation is effectuated without the transferor's intent, then another 'exploitative offense' (eg, forced labor or slavery) may be applicable where child exploitation is not.

During the drafting process, state delegates also discussed including types of exploitation in the realm of 'forced adoption', 'illegal adoption' and the 'purchase or sale of children'.[648] Although left out, an interpretive note on this point mentioned that '[w]here illegal adoption amounts to a practice similar to slavery… it will also fall within the scope of the protocol.'[649] As the Exploitation Issue Paper explains,

> Under this provision it is only when the adoption is undertaken 'with a view to the exploitation of the child or young person or of his labour' that it will constitute trafficking. In short, illegal adoption, even when amounting to the sale of children will not be characterized as trafficking under the Protocol unless exploitative intent can be shown.[650]

As just demonstrated, legally distinguishing slavery from serfdom, or slavery from servile marriage becomes a difficult task. An almost identical elemental overlap exists between the Supplementary Slavery Convention's definition of 'child exploitation' and 'trafficking in persons' as their respective elements seem to be identical.

---

645 Supplementary Slavery Convention (n 541) Art 1(c). Again, we run into the issue of utilizing the term, 'exploitation' without attaching any specific meaning to the term.

646 Exploitation Issue Paper (n 424) 34-35: On this point, the issue paper notes that '[s]ubsequent developments call into question whether exploitative purpose or result are in fact required. For example, an optional protocol to the Convention on the Rights of the Child defines "sale of children" as: "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration". This broader definition could potentially operate to extend the concept of sale of children to include practices such as sale for adoption and even commercial surrogacy arrangements. However, the requirement to additionally establish that the sale is for exploitation would remain intact' (citations omitted).

647 Allain, *Of Human Exploitation and Trafficking* (n 303) 197. Emphasis added.

648 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 342, note 13, 344 note 30, 350. See also, Exploitation Issue Paper (n 424) 38.

649 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 347. See also, Exploitation Issue Paper (n 424) 38.

650 Exploitation Issue Paper (n 424) 38-39 citing the Supplementary Slavery Convention (n 541) Art 1(d).

3.3.6.2.5 The Removal of Organs

The final type of exploitation listed in Article 3(a) of the Palermo Protocol is the 'removal of organs'. As the demand for organs greatly outweighs the supply,[651] persons desperate to extend their lives through transplantation have enabled the emergence of an exploitative practice only made possible by the significant medical developments of the last forty years.[652] The exploitative purpose of 'organ removal' was a late addition to the Palermo Protocol's third element of human trafficking.[653] This inclusion was also inconsistently accepted since several delegates wanted the focus of trafficking to remain on the person as opposed to their parts.[654] However, according to the UNODC, since the Palermo Protocol's entry into force, this end purpose's 'links with trafficking, have become more apparent and better understood.'[655]

The preparatory works are fairly silent on this form of exploitation. However, they do clarify that '[t]he removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation.'[656] The UNODC documents refrain from providing a definition of this exploitative purpose. Instead of defining this concept, the UN has described the three most prevalent scenarios of trafficking for the 'purpose of organ removal' which include:

> Firstly, there are cases where traffickers force or deceive the victims into giving up an organ. Secondly, there are cases where victims formally or informally agree to sell an organ and are cheated because they are not paid for the organ or are paid less than the promised price. Thirdly, vulnerable persons are treated for an ailment, which may or may not exist and thereupon organs are removed without the victim's knowledge.[657]

---

651 LP Francis and JG Francis, Stateless Crimes, Legitimacy, and International Criminal Law: The Case of Organ Trafficking (2010) 4 Criminal Law and Philosophy 283, 284; E Kelly, International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter (2013) 54 Boston College Law Review 1317, 1317; Organization for Security and Cooperation in Europe (OSCE), Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings (OSCE 2013) 58 (OSCE Organ Removal Report).

652 Allain, *Of Human Exploitation and Trafficking* (n 303) 326-331.

653 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 344, note 28. See also, Gallagher, *The International Law of Human Trafficking* (n 298) 39: The term 'removal of organs' was suggested by the chair person. Other proposals included: '"illicit removal of organs", "transfer of organs of persons for profit" and "trafficking in organs" and expanding the wording to include "other body parts".'

654 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 344, note 28: One delegation noted that, while trafficking in persons for the purpose of removing organs was within the mandate of the Ad Hoc Committee, any subsequent trafficking in such organs or tissues might not be. Another delegation noted that dealing with organ trafficking as such might make it necessary to develop additional measures, since the other provisions of the draft protocol dealt with trafficking in persons and not organs. See also, Exploitation Issue Paper (n 424) 36.

655 Exploitation Issue Paper (n 424) 37 citing OSCE Organ Removal Report (n 651).

656 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 347. See also, Exploitation Issue Paper (n 424) 36-37: '[t]his raises several questions, not least of which is whether the same rule would apply to adults (subject of course to their valid consent) and if not, why not.'

657 UN.GIFT, 'Trafficking for Organ Trade' <http://www.ungift.org/knowledgehub/en/about/trafficking-for-organ-trade.html> accessed 17 November 2015 (Trafficking for Organ Trade): The vulnerable categories of persons mentioned include migrants, especially migrant workers, homeless persons, illiterate persons, etc. It is known that trafficking for organ trade could occur with persons of any age.

The UNODC articulates that '"organ removal" as an end purpose of trafficking can occur for reasons of culture and religious ritual, as well as for the commercial trade in organs for transplantation.'[658] As opposed to the other enumerated forms of exploitation in the Palermo Protocol, the Exploitation Issue Paper notes,

> it is only 'removal of organs' that does not necessarily constitute an inherent wrong – or indeed a crime in its own right in national law. In other words, unlike sexual exploitation, forced labour or services, slavery, practices similar to slavery and servitude, which are 'wrong' irrespective of whether or not they take place in the context of trafficking, the removal of organs may be lawful or unlawful depending on the purpose and circumstances of that removal.[659]

Another difference organ removal has from the other enumerated forms of exploitation is that both the UNODC and CoE contemplate and include the removal of organs from living as well as deceased persons in their concept of exploitation within the offense of trafficking.[660] Whether the dead can be exploited is more often a philosophical topic, but also an unsettled issue within ICL.[661] This subject was not discussed in the drafting process of any of the forms of exploitation. However, the documentation of organs being taken from the deceased by the Organization for Security and Co-operation in Europe (OSCE) has identified it as trafficking:

> there are reports which involve deceased donors. This has been the case in some South American and Asian countries, where organs from deceased donors have been provided on a commercial basis for foreigners requiring transplants, including kidneys, livers and hearts. There is a well-known example of an Asian country where organs from executed prisoners have allegedly been used for the majority of the transplants performed in the country. Doubts concerning the validity of consent obtained from the executed prisoners, as a vulnerable group, and the fact that organs were mainly allocated to foreigners might lead this practice to be regarded as a particular form of trafficking in organs.[662]

658 Exploitation Issue Paper (n 424) 37-38.

659 ibid 37.

660 A A Aronowitz and E Isitman, 'Trafficking of Human Beings for the Purpose of Organ Removal: Are (International) Legal Instruments Effective Measures to Eradicate the Practice?' 1 Groningen Journal of International Law 74, 75. See also, UNODC Toolkit (n 356); CoE, Convention against Trafficking in Human Organs (adopted 9 July 2014) CM (2013)79 add, Art 4 (CoE Trafficking in Organs Convention). See also, CoE, Convention against Trafficking in Human Organs Explanatory Report (2014) <https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2013)79&Language=lanEnglish&Ver=addfinal&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> accessed 17 November 2015 [31]. See also, Scarpa, 'Issue of Consent' (n 312) 160.

661 See generally, B Brooks-Gordon *et al* (eds), *Death Rites and Rights* (Hart Publishing 2007). For more on International Criminal Law and its treatment of issues pertaining to the abuse (and often 'exploitation') of corpses in the context of trafficking, see also C Fournet and N Siller, '"We Demand Dignity for the Victims" – Reflections on the Legal Qualification of the Indecent Disposal of Corpses (2015) 15 International Criminal Law Review 896, 917-924.

662 OSCE Organ Removal Report (n 651) 59: The OSCE noted additional reports about the finding of corpses lacking certain pieces of anatomy citing, V Chaudury, 'Argentina uncovers patients killed for organs' (1992) 34 British Medical Journal 1073-1074.

The lack of guidance provided has led to a widespread misunderstanding among the legal and scientific communities with respect to the phrase, 'the removal of organs' in the Palermo Protocol.[663] Kelly explains that the current inability to initiate a global solution for organ trafficking is rooted in 'confusion over the scope of the problem itself.'[664] Framing the issue of organ trafficking has primarily developed over the last decade through field research which concludes trafficking 'for the purpose of organ removal' is only a subsection of the organ, tissue and cell trade.[665] Additionally, there is a 'general consensus on the point that trafficking in persons for the purpose of organ removal is technically and legally distinct from 'trafficking' in organs cells and tissues.'[666]

The UN has identified common targets of organ trafficking which include kidneys and livers, and explained that 'any organ which can be removed and used, could be the subject of such illegal trade'.[667] However, the inclusion of terms in addition to 'organ' within the trafficking framework was attempted without success:

> At the ninth session of the Ad Hoc Committee, several of the delegations that supported listing forms of 'exploitation' requested that such a list should include the removal of or trafficking in human organs, tissues or body parts and it was decided to include such a reference for purposes of further discussion. The wording was proposed by the Chairperson. Also proposed were the words 'illicit removal of organs', 'transfer of organs of persons for

663 CoE/UN Joint Study (n 376) 7-8. See generally, RKL Panjabi, 'The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century' (2010) 28 Pace Environmental Law Review 1.

664 Kelly (n 651) 1318: However, Kelly appears to restrict the scope of human trafficking for the purpose of organ removal which she describes as involving 'the coercive transport of an individual and subsequent organ removal', discriminately embracing some of the acts and means as opposed to all of the available options enumerated in the Palermo Protocol. The World Health Organization has focused on the issue of organ trafficking since the early 1990s using its own definition of 'organ trafficking' as: The recruitment, transport, transfer, harboring or receipt of living or deceased persons or their cells, tissues or organs, 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 to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of cells, tissues and organs for transplantation. World Health Organization, 'Global Glossary of Terms and Definitions on Donation and Transplantation'(Geneva 2009) <http://www.who.int/transplantation/activities/GlobalGlossaryonDonationTransplantation.pdf?ua=1> accessed 17 November 2015, 12. Clearly, this definition includes several additions to the Palermo Protocol's concept which may be of legal significance as well as a source of confusion in determining the elements of this crime. First, it makes reference to the acquirement of human materials from living as well as deceased persons. Secondly, the definition of trafficking includes cells, tissues and organs. Finally, it includes that the removal of organs is for the purpose of transplantation.

665 CoE/UN Joint Study (n 376) 7.

666 Gallagher, *The International Law of Human Trafficking* (n 298) 40; Francis and Francis (n 651) 285; Exploitation Issue Paper (n 424) 37. While the WHO expands trafficking to include cells and tissues in addition to organs, it may be prudent to first further clarify what an organ is. Although undefined in the Palermo Protocol, general usage defines 'organ' as a 'part of an organism which is typically self-contained and has a specific vital function' 'organ', *Oxford Dictionaries* (OUP 2015) <http://www.oxforddictionaries.com/definition/english/organ> accessed 17 November 2015. See also CoE Trafficking Convention (n 309) Art 2(2): In the context of combatting and preventing trafficking in human organs, the CoE Trafficking in Organs Convention which defines 'human organ' as: a differentiated part of the human body, formed by different tissues, that maintains its structure, vascularisation and capacity to develop physiological functions with a significant level of autonomy. A part of an organ is also considered to be an organ if its function is to be used for the same purpose as the entire organ in the human body, maintaining the requirements of structure and vascularisation. Note that the WHO uses this definition as well.

667 Trafficking for Organ Trade (n 657).

> profit' and 'trafficking in organs' and expanding the wording to include 'other body parts'. One delegation noted that, while trafficking in persons for the purpose of removing organs was within the mandate of the Ad Hoc Committee, any subsequent trafficking in such organs or tissues might not be. Another delegation noted that dealing with organ trafficking as such might make it necessary to develop additional measures, since the other provisions of the draft protocol dealt with trafficking in persons and not organs.[668]

Although these additional terms were decidedly left out of the Palermo Protocol's definition, Article 3's non-exhaustive nature of exploitative purposes may still conceivably enable a trafficking case involving tissues, cells, or 'other body parts'.

To briefly conclude on the purpose element of trafficking, it is clear that a definition of 'exploitation' has not yet emerged in international law. A review of the Palermo Protocol's enumerated forms of exploitation permits some measure of clarity. All of the identified forms of exploitation have been interpreted, or even possess an articulated definition under international law. These international definitions comport with the common definition of 'exploitation' which is understood as a practice by which someone is treated in such a way that would at the very least be considered as taking unfair advantage of another or subjecting another to unfair treatment. The Palermo Protocol's enumerated forms of exploitation can clearly be considered more severe than subjection to 'unfair treatment'. There is also an aspect of harm. Whether a 'severity bright line' exists to be included as a form of exploitation within the Palermo Protocol and where it is located to satisfy this element under trafficking law is unclear. However, a review of the preparatory works does clarify that the personal gain of another is not a requirement. A review of the international definitions for the listed forms of exploitation confirms this. For example, the various forms of 'servile marriage' do not require gain, but rather, the commodification of a person.

While trafficking's final element requires an understanding of the concept of 'exploitation', its primary function serves as the mental component of the offense which will be addressed in the following subsection.

3.3.6.3 Reflections on Intent for the *Mens Rea* Element

The final element of trafficking requires that the commission of the first two elements be 'for the purpose of exploitation.'[669] There are two main considerations worth discussing regarding this element of the offense. First, the construction of the purpose element signifies its *mens rea* component as requiring an ulterior intention. Second, the level of intent required to satisfy the offense.

Regarding the first consideration, characterizations of this element have often portrayed it as requiring exploitation *per se*, or that trafficking is in itself exploitation. However, a plain reading of Article 3 and the preparatory works confirm that the first two elements of trafficking must only occur *for the purpose of* exploitation (third element) delineating this offense from *ipso facto*

668 CTNOC and its Protocols' *Travaux Préparatoires* (n 360) 344, note 28.

669 Palermo Protocol (n 305) Art 3.

exploitation.[670] The classification of this element as a *dolus specialis* offense is commonly agreed upon by the international community. Specifically, the UNODC explains that:

> The 'purpose of exploitation' is a *dolus specialis* mental element: *Dolus specialis* can be defined as the purpose aimed at by the perpetrator when committing the material acts of the offence. It is the purpose that matters, not the practical result attained by the perpetrator. Thus, the fulfilment of the *dolus specialis* element does not require that the aim be actually achieved. In other words, the 'acts' and 'means' of the perpetrator must *aim* to exploit the victim. It is not therefore necessary that the perpetrator actually exploits the victim.[671]

As Obokata explains, exploitation is not required because the final 'element relates to the *mens rea*, and ulterior intention in particular, rather than the *actus reus*.'[672] As such, Allain describes human trafficking as 'the international supply chain into exploitation' as opposed to a type of exploitation.[673]

The second consideration is determining the level of intent needed to satisfy the offense. The Palermo Protocol does not explicitly identify the *mens rea* intent level associated with the crime of trafficking in persons. An examination of the relevant portions of the Palermo Protocol, its parent instrument – the CTNOC, their preparatory works and UNODC manuals and guides that address this *mens rea* element provide little to no guidance. On the issue of intent, the Exploitation Issue Paper explained that:

> The final element, 'for the purpose of' will typically provide the basis for identifying the mens rea aspect of the offence. Trafficking will occur if the implicated individual or entity intended that the action (which in the case of trafficking in adults must have occurred or been made possible through one of the stipulated means) would lead to exploitation.[674]

It is rather logical that 'for the purpose of' would correspond to an intentional fault level by virtue of a plain reading of this phrase. Therefore, criminal culpability only attaches if it was the trafficker's aim to exploit when s/he committed the act and means elements.

670 Emphasis added. This position is also held by the UNODC. See, UNODC Legislative Guide (n 357) 269 [33]; UNODC Module 1 (n 356) 6. On this critique, see JA Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 The American Journal of International Law 609, 609-611. Chuang argues that defining trafficking's 'legal parameters' has shifted such that 'all forced labor is recast as trafficking' and 'all trafficking is labeled as slavery' – a phenomena Chuang refers to as 'exploitation creep'. The validity of this observation in the context of international law will be addressed in chapter 4.

671 UNODC Module 1 (n 356) 5, note 1. See also, Exploitation Issue Paper (n 424) 24: '[t]he final element, "for the purpose of" will typically provide the basis for identifying the mens rea aspect of the offence. Trafficking will occur if the implicated individual or entity intended that the action (which in the case of trafficking in adults must have occurred or been made possible through one of the stipulated means) would lead to exploitation. Trafficking is thereby a crime of specific or special intent. There is no requirement for exploitation to have occurred: the crime of trafficking is made out under the Protocol once the relevant elements of act and purpose (or, in the case of children, act only) are made out along with an intention to exploit.'

672 Obokata, 'Human Trafficking' (n 358) 174.

673 Allain, *Of Human Exploitation and Trafficking* (n 303) 355.

674 Exploitation Issue Paper (n 424) 24

In situations where the traffic is committed by several parties, responsible for different stages of the trafficking process, Gallagher states that the

> intention to exploit can be held by any of the individuals or entities involved in any of the acts stipulated in the definition… Accordingly, the requisite intention to exploit could be just as easily held by a final exploiter (brothel owner, factory manager, etc.) as by a recruiter or broker. In fact, such intent should be easier to establish the closer the suspected trafficker is to the situation of exploitation. It may be difficult, for example, to establish the necessary *mens rea* with respect to a recruiter or transporter who may, quite reasonably, deny any knowledge of the final end purpose (citations omitted).[675]

Gallagher is certainly right that proof issues will arise concerning the issue of intent. But it is important to clarify that each person accused of trafficking before a court of law must possess the requisite intent regardless of their spot on the trafficking chain. Whether that level of intent is limited to *dolus directus* of the first degree ('concrete intent' or purpose) or also includes *dolus directus* of the second degree (awareness of an inevitable outcome) is yet to be seen. It would seem however, that permitting any lower level of intent such as *dolus eventualis* would run contrary to the plain language of 'for the purpose of' as codified in the Palermo Protocol.

3.4 Concluding Remarks and Segue Way into Part II of the Research Project

The objective of Chapter 3 was the dissection of the current international definition of 'trafficking in persons' in hopes of creating a common understanding of this crime to be used under international law, and even perhaps, within domestic criminal justice systems. Effectuating this objective was attempted though an understanding of the Palermo Protocol's relationship to the CTNOC, and in defining and delineating each term within each of trafficking's three elements.

As evidenced throughout the Chapter, a universal list of definitions for these terms in the context of trafficking has yet to manifest. Nevertheless, identifying and associating meaning to each of these terms was for the most part, an achievable task. As far as the 'act' element is concerned, definitions for the majority of terms were locatable, commonly used and distinguishable from one another.

The terms contained in the 'means' element were not as distinct. It remains to be seen if this muddled list will have any adverse consequences in international practice – whether in procedural law (eg, issues of pleading and specificity) or in the context of substantive legal interpretation (eg, definitions and elements). As noted in the Commentary, '[l]egal systems which require great specificity in formulating criminal charges may experience some difficulty with a serious risk of duplicity (the formulation of a charge which suggests two or more bases for the allegation).'[676] As several of these 'means' are not separately contained concepts due to the non-mutually exclusive and linguistic nature of those enumerated 'means', one could argue this lack of precision unfairly prejudices the defendant. However, that claim may not hold much weight considering that the objective of the 'means' element, regardless of its specific manifestation or terminological reference, is quite clear: the distortion of one's free will.[677]

675 Gallagher, *The International Law of Human Trafficking* (n 298) 34.

676 McClean, *Commentary* (n 302) 323.

677 See also, Wijers, 'Analysis of the Definition' (n 365) 22.

In terms of the final element, a consensus could not be reached on defining 'exploitation' under international law, even though doing so would likely bring greater transparency to the crime of trafficking. A common understanding of 'exploitation', understood as a practice by which someone takes an 'unfair advantage' with an aspect of harm could be considered as a starting point in fashioning an internationally recognized definition of this concept under international law. Despite this definitional lacuna, each of the identified forms of exploitation could be described. Moreover, the element's *mens rea* character was also discussed to bring greater clarity to this offense.

Accordingly, Part I of this research has addressed the whole of international laws addressing human trafficking. Considering that this research demonstrates that each element of the trafficking offense can be understood, the author hopes that this work can be used as a source of information for those working in this area of the law. Whether that be in legal practice or scholarship, the author's aim was to provide a collective work which clarifies trafficking terms so that the alleged 'definitional confusion' attributed to the Palermo Protocol's codification disappears.

With the Palermo Protocol's construct of 'trafficking in persons' clarified in law, Part II shifts focus to trafficking's operability within international criminal justice mechanisms. The second research question resolves to determine whether the crime against humanity of enslavement has incorporated the crime of trafficking within its construct.

To answer this question, Part II of this research is divided into three Chapters. Chapter 4 will address the international definition of enslavement and its relationship to other associated legal concepts and offenses under international law. Afterwards, Chapter 5 will turn to examine the Rome Statute of the International Criminal Court and whether its criminalization of enslavement allows for the prosecution of traffickers. Finally, Chapter 6 will examine international criminal jurisprudence on the matter.

Part II:
Determining Trafficking's Incorporation within Enslavement as a Crime Against Humanity

4 Defining Slavery, Slave Trade, Enslavement and Sexual Slavery

4.1 Introduction

With a clearer idea of what constitutes trafficking under international law, Part II of this research project aims to determine whether traffickers can be prosecuted before international criminal courts and tribunals under the charge of enslavement as a crime against humanity. It would therefore seem logical to begin Part II with an examination of the law of enslavement. International law, however, is not so straightforward.

Enslavement as a crime against humanity has been defined in similar fashion to the international legal definition of 'slavery', as codified in the 1926 Slavery Convention. As such, an examination of the concept of slavery is an essential precursor before turning to the law of enslavement. As sexual slavery has been held to be a specific form of enslavement, this crime's definition must also be examined.

In addition to slavery, the Slavery Convention also defines the concept of 'slave trade'. Considering that the slave trade's codification shares the same instrument as slavery's codification (which forms the basis of enslavement's definition) as well as the fact that the definition of 'slave trade' resembles the Palermo Protocol's codification of trafficking in persons, this internationally codified concept will also be examined.

It should also be mentioned that Chapter 4's examination of enslavement is incomplete. The Rome Statute of the International Criminal Court (ICC) criminalizes enslavement as a crime against humanity and defines this crime within its statute. I will only briefly mention this codification in Chapter 4. Due to the particularity of the Rome Statute's codification of 'enslavement' which references trafficking in persons, I believe its examination merits a separate chapter.

This chapter will first identify and define the concepts under study (slavery, slave trade, enslavement and sexual slavery) as found codified under international law. Afterwards, this chapter will compare those legal compositions against each other and the Palermo Protocol's construct of 'trafficking in persons' as discussed in Chapter 3.

Upon examination of these concepts, it seems that international law permits the discernibility of some of these practices from each other, while for others, the law is more ambiguous. Specifically, trafficking and the slave trade can be understood as concepts addressing mechanisms used to deliver a person into a state of slavery or exploitation. The emphasis is therefore on the *process* of acquiring another and/or safeguarding them for exploitative purposes. Slavery's codification, however, is concerned with determining one's *condition of subjugation*.

As for enslavement and sexual slavery, the law appears imprecise. Enslavement's definition was inspired by the Slavery Convention's definition of 'slavery', but enslavement's interpretation has been broader than its espoused definitional construct. This broadening is evidenced in two ways. First, the law of enslavement has been characterized as an umbrella offense, encompassing other exploitative practices than slavery. Among others, these include the Supplementary Slavery Convention's 'practices similar to slavery' of servile marriage, debt bondage, serfdom and child exploitation. Secondly, the crime against humanity of enslavement has also been interpreted to encompass not only the *subjection of one into exploitation* through the exercise of powers attaching to the right of ownership but also the *process* of acquiring one for exploitative purposes.

This interpretation of enslavement thereby blurs the legal boundaries between enslavement and other crimes and concepts that center on victim acquisition, like trafficking in persons and slave trading. As for the crime of sexual slavery, it has been characterized as a more specific form of enslavement, with the additional requirement of causing the victim to engage in acts of a sexual nature. Like enslavement, the crime of sexual slavery faces the same broadening consequences.

4.2 Slavery

While slavery was condemned as a practice against natural law for centuries, any global instrumental international effort to define the concept did not materialize until 1926 with the Slavery Convention.[678] As briefly mentioned in Chapter 3, this instrument finally codified a legal definition of the term 'slavery' and called on states to take the 'necessary steps' to 'bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.'[679] Nevertheless, the Slavery Convention only specifically defines the concepts of 'slavery' and the 'slave trade'. Under its Article 1(1), 'slavery' is defined as:

> the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[680]

The Slavery Convention's primary contribution is the codification of an international definition of 'slavery'. While the Slavery Convention defines this concept, it does not however criminalize the practice or commit states to impose any actionable consequences for those engaged in slavery. In fact, the term 'slavery' is not specifically used in any international legal instrument criminalizing this practice. Instead, as codified under international law, freedom from 'slavery' has been used to identify a human right. Other than under human rights law, the concept of 'slavery' is used to describe the condition or status of a person, not a criminal offense. This is not to say that engaging in slavery (eg, *exercising* 'powers') is legal, but rather the actual exercise of powers (in the context of ICL) has been termed 'enslavement' or 'sexual slavery', which will be discussed later on in this chapter.[681]

The Slavery Convention's universally accepted definition of 'slavery' outlines this concept's legal confines. This definition states that slavery can be a 'status' or 'condition' which exhibits the modern application of this definition in an era which has completely prohibited the legal classification of people as property (slavery as a 'status') by way of domestic criminalization of the practice, but is nevertheless faced with the commodification of persons (slavery as a 'condition')

678 J Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, (Vol. 1, Martinus Nijhoff Publishers 2008) 31. This is not to discount, however, the significant bilateral efforts and judicial institutions erected in the nineteenth century to combat slave trading which will be discussed below in subsection 4.3.

679 Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Art 2 (Slavery Convention).

680 ibid Art 1(1).

681 'Slavery' has nevertheless been recognized 'as a violation of the laws or customs of war'. See eg, *Prosecutor v Krnojelac* (Judgment) IT-97-25-T, T Ch (15 March 2002) [10] (*Krnojelac* TJ).

around the globe.[682]

Even though it is recognized as the universal definition, identifying the legal parameters of what constitutes 'slavery' as defined in the Slavery Convention has been plagued by criticism, ambiguity and efforts leading to its legal dilution.[683] An examination of this definition boils down to one issue: the identification and contextualization of 'powers attaching to the right of ownership'.

However, specific 'powers attaching to the right of ownership' ('powers') are not identified in the Slavery Convention. The following subsections will therefore attempt to clarify the concept of 'powers' through an examination of other relevant sources of law. The most fruitful sources in this examination include: legal developments pertaining to framing and understanding the concept of slavery before its 1926 codification, the Slavery Convention's preparatory works, interpretative guidance concerning the Slavery Convention from relevant UN committees tasked with investigating this concept and slavery scholars who have scrutinized this concept at length.

Extra time and attention is spent identifying and understanding the concept of 'powers' because it is not only used in defining 'slavery', but as will be seen in later subsections of this chapter as well as in the following two Chapters, 'powers attaching to the right of ownership' is a concept used in other international instruments and by international judicial institutions to define the crimes of enslavement and sexual slavery.

4.2.1 Prior to an International Definition: Identifying Slavery in Law through the Master-Slave Relationship and Notions of Property and Ownership

The earliest recorded slavery laws can be traced back to the Roman Empire.[684] The concept of slavery was fundamental to the application of law which codified that '[a]ll men are either free or slave'.[685] Since a slave was characterized as a possession, Roman law addressed issues involving slaves under the realm of property law.[686] The term 'slavery' was not defined, but rather described

682 This is not to say that all judicial institutions refuse to recognize the legal impossibility to own another human being. See for example, *Hadijatou Mani Koraou v. The Republic of Niger*, ECW/CCJ/JUD/06/08, 27 October 2008. See also, J Allain, 'The Definition of 'Slavery' in General International Law and in Crime of Enslavement within the Rome Statute' (26 April 2007) Guest Lecture Series of the Office of the Prosecutor, 9 <http://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf> accessed 26 October 2015.

683 J Allain and R Hickey, 'Property and the Definition of Slavery' (2012) 61 International and Comparative Law Quarterly 915, 916-918. See also, S Miers 'Contemporary Forms of Slavery' (1996) 13(3) Slavery and Abolitions 238; PV Sellers, 'Wartime Female Slavery: Enslavement?' (2011) 44 Cornell International Law Journal 115, 124.

684 WW Buckland, *The Roman law of slavery: The condition of the Slave in private law from Augustus to Justinian* (3rd edn, The Lawbook Exchange Ltd, 2007); A Honoré, 'The Nature of Slavery' in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 9 (Honoré Chapter).

685 RH Helmholz, 'The Law of Slavery and the European *Ius Commune*' in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 19 (Helmholz Chapter) citing *Institutiones Justinani*, Lib. 1, tit. 3, lex 1. See also, Allain, *Of Human Exploitation and Trafficking* (n_) 13.

686 A Watson, *Roman Slave Law* (John Hopkins University 1987); JW Cairns, 'The Definition of Slavery in Eighteenth-Century Thinking' in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 83 (Cairns Chapter). See also, Honoré Chapter (n 684) 12: Although pieces of property, Roman law nevertheless recognized slaves as people. As such, 'Roman law, then, made the effort to deal with the paradox that, legally speaking, these items were of property were human beings who, like free people took part in ordinary life. They had families and friends. They could be doctors, actors, teachers, bookkeepers, bankers, agents, farmers, actuaries, philosophers. But they did not have the legal standing of free people: the capacity to have rights in law'.

in piecemeal by the rights enjoyed by a slave's master (what are now often called 'powers').[687] On this point Honoré writes:

> A slave's status combined subjection with disability. As regards subjection, he or she was subject to the slave owner's orders. A slave could be sold, given as a gift, left by the owner's last will surrendered for a wrong committed by the slave, mortgaged or pledged for the owner's debts. Slaves did not control their own way of life. They were items of property (*res*) in the legal sense.[688]

Likewise, Cairns explains that under Roman law, slave owners were permitted several capacities (eg, 'powers') in regards to their slave, including: the ability to sell, complete claim to anything acquired by the slave, to kill, to take the children birthed from an owned slave, give in 'noxal surrender' and right to free.[689]

Along with Canon law, the *ius commune* 'furnished the principle means of defining slavery', during the Middle Ages.[690] Considering the range of 'limitations on freedom' observed, the struggle in explicitly defining this practice persisted.[691] For example, medieval jurists recognized 'that the distinction between slave and free was not an absolute one'[692] such 'that gradations of freedom could exist in law as well as in fact.'[693] These observations included practices the Supplementary Slavery Convention identifies as 'serfdom' and 'debt-bondage'.[694] The inability or unwillingness to define 'slavery' therefore led medieval jurists to approach 'the consequent work of the definition indirectly.'[695] As such, instead of first determining what rights were or were not associated by virtue of a person's status (eg, slave) – which would require that status be defined in law, they focused on the particular legal issue at hand.[696] For example, who to punish (slave or master) in the slave's commission of criminal acts,[697] whether a slave could be called as a witness in court,[698]

687 Cairns Chapter (n 686) 62, 66.

688 Honoré Chapter (n 684) 12.

689 Cairns Chapter (n 686) 66.

690 Helmholz Chapter (n 685) 17.

691 ibid 21-23.

692 ibid 38.

693 ibid 23.

694 ibid 22-23: 'For example, there were men known as *dediticii*: citizens of a vanquished foreign states who has surrendered to the might of Rome. According to the medieval *glossa ordina*, they 'lived as slaves but died as free men. In addition, the term *mancipa* was often used as a synonym for slaves in the texts, although sometimes it was also used for free persons. Then there was the large class of *coloni*, *originarii*, or *adscripticii*, men and women who were technically free but were "bound to the soil" and its cultivation…Men and women classed as *nativi* or *villani* or *rustici* seem also to have been similarly obligated to service and to the soil. The *famulus* seemingly held a roughly similar status, except that his service usually occurred within the master's household; famuli were not ordinarily tired to the land. The *operarius* appears to have been similar, except perhaps in the of obligatory service. European vernaculars knew a similar multiplication of terms denoting semi-free status' (citations omitted). On the legal definitions of 'serfdom' and 'debt bondage', see Chapter 3, subsections 3.3.6.2.6 – 3.3.6.2.7.

695 Helmholz Chapter (n 685) 38.

696 ibid 38.

697 ibid 24-25.

698 ibid 26-29.

whether slaves could wed and/or divorce,[699] whether slaves could be victims of crimes[700] and what, if any economic relationship could exist between a master and his or her slave.[701]

Describing the master-slave relationship and facilities enjoyed by the slave owner as portrayed under Roman law continued to appear long after the height of the Roman Empire.[702] As Cairns explains,

> Roman law defined slavery by reference to ownership and in opposition to freedom; while the extent and nature of the rights over and legal disabilities of the slave that followed were never tightly defined, they may be listed. In the eighteenth and nineteenth centuries, the list of incidents and attributions of ownership of human beings remained substantially the same.[703]

For example, in legal teachings from the 1770s, the slave condition was identified by an array of factors (or 'powers') which included: an incapacity to own property, the master's retention of an arbitrary power over the slave, the master's control over the liberty of their slaves, a master's retention over the labor and fruits of their slave's labor, the master's ability to transfer their slave to another master and that any freedom of the slave was at the sole discretion of the master.[704]

It was not until the 1800s, however, that the earliest codified prohibition on slavery (in the context of armed conflicts), appeared in the Instructions for the Government of Armies of the United States in the Field (Lieber Code) in response to the American Civil War (1861-1865).[705] Drafted by legal scholar Francis Lieber in 1863, the Lieber Code signifies the first attempt to 'codify the laws of war'.[706] In reference to slavery, Article 42 states:

> Slavery, complicating and confounding the ideas of property, (that is of a thing,) and of personality, (that is of humanity,) exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that 'so far as the law of nature is concerned, all men are equal.' Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.[707]

699 ibid 29-31.

700 ibid 32-34.

701 ibid 34-37.

702 Cairns Chapter (n 686) 62-65.

703 ibid 66.

704 ibid 63- 64.

705 J Henckaerts and L Doswald-Beck, International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, *Volume I: Rules* (3rd edn, CUP 2009) 327.

706 D Schindler and J Toman, *The Laws of Armed Conflicts* (Martinus Nihjoff Publisher 1988) 3-23.

707 General Orders No. 100: The Lieber Code Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863. Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, (Government Printing Office 1898) <http://avalon.law.yale.edu/19th_century/lieber.asp#art23> accessed 12 December 2015.

Article 42 thereby recognizes the role that Roman law concepts (pertaining to property) continued to play in conceptualizing slavery as the reduction of a person to 'a thing' well into the nineteenth century.

A continued reliance on property law concepts in understanding slavery was widespread in legal practice. As Hickey explains, the 'distinction between the legal relation ownership and the various powers which it might entail' was a generally utilized concept in legal practice as early as the 1880s.[708] It was not until the work of the League of Nation's Temporary Slave Commission in the 1920s however that an international instrument containing an actual definition of 'slavery' came to fruition.[709]

4.2.2 The Slavery Convention and Enumerating 'Powers Attaching to the Right of Ownership'[710]

Considering this history, it should come as no surprise that drafting discussions concerning an international convention on slavery also described 'slavery' using a property paradigm. For example, a reply to the League of Nations by the Union of South Africa during the Slavery Convention's drafting process reasoned that the 'test' in determining slavery is as follows:

> a person is a slave if any other person can, by law or enforceable custom, claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to render his labour or to control the fruits thereof or the consideration therefrom is taken from him. The term also seems to imply a permanent status or condition of a person whose natural freedom is so taken away, for from the proprietary interest of the other person in the person to whom that status attaches is implied a right of disposal by sale, gift or exchange.[711]

In a similar vein, the Sixth Committee of the Assembly of the League of Nations interpreted the concept of slavery as 'the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things.'[712] The finalized definition of slavery embraced notions of property by way of evidencing the exercise of ownership attributes. As previously mentioned, the Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[713] The Slavery Convention does not, however, elaborate further on the substance of these 'powers'.

---

708 R Hickey, 'Seeking to Understand the Definition of Slavery' in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 224 (Hickey Chapter).

709 Allain, 'Of Human Exploitation' (n 685) 112. It must also be noted, however, that several international instruments also came into force concerning the prohibition of slavery and more specifically slave trading, without however defining the concept. The instruments addressing slave trade will be discussed in subsection 4.3.

710 Unlike the formative international anti-trafficking instruments, a legal examination of the Slavery Convention and its preparatory works have already been heavily scrutinized and commented on. See for example, J Allain, *The Slavery Conventions* (n 678); J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

711 Allain, *The Slavery Conventions*, (n 678) 55-56, note 13.

712 ibid 9 citing LoN, Slavery Convention: Report Presented to the Assembly by the Sixth Committee, A.104.1926.VI, as found in League of Nations, Publications of the League of Nations, VI.B.Slavery.1926, VI.B.5. 24 September 1926, 1-2.

713 Slavery Convention (n 679) Art 1(1).

Since 1926, a plethora of international instruments have consistently identified the perceived criminality of placing someone in the condition of slavery or enslaving a person in various contexts (eg, peace, conflict) and circumstances including the status of the person in question (eg, prisoner of war or civilian).[714] For example, Additional Protocol II to the 1977 Geneva Conventions provides under its Article 4 (Fundamental guarantees) that prohibitions on 'slavery and the slave trade in all their forms' shall remain at all times.[715] However, this instrument refrained from defining these concepts or identifying what 'forms' it considers within the context of slavery and the slave trade.[716] In fact, no additional insight or interpretation pertaining to the material elements of the actual legal definition of slavery, as codified in the 1926 Slavery Convention can be found within these instruments. How then, can one be reduced to the condition of slavery as described in the Slavery Convention?

According to the Slavery Convention's codification, a legal determination of slavery must be based entirely on identifying one's exercise of 'powers attaching to the right of ownership' over another. It is therefore this component of slavery's definition which must be fully examined in order to accurately understand the substantive confines of this concept.

International efforts to enumerate specific 'powers attaching to the right of ownership' in the context of the Slavery Convention did not manifest until 1953 in the United Nations Secretary-General's report on slavery.[717] On this effort, Allain writes, '[f]or the Secretary-General, it could "reasonably be assumed that the basic concept" which the drafters of the definition "had in mind was that of the authority of the master over the slave in Roman law"'.[718] Again, the influence of Roman law on more contemporary codifications is noteworthy.

714 See, ICRC, 'Rule 94: Slavery and the slave trade in all their forms are prohibited' <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule94> accessed 10 May 2016: Under its review of customary international humanitarian law, the ICRC notes that while 'not actually spelled out in the Hague and Geneva Conventions, nor in Additional Protocol I, it is clear that enslaving persons is an international armed conflict is prohibited.' For a comprehensive list and description of these prohibiting instruments, see Henckaerts and Doswald-Beck, *Volume I: Rules* (n 705) 327-330; J Henckaerts and L Doswald-Beck (eds), International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, *Volume II: Practice* (CUP 2005) 2262-2299: The only other international instruments which described this concept (referring to enslavement) is the Rome Statute and Elements of Crimes to the Rome Statute, to be addressed in Chapter 5. As discussed in Chapter 3, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force 30 April 1957) 226 UNTS 3 (Supplementary Slavery Convention) was created in order 'to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery' (Preamble). This convention formally enumerated and defined several 'institutions and practices similar to slavery' including: debt bondage, serfdom, servile marriage and child exploitation. The Supplementary Slavery Convention also reconfirmed the Slavery Convention's definition of 'slavery' (Art 7(a)). See also, A Gallagher, 'Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage' in LN Sadat and MP Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008) 397; VP Nanda and MC Bassiouni, 'Slavery and Slave Trade: Steps toward Eradication' (1972) 12(2) Santa Clara Lawyer 424.

715 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) Art 4(2)(f) (AP II).

716 ibid Art 5(1)(e) in the context of forced labor. See also, MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, Kluwer Law International 1999) 305-309.

717 The Secretary-General, *Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude*, UN Doc E/2357, 27 January 1953 (1953 Report).

718 Allain, *Of Human Exploitation and Trafficking* (n 685) 114.

The 1953 Report identified the following 'powers':

1. The individual may be made the object of a purchase;
2. The master may use the individual in his capacity to work, in an absolute manner without any restriction;
3. The products of labor of the individual become the property of the master without any compensation commensurate to the value of the labor;
4. The ownership of the individual can be transferred to another person;
5. The status/condition is permanent, that is to say, it cannot be terminated at the will of the individual subjected to it;
6. The status/condition is transmitted *ipso facto* to descendants of the individual having such status.[719]

Although preexisting, this list is virtually mirrored by property scholar Honoré's itemization of the characteristics that identify the 'position of an owner'.[720] Honoré's list includes: the right to use, the right to possess, the right to income, the right to manage, the right to the capital (including transmissibility), the right to security, the absence of term, prohibition of harmful use, liability to execution; residuary character, and rights, liberties, powers, and immunities attached to these incidents of ownership.[721]

Likewise, and as recently as 2012, a group of slavery scholars published their collective understanding of slavery and 'powers attaching to the right of ownership' in an effort to clarify the legal definition of slavery through the use of property law concepts.[722] Their principal conclusion: if no legal right to own an object exists (eg, slavery as a 'status', 'chattel slavery' or *de jure* slavery), the primary issue becomes one of possession and whom has the 'greatest interest' in the object (eg, determining *de facto* slavery).[723] This component is so fundamental to the product of their research, the Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, that they premise their understanding of slavery as 'control tantamount to possession'.[724] Possession is therefore not identified as a 'power', but rather 'to mean the maintenance of effective control'.[725]

Determining the existence of slavery according to the Bellagio-Harvard Guidelines is explained in Guideline 5 which states that 'it is necessary to examine the particular circumstances, asking whether "*powers attaching to the right of ownership*" are being exercised, so as to demonstrate control of a person tantamount to their possession.'[726] Consistent with the 1953 UN Report, Guideline 4 of the Bellagio-Harvard Guidelines identifies six 'powers', which include: buying, selling or transferring a

719 Hickey Chapter (n 708) citing the 1953 Report (n 717).

720 Hickey Chapter (n 708).

721 See, AM Honoré 'Ownership' in AG Guest, *Oxford Essays in Jurisprudence* (OUP 1961) 107.

722 2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) Appendix 1 (Bellagio-Harvard Guidelines). The legal value of this document has not yet been formally assessed. However, the group of legal scholars who drafted the Bellagio-Harvard Guidelines are arguably the 'most highly qualified publicists' in this field which, as codified in Article 38(d) of the Statuteo of the International Court of Justice, permits this source of law some measure of persuasive authority. Interestingly, the Global Slavery Index now uses these guidelines in their measurement of the phenomeon. See, Walk Free Foundation, Global Slavery Index (2016) 12 <http://assets.globalslaveryindex.org/downloads/Global+Slavery+Index+2016.pdf> accessed 20 July 2016.

723 J Allain, 'The Definition of Slavery in International Law' (2009) 52 Howard Law Journal 239.

724 Hickey Chapter (n 708) 239.

725 ibid 237.

726 Bellagio-Harvard Guidelines (n 722) 378. Emphasis in the original text.

person; using a person; managing the use of a person; profiting from the use of a person; transferring a person to an heir or successor; and, the disposal, mistreatment or neglect of a person.[727]

A review of this literature on 'powers attaching to the right of ownership' collectively reveals that five 'powers' distinguishably manifest. I count five (use, management of use, entitled to and profiting from the use, transferability of use and duration) as opposed to the six listed in the 1953 Report or the Bellagio Harvard Guidelines because I believe that the 'transferability of use' power also encompasses the notion that a person can be made the object of a purchase. The latter concept denotes a reduction to a commodity because of their transferability, so it is considered in my assessment to fall within the 'transferability of use' power.

The first 'power' focuses on the 'use' of a person and is central to establishing slavery. It has been described as referring 'to an owner's ability to enjoy personally the benefits of something.'[728] This power can 'include the derived benefit from the services or labour of that person'[729] as well as the ability to completely use a person until their demise. This usage can be exhibited through a slaver's control over one's agenda, living situation and conditions, physical and sexual autonomy, personal decisions and movement.

In addition to use, is the management of one's use. This second power 'refers to an owner's ability to make decisions about how a thing is to be used: to specify who should use it, when, and for what purposes.'[730] This power is therefore concerned with the ability to control and determine another's output and actions either directly or by 'delegating power' to another.[731] As Hickey explains, '[i]t also supposes and compromises the powers necessary to bring those objectives to fruition: for example, the power to make agreements or contracts that person X should use resource Y for a given purpose and a given time period.'[732] The management of one's use is therefore primarily concerned with a slaver's control over the type of work and/or the working conditions of their slave.

Relatedly, the third 'power' emphasizes the slaver's absolute entitlement to, and profiting from such use. Honoré characterizes this power as a '"surrogate of use", meaning that those benefits which an owner derives from the permitted exploitation of her thing by another might be seen as a reward or compensation for the owner forgoing her own personal use of the thing.'[733] As such, all profits belong to the master (slaver) and the slave (as an entity), may also be used as a form of payment.[734]

The fourth 'power' centers on the transferability of a slave's use. Regardless of any legal recognition, the capacity to transfer the slave as if he or she were a piece of property is at the heart of this power. It may manifest in a variety of ways, for example, buying/selling or the gift or receipt in terms of an inheritance,[735] or even allocation disguised as a dowry, adoption or via transfer of guardianship. Regardless of the form of transfer, 'in each case we very clearly see the owner's autonomy to make decisions altering the status quo as regards the general distribution of resources.'[736]

727 ibid 376-378.

728 Hickey Chapter (n 708) 227.

729 Bellagio-Harvard Guidelines (n 722) 377.

730 Hickey Chapter (n 708) 227.

731 Bellagio-Harvard Guidelines (n 722) 377.

732 Hickey Chapter (n 708) 227.

733 ibid.

734 Bellagio-Harvard Guidelines (n 722) 377: For example, the person is 'mortgaged, lent for profit, or used as collateral.'

735 Hickey Chapter (n 708) 228.

736 ibid.

The final 'power' can be described as the control over the 'duration' of this condition. While drafting the Slavery Convention, the concept of 'duration' was referenced and described as a '*permanent* status or condition of a person.'[737] It is permanent such that it 'cannot be terminated at the will of the individual subjected to it.'[738] As Hickey explains, 'one of the cardinal features of slavery is that, from the perspective of the slave, the control she experiences is indefinite.'[739] A comprehensive view of these 'powers' can be found on the following page in Table 4.1.

Table 4.1 Powers Attaching to the Right of Ownership

Power Attached to the Right of Ownership	Description	Examples
Use	The ability to wholly control another and 'may include the derived benefit from the services or labour of that person'[740] including the ability to completely use a person until their demise.	The ability to control: - Agenda - Living situation - Physical and Sexual autonomy - Personal decisions - Movement - Treatment (physical and psychological) - Life and death
Management of use	The ability to control another, determine their slave's output and actions either directly or by 'delegating power'[741] to another.	The ability to control: - Type of work - Working conditions
Entitled to and profiting from the use	Any profits earned by this person belong to the slaver. The slave may also be used as a method of payment	Any form of payment earned from labor or services performed which goes to the slaver Person is 'mortgaged, lent for profit, or used as collateral'[742]
Transferability of use	The capacity (regardless of legally recognition) to transfer a person as if s/he were a piece of property	Buying or selling - Give/receive as a gift/inheritance to successor - Barter/exchange - Lending of services or complete use
Duration	A permanent condition such that it 'cannot be terminated at the will of the individual subjected to it.'[743]	

737 Allain, *The Slavery Conventions* (n 678) 55, 58 citing the submission from South Africa. Emphasis in the original text.

738 1953 Report (n 717).

739 Hickey Chapter (n 708) 229.

740 Bellagio-Harvard Guidelines (n 722) 377.

741 ibid.

742 ibid.

743 1953 Report (n 717).

An examination of the identified 'powers' makes clear that while one can be exploited when 'powers' are exercised (eg, the power of 'use' encompasses the ability to subject one to forced labor), exploitation or even the intent to exploit another is not an element of slavery as defined in the Slavery Convention. Considering this, the inclusion of Bellagio-Harvard Guideline 2 is troubling. Entitled: 'The Exercise of the Powers Attaching to the Right of Ownership', Guideline 2 reads:

> In cases of slavery, the exercise of 'the powers attaching to the right of ownership' should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, *with the intent of exploitation* through the use, management, profit, transfer or disposal of that person. Usually this exercise *will be supported by and obtained through means such as violent force, deception and/or coercion*.[744]

This explanation adds an additional element to the exercise of 'powers': *the intent to exploit*. As just mentioned, this interpretation is not included in the Slavery Convention. I have also not found this interpretation in other sources of law interpreting the concept of 'powers' in Slavery Convention's definition of 'slavery'.

Yet, the notion that slavery is a form of exploitation or that slavers must have the intent to exploit their slaves is a commonly held belief. This is most likely due to the fact that many associate slavery with transatlantic or chattel slavery which was inherently exploitative. Additionally, and as far as I have seen, every case of slavery examined involves some aspect of exploitation.

However, this research confines itself to the *legal definition* of slavery as found under international law. The definition of 'slavery' does not require the intent to exploit, but describes slavery a status or condition of another whereby one exercises 'powers attaching to the right of ownership' over another. As explained in the 1953 Report as well as in Guideline 4 of the Bellagio-Harvard Guidelines, the exercise of 'powers' does not include the caveat that they be exercised with the intent to exploit. To read this element into the concept of 'powers' as conceived in the Slavery Convention is to stray needlessly from the original construct.

While the intent to exploit may exist in the vast majority of slavery conditions, it is not an aspect of the legally defined offense. Therefore, to consider the exercise of 'powers' as 'constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, *with the intent of exploitation*' is not necessarily incorrect. However, the 'intention to exploit' cannot be considered as an element of the concept of 'powers'. Addressing this imprecise description is therefore important. That being said, and as will be discussed in the following chapter, the inclusion of the *intent to exploit* may be reasonable when it comes to interpreting enslavement as a crime against humanity.

It should also be mentioned that because slavery (as defined in the Slavery Convention) cannot be considered to always be a form of exploitation, this conflicts with the Palermo Protocol's construct of trafficking. The definition of 'trafficking in persons' enumerates several forms of exploitation, slavery being one of them.

A review of Bellagio-Harvard Guideline 2 is also noteworthy considering it describes the manifestation of exercising 'powers' in a striking similarity to the Palermo Protocol's construct of 'trafficking in persons'. It will be recalled that the definition of trafficking requires perpetration of three elements: an 'act', a 'means' and a 'purpose'. The 'purpose' element requires that the 'act' and 'means' elements are perpetrated with the intent to exploit. Likewise, Guideline 2 explains that the

744 Bellagio-Harvard Guidelines (n 722) 376. Emphasis added.

exercise of powers is done with *the intent to exploit*. Furthermore, that intention, as explained in Guideline 2 can be demonstrated through the perpetration of identified 'means' which is also the case in assessing a case of human trafficking. Moreover, the specific 'means' identified in Guideline 2 are also included in the Palermo Protocol's definition of 'trafficking in persons'.

Guideline 2 essentially uses a portion of the Palermo Protocol's construct of trafficking in its explanation of how 'powers' may be exercised. It should be mentioned that Guideline 2's use of terminology also found in the definition of trafficking does not incorporate trafficking into the concept, but rather gives examples of how slavers may exercise 'powers'. That being said, there are some clear interpretational overlaps in Guideline 2 between slavery as a legal construct and trafficking in persons as a legal construct.

In sum, the use of a property paradigm to understand the slave-master relationship in law has been consistently employed for centuries up and until the present day, and designates a model by which to assess the existence of slavery as codified in the Slavery Convention. The law prescribes no precise formula or amount of exercised 'powers' required to satisfy this condition. Nevertheless, a qualitative case-by-case analysis of the exercise of 'powers' enumerated in Table 4.1 is required in order to make the legal determination that someone has reduced another to the condition of slavery.[745] As the Slavery Convention notes 'any or all' of the powers can be exercised, perhaps the exercise of only one power is enough.

The most recent interpretation of 'powers' in the Bellagio-Harvard Guidelines has characterized the legal understanding of slavery such that it shares some qualities with the international definition of trafficking in persons. A review the legal definition of 'slavery' and what is meant by 'powers' clarifies that their exercise is not *per se* exploitative. This conclusion is in line with identified powers in the 1953 Report and Bellagio-Harvard Guideline 4. However, contrary to Bellagio-Harvard Guideline 2, it cannot be concluded that the Slavery Convention's definition of 'slavery' requires that 'powers' be exercised with the intent to exploit.

4.3 Slave Trade

The Slavery Convention identifies another term worthy of attention. The term 'slave trade' is also defined in Article 1. This concept was separately defined in the Slavery Convention thereby distinguishing it from slavery. But before discussing its definition in the Slavery Convention, its worth reviewing the history of international law addressing slave trade.

A stark historical contrast exists between state action taken to address slavery versus the slave trade, due in large part to the creation of international law(s) on the matter. Whereas various international instruments discussed the evil of slavery– the vast majority of these documents refrained from committing or motivating states to act against the practice. States were however much more active and involved in legislating against the practice of slave trading. Because of that, it is worth first briefly reviewing some of the ways in which slave trading was addressed and combatted under international law before its codification in the Slavery Convention.

745 AT Gallagher, 'Human Rights and Human Trafficking: Quagmire Or Firm Ground? A Response to James Hathaway' (2009) 50 Virginia Journal of International Law 789. See also, Hickey Chapter (n 708) 237-238: He writes, 'whilst not requiring all of incidents…we might expect at least a few of them to be present before declaring the existence of ownership.'

While slavery focuses on the condition of a person (eg, slave), slave trading encompasses the actions/measures used to acquire, transmit and/or facilitate persons for their reduction into slavery. The Atlantic slave trade existed from 1519 to 1867.[746] Great Britain enacted the Slave Trade Act of 1807 which abolished slave trading domestically.[747] This domestic codification initiated a series of international consequences. First, the outlawing of slave trading under British law formed the basis for British Admiralty courts to condemn foreign slave trading ships in British waters during the Napoleonic War.[748] Secondly, the domestic codification motivated Great Britain to also effect change at the international level. At the Congress of Vienna in 1814, Great Britain proposed to internationally outlaw slave trading within three years' time.[749] In order to effectuate this agreement, it was further proposed by Great Britain that this instrument be supervised by an institution to ensure adherence, and that compliance measures permit a reciprocal right to visit the ships of States Parties on the high seas for inspection and confiscation of slave cargo.[750]

State attendees to the Congress of Vienna declared their collective desire to 'bring to an end a scourge which has for a long time desolated Africa, degraded Europe and afflicted humanity'.[751] However, instead of committing to action as Great Britain proposed, the delegates only agreed to consider:

> the universal Abolition of the Slave Trade as *a measure particularly worthy of their attention*, conformable to the spirit of the times, and to the generous principles of their august Sovereigns, they are animated with the sincere desire of concurring in the roost prompt and effectual execution of this measure, by all the means at their disposal; and of acting, in the employment of these means, with all the zeal and perseverance which is due to so great and noble a cause.[752]

Essentially, the end result was that states agreed that they should end slave trading and *would try* to do so through an international agreement at another, later point in time.[753]

After British attempts to create a universal treaty outlawing the slave trade failed, a series of bilateral treaties suppressing the slave trade at sea between Great Britain and thirty-one nations entered into force.[754] Great Britain's efforts to internationally outlaw slave trading intensified in 1817 (and lasting until 1871), with the negotiation of additional bilateral agreements (beginning with the Netherlands, Portugal and Spain) forming the basis to erect 'international courts for the

746 J Allain, 'The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade' (2007) 78(1) British Yearbook of International Law 342, 344.

747 An Act for the Abolition of the Slave Trade, 47 Geo III Sess. 1c 36. A full version of this law can be found at <http://www.pdavis.nl/Legis_06.htm> accessed 26 September 2016.

748 Allain, 'The Nineteenth Century Law of the Sea' (n 746) 349.

749 ibid 355.

750 ibid.

751 Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden) relative to the Universal Abolition of the Slave Trade (signed at Vienna, 8 February 1815) 63 CTS 473. See also, Allain, 'The Nineteenth Century Law of the Sea' (n 746) 355.

752 Universal Abolition of the Slave Trade (n 751).

753 ibid. See also, Allain, 'The Nineteenth Century Law of the Sea' (n 746) 355.

754 Allain, 'The Nineteenth Century Law of the Sea' (n 746) 357.

suppression of the slave trade.'[755] Sometimes called 'Mixed Courts of Justice' and other times, 'Mixed Commissions', these judicial institutions were comprised of judges from countries of States Parties to the bilateral treaties and decided cases brought before them via an application of international law.[756]

Each bilateral treaty was independent of one another and the agreements' scope of application varied. However, these treaties all permitted the policing and detainment of vessels by each other 'for having been engaged in an illicit Traffic of Slaves'.[757] Upon a finding (reached by a vote amongst the panel judges) that the ship engaged in the illicit traffic of slaves (used synonymously with the terms 'slave trade' or 'slave trading') by the commission, it was 'condemned'.[758] The consequence of this finding resulted in a public auction of the vessel.[759] Proceeds from the sale were split between the governments concerned, used to fund the slave trading commissions, and as prize money for those responsible for the ship's capture.[760] During this relatively short period of cooperation, these courts/commissions nevertheless 'heard more than 600 cases and freed almost 80,000 slaves found aboard illegal slave trading vessels. During their peak years of operation, the courts heard cases that are estimated to have involved as many as one out of every five or six ships involved in the transatlantic slave trade.'[761]

It was not until 1885 that The Declaration Relative to the Slave Trade, (drafted at the 1885 General Act of the Conference of Berlin) finally forbade slave trading in a multilateral instrument. However, this declaration was territorially based – an addition to a treaty primarily concerned with navigation issues on the Congo river.[762] Specifically, the declaration stated that:

> Seeing the trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves…Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.[763]

755 JS Martinez, 'Antislavery Courts and the Dawn of International Human Rights Law' (2008) 117 Yale Law Journal 550, 552, 576. See also, See also, Allain, 'The Nineteenth Century Law of the Sea' (n 746) 357-359.

756 Martinez, 'Antislavery Courts' (n 755) 577-578; Allain, 'The Nineteenth Century Law of the Sea' (n 746) 359.

757 Martinez, 'Antislavery Courts' (n 755) 577-578. In later years, several of these agreements were modified such that detainment and condemnation was also permitted based on 'evidence that slaves had been on board earlier in the voyage' and 'ships that were equipped for the slave trade but that had not yet boarded their human cargo' (588-589).

758 ibid 589-591.

759 ibid 591.

760 ibid.

761 ibid 553 (citations omitted). See also, Allain, 'The Nineteenth Century Law of the Sea' (n 746) 360.

762 Allain, 'The Nineteenth Century Law of the Sea' (n 746) 377-377.

763 Allain, 'The Nineteenth Century Law of the Sea' (n 746) 377-378 citing Art 9, General Act of the Conference of Berlin, relative to the Development of Trade and Civilization in Africa; the free navigation of the River Congo, Niger, etc.; the Suppression of the Slave Trade by Sea and Land; the occupation of Territory on the African Coast, etc. 26 February 1885, Sir E Hertslet, *The Map of Africa by Treaty* (Vol. 2 Routledge 1967) 474.

Considering the instrument's geographical limitations and a continued interest in addressing the abolition of the slave trading, Belgium hosted an international conference in 1890 to address slave trading. The General Act of Brussels Conference hosted seventeen nations 'to discuss the end of the slave trade by land and sea'.[764] This international meeting culminated with the Brussels Conference Act of 1890 which declared to 'put an end to Negro Slave Trade by land as well as by sea, and to improve the moral and material conditions of existence of the native races'.[765]

In spite of the fact that the parties to these various bilateral and multilateral instruments resolved to take action against the slave trade, the instruments themselves did not actually define the concept of 'illicit traffic of slaves' or 'slave trade'. Likewise, it does not appear that the commissions hearing these cases defined this concept either.[766] As in the instance of defining 'slavery', the internationally recognized definition of the 'slave trade' originates in the Slavery Convention. Defining Article 1(2) reads as follows:

> The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.[767]

Like slavery, the slave trade is also not specifically criminalized in the Slavery Convention. Rather, the Slavery Convention only defines this concept. It is worth mentioning however that Article 6 of the Slavery Convention does at least contemplate the domestic criminalization of slavery and slave trading. It reads:

> Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions.

While not codifying criminal offenses, the Slavery Convention implicitly acknowledges the criminality of perpetrating slavery or slave trade.

As far as its drafting history, there is little to report concerning the motivations or considerations of those involved in fashioning this definition.[768] Allain's meticulous review of the Slavery Convention's drafting history uncovered that 'the primary issue of concern was not the definition

764 Allain, 'The Nineteenth Century Law of the Sea'(n 746) 379. These states included: Austria, Belgium, Congo Free State, Denmark, France, Germany, Great Britain, Italy, The Netherlands, Persia, Portugal, Russia, Spain, Sweden and Norway, Turkey, the United States of America, and Zanzibar.

765 General Act for the Repression of African Slave Trade (adopted on 2 July 1890 by the Anti-Slavery Conference held in Brussels from 18 November 1899 to 2 July 1890) *reprinted* in the Official Records of the United Nations Conference on the Law of the Sea (Preparatory Documents) UN Doc A/CONF.13/7 (1958). In practice, these agreements relating with the ability for foreign ships to board others in peacetime, a hotly contested issue. See for example, *Muscat Dhows Case* (*France v Great Britain*) (1961) XI RIAA 83.

766 Instead, concerns expressed had more to do with identifying evidence of slave trading then interpreting its content.

767 Slavery Convention (n 679) Art 1(2).

768 Allain, *The Slavery Conventions* (n 678) 65.

in relation to either slavery or the slave trade, but the obligation which might flow from having to act upon the defined notions'.[769]

The definitional dichotomy between slavery and slave trade, as codified in the Slavery Convention, is rather apparent. Slavery primarily encompasses considerations of treatment or subjugation which evidences a person's classification as a 'slave'. Slave trade, however, concerns itself with the process of slave acquisition and the facilitation of slaves to others. There is some overlap in that the power attaching to the right of ownership concerning 'transfer of use' appears to encompasses several of the 'acts of disposal' referenced in the Slavery Convention's definition of the 'slave trade'. Specifically, the 'power' of transfer of use involves the capacity to transfer a person as if she or he were a piece of property. Examples of this 'power' include the buying or selling of a person. Likewise, 'acts of disposal' mentioned in the definition of slave trade also include the 'sale or exchange' of an acquired slave thus evidencing some substantive overlap between the concept. This substantive overlap is shared by the Palermo Protocol's definition of trafficking in persons which enumerates the act of 'transfer' which, as discussed in Chapter 3, refers to the conveyance of property and would encompass the buying or selling of another. Additionally, the construction of slave trade's definition looks like a more specific form of trafficking considering it also describes actions taken (eg, acquisition, capture and disposal) for with the intent to reduce that person to slavery.

As mentioned above, neither slavery, nor the slave trade were criminalized in the Slavery Convention. In turning now to international *criminal* law (ICL), the closest codified concept resembling slavery and perhaps even the slave trade is 'enslavement' which will be considered in the following subsection.

4.4 Enslavement

It is primarily 'enslavement' (not slavery or slave trade), which is the term used in the statutes of international criminal courts and tribunals.[770] Under ICL, enslavement is one of many enumerated qualifying acts under the international offense of 'crimes against humanity'.[771] As far as its inclusion in an international instrument is concerned, the concept of 'crimes against humanity' is said to have first appeared in the Hague Convention of 1899 on Laws and Customs of War on Land.[772] Specifically, this instrument noted that:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them,

769 ibid.

770 Within international treaties, the Geneva Conventions typically discuss concepts in the nature of 'force', 'work' and working conditions. However, AP II (n 715) Art 4(2)(f) provides that 'slavery and the slave trade in all their forms" are and shall remain prohibited at any time and in any place whatsoever.' However, defendants before ICL tribunals have been charged with the crime of slavery 'as a violation of the laws or customs of war'. For example, see *Krnojelac* TJ (n 681).

771 For example, UNGA Rome Statute of the International Criminal Court (17 July 1998) Art 7 (Rome Statute). Other qualifying acts included within 'crimes against humanity' include: murder, extermination, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution, enforced disappearance of persons, apartheid and other inhumane acts of a similar character.

772 C Fournet, *International Crimes: Theories, Practice and Evolution* (Cameron May, London 2006) 27.

> populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from *the laws of humanity*, and the requirements of the public conscience.[773]

As Fournet explains, the concept of "'humanity" was invoked as a norm and "the laws of humanity" were considered as being the mould of "principles of international law."'[774]

This concept surfaced again in a joint statement by the Allied Powers (including Great Britain, France and Russia) in 1915, which termed the Turkish massacres of Armenians as 'crimes against humanity and civilisation'.[775] However, this document and the characterization of 'crimes against humanity' did not translate into any legal effect – most notably as it concerns the perpetrators of the Armenian Genocide.[776]

Failing to hold perpetrators accountable under the law for offenses of this gravity was not to be repeated after the conclusion of the Second World War (WWII). Consequently, victors of the war established the International Military Tribunal (IMT) in Nuremberg 'to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations' for crimes against peace, war crimes and crimes against humanity;[777] thereby codifying the concept of 'crimes against humanity' for the first time in positive international law.[778] The Charter of the IMT codified 'crimes against humanity' as follows:

> murder, extermination, *enslavement*, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[779]

As with the other acts, the IMT Charter itemized 'enslavement' without any accompanying definition or description. Likewise, subsequent prosecutions of Nazi war criminals by the United States of America from 1946-1949 before its military tribunals in Nuremberg (US NMTs), as well as the International Military Tribunal for the Far East (IMTFE), erected to address the individual criminal responsibility of the Japanese, also codified the international offense of 'crimes against humanity'.

773 Hague Convention Respecting the Laws and Customs of War on Land (Hague II) (29 July 1899) 32 Stat. 1803 Treaty Series 403. Emphasis added.

774 Fournet, *International Crimes* (n 772) 27. See also, MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (n 715) 156-157.

775 Fournet, *International Crimes* (n 772) 27 citing E Schwelb, 'Crimes Against Humanity' (1946) BYBIL 178-181.

776 Fournet, *International Crimes* (n 772) 27-28.

777 Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, 82 UNTS 279. *Reprinted in* (Supp. 1945) 39 American Journal of International Law 257 Art 6 (IMT Charter).

778 Fournet, *International Crimes* (n 772) 29-32. See also, MC Bassiouni, 'Enslavement as an International Crime' (1991) 23 New York University Journal of International Law and Politics 445.

779 IMT Charter (n 777) Art 6. Emphasis added.

Under both instruments, enslavement as a crime against humanity was included and left undefined.[780]

Whereas the concept of 'slavery' is fully encompassed within the Slavery Convention's definition, 'enslavement', as codified within the previous and currently operating international judicial institutions, is characterized as a 'crime against humanity', and thus requires a two-part analysis: satisfaction of the contextual elements which permit classification as a 'crime against humanity', as well as the material elements which comprise the crime of 'enslavement'. What designates an offense as a 'crime against humanity' will be discussed in the following Chapter. In short, a crime against humanity is currently and primarily understood as the commission of an enumerated crime (eg, enslavement) 'as part of a widespread or systematic attack directed against any civilian population with the perpetrator's knowledge of the attack'.[781]

While the word 'enslavement' is obviously related to the concept of 'slavery', common understandings of these terms found in dictionaries do not denote them as synonyms. Generally, 'slavery' is described as 'severe toil like that of a slave; heavy labour, hard work, drudgery'; '[t]he condition of a slave; the fact of being a slave; servitude; bondage'; and as '[t]he condition or fact of being entirely subject to, or under the domination of, some power or influence.'[782] Although not identical to the Slavery Convention's definition, the essence of the conduct holds true – slavery is a condition of subjection.

A common definition of 'enslavement' is understood to include: '[t]he action of enslaving; the state of being enslaved';[783] and the definition of 'enslave' is '[t]o reduce to slavery; to make a slave of'.[784] Common definitions of enslavement thereby indicate that it not only includes one's subjection to slavery, but also those actions taken to acquire or facilitate persons into slavery. The second part of this understanding resembles the codification of human trafficking which is concerned with actions (eg, recruitment, transportation, transfer) and means (eg, use of force, deception) used to obtain individuals for their placement into, among other conditions, slavery.

Any effort to define, or expand upon, what 'enslavement' as a crime against humanity is in codified law, however, was not attempted until decades after WWII. The International Law Commission (ILC) elaborated on what it believed 'enslavement' as a crime against humanity to encompass in its Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code):

> Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

780 Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council of Germany, No. 3, Berlin, 31 January 1946. *Excerpts reprinted in* SR Ratner and JS Abrams, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, (2nd edn, OUP 2001); Charter of the International Military Tribunal for the Far East, 19 January 1946, United Nations Treaties and Other International Acts Series 1589 (IMTFE Charter).

781 These (contextual) elements will be discussed in Chapter 5, subsection 5.4.

782 'Slavery' OED Online <http://www.oed.com/view/Entry/181498?rskey=njNmiM&result=1&isAdvanced=false#eid> accessed 22 February 2016.

783 'Enslavement' OED Online <http://www.oed.com/view/Entry/62694?redirectedFrom=enslavement#eid> accessed 22 February 2016

784 'Enslave' OED Online <http://www.oed.com/view/Entry/62692?redirectedFrom=enslave#eid> accessed 22 February 2016

(slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour).[785]

The ILC's draft construct thereby characterized enslavement as its own umbrella offense encompassing slavery (as defined in the Slavery Convention), servitude (which would include the Supplementary Slavery Convention's practices of debt bondage, serfdom, servile marriage and child exploitation) and forced or compulsory labor. While not explicitly referencing slave trade, it did identify the Slavery Convention which includes slave trade.

More importantly, the 1996 Draft Code encompasses trafficking. It describes enslavement as incorporating acts which 'establish or maintain over persons a status of slavery…servitude…forced labour'. To 'establish' one's subjection to slavery, servitude or forced labor thereby incorporates the process of victim acquisition into the offense of enslavement. Actions and/or methods used by persons to acquire victims, like the ones codified in the Palermo Protocol (eg, recruitment, transfer, abduction, harboring), for the purpose of their subjection to forms of exploitation, which the 1996 Draft Code has determined to include the status of slavery, servitude or forced labor, are the essence of the crime of trafficking in persons. As such, the material elements of the 1996 Draft Code appear to include the crime of trafficking within their construct. The ILC's understanding of enslavement would also incorporate slave trade considering that the slave trade covers actions of establishing and facilitating persons for their subjection to slavery. It should be mentioned however that the 1996 Draft Code remained a draft and as such, lacks legal binding value but nevertheless bears some authoritative value.[786]

---

785 ILC 1996 Draft Code of Crimes, II (2) *ILC Yearbook*: In 1954, the an earlier version of the ILC's Draft Code of Crimes against the Peace and Security of Mankind did not include crimes against humanity. However, it did list enslavement (among other offenses now listed under 'crimes against humanity') under 'Inhuman acts'. In 1991, the ILC released another draft code of Crimes against the Peace and Security of Mankind. This time, the ILC identified the crime of 'systemic or mass violations of human rights' instead of 'crimes against humanity' or 'inhuman acts'. Within that offense, the draft enumerated 'establishing or maintaining over persons a status of slavery, servitude or forced labour' The commentary to the 1996 ILC Draft as it concerns slavery, servitude and forced labor is worth reproducing in full: 'Another violation of human rights covered by the draft article is establishing and maintaining over persons a status of slavery, servitude or forced labour. In regard to the definition of these crimes, the Commission considered that, since there were specific conventions on these matters it was enough for the draft article to enumerate the crimes and leave it to the commentary to mention the principles of international law underlying these conventions. For example, slavery is defined in the Slavery Convention, of 25 September 1926, and in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956, which also defines servitude. Both slavery and servitude are also prohibited under article 8 of the International Covenant on Civil and Political Rights, of 16 December 1966. The article also prohibits forced labour, a concept which it spells out, and which also forms the subject of some conventions, such as ILO Conventions Nos. 29 and 105 concerning the Abolition of Forced Labour. It should none the less be pointed out that, unlike some of these conventions and the 1954 draft Code, it is a crime under the present draft article not only to place persons in or reduce them to a status of slavery, servitude or forced labour but also to maintain them in that status, should they already be in such a situation when the Code enters into force.'

786 J Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill/Nijhoff 2015) 236: Determining the precise value of this instrument considering its draft status is of course difficult. Allain contends that the 1996 ILC Draft Code 'has, in essence fallen into abeyance as a result of the establishment of the International Criminal Court'. However, as will be seen in chapter 6, several ICL judicial institutions reviewed the ILC's draft code in order to ascertain the status of customary international law on enslavement and how it should be interpreted. See also, MN Shaw, *International Law* (7th edn, CUP 2014) 63: The ILC's work clearly bears some measure of persuasive authority in international law considering it is referred to by the International Court of Justice.

Other codified definitions of 'enslavement' in international law are limited. Every international court and tribunal (past and present) has enumerated 'enslavement' as a crime against humanity within their respective statutes.[787] However, apart from the Rome Statute of the International Criminal Court, none of the other judicial institutions' statutes actually define 'enslavement'. Such interpretation has therefore been left to the judiciary, and as mentioned before, its examination is reserved for Chapter 6.

The only codified definition of 'enslavement' is contained within the Rome Statute. Article 7(2)(c) defines 'enslavement' as:

> 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.[788]

This definition contains some of the same language found in the Slavery Convention's definition of 'slavery'. Most importantly for purposes of this study, this definition actually references 'trafficking in persons'.

The Elements of Crimes to the Rome Statute (Elements of Crimes) describes the material elements of 'enslavement' as follows:

> The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[789]

A footnote to the Elements of Crimes' description of enslavement above further positions that:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[790]

While the following Chapter is wholly reserved for thoroughly examining and analyzing these texts, it should nevertheless be mentioned in this chapter that the Rome Statute and Elements of Crimes appear to construct enslavement in a similar fashion to the ILC in their 1996 Draft Code.

---

787 IMT Charter (n 777) Art 6(c); IMTFE Charter (n 780) Art 5(c); CCL No. 10 (n 780) Art 2(c); Rome Statute (n 771) Art 7(1)(c); Statute of the International Tribunal for the Former Yugoslavia (approved on 25 May 1993 by UNSC Res 827) Art 5(c) (ICTY Statute); Statute of International Criminal Tribunal for Rwanda (decided on 8 November 1994 by UNSC Res 955) Art 3(c) (ICTR Statute); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusions of amendments as promulgated on 27 October 2004, NS/RKM/1004/006) Art 5 (ECCC Statute); UNSC, Statute of the Special Court for Sierra Leone (approved 16 January 2002 by UNSC Res 1315 (2000)) Art 2(c) (SCSL Statute).

788 Rome Statute (n 771) Art 7(2)(c). Emphasis added.

789 Elements of Crimes to the International Criminal Court, (adopted by the Assembly of State Parties First Session, 3-10 2002) ICC-ASP/1/3 (part II-B) UN Doc PCNICC/2000/1/Add.2 (2000), Art 7(1)(c)(1) (Elements of Crimes).

790 ibid, note 11.

Specifically, the subjection to practices other than slavery is included in the Rome Statute (by its reference to trafficking) and its Elements of Crimes (by reference to forced labor and the 'practices similar to slavery' found in the Supplementary Slavery Convention). However, whereas the 1996 Draft Code classifies enslavement as an umbrella offense, the Rome Statute's definition appears to condition the inclusion of other practices such that the 'deprivation of liberty' triggering incorporation must be 'similar' to the exercise of 'powers'.

In reviewing these various definitions of enslavement (common dictionary definitions, the 1996 Draft Code and the Rome Statute and its Elements of Crimes), the material difference between the Slavery Convention's definition of 'slavery' and the definitions of enslavement is *where* the emphasis is placed. 'Slavery' determines the *status or condition* of a person through an exercise of 'powers', whereas 'enslavement' criminalizes *the exercise of those 'powers'* which reduces another to the condition of slavery. Understanding this difference can resolve some of the definitional confusion between these concepts.

The definitions of 'enslavement' referenced all appear to embrace a more expansive understanding of enslavement than the Slavery Convention's construct of 'slavery'. This is evidenced in that the definitions of enslavement are not restricted to the exercise of 'powers', but include exploitative practices, for example, forced labor, servile marriage, debt bondage, serfdom and even perhaps, as referenced in the Rome Statute, human trafficking. Additionally, the 1996 Draft Code has expanded the offense of enslavement to include actions taken to acquire a person for their subjection to these exploitative practices, which is precisely what human trafficking criminalizes, thus codifying a direct link between the material elements of the crimes of enslavement and trafficking in persons.

In reviewing the international codifications, definitions and interpretations of enslavement that do exist, the primary issue then becomes identifying what actions and/or practices are incorporated under this international crime.

4.5 Sexual Slavery

'Slavery' and 'enslavement' are not the only similar terms that factor into this assessment. As such, this subsection evaluates the codification of the crime of 'sexual slavery'. In addition to 'enslavement', 'sexual slavery' is codified as a crime against humanity *and* as a war crime within the Rome Statute of the ICC.[791] Since crimes against humanity need not occur during an armed conflict, it is therefore only contextual attributes which differentiate the crime against humanity of sexual slavery from the war crime of sexual slavery – at least as defined in the Elements of Crimes to the Rome Statute. It defines 'sexual slavery' as:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.[792]

791 Rome Statute (n 771) Arts 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2. Like crimes against humanity, war crimes are international crimes which require the satisfaction of material and contextual elements. The contextual elements for war crimes are codified in Art 8 of the Rome Statute.

792 Elements of Crimes (n 789) Arts 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2. Citations omitted.

This description of sexual slavery bears similarities with the Slavery Convention's construction of 'slavery' in the first element of this crime which requires that the perpetrator 'exercise any or all of the powers attaching to the right of ownership over' another. It is also noteworthy that the Elements of Crimes uses identical language in the crimes of sexual slavery and enslavement when describing the first material element of each offense. Moreover, the footnote to the first substantive element of sexual slavery is identical to the footnote accompanying the elements of enslavement explaining:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[793]

The only substantive deviation is that sexual slavery also requires that the victim 'engage in one or more acts of a sexual nature.' As such, sexual slavery can be understood as a more specific form of enslavement in the context of crimes against humanity.

The Special Court of Sierra Leone (SCSL) also codifies 'sexual slavery' as a crime against humanity.[794] The SCSL Statute does not provide any definition for this offense.

4.6 Discerning Slavery, Slave Trade, Enslavement and Sexual Slavery from Each Other and Trafficking under Codified International Law

There are identifiable distinguishing features, as well as overlapping substantive qualities among slavery, slave trade, enslavement and sexual slavery.

Slavery is concerned with *classifying the condition of a person* by the treatment exacted upon them. Trafficking focuses on *actions taken and methods used to acquire people for the purpose of their exploitation.* The Palermo Protocol has identified slavery as a type of exploitation. The discernibility between the definitions of trafficking and slavery is possible. Allain and Bales describe this dichotomy in the following terms,

> a person might be taken into slavery by many paths, but…the vehicle [referencing human trafficking] by which a person arrives in the state or condition of slavery, while important for understanding the particular nature of a case of slavery, does not determine that state, it is simply the means by which a person arrives under the control of another.[795]

To distinguish whether someone is held in slavery from whether they are a trafficked person, one should inquire how the alleged victim was acquired or obtained and whether some action or process facilitated the criminal actor(s)' ability to obtain their subject *before* the identified 'powers attaching to the right of ownership' were perpetrated. If the answer is 'yes', one must look first at whether the person was trafficked under the law. This assessment should be performed by engaging with the Palermo Protocol's elements (act, means and purpose) as discussed in Chapter 3.

793 ibid notes 18, 53, 66.

794 Rome Statute (n 771) Art 7(1)(g); SCSL Statute (n 787) Art 2(g).

795 J Allain and K Bales, 'Slavery and its Definition', 14 *Global Dialogue* (2012) 1, 6.

To determine the existence of slavery, a separate examination of specific acts committed by the offender(s) must be analyzed through the filter of slavery via 'powers attached to the right of ownership' as explained in subsection 4.2.2 of this chapter.

It should also be mentioned that while the actions and means perpetrated in the case of trafficking must be for the purpose of exploitation, that requirement does not exist in an assessment of slavery. The focus of slavery is on the exercise of 'powers' which is about control and treating a person like they are a piece of property. While the exercise of powers can be (and is often) exploitative, it is not an element of the construct. This understanding is difficult to reconcile with the Palermo Protocol's definition of 'trafficking in persons' considering that it identifies slavery as a form of exploitation.

Slave trade concentrates on *actions taken to acquire people for the purpose of reducing them to slavery*. The dichotomy between slavery and slave trade is similar to that of slavery and trafficking. However, as discussed above,[796] the constructs of slavery and slave trade overlap with each other when it comes to addressing the 'transferability' of slaves. Under slavery, the 'power' of *transfer of use* pertains to the ability of a person to transfer (eg, buying or selling) another person, as if she or he were a piece of property. The inclusion of *acts of disposal* in the definition of 'slave trade' serves a similar function which encompasses the sale or exchange of a slave. This substantive commonality is also shared by the international definition of 'trafficking in persons' which lists the 'act' of *transfer*.[797] *Transfer* is interpreted similarly to slavery's *transfer of use* and slave trade's *acts of disposal*, namely as the conveyance of property and covers the buying or selling of another,[798] thereby demonstrating a minor material overlap between these practices.

Distinguishing trafficking from slave trade is a little more difficult. A plain reading of the Slavery Convention's definition of 'slave trade' shows striking similarities with the Palermo Protocol's definition of 'trafficking in persons'. First, just as in the case of trafficking, slave trade's focus is on the *process* of bringing someone to a state of slavery. In a case of trafficking, slavery is a form of 'exploitation' satisfying the third element. In the case of slave trade, the end result must be slavery or the process engaged in must be while the person in question has already been reduced to slavery. Secondly, just as trafficking is classified as a *dolus specialis* offense, it appears that the same classification applies in slave trading as well considering that the definition speaks of acquiring a person 'with intent to reduce him to slavery' without requiring that reduction to take place as an element of the offense. In contrast, trafficking (in adults) requires the perpetration to include some form of 'means' (thus making consent to the intended form of exploitation of the victim irrelevant) to satisfy the offense, whereas slave trading does not. Slave trade only requires some type of action (capture, acquisition or disposal) regardless of the manner with which it is carried out.

As for discerning slavery from enslavement or sexual slavery, one must first note that the definitions of these practices all resemble one another considering that each concept/crime is evaluated in light of the exercise of 'powers attaching to the right of ownership' over another. Slavery's focus is on *classifying the condition of a person*. Determining the exercise of 'powers' confirms one's condition and their subjection to slavery. Enslavement's focus is on the actual *exercise of 'powers'* which thereby permits the attribution of criminal responsibility. Sexual slavery is equally concerned with ascertaining the actual *exercise of 'powers'* and attribution of criminal responsibility. However, sexual slavery also requires that the victim engages in acts of a sexual

796 See *supra*, page 158.

797 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3(a) (Palermo Protocol).

798 See discussion *supra* on transfer in the Palermo Protocol in Chapter 3, subsection 3.3.3.3.

nature to satisfy the offense. It should also be noted that an additional assessment pertaining to the contextual elements of crimes against humanity or war crimes (depending on the charge), must also take place as it concerns enslavement and sexual slavery.

While the legal definitions of 'enslavement' and 'sexual slavery' are inspired by the Slavery Convention's definition of 'slavery', these criminal acts have been interpreted to be broader than the Slavery Convention's construct. Enslavement as a crime against humanity appears to not only encompass the treatment exacted upon persons, but also actions and methods used to acquire persons for the purpose of exploitation which is the legal definition of trafficking in persons.

Moreover, treatment amounting to enslavement encompasses practices not formally identified as requiring the exercise of 'powers attaching to the right of ownership' under the law. As discussed earlier, these practices include: servitude/practices similar to slavery (eg, debt bondage, serfdom, child exploitation and servile marriage), forced labor, slave trade and trafficking in persons. Considering the inclusion of additional exploitative practices, it is unclear whether the crime of enslavement requires the intent to, or perpetration of exploitation.

The Rome Statute's inclusion of trafficking in the definition of 'enslavement' and in the Elements of Crimes also raises significant questions regarding the discernibility of trafficking from enslavement, or at the very least questions concerning their relationship to one another. Evidently, further investigation into the Rome Statute's definitional contours is needed, and is reserved for the following Chapter.

As demonstrated, distinguishing these concepts from one another in law is not straightforward which makes answering the question posed in Part II of this research challenging. It may also be interesting to consider the importance in distinguishing these concepts in light of their perceived status under international law.

4.7 Customary Status, *Erga Omnes* Obligation and *Jus Cogens* Norms

Peremptory (*jus cogens*) norms are 'norms of customary international law influenced by general principles of law, namely human dignity.'[799] When a law reaches this station, it constitutes a non-derogable norm of international law and an obligation *erga omnes*.[800] The 'peremptory' character of this norm means it 'is binding on all [s]tates alike, whether they are opposed to it or not'.[801] The obligation *erga omnes*[802] is understood as the universal responsibility and legal interest that every state possesses in the protection of the identified *jus cogens* norm as well as the permitted standing to bring a claim before the International Court of Justice against another state.[803]

799 T Weatherall, *Jus Cogens: International Law and Social Contract* (CUP Cambridge, 2015) 203.

800 MC Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes'(1996) 59 Law and Contemporary Problems 63, 65. See also, MN Shaw, *International Law* (7th edn, CUP 2014) 87-91.

801 AJJ de Hoogh, 'The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective' (1991) 42 Austrian Journal of Public International Law 183, 186.

802 Note: obligations *erga omnes* cannot be obstructed by any type of treaty, agreement or declaration.

803 Gallagher, 'Using International Human Rights Law' (n 714) 10: Internationally recognized legal obligations associated with *jus cogens* crimes include: the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense 'obedience to superior orders' (save as migration sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under 'states of emergency,' and universal jurisdiction over perpetrators of such crimes.

Formally established by virtue of the VCLT, Article 53 describes peremptory (*jus cogens*) norms of international law as those, 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' Drafters (the ILC) of the VCLT however, purposefully refrained from itemizing peremptory norms, explaining in their commentary to the VCLT that:

> The emergence of rule having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.[804]

Nevertheless, the ILC did include examples within its commentary that would violate the 'obvious and best settled rules of *jus cogens*'[805] which included, 'a treaty contemplating or conniving at the commission of acts, such as *trade in slaves*, piracy, or genocide, in the suppression of which every State is called upon to co-operate.'[806]

Under international law, a significant amount of legal literature (and the lack of opposition to the position) has already classified the prohibition of specific conduct belonging to *jus cogens*.[807] Unanimously included is slavery and the slave trade considering its perpetration 'quite obviously violate[s] the respect owed to the intrinsic worth of the human person and contravene[s] the interests of the international community.'[808]

Irrespective of the possible qualification of these norms as ones of *jus cogens*, their customary status has been regulated. As it concerns the definitions of 'slavery' and the 'slave trade', it has been held that '[t]he customary international law status of these substantive provisions is evidenced by the almost universal acceptance of that [Slavery] Convention and the central role that the definition of slavery in particular has come to play in subsequent international law developments in this field.'[809] This classification has also been recurrently affirmed by judicial entities. For example, the International Court of Justice found that nations have the *erga omnes* obligation concerning

804 Weatherall (n 799) 201 citing H Waldock, 'Fifth Report on the Law of Treaties' [1966] II YbILC 248 [3] (Commentary to Draft Article 50).

805 Report of the International Law Commission to the General Assembly, UN Doc.A./CN.4/Ser.A/Add.1 (1963).

806 Weatherall (n 799) 201, note 6 citing Waldock (n 804). Emphasis added.

807 Weatherall (n 799) 209.

808 ibid. See also, Bassiouni, 'International Crimes: Jus Cogens' (n 800) 68. Many scholars including Bassiouni also include 'slave- related practices' within this list. The legal basis of determining such a classification derives from the following sources: '(1) international pronouncements, or what can be called international *opinio juris,* reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.' See also, G Boas, JL Bischoff and NL Reid, *Elements of Crimes Under International Law* (International Criminal Law Practitioner Library Series, Vol II CUP 2014) 65.

809 *Prosecutor v Dragolijb Kunarac, Radomir Kovač, and Zoran Vuković* (Judgment) IT-96-23-T and IT-9623/1, T Ch (22 February 2001) [520] (*Kunarac* TJ).

slavery.[810] Furthermore, this sentiment is consistently echoed by other courts around the world.[811]

What about the concepts discussed in this chapter? As an almost identical definition from the Slavery Convention is used to define the crime against humanity of enslavement, would not this status also apply to enslavement? As discussed above, enslavement emphasizes the exercise of powers as opposed to the condition of the person subjected to the practice so perhaps this peremptory norm also applies to this offense.[812] Considering that sexual slavery is just a more specific form of enslavement, it would seem that the same classification is also in order for this offense.[813] However, since enslavement and sexual slavery have also been defined to encompass other practices perhaps one could argue that the this status does not apply. If the facts of the case must evidence the exercise of 'powers attaching to the right of ownership' over another, that argument is then likely to fail considering that while the codifications encompass other practices, they do so in name only.

What about trafficking in persons? If enslavement has subsumed this offense within its construct, there is an argument that this classification applies. However, this is difficult to rationalize considering how distinguishable trafficking in persons appears to be from slavery.[814] Moreover, none of the trafficking treaties or customary international law unequivocally impose individual criminal responsibility for human traffickers and the Palermo Protocol does not even suggest that the instrument permits States Parties to apply universal jurisdiction to human traffickers.[815] Nevertheless, as revealed in the introduction, the current practice of international law equating 'trafficking as slavery' is presently 'in a state of flux'.[816] The Bellagio-Harvard Guidelines' description of exercising powers which is done with the intent to exploit and is proven through the perpetration of behavior also conforming to the 'act' and 'means' elements of trafficking may demonstrate this shift or 'flux' in the legal understanding – and therefore the potential amalgamation of these concepts in law.

---

810 *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (Second Phase) [1970] ICJ Rep 3 [33]-[34]: The ICJ held that security from enslavement is one of two examples of "obligations *erga omnes* arising out of human rights law." See also, *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece Intervening*) (Judgment) [2012] ICJ Rep 99 [93].

811 For example, see Krnojelac (n 681) [353]; *Aloeboetoe et al. v Suriname*, (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) [56]-[57]; *Regina v. Tang*, High Court of Australia (2008) HCA 39 [111]; *United States v La Jeune Eugenie*, 26 Federal Case Reports 832, 851 (1822); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1154 note 5 (7th Cir. 2001); *John Doe I v. Unocal Corp*., 395 F.3d 932, 945 (9th Cir. 2002).

812 *Kunarac* TJ (n 809) [539].

813 *Prosecutor v Sesay, Kallon and Gbao (the RUF Accused) (Judgment) SCSL-04-15-T, T Ch I (2 March 2009) [157] (RUF TJ)*. Specifically, the TJ held that the prohibition under customary international law applies to sexual slavery because it is 'an international crime and a violation of jus cogens norms in the exact same manner as slavery.' See also, Final Report of the Special Rapporteur on Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict' (1998) UN Doc E/CN.4/Sub.2/1998/13 [8].

814 For more on the customary status of prohibition on trafficking, See, T Obokata, 'Human Trafficking' in N Boister and RJ Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 183-185.

815 See for example, SS Huntley, 'The Phenomenon of "Baby Factories" in Nigeria as a New Trend in Human Trafficking' (2013) International Crimes Database Brief 3, 8 <http://www.internationalcrimesdatabase.org/upload/documents/20140916T170728-ICD%20Brief%203%20-%20Huntley.pdf> accessed 20 May 2016.

816 Gallagher, *The International Law of Human Trafficking* (n 818) 191. See also, UN Economic and Social Council 'Report of the Ad Hoc Committee on Slavery (Second Session) (4 May 1951) UN Doc E/1988, 5 [8]. An observation also made with regards to slavery as early as 1951 by the UN Economic and Social Council which recounted 'that the rather loose present-day usage of the term "slavery"…arises in part from the fact that the nature of the institution, the conditions which surround it, and the public attitudes toward it, are undergoing constant change.'

As a result of this status, reducing someone to the condition of slavery or engaging in slave trading and even perhaps, perpetrating enslavement and sexual slavery purportedly generates a legal obligation for states to prosecute those who commit these acts regardless of 'where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war).'[817] Nevertheless, action taken in response to the perpetration of slavery, slave trading, or even enslavement and sexual slavery under international law has yet to be done (or claimed to be done), because of any obligation *erga omnes* or peremptory character of the offense. Rather, legal action against individual actors or states have been brought before judicial institutions because its perpetration was considered to violate international human rights law and international criminal law as codified in international instruments. Therefore, the practical value of this classification to date is not as significant as actual criminal or human rights codifications attached to an adjudicating body.

4.8 Concluding Remarks

This chapter's findings raise issues concerning the material relationships between slavery, slave trade, enslavement, sexual slavery and trafficking, and their discernibility under international law. Gallagher explains that the link between slavery/enslavement and trafficking is understandable since these practices involve the organized movement of persons for exploitative purposes, are steered by private entities for profit outside of the public realm, engage in the complete control over persons by eliminating or minimizing personal autonomy and can only occur via 'massive and systemic violations of human rights'.[818] A relationship is clearly visible between these codified legal concepts, but whether these codifications permit discernibility under international law, which is paramount in contemporary criminal justice systems, is unclear.

The Slavery Convention defines 'slave trade', which is primarily concerned with the procurement of persons for the purpose of reducing them to slavery – a concept which is now regularly attendant,[819] if not indistinguishable in discourse from human trafficking: the *process of acquiring* a person for their exploitation. The law however clarifies the differences between these concepts. The end purposes of these practices are not the same as exploitation and slavery are not synonyms. Moreover, while slave trade and human trafficking share what is termed the 'act' element in trafficking's codification, slave trading does not require perpetration of trafficking's 'means' element.

Enslavement and sexual slavery, as understood under ICL, pertains to conduct related to the *treatment* exacted upon a person. It is a determination of the type and form of subjugation – or perhaps exploitation, in light of the exercise of 'powers' and the offense's applicable contextual backdrop, which thereby permits its classification as enslavement or sexual slavery and the attribution of individual criminal liability. Slavery is also concerned with the treatment (measured via the exercise of 'powers'), but only so as to *classify the condition* to which a person is subjected. Nevertheless, slavery has also been charged as a war crime. While the Slavery Convention's codification cannot be interpreted to require that 'powers' are exercised with the intent to exploit, or that exploitation take place, the same cannot be concluded with the crimes of enslavement or sexual slavery considering that enslavement appears to embrace exploitative practices within its construct.

817 Bassiouni, 'International Crimes: Jus Cogens' (n 800) 66.

818 AT Gallagher, *The International Law of Human Trafficking* (CUP 2010) 177.

819 See, KE Bravo, 'Exploring the Analogy between Modern Trafficking in Humans and the Transatlantic Slave Trade' (2007) 25 Boston University International Law Journal 207.

However, concluding that the international law of enslavement has also expanded to encompass other practices like servitude, forced labor, or trafficking, as well as acts of victim acquisition (evidencing the potential inclusion of slave trade and trafficking) is not yet possible at the end of this chapter. A common understanding of enslavement, the 1996 Draft Code's definition, a cursory review of the Rome Statute's definition and further explanations in the Elements of Crimes seems to evidence a larger scope of application than Slavery Convention's construct of 'slavery'. However, the ILC's definition of 'enslavement' is only a draft and the Rome Statute requires further examination. Moreover, other international criminal justice institutions (eg, ICTY) have not codified any definition of 'enslavement' and so the examination of jurisprudence is essential in order to solidify a comprehensive international understanding of enslavement and determine whether trafficking has been incorporated into the legal construct. As such, a full understanding of the definitional contours of the crime against humanity of enslavement is incomplete until the Rome Statute's definition of enslavement (Chapter 5) and international enslavement jurisprudence (Chapter 6) are examined.

5 The Rome Statute and its Definition of 'Enslavement' as a Crime Against Humanity

5.1 Introduction

International crimes have been codified in the Rome Statute of the International Criminal Court (Rome Statute). Enslavement is identified under 'crimes against humanity' and defined under Article 7(2)(c) as:

> 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*.[820]

Considering the research question at hand, it is primarily the uncertain position held by the inclusion of 'trafficking in persons' within the definition that necessitates a separate chapter for such an examination. Additionally, the Rome Statute's codification is deserving of special attention seeing as at this point in time the International Criminal Court (ICC) is the likely forum to hear any future international trafficking prosecution. As such, I have separated this examination from the ICC's enslavement jurisprudence. I think it is also important to separate the case law considering that there is a wealth of jurisprudence from other international criminal courts and tribunals which should, in my opinion, be reviewed and analyzed all together.

The inspection of international law in Chapter 4 revealed that while the term 'enslavement' is codified as a crime against humanity by each and every international (and hybrid) criminal law (ICL) institution (past and present), only the Rome Statute includes an actual definition of this offense. Bedont describes the Rome Statute's construction of this crime as 'draw[ing] from prior definitions of slavery, with the addition of a reference to including trafficking in persons, in particular women and children'.[821]

The inclusion of 'trafficking in persons' in the second half of the Rome Statute's definition of enslavement is a distinguishing feature from the universal definition of 'slavery' which is reproduced in the first half of this definition. The codified connection between enslavement and trafficking is not seen anywhere else in international criminal law.[822] As explained in Chapter 3, 'trafficking in persons' is currently classified as a transnational organized crime, not an international offense.[823] Nevertheless, trafficking 'has increasingly been recognized…to rank among the "most serious crimes of concern to the international community as a whole" or *delicta juris gentium*.'[824]

---

820 UNGA Rome Statute of the International Criminal Court (17 July 1998) (Rome Statute). Emphasis added.

821 B Bedont 'Gender Provisions' in F Lattanzi and W Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (il Sirente Vol. I 1999) 200.

822 N Tavakoli, 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime' (2009) 9 International Criminal Law Review 77, 85: Tavakoli writes that '[t]he close relationship between trafficking and slavery suggests that trafficking is in reality a form of slavery, and thus should be elevated to an international, rather than simply a transnational, crime.'

823 International crimes include genocide, crimes against humanity, war crimes and aggression

824 T Obokata, 'Trafficking in Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' 54(2) The International Comparative Law Quarterly (2005) 445.

Moreover, discussions concerning the prosecution of human traffickers before the ICC is widespread within international discourse.[825]

As mentioned in Chapter 1, it is the Rome Statute's definition of 'enslavement' which is most frequently used as a basis for those claiming that traffickers can and should be prosecuted under ICL.[826] On this point, Bedont explains that '[t]hanks to this definition, the crime of trafficking in persons has been unambiguously brought within the jurisdiction of the Court.'[827] While 'trafficking in persons' unambiguously appears in the definition of enslavement, the material implications of trafficking's inclusion in this definition (eg, what conduct this reference includes) is anything but clear.

Scholarly discourse on the role this trafficking language plays in the Rome Statute's definition highlights this uncertainty in the law. For example, Gallagher explains that

> The reference to trafficking in persons in the definition of the crime against humanity of enslavement has attracted very little comment or analysis but appears to have caused considerable confusion…The assumption that the ICC Statute 'includes trafficking as a crime against humanity,' or alternatively, that it 'established a new definition of enslavement which includes trafficking in persons' is widespread.[828]

As highlighted in Chapter 1, the Office of the Prosecutor's (OTP) position on prosecuting traffickers before the ICC is also unclear. In July 2015, the OTP commented that, 'ICC crimes usually do not occur in isolation from other types of criminality, such as ordinary opportunistic

825 J Allain, 'The Definition of "Slavery" in General International Law and the Crime of Enslavement within the Rome Statute' (2007) Guest Lecture Series of the Office of the Prosecutor <http://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf> accessed 15 February 2016; J Aston and V Paranjape, 'Human Trafficking and its Prosecution: Challenges of the ICC' (*SSRN* 2012) <http://dx.doi.org/10.2139/ssrn.2203711> accessed 15 February 2016; AT Gallagher, *The International Law of Human Trafficking* (CUP 2010); J Kim, 'Prosecuting human trafficking as a crime against humanity under the Rome Statute' (2011) Columbia Law School Gender and Sexuality Online <http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf> accessed 15 February 2016; MY Mattar, 'The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case?' (2002) The Protection Project <http://www.protectionproject.org/wp-content/uploads/2010/09/icc.pdf> accessed 15 February 2016; CF Moran, 'Human Trafficking and the Rome Statute of the International Criminal Court' (2014) 3 The Age of Human Rights Journal 32; Obokata, 'Trafficking of Human Beings as a Crime against Humanity' (n 824) 445; M O'Brien, 'Prosecuting Peacekeepers in the ICC for Human Trafficking' (2006) 1 Intercultural Human Rights Law Review 281; AM Pesman, 'Prosecuting human trafficking cases as a crime against humanity?' (2012) <http://dare.uva.nl/cgi/arno/show.cgi?fid=462894> accessed 15 February 2016; H van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 Chinese Journal of International Law para.

826 There is a minority of those who oppose this. For a discussion on this, see: N Siller, 'Modern Slavery: Does International Law Distinguish Between Slavery, Enslavement and Trafficking' (2016) 14 Journal of International Criminal Justice 405; N Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (2015) 2 European Journal of Comparative Law and Governance 236.

827 Bedont (n 821) 200.

828 Gallagher, *The International Law of Human Trafficking* (n 825) 215-216 (citations omitted). This quotation was previously mentioned in Chapter 1. See also, I Atak and JC Simeon, 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' (2014) 12 Journal of International Criminal Justice 1019, 1020: Atak and Simeon believe that Article 7(2)(c) defines trafficking as a crime against humanity. See also, K Corrie, 'Could the International Criminal Court Strategically Prosecute Modern Day Slavery? (2016) 14 Journal of International Criminal Justice 285, 286; Tavakoli (n 822) 85.

crimes or transnational organised criminal activity.'[829] Encompassed among the 'other types of criminality', the OTP enumerated trafficking in human beings, thereby differentiating trafficking from 'ICC crimes'.[830] In June 2016, however, the OTP released its 'Draft Policy on Children' which specifically stated that:

> The Office will make full use of the regulatory framework to address the various ways that children are affected in the context of crimes within the jurisdiction of the Court. Wherever the evidence permits, it will seek to include charges for crimes directed specifically against children, such as the …*trafficking in children as a crime against humanity, either as a form of enslavement or sexual slavery*.[831]

The draft policy contemplates trafficking as its own crime against humanity as a form of enslavement or sexual slavery as a crime against humanity. On 15 September 2016, the OTP released a 'Policy Paper on Case Selection and Prioritisation'.[832] In similar fashion to the OTP's comments in July, this policy paper distinguished between 'Rome Statute Crimes' and 'conduct which constitutes a serious crime under national law'. The policy paper assigned 'human trafficking' to the latter category of crimes.[833] The OTP does not appear to have a firm position on, or understanding of, trafficking's inclusion within ICL and the potential prosecution of traffickers before the ICC.

Considering the ambiguity in law, Chapter 5 will therefore attempt to clarify the inclusionary extent of trafficking within the crime against humanity of enslavement. First, this chapter will review the Rome Statute's drafting history and related texts in an effort to glean further insight into the rationale behind including trafficking and its meaning within the definition of enslavement.

Second, Article 7(2)(c)'s definition of enslavement will be dissected and examined to specifically address the material elements of this crime. As the concept of 'powers attaching to the right of ownership' was analyzed in the preceding Chapter, this discussion will primarily focus on the context and limitations (if any) of the second half of the definition: 'and includes the exercise of such power in the course of trafficking in persons, in particular women and children' as well as the Elements of Crimes to the Rome Statute (Elements of Crimes) which have yet to be critically examined.[834]

Third and finally, this chapter will identify and explore the *chapeau* elements of 'crimes against humanity'. The Rome Statute defines 'crimes against humanity' as 'acts when committed as part

829 Office of the Prosecutor, 'Strategic Plan 2016-2018' (6 July 2015) <http://www.pgaction.org/pdf/OTP-Draft-Strategic-Plan-2016-2018.pdf> accessed 26 October 2015 14 [30].

830 ibid. See also, United States Mission to the United Nations, 'Statement by the President of the Security Council on Trafficking in Persons in Situations of Conflict (16 December 2015) <http://usun.state.gov/remarks/7052?mc_cid=5c1e51c8fa&mc_eid=726f9f8f81> accessed 15 January 2016.
In a statement issued by its President in December 2016, the UNSC condemned 'instances of trafficking in persons in areas affected by armed conflict'. A declaration which may in fact suggest that there is a role for international criminal justice to play in the prosecution of traffickers, at least in the context of an armed conflict.

831 OTP, 'Draft Policy on Children' (June 2016) < https://www.icc-cpi.int/iccdocs/otp/22.06.2016-Draft-Policy-on-Children_ENG.pdf> accessed 19 July 2016, 3 [4]. Emphasis added.

832 OTP, 'Policy Paper on Case Selection and Prioritisation' (September 2016) <file:///X:/My%20Downloads/20160915_OTP-Policy_Case-Selection_Eng%20(1).pdf> accessed 28 September 2016.

833 ibid [7].

834 With the exception of J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, (Martinus Nijhoff Publishers, Leiden 2013) 285-289. See also, Siller, The Prosecution of Human Traffickers (n 826) 240-246.

of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[835] Each of these components will be discussed in the context of a potential trafficking prosecution before the ICC.

If the OTP decides to pursue a trafficking prosecution, several considerations emerge. Among others, the choice of charges will be a central issue. It should be noted that while the term 'trafficking in persons' only appears in the definition of enslavement, that does not theoretically prohibit the prosecution of traffickers (depending of course on the nature and circumstances of their conduct), with another enumerated act within crimes against humanity, or even another crime in the Rome Statute.[836] The focus of this research is limited to clarifying the definition of 'enslavement' as a crime against humanity.

5.2 Drafting the Rome Statute's Definition of 'Enslavement'

Establishing an international criminal court has been a topic of international discussion for over a century.[837] Shortly after the trials at Nuremberg, interest in establishing a permanent international criminal justice institution intensified.[838] On 9 December 1948, the United Nations General Assembly (UNGA) adopted a resolution stating

> that 'in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,' and therefore invit[ed] the International Law Commission [ILC] to study the desirability and possibility of establishing such a judicial organ, in particular as 'a Criminal Chamber of the International Court of Justice.'[839]

835 Rome Statute (n 820) Art 7(1).

836 For example, See F Pocar, 'Migration and International Law' in *International Migration Law and Policies in the Mediterranean Context* (2009) IOM Migration Research Series, 23-24 <https://publications.iom.int/system/files/pdf/iml_mediterranean_0.pdf> accessed 28 September 2016: Judge Pocar avers that in the context of crimes against humanity, enslavement as well as deportation or forcible transfer, sexual slavery, enforced prostitution and 'other humane acts of a similar character' could be considered relevant charges for the international prosecution of traffickers. See also, Obokata, 'Trafficking in Human Beings as a Crime Against Humanity' (n 824) 450: Obokata also discusses prosecuting traffickers under the crime of forcible transfer. See also, O'Brien (n 825); Moran (n 825) 35. It should also be mentioned that trafficking is mentioned in the Elements of Crimes in relation to sexual slavery as a war crime and a crime against humanity. As sexual slavery is a specific form of enslavement, nothing is gained in terms of interpretation in conducting a separate in-depth separate discussion on its description in the Elements of Crimes. Jurisprudence on the matter is however another issue and will be discussed in chapter 6, Section 6.4.

837 BS Moshan, 'Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity' (1998) 22 Fordham International Law Journal 154, 165; 'Key Moments in the Establishment of the International Criminal Court: A Timeline of the Establishment and Work of the International Criminal Court' (Coalition for the International Criminal Court (CICC) Fact Sheet) <http://www.iccnow.org/documents/ICC_Timeline_updated_0708.pdf> accessed 15 February 2016 (CICC Factsheet).

838 CICC Factsheet (n 837).

839 VV Pella, 'Towards and International Criminal Court' (1950) 44 American Journal of International Law 37 citing to the Report (Rapporteur, Mr. J Spiropoulos) of the Sixth Committee of the General Assembly, UN Doc A/760 (5 December 1948).

Significant momentum in actually realizing this idea only sparked in 1989 after the passage of General Assembly Resolution (GA Res) 44/39.[840] It tasked the ILC with examining the issue of 'establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons' who have committed offenses enumerated in a corresponding criminal code.[841]

The emerging 'criminal code' was believed to eventually manifest from the decades long work of the ILC and their Draft Code of Offences against the Peace and Security of Mankind.[842] In 1994, the ILC adopted a Draft Statute for an International Criminal Court (ILC Draft Statute).[843] Its proposed jurisdiction, as enumerated in Draft Article 20, covered the following offenses:

a. The crime of genocide;
b. The crime of aggression;
c. Serious violations of the laws and customs applicable in armed conflict;
d. Crimes against humanity;
e. Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.[844]

Under the category of crimes against humanity, 'enslavement' was enumerated in the commentary accompanying the ILC Draft Statute, amongst a list of other acts.

All of the offenses listed under crimes against humanity were left undefined.[845] The ILC actually commented that the real focus of crimes against humanity should be on the contextual, as opposed to the material, elements of the incorporated acts. Specifically, the commentary to the ILC Draft Statute stated that '[t]he particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment, etc.) are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part.'[846] The ILC did not mention human trafficking in connection with enslavement, or anywhere else in the ILC Draft Statute or its commentary.

Upon the ILC's recommendation, and by virtue of GA Res 49/53 of 9 December 1994, the UNGA established an *ad hoc* committee so that 'all States Members of the United Nations or members of specialized agencies' could examine the ILC Draft Statute and 'consider arrangements for the convening of an international conference of plenipotentiaries.'[847] Interestingly, the 1995

840 UN, 'Diplomatic Conferences' <http://www.un.org/law/diplomaticconferences/> accessed 15 February 2016 (UN Diplomatic Conferences website).

841 ibid.

842 ibid.

843 ILC, *Draft Statute for an International Criminal Court with Commentaries* (22 July 1994) <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf> accessed 15 February 2016 (ILC Draft Statute).

844 ibid Art 20. For more on the development of crimes against humanity, see P Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 Fordham International Law Journal 457.

845 As a point of comparison, the ILC did include Art 21 of its draft Code of Crimes against the Peace and Security of Mankind which addressed 'systemic or mass violations of human rights'. Art 21 did not enumerate 'enslavement', but 'establishing or maintaining over persons of a status of slavery, servitude or forced labour'.

846 ILC Draft Statute (n 843) 40 [14].

847 UN Diplomatic Conferences website (n 840).

Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court noted that an additional explanation on 'the specific content of such offences as extermination, deportation and *enslavement*' was needed.[848] No further elaboration was however contained in this report with respect to the definition of enslavement.

Throughout the course of the following two years, six Preparatory Committee (commonly referred to as 'PrepCom') meetings were held to perform the groundwork of the international conference of plenipotentiaries.[849] In light of the ILC's drafted effort, the objective of these meetings was to continue 'work on a draft statute to establish a permanent international criminal court'.[850] Attendance and/or participation was permitted by state delegates to the UN as well as NGOs, interest groups and other independent interested persons (eg, judges, academics).[851]

The first PrepCom meeting was held from 25 March – 12 April 1996. From the onset, there was a consensus 'that at least murder, extermination and enslavement should be incorporated into the notion of crimes against humanity.'[852] The United States of America's (USA) delegation proposed the following definitions for 'enslavement' and 'forced labor' as crimes against humanity:

> Enslavement, meaning intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him.
>
> Forced labor, meaning forcing a person to perform labor in a manner inconsistent with that allowed under international law and in circumstances analogous to enslavement.[853]

While providing separate definitions for 'enslavement' and 'forced labor', the USA delegation appears to have nevertheless defined the concepts with some degree of overlap. These constructions also introduced the notion that certain instances of forced labor should or could be captured by the crime against humanity of enslavement. However this argument was not specifically articulated or elaborated upon in the USA's proposal.

A number of NGOs also gave input during this first session. Human Rights Watch (HRW) indicated that enslavement should include 'slavery-related practices' without, however, identifying any, which perhaps evidenced the NGO's lack of understanding among various practices and

848 MC Bassiouni, *The Statute of the International Criminal Court: A Documented History* (Transnational Publishers, Inc. 1998) 628 [78]. Emphasis added.

849 See also, K Ambos, 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law View Point' (1996) 7 European Journal of International Law 519, 521: Around the same time, 'an independent committee of experts met to work on an alternative draft… in June of 1995 in Siracusa, Italy' (Siracusa Draft).

850 CICC, 'History of the ICC: Preparatory Committee' <http://www.iccnow.org/?mod=prepcommittee> accessed 15 February 2016.

851 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) UN Doc A/CONF.183/10 (Final Act).

852 A Zimmerman, 'The Creation of a Permanent International Criminal Court' (1998) 2 Max Planck Yearbook of United Nations Law 169, 179.

853 United States Delegation, 'For Annex to Statute: Elements Related to Article on Crimes Against Humanity' (Draft Proposal 27 March 1996) <http://www.iccnow.org/documents/USCrimesAgainstHumanity.pdf> accessed 15 February 2016.

or legal concepts.[854] The first discussion of incorporating human trafficking within the court's jurisdiction (and linking trafficking and slavery) appeared in the 'Position Paper on the ICC' submitted by Equality Now.[855] This NGO made the following comment:

> Article 20 [referencing the ILC Draft Statute], lists the crimes over which the Court will have jurisdiction. In addition to genocide, aggression, war crimes, and crimes against humanity, Article 20(e) extends jurisdiction of the Court to 'crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.' Absent from the treaties listed in the Annex is the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted by the UN General Assembly in 1949. Like the other crimes covered by Article 20(e), including torture, hostage taking and drug trafficking, traffic in persons is difficult for individual States to prosecute in their domestic courts due to the international nature of this crime. Human trafficking is a form of slavery and should be included as one of the 'exceptionally serious crimes of international concern.' The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others should be added to the list of treaties in the Annex.[856]

Interestingly, although calling it a 'form of slavery', Equality Now advocated for human trafficking to be recognized separate from enslavement and the category of crimes against humanity altogether.

It is unclear as to what effect, if any, this submission had in the first PrepCom meeting considering a lack of (reported) discussion on the matter. In the summary of the first PreCom's work, the only comment regarding the crime of enslavement was that

> Some delegations expressed the view that enslavement required further clarification based on the relevant legal instruments. There were proposals to refer to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour. The view was expressed that forced labour, if included, should be limited to clearly unacceptable acts.[857]

The second PrepCom meeting resumed work on the establishment of the court in August (12-30) 1996. Of the perceived 'major unresolved issues in the [ILC] Draft Statute', was a lack of definitions for the acts identified in crimes against humanity.[858] Regardless, no further decisions were made in respect to defining 'enslavement' or discussing the inclusion of human

854 Human Rights Watch, 'Commentary for the Preparatory Committee on the Establishment of an International Criminal Court' <http://www.iccnow.org/documents/1PrepCmtCommentaryHRW.pdf> accessed 15 February 2016, 9 (per the updated Siracusa Draft).

855 Equality Now, 'Position Paper on the ICC' (April 1995) <http://www.iccnow.org/documents/1PrepCmtDraftStatute.pdf> accessed 15 February 2016, 2. I say 'perhaps only' because this is the only document that I was able to locate which requested the inclusion of trafficking during the PrepCom meetings.

856 ibid 2.

857 Preparatory Committee on the Establishment of an International Criminal Court, 'Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996' (7 May 1996) UN Doc A/AC.249/1 22 [54] <http://www.iccnow.org/documents/ProceedingSummary.pdf> accessed 21 July 2016.

858 Lawyers Committee for Human Rights, 'Establishing an International Criminal Court: Major Unresolved Issues' (1996) <http://www.iccnow.org/documents/2PrepCmtEstablishICCLCHR.pdf> accessed 15 February 2016.

trafficking at this meeting.[859] The third PrepCom meeting was held from 11-21 February 1997.[860] A Working Group on the 'definition of crimes' prepared a draft consolidated text on crimes against humanity.[861] For the first time, definitions were included in the proposed text for several acts incorporated within crimes against humanity including: extermination, deportation or forcible transfer of population, torture, persecution and enforced disappearance of persons, but not for enslavement.[862] The fourth PrepCom meeting, held on 4-15 August 1997, did *not* engage in any additional discussion of enslavement.[863] Likewise, the fifth PrepCom meeting, held 1-12 December 1997 (which focused primarily on war crimes), provided no further insight on defining the concept of 'enslavement' as a crime against humanity.[864] Furthermore, none of these meetings addressed human trafficking.

In an effort to facilitate the final PrepCom meeting, the chairman of the Preparatory Committee instigated a meeting from 19-30 January 1998 in Zutphen, the Netherlands.[865] Its participants included members of the Bureau,[866] chairs of different working groups, coordinators and the secretariat.[867] Specifically, this coalition was convened to:

1. Consider the structure of the Statute and the placement of the articles;
2. Identify relationships between articles, including possible overlaps and inconsistencies; and
3. Consider the required degree of detail in the articles and whether some articles or their detailed version could be placed in an instrument other than the Statute.[868]

859 'Decisions taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' <http://www.iccnow.org/documents/DecisionsTaken11to21Feb97.pdf> accessed 15 February 2016.

860 See also, Amnesty International, 'Making the Right Choices-Part I- Defining the Crimes And Permissible Defences And Initiating A Prosecution' (1 January 1997) <http://www.iccnow.org/documents/ALMakingRightChoises97PartI.pdf> accessed 6 May 2016, 44-45: In January 1997, Amnesty International submitted this issue paper. Specifically, the paper advocated for the inclusion of enslavement as a crime against humanity but did not propose a definition for the offense. This paper also made no mention of human trafficking.

861 Preparatory Committee on the Establishment of an International Criminal Court Working Group on Definition of Crimes 'Draft Consolidated Text' (20 February 1997) UN Doc A/AC.249/1997/WG.1/CRP.5. <http://www.iccnow.org/documents/WrkGrp1CrimesAgainstHuFeb97.pdf> accessed 21 July 2016.

862 ibid. See also, Bassiouni, *A Documented History* (n 848) 369-383.

863 Bassiouni, *A Documented History* (n 848) 349-368.

864 ibid 313-347. See however, Women's Caucus for Gender Justice in the International Criminal Court, 'Recommendations and Commentary For December 1997 PrepCom On The Establishment of An International Criminal Court United Nations Headquarters December 1-12, 1997' <http://www.iccnow.org/documents/5PrepComRecommWomensC.pdf> accessed 15 February 2016: A submission by the Women's Caucus for Gender Justice in the International Criminal Court discusses the definitions and concepts of (war) crimes that this group believed should be recognized including: enslavement, forced marriage, sexual slavery, rape, etc.

865 Bassiouni, *A Documented History* (n 848) 221.

866 See also, J Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11 Pace International Law Review 361, note 11: Washburn explains that 'the "Bureau" in UN practice includes all elected officials of a UN body or conference. These are members of government delegations. Closely associated with these officials, and often included in broader use of the term, are members of the Secretariat assigned to assist the officials and other persons they may appoint as Conference secretaries, rapporteurs, coordinators, drafters and the like. The complete formal lists of the elected officials of all bodies of the Conference and of its UN staff appear in paragraphs 17-20 of the Final Act attached to the Rome Statute.'

867 Bassiouni, *A Documented History* (n 848) 221.

868 ibid.

No further clarification or work was reported done on the concept of enslavement or its definition.[869]

The sixth and final Preparatory Committee meeting was held from 16 March to 3 April 1998. USA's delegation submitted another definitional proposal for enslavement, this time, delineating the offense via an enumeration of its elements, which read as follows:

1. that the accused intended to own or cause to be owned one or more persons and the fruits of their labor;
2. that one or more persons was forced to do labor without any compensation;
3. that the accused exerted ownership rights over one or more persons so as to deprive them of all individual rights; and
4. that the enslavement was carried out as part of a widespread or systematic attack.[870]

In April 1998, shortly after USA's submission, a report of the final PrepCom meeting contained a 'revised' Draft Statute for the International Court (PrepCom Draft Statute). The PrepCom Draft Statute contained 116 articles comprising of 1,700 brackets which indicated the disagreed upon language amongst the drafters.[871] Considering the PrepCom Draft Statute left the term 'enslavement' undefined, it seems safe to assert that USA's proposed definition of 'enslavement' was not embraced by the drafters.[872] The PrepCom Draft Statute did not mention human trafficking.

From 15 June to 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome (Rome Conference) in which delegates from over 160 states and many organizations participated. On the first day of the Rome Conference, a 'Committee of the Whole' was established.[873] This committee was tasked 'with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested', in essence – finalizing a statute for the court.[874]

In all, the Committee of the Whole held 42 meetings throughout the duration of the Rome Conference.[875] In an effort to tackle various parts of the statute simultaneously, this elected

869 ibid 233-234.

870 USA Reference Paper, Elements of Offenses for the International Criminal Court (27 March 1998) <http://www.iccnow.org/documents/USElementsofOffensesMarch98.pdf> accessed 15 February 2016: Furthermore, a comment to this construction reads: The detention or internment of protected persons, defined in accordance with the Geneva Conventions of 1949, does not constitute enslavement under this statute. A comment on the US proposed definition of enforced prostitution is also interesting: 'Enforced prostitution is intentional sexual enslavement wherein the 'forcible' element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature related to rape or sexual abuse.'

871 *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/Conf. 183/2/ Add.1 (1998). See also, Washburn (n 866) 362-363

872 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June – 17 July 1998) UN Doc A/CONF.183/13(Vol. III) 20-21 (Vol. III).

873 ibid 93 [1]-[3].

874 Final Act (n 851) 5 [22].

875 Vol. III (n 872) 93 [7].

committee quickly divided itself into several working groups.[876] It considered the ILC Draft Statute, the PrepCom Draft Statute and various proposals and working papers submitted during the Rome Conference.[877]

The inclusion of trafficking within the crime of enslavement first emerged from a proposal by the Bureau on 9 July 1998.[878] This proposal defined 'enslavement' to mean:

> the exercise of any or all of the powers attaching to the right of ownership over a person and includes the deprivation of physical liberty in the course of trafficking in persons, in particular women and children for the purpose of sexual exploitation;[879]

The only other proposal was submitted by the USA and, in similar fashion to their submission at the final PrepCom meeting, defined the offense as follows:

> Enslavement
> 1. Part 2 offence: Enslavement.
> 2. Elements:
>   i. That the accused intended to own or cause to be owned one or more persons and the fruits of their labour;
>   ii. That one or more persons was deprived of all essential individual rights or forced to do labour without any compensation;
>   iii. That the deprivation or forced labour was without lawful justification or excuse; and
>   iv. That the enslavement was carried out with conscious participation in a widespread [or/and] systematic attack.
> 3. Comment: The 'without lawful justification or excuse' requirement would mean, for example, that the detention or internment of protected persons, defined in accordance with the Geneva Conventions of 1949, would not result in culpability with respect to this offence.[880]

Without any (reported) explanation, the Bureau's construction of 'enslavement' was preferred, as evidenced by its insertion into the working group's draft text of crimes against humanity. At the Committee of the Whole's 34th meeting on 13 July 1998, finalizing the statute was strenuously urged. The only other discourse recorded involving the definition of enslavement came from Mr. Sadi of Jordan who, after consulting with other delegations,

> proposed the following refinement of the definition of enslavement in paragraph 2 (a ter): '"Enslavement" means the exercise of any or all of the powers attaching to the right of

876 ibid 93-94 [9].

877 ibid 94 [10]-[11].

878 It has also been written that it was the Italian delegation involved in this drafted definition. For example in D. Robinson, 'Article 7(1)(c) – Crime Against Humanity of Enslavement' in RS Lee and H Friman (eds), *The International Criminal Court*: *Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 85, he writes: '[a] helpful clarification, proposed by Italy, adds that enslavement "includes the exercise of such power in the course of trafficking in persons, in particular women and children."'

879 Vol. III (n 872) 204 citing the 'Bureau discussion paper' UN Doc A/CONF. 183/C. 1/L.53, 213 citing 'Bureau proposal' UN Doc A/CONF. 183/C. 1/L.59, 221 citing UN Doc A/CONF.183/C.1/L.44.

880 Vol. III (n 872) 203 citing 'United States of America: proposal regarding article 5' UN DOC A/CONF.183/C.1/L.8.

> ownership of a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.'[881]

This proposal was accepted and inserted into the Draft Statute[882] which became what is now Article 7(2)(c).[883]

A review of the preparatory texts references the inclusion of trafficking in enslavement's definition. The motivation or rationale behind this inclusion however remains unclear. Robinson explains that the construction of enslavement's material element 'was drawn from the war crime of sexual slavery, which had been previously negotiated.'[884] However, whether Robinson is referring to the entirety of enslavement's definition under Article 7(2)(c), only the first half addressing the exercise of powers attaching to the right of ownership over another or the Elements of Crimes is unclear. As the Rome Statute does not contain a definition for 'sexual slavery' as a war crime or crime against humanity it would seem only logical that Robinson was referencing the Elements of Crimes which does contain a definition of 'sexual slavery'. However, the Elements of Crimes was created *after* the Rome Statute's finalization and does not reference trafficking.

As part of the Final Act of the Rome Conference, a Preparatory Commission was established and assigned (among other things) to create an Elements of Crimes to assist in interpreting provisions of the Rome Statute.[885] The Elements of Crimes defines 'sexual slavery' as follows:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[886]

---

881 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June – 17 July 1998) UN Doc A/CONF.183/13, 332 [74] (Vol. II): The only recorded mention of enslavement came from Mr. Kirabokyamaria of Uganda who 'agreed with those delegations and non-governmental organizations that advocated adequate and effective provisions in the Statute for safeguarding children. The prosecution of abduction, rape, enslavement and other forms of child abuse should be prominently reflected in the Statute. Gender concerns should also be taken into account.' (118 [70]).

882 Vol. III (n 872) 95.

883 The only other central issue in the drafting process concerns the framing of gender issues in the final days of the Rome Conference. See, Moshan (n 837) 171-172: Although the drafters demonstrated 'an increased willingness…to implement gender concerns' within the statute, they refrained from 'encompass[ing] gender-based crimes that are neither systematic nor widespread, but nonetheless savage and brutal' within the Court's jurisdiction which was strenuously advocated by women's groups.

884 Robinson, Article 7(1)(c) (n 878) 85. See also, C Byron, War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court (Manchester University Press 2009) 217. However, Byron relies on Robinson's work in making this point.

885 Final Act (n 851).

886 Elements of Crimes to the International Criminal Court, ICC-ASP/1/3 (part II-B) UN Doc PCNICC/2000/1/Add.2 (2000) Arts 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2 (Elements of Crimes).

Trafficking is not included in the text of any of the elements of sexual slavery but it is referenced in a footnote to the first element of sexual slavery in the Elements of Crimes which reads:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. *It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children*.[887]

As mentioned in the previous chapter, this footnote also appears verbatim in the Elements of Crimes concerning the material elements of enslavement. This seems to indicate a certain degree of material overlap between sexual slavery and enslavement.

What can be gleaned from the final definitional revision of enslavement is that it closely resembles the Slavery Convention's construct of slavery. Specifically, it prevented the inclusion of an apparent lesser form of subjugation, namely, the 'deprivation of physical liberty' in place of exercising powers attaching to the right of ownership to satisfy the material element of enslavement. As explained in the Elements of Crimes, any 'deprivation of liberty' must be akin to the exercise of 'powers' to fit within the definition enslavement's definitional framework. Additionally, in removing 'for the purpose of sexual exploitation' from the definition, the Rome Statute's definition presumably recognizes that the perpetration of trafficking can include exploitative purposes outside of sexual exploitation.

Considering this drafting history, not much can be concluded as to why trafficking was included in the definition of enslavement or what meaning it retains within the definition. Considering the persisting lack of clarity, attention will turn to the definition itself. The following section will examine the material element(s) of this codified offense in the Rome Statute's Article 7(2)(c).

5.3 The Material Element of Enslavement[888]

It will be recalled that Article 7(2)(c) defines 'enslavement' as: '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'.[889] The first portion of Article 7(2)(c)'s definition, namely, that enslavement is 'the exercise of any or all of the powers attaching to the right of ownership' over a person has a noticeable textual link to Article 1(1) of the Slavery Convention and its definition of 'slavery'. The textual difference being (as discussed in Chapter 4) that 'slavery' identifies the *status or condition* of a person based on another's *exercise* of 'powers' over them, whereas enslavement criminalizes the exercise of those 'powers'.[890]

This is not to say that the Rome Statute's definition of 'enslavement' has exclusively bound itself to the Slavery Convention's construct of 'powers', but rather, that it has borrowed language and

887 ibid Arts 7(1)(g)-2, note 18, 8(2)(b)(xxii)-2, note 53, 8(2)(e)(vi)-2, note 66. Emphasis added.

888 The beginning stages of this research first appeared in Siller, 'The Prosecution of Human Traffickers?' (826) 240-246.

889 Emphasis added.

890 CK Hall and C Stahn, 'Article 7' in O Triffterer and K Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (CH Beck, Hart, Nomos 2016) 190[41].

concepts from it to fashion the definition of enslavement.[891] Even so, neither the Rome Statute, nor the Elements of Crimes makes specific reference to the Slavery Convention. The Elements of Crimes however does reference the Supplementary Slavery Convention (as just discussed above). The Supplementary Slavery Convention explicitly uses the Slavery Convention's definition of 'slavery' as it is the Slavery Convention's supplementing instrument.[892]

The Elements of Crimes reference to the Supplementary Slavery Convention does not confine the Rome Statute's legal definition of 'sexual slavery' or 'enslavement' to the Slavery Convention's definition of 'slavery' either. Rather, this reference was inserted so as to solidify the potential incorporation of practices not traditionally labelled as 'slavery' under international law within the crimes of sexual slavery and/or enslavement.[893] The only apparent caveat being that the particular 'deprivation of liberty' in question is on par with the exercise of 'powers attaching to the right of ownership' over another. Nevertheless, it is evident that the Slavery Convention's definition of 'slavery' is the starting point in understanding the material confines of this offense. The concept of 'powers', their identification and examples of their exercise was already discussed in Chapter 4 and will therefore not be addressed again in this chapter.[894]

It is the remaining portion of the definition of enslavement, 'and includes the exercise of such power in the course of trafficking in persons, in particular women and children', which necessitates further discussion in two regards. First, determining how 'trafficking in persons' within Article 7(2)(c) should be defined. Second, identifying the context and limitations (if any) of the second half of the definition and the phrase 'in the course of' which separates the universal concept of slavery from the inclusion of trafficking in the Rome Statute's definition of enslavement as a crime against humanity.

5.3.1 Defining 'Trafficking in Persons'

'Trafficking in persons' appears (undefined) in the definition of enslavement. Neither the judgments from ICC, nor submissions of the OTP have, as of yet, even attempted to define it. As discussed in Chapter 3, the Palermo Protocol contains the universally recognized international definition of 'trafficking in persons'.[895] Even though the Palermo Protocol post-dates the Rome Statute, it appears that, at a minimum, there was some awareness on the part of drafters of the Elements of Crimes to the Rome Statute that the Palermo Protocol would contain a codified definition of 'trafficking' which could be used to interpret the concept of 'trafficking in persons' as enshrined in the Rome Statute. For example, in their recommendations to the Elements of

891 Robinson, 'Article 7(1)(c)' (n 878) 84.

892 Elements of Crimes (n 886) Arts 7(1)(g)-2, note 18, 8(2)(b)(xxii)-2, note 53, 8(2)(e)(vi)-2, note 66.

893 ibid. See also, Robinson, 'Article 7(1)(c)' (n 878) 85: who explains that because certain 'delegations had misgivings that the term "servile status" was excessively vague … the term was clarified by reference to its origin, the 1956 Supplementary Slavery Convention.'

894 See *supra* Chapter 4, subsection 4.2.2.

895 See *supra* Chapter 3, section 3.1.

Crimes' PrepCom held in November and December of 1999, the Women's Caucus[896] explained that:

> The crime of trafficking is currently being defined by the Committee on the Elaboration of a Convention against Transnational Organised Crime in Vienna for a draft Protocol to Prevent, Suppress and Punish Trafficking in Persons. The Women's Caucus believes that the exercise of defining trafficking is best left to this Committee working on the draft Protocol since it has time and expertise, not available to the ICC Preparatory Commission, to perform this task. Thus, it is preferable that no definition of trafficking be included in the ICC Elements of Crime in order to avoid the possibility of different definitions in different international treaties.[897]

Determining a definition for 'trafficking in persons' as contained in the Rome Statute is important considering the principle of *nullum crimen sine lege* which is codified in Article 22 of the Rome Statute as well as general notions of due process of law.[898] It would seem rather important to the preparation of the prosecution's as well as the defense's case to know what conduct is considered as 'trafficking in persons' if a defendant is charged with enslavement on the basis of trafficking.

Since the Palermo Protocol's entry into force, it is now commonly believed that the ICC will or should embrace its definition of 'trafficking in persons' to interpret trafficking within the definition of 'enslavement' as a crime against humanity.[899] It is already a widely used practice among legal scholars to utilize the Palermo Protocol's definition of 'trafficking in persons' in the context of the ICC's codification of enslavement.[900] On this point, Allain has commented that

---

896 The Women's Caucus for Gender Justice was created during the PrepCom meeting in February 1997. It is 'a network of individuals and groups committed to strengthening advocacy on women's human rights and helping to develop greater capacity among women in the use of International Criminal Court and other mechanisms that provide women avenues of and access to different systems of justice.' More about its origins, objectives, mandate etc. can be found here: <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.html> accessed 28 September 2016.

897 Women's Caucus Advocacy in ICC Negotiations, 'Recommendations & Commentary for Elements Annex Part I' (Submitted to the 29 November- 17 December PrepCom) <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/111999pc/elannex1.html> accessed 6 May 2016.

898 Rome Statute (n 820) Art 22 reads:
1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

899 For example, see Siller, 'Modern Slavery' (n 826). See also, Moran (n 825) 33-35: who argues that trafficking (as defined in the Palermo Protocol) 'should be included within the jurisdiction of the ICC as a core international crime rather than a crime against humanity'.

900 See for example, Allain, 'The Definition of "Slavery" in General International Law' (n 825); Aston and Paranjape (n 825) 10; Atak and Simeon (n 828) 1021; Kim (n 825) 11-13; Obokata, 'Trafficking as a Crime against Humanity' (n 824) 446; O'Brien (n 825) 287; Pesman (n 825); G Werle and F Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) [938]-[939]; C Byron, War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court (Manchester University Press 2009) 218.

> While the jurisdiction of the Court does not criminalize trafficking in persons per se, it does, by reference… utilize the language of what would come to be the official title of the Palermo Protocol, bringing the possible application of this instrument into the orbit of international judicial consideration.[901]

Other scholars typically do not offer an alternative definition; they just refrain from referencing any definition of trafficking in this context.[902]

Allain's observation appears well founded considering the Palermo Protocol's rather sweeping ratification status and influence on domestic and regional trafficking laws. The UN Security Council recognizes this status and advocates the use of its construct, stating that the Palermo Protocol 'includes the first internationally agreed definition of the crime of trafficking in persons and provides a framework to effectively prevent and combat trafficking in persons'.[903] Moreover the Council of Europe's (CoE) Explanatory Report on its Trafficking Convention which adopted the Palermo Protocol's definition of 'trafficking in persons' references the Rome Statute and its inclusion of trafficking within the definition of 'enslavement'.[904] The CoE's reference to the Rome Statute has even triggered Judge Schomburg to question if such a reference creates a 'bridge' for international courts to use this definition.[905] The OTP seems to agree. In its 'Draft Policy on Children', the OTP stated that:

> Other treaties that may prove useful in the interpretation of this aspect of article 7 of the Statute [in reference to 'trafficking in children as a form of enslavement'] include the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[906]

As it concerns the adoption of a definition of 'trafficking in persons', perhaps the work of the African Union indicates the Palermo Protocol's influential power on ICL. In June 2014, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court

---

901 J Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 14 Albany Government Law Review 1, 4.

902 See for example, Mattar (n 825); V Roth (ed), *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers 2012) 145; S. Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008) 125-128. See also, Werle and Jessberger (n 900) [939]. While Werle and Jessberger do not state that the ICC should adopt the Palermo Protocol's definition of 'trafficking in persons', they do however conclude that the Palermo Protocol contains a definition of this crime 'for the first time in international treaty law'.

903 United States Mission to the United Nations, 'Statement by the President of the Security Council on Trafficking in Persons in Situations of Conflict (16 December 2015) <http://usun.state.gov/remarks/7052?mc_cid=5c1e51c8fa&mc_eid=726f9f8f81> accessed 15 January 2016.

904 Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (adopted 3 May 2005, entered into force 1 February 2008) Warsaw, 16.V.2005, CETS No. 197, [43].

905 W Schomburg, 'Trafficking in Human Beings: From International Cooperation in Criminal Matters to International Criminal Courts', lecture given at The Hague Academy of International Law, Advanced Course on International Criminal Law with Special Focus on International Criminal Justice, Migration and Human Trafficking 6 June 2016.

906 OTP, 'Draft Policy on Children' (n 831) 19-20, note 49.

of Justice and Human Rights (Malabo Protocol).[907] The future of ICC prosecutions involving allegations of international crimes committed in Africa is unclear considering that this protocol 'extends the jurisdiction of the yet to be established African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes.'[908]

Under Article 28A, the Malabo Protocol states that the International Criminal Law Section of the Court shall have the power to try persons for the crime of trafficking in persons. Article 28C of the Malabo Protocol codifies crimes against humanity. Enslavement is identified as one of the following acts constituting crimes against humanity and the Malabo Protocol has adopted the Rome Statute's definition of 'enslavement' verbatim which includes reference to trafficking in persons. In terms of defining the concept of 'trafficking in persons' within the statute as a whole, the Malabo Protocol adopted the Palermo Protocol's definition of trafficking. Specifically, Article 28J states:

> For the purposes of this Statute:
>
> 1. "Trafficking in persons" means 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.
> 2. Exploitation shall include 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;
> 3. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (1) of this article shall be irrelevant where any of the means set forth in subparagraph (1) have been used;
> 4. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (1) of this article;

This inclusion within the Malabo Protocol further cements the prominence of Palermo Protocol and the applicability its definition of 'trafficking in persons' within the context of international criminal justice.

Considering its universal recognition and the lack of any real alternatives, the Palermo Protocol's construct of 'trafficking in persons' is the best definitional guidance in the interpretation of 'trafficking in persons' as found in the definition of enslavement in the Rome Statute. As such,

907 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.529(XXIII) (2014) (Malabo Protocol).

908 Amnesty International, 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' (2016), 5 <file:///X:/My%20Downloads/AFR0130632016ENGLISH%20(1).PDF> accessed 2 January 2017. See also, F Mninde-Silungwe, 'Trafficking in Persons (Article 28J) and Trafficking in Drugs (Article 28K)' in G Werle and M Vormbaum, *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press and Springer 2017) 109-123. It should be noted however that the Malabo Protocol labels all crimes as international ones; a decision which Mninde-Silungwe heavily criticizes. See also, Abraham G, 'Africa's Evolving Continental Court Structures: At the Crossroads?'(2015) Occasional Paper 209 < http://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file> accessed 2 January 2017.

and where relevant, the definition of 'trafficking in persons' found in Article 3(a) of the Palermo Protocol will be used throughout the remainder of this chapter to discuss how the second half of the Rome Statute's definition of 'enslavement' as a crime against humanity could be understood.

5.3.2 Interpreting the Meaning of Trafficking's Inclusion

It is the remainder of the Rome Statute's definition of 'enslavement' as a crime against humanity: 'and includes the exercise of such power in the course of trafficking in persons, in particular women and children' that needs further clarification. Academic references to trafficking within the Rome Statute generally conclude that trafficking in persons, free from any substantive limitations, is included under Article 7.[909] For example, Corrie explains that the Rome Statute 'expressly includes trafficking in persons, and arguably encompasses most forms of modern slavery.'[910] Both Robinson and Tavakoli each aver that trafficking is a form of slavery/enslavement,[911] while Werle and Jessberger explain that trafficking is a practice 'similar to enslavement.'[912] O'Brien concludes that traffickers should be prosecuted before the ICC because human trafficking is an 'example' of enslavement.[913]

There is a consensus that trafficking is included within the realm of enslavement. However, this is obvious as the term 'trafficking in persons' appears in the definition. A substantive discussion on what the inclusion of 'trafficking' within the definition of 'enslavement' actually *means* within the Rome Statute's definition largely continues to escape academic scrutiny.[914]

As revealed above in section 5.2, a review of the preparatory documents provides little to no guidance as to *why* trafficking was inserted into the definition of enslavement or *how* it can be interpreted. I believe there to be three ways to interpret trafficking's inclusion within the Rome Statute's definition of enslavement which include: (1) a textual approach based on Article 7(2)(c); (2) a textual approach of Article 7(2)(c) in combination with the Elements of Crimes; and, (3) a broader approach to this definition in light of what this research has uncovered thus far.

5.3.2.1 A Textual Approach

As far as a textual approach to understanding this definition is concerned, a plain reading of Article 7(2)(c) appears to only permit the prosecution of traffickers who also exercise 'powers' – a concept intrinsically linked to the definitional limits of Article 1(1) of the Slavery Convention. This link is evident because the first half of the definition of 'enslavement' in the Rome Statute adopts the Slavery Convention's construct.

A phrase separates the 'powers' language from the inclusion of trafficking: 'in the course of'. This expression is a common idiom for which words or phrases including: 'in', 'during' or 'at the

909 Mattar (n 825); Aston and Paranjape (n 825) 10.

910 Corrie (n 828) 286.

911 Tavakoli (n 822) 85; Robinson, 'Article 7(1)(c)' (n 878) 85.

912 Werle and Jessberger (n 900) [938].

913 O'Brien (n 825) 327.

914 That is not to say there is a complete void in scholarship. See for example, Hall and Stahn (n 890) 262 [122]; MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd Rev. edn, Kluwer Law International 2009) 311; MC Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 380. Gallagher, *The International Law of Human Trafficking* (n 825) 214-217.

same time' can suffice.[915] As such, the definition plainly reads that perpetrators exercising 'powers attaching to the right of ownership' over another 'in the course of' (while or during) trafficking in persons are included within the confines of this offense.[916]

In using this interpretation, Allain comes to the conclusion that the insertion of trafficking language therefore 'does not add to the substance of the definition of enslavement but simply confirms that powers attaching to the right of ownership may be found in instances of trafficking in persons.'[917]

However, if the Palermo Protocol's definition of 'trafficking in persons' is adopted, a textual approach may in fact add to the substance of this crime by requiring the perpetration of trafficking elements (eg, 'act', 'means' and 'purpose'), even though these are nowhere to be found in the definition of enslavement as enshrined in the Rome Statute.[918] Accordingly, the prosecution of trafficking defendants would appear permissible before the ICC (when charged under the crime of enslavement) so long as the:

1. the trafficking elements ('act' and 'means' requirements as codified in Article 3 of the Palermo Protocol) with the specific exploitative purpose of slavery; and
2. any or all of the powers attaching to the right of ownership were exercised.

Utilizing a textual approach to understanding the offense can only be speculative as the ICC has yet to rule on the matter or adopt a definition of 'trafficking in persons'. However, reading the additional trafficking elements into the definition of enslavement seems to be a somewhat absurd consequence of defining the crime in this manner.

Why would the drafters include trafficking into the definition of enslavement if it was only going to make it a more difficult crime to prove before the ICC through the addition of elements? As such, I am not persuaded that this is an appropriate interpretation of the crime. Moreover, as the Rome Statute's reference companion is the Elements of Crimes, this instrument must also be taken into account.

5.3.2.2 A Textual Approach in Combination with the Elements of Crimes

A second interpretative approach is a textual analysis of Article 7(2)(c) in combination with the Elements of Crimes. The Elements of Crimes enumerates the elements of 'enslavement' as follows:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[919]

915 C Ammer, *The American Heritage Dictionary of Idioms* ('in the course of') <http://dictionary.reference.com/browse/in-the-course-of> accessed 16 February 2016; 'In the course of' (n.d.) *Webster's Revised Unabridged Dictionary* (1913) <http://www.thefreedictionary.com/In+the+course+of> accessed 16 February 2016.

916 Allain, *Of Human Exploitation* (n 834) 286-288. Allain also discounts any argument that the Elements of Crimes permits a looser understanding of this application.

917 ibid 285.

918 Palermo Protocol, Art 3.

919 Elements of Crimes (n 886) Art 7(1)(c).

The second and third elements here refer to the contextual elements of trafficking (to be discussed in subsection 5.4) and can therefore be ignored for purposes of this discussion. The first element addresses the material substance of the act of enslavement and must therefore be examined.

Instead of identifying actual 'powers attaching to the right of ownership' (eg, ability to use), the Elements of Crimes included 'examples' (eg, purchasing, selling, lending) of exercising 'powers' over another.[920] The perceived 'commercial nature of each illustration' however raised concerns for many who objected to the insertion of this language before the Elements of Crimes' Preparatory Commission.[921] For example, the Women's Caucus objected to this phrasing stating that the Elements of Crimes 'should not limit the crime of enslavement by singling out a limited set of practices such as purchasing, selling or confinement'.[922] Specifically, the Women's Caucus explained that 'the Rome Statute's definition is based on…article 1 of the Slavery Convention'.[923] In relying on the Slavery Convention's definition of 'slavery' and enslavement jurisprudence from the ICTY (which also uses the Slavery Convention's construct to interpret the crime of enslavement), the Women's Caucus explained that:

> the crime of enslavement encompasses a range of slavery-like conditions; it is not restricted to a particular form or mechanism of enslavement such as purchasing or selling a person; it does not require confinement or similar loss of liberty; and it does not preclude any compensation to the victim. Rather, the hallmark of slavery is the loss of right to control the use of one's body or the loss of autonomy or ownership over one's body. Since the exercise of ownership takes many different forms, it is best to adopt the generic definition of enslavement in the Rome Statute and leave it for the Court to apply that definition consistent with international law.[924]

As it concerns retaining a place for trafficking within the Elements of Crimes' definition of enslavement the Women's Caucus stated that:

> it is essential that this PrepCom take care not to define enslavement in the Elements Annex so as to exclude central aspects of trafficking…the crime of trafficking includes recruitment, kidnapping, force, fraud, deception or coercion and is not limited to purchase or sale. In a position paper on the draft Protocol, the Special Rapporteur on Violence against Women recommends that the trafficking definition encompass all persons involved in the trafficking chain, including the person at the beginning of the chain, who provides or sells the trafficked person, and the person at the end of the chain, who receives or purchases the trafficked person, holds the trafficked person in forced labour, or profits from that labour.

---

920 See, WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 161.

921 ibid citing D Robinson, 'The Elements of Crimes Against Humanity' in RS Lee and H Friman (eds), *The International Criminal Court*: *Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 57-108. See also, Robinson, Article 7(1)(c) (n 878) 85.

922 Women's Caucus Advocacy in ICC Negotiations, 'Recommendations & Commentary for Elements Annex Part I' (Submitted to the 29 November- 17 December Prep Com) <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/111999pc/elannex1.html> accessed 6 May 2016.

923 ibid.

924 ibid. The ICTY's most notable discussion of enslavement as a crime against humanity can be found in Chapter 6, subsection 6.2.1.

> For all these reasons, it is preferable to include only the language of the Rome Statute: 'the exercise of such power in the course of trafficking' – in the Elements Annex in order to embrace the full range of the conduct through which the perpetrators of this crime subject women, men and children to enslavement. In the alternative, if an illustrative list is preferred, it must include some of the more common methods of trafficking, in addition to purchase or sale, such as recruitment, deception, and coercion for this purpose.[925]

Schabas and Robinson have each explained in their respective commentaries on the drafting of the Rome Statute and its Elements of Crimes[926] that these types of voiced concerns prompted the addition of footnote 11 to Element 1 of the definition in the Elements of Crimes which reads:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[927]

What I gather from the first element in the Elements of Crimes and its footnote is that: (1) the Slavery Convention's definition of slavery *influenced* the drafters' construction of this crime; and (2) the Elements of Crimes' drafters wanted to solidify the notion that the Rome Statute's definition of enslavement is *not bound* to the Slavery Convention's construct, but that it is broader than the traditional perception of slavery (what many associate with 'transatlantic slavery' or 'chattel slavery'), and will therefore encompass practices that may be known by other names under the law (eg, debt bondage, servile marriage) so long as 'powers' are exercised, *or* a 'similar deprivation of liberty' is imposed over another.

The first observation is rather obvious considering that the 'powers' language is uniquely found in the Slavery Convention. The second observation is as equally straightforward. In addition to the 'powers' language, the first element also states 'or by imposing on them a similar deprivation of liberty' thereby preventing the material element of enslavement to be limited by the Slavery Convention's construct of 'powers'. The comma separating the 'powers' language from a similar 'deprivation of liberty' connotes that either of the two will satisfy the material element.

The footnote to the first element of enslavement in the Elements of Crimes echoes the broadening of enslavement's material element by explaining that the 'deprivation of liberty' needed to satisfy this element can arise via the perpetration of practices enumerated in the Supplementary Slavery Convention or by exacting forced labor.

In continuing to use a textual approach to dissect footnote 11 in the Elements of Crimes, Allain contends that the formation of these sentences acknowledge 'two distinct considerations' since the first sentence states '[i]t is understood' and the second starts a new contention '[i]t is *also* understood'.[928] Moreover, the second sentence includes the phrasing 'described in this element'

925 ibid.

926 Schabas, *The International Criminal Court* (n 920) 161. Robinson, 'Article 7(1)(c)' (n 878) 84-86.

927 Elements of Crimes (n 886) Art. 7(1)(c) note 11: For purposes of comparison, the earlier drafted version of this footnote reads as follows: 'It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.'

928 Allain, *Of Human Exploitation* (n 834) 287-288. Emphasis added.

thereby referencing Element 1 (as opposed to the first sentence in footnote 11). As such, it is logical to isolate these sentences from one another to make sense of them.[929]

In reviewing the first sentence, it essentially states that practices like forced labor and those encompassed in the Supplementary Slavery Convention (eg, servile marriage, child exploitation, debt bondage and serfdom) could, 'in some circumstances' meet the 'deprivation of liberty' threshold for enslavement. As this convention supplements the Slavery Convention, I believe slave trade is also included in the list of practices. However, this qualification appears to always come down to whether the 'deprivation of liberty' in question is *similar* to an exercise of 'powers' over another, which the Elements of Crimes unfortunately failed to elaborate upon.

Nevertheless, there are important takeaways from sentence one of footnote 11. This sentence makes clear that the concept of 'powers' includes the 'deprivation of liberty'. It also clarifies that the practices listed in the footnote (eg, forced labor) contain an aspect of depriving one's liberty. For these practices to qualify under this international crime, a qualitative examination is necessary.

The second sentence in footnote 11 of the Elements of Crimes is more problematic considering that it appears to conflict with a plain reading of the Rome Statute's definition.[930] Article 7(2)(c) states that enslavement 'includes the exercise of such power *in the course of* trafficking in persons, in particular women and children', thus contemplating the inclusion of trafficking so long as 'powers' are exercised. In contrast, the second sentence in footnote 11 states that 'the conduct described in this element includes trafficking in persons' thereby appearing 'to extend the definition of enslavement not only to those powers attaching to the right of ownership which might be present in a case of trafficking but to actually *equate* trafficking to enslavement.'[931] As Gallagher explains:

> The elements of the crime of enslavement reveal that, although the ICC Statute continues the firm attachment to attributes of ownership enshrined in the 1926 [Slavery Convention] definition, it also admits a cautious expansion of the concept by acknowledging that certain circumstances, *become* slavery.[932]

As such, this footnote encourages a reading of the definition of trafficking other than what is found in the Palermo Protocol. I will reiterate here, the Rome Statute is not required to use the Palermo Protocol's definition of 'trafficking in persons'. Another definition of trafficking may not be a problem for the prosecution of traffickers before the ICC. However, using a different definition of trafficking would likely frustrate the harmonization of international law concerning the crime of trafficking. It would also be in conflict with one of the Palermo Protocol's aims as well as potentially with the promotion of cooperation between states.[933]

929 ibid 287. Emphasis in original text.

930 ibid 287-288.

931 ibid 287.

932 Gallagher, *The International Law of Human Trafficking* (n 825) 185. Emphasis in original text. See also Gallagher at 216: She states that this footnote incorporates several other practices and that perhaps trafficking could, 'according to the Elements of Crimes, be included in the same way.'

933 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 2(Palermo Protocol).

Article 21 of the Rome Statute obliges the ICC to apply the Rome Statute first, and thereafter the Elements of Crimes.[934] If the Palermo Protocol's construct of trafficking is used to interpret the Rome Statute's inclusion of 'trafficking in persons' in its definition of enslavement, Allain points out that the expanded understanding of enslavement in the Elements of Crimes fails to conform to the limits of Article 7(2)(c)'s definition.[935] It is therefore inconsistent with the Rome Statute and in contravention of Article 9(3) which states that '[t]he Elements of Crimes and amendments thereto shall be consistent with this Statute.'[936] As such, the Pre-Trial Chamber's (PTC) holding in the *Al Bashir* arrest warrant case would seem to apply in this situation which determined that when 'an irreconcilable contradiction' between the Rome Statute and Elements of Crimes exists, the Elements of Crimes need not be applied.[937] Therefore, the second sentence of footnote 11 could or perhaps should be disregarded.

If the second sentence of footnote 11 is disregarded, it would seem that the material element of enslavement can be satisfied if:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over another

   OR

2. The perpetrator imposed a similar deprivation of liberty over another as seen through the perpetration of:
   a. Exacting forced labor;
   b. Slave trading; or
   c. Engaging in practices identified in the Supplementary Slavery Convention
      i. Debt bondage
      ii. Serfdom
      iii. Servile Marriage
      iv. Child Exploitation

As this specific discussion is speculative, it is unclear whether disregarding the second sentence of footnote 11 provides for a better outcome. It seems odd that one should even have to discount it. A purely textual approach to the interpretation of the Elements of Crimes however seems to require it. Additionally, disregarding the second sentence is more likely to preserve the individual substantive identities of enslavement and trafficking in persons. If the second sentence in footnote 11 is *not* disregarded, it would appear that the Rome Statute perceives 'trafficking in persons' synonymously with 'enslavement'.

Considering approach one produces an irrational result and approach two results in the disregarding of an entire sentence from the Elements of Crimes, I am left unsatisfied with these interpretative options. It is also unclear whether the second sentence of the Elements of Crimes' footnote presents such an 'irreconcilable contradiction' that it must be disregarded. However, in order to demonstrate that belief, I must adopt an interpretative approach which is not confined to a strict textual analysis.

---

934 See also, R Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014) 153.

935 Allain, *Of Human Exploitation* (n 834) 288.

936 ibid.

937 See also, Cryer *et al* (n 934) 153 citing *Prosecutor v Al Bahir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, PTC I (4 March 2009) [128]-[132].

5.3.2.3 A Comprehensive Understanding of Enslavement Considering the inclusion of Trafficking within Enslavement's Definition and International Law

The principal reason to stray from a purely textual approach in interpreting the Rome Statute's codification of enslavement is that the ICC and its instruments cannot and do not operate in a vacuum. It is widely recognized that different realms of international law borrow concepts and interpretations from one another.[938] Moreover, the ICC frequently cites to sources of law outside of its statute and relies on jurisprudence from other regional and international jurisdictions in its examination of the law. As such, the interpretation of Article 7(2)(c) and the Elements of Crimes must be combined with the insight gleaned on international law concerning enslavement as discussed in Chapter 4 in order to more accurately attach legal meaning to the inclusion of 'trafficking in persons'. While I advocate an approach outside of the text of the ICC instruments, I do not consider it an interpretative approach outside of the law on enslavement. In taking this approach, one's understanding of the Rome Statute's material element of enslavement changes.

The Elements of Crimes essentially re-purposes enslavement's construct as an umbrella offense. As such, any practice that exercises 'powers' or is a 'deprivation of liberty' similar to the exercise of 'powers' fits under the umbrella of enslavement, regardless of the practice's purported legal designation. This understanding is consistent with enslavement codifications and interpretations discussed in Chapter 4.[939]

Considering the findings of Chapter 4 in combination with the Rome Statute and Elements of Crimes, I think that the inclusion of trafficking into the Rome Statute's definition evidences an understanding of enslavement which:

1. requires that the defendant exercise 'powers'/ similar 'deprivation of liberty' *with the intent to exploit* or that *exploitation occurred* or requires that the victim is *commodified*; **and** that
2. the crime of enslavement also encompasses *the acquisition of persons* for the purpose of exploitation.

The basis for making these observations clearly merits some explanation. Indeed, it is my belief that *either* exploitation/exploitative intent *or* victim commodification is required to satisfy the material elements of enslavement. I will first address the intent to exploit or exploitation and then discuss the inclusion of victim commodification. Thereafter I will address my second observation that the crime of enslavement also encompasses the acquisition of persons for the purpose of exploitation.

My first observation is that the crime of enslavement requires the perpetration of exploitation or exploitative intent. This observation is drawn from attaching meaning to Article 7(2)(c)'s inclusion of 'trafficking in persons' and the Elements of Crimes inclusion of exploitative practices. The crime of trafficking has always been construed under international law as a mechanism to

938 For example, see E Decaux, 'The Place of Human Rights Courts and International Criminal Courts in the International System' (2011) 9 Journal of International Criminal Justice 597; WA Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Court of Human Rights' (2011) 9 Journal of International Criminal Justice 609; O de Frouville, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment (2011) 9 Journal of International Criminal Justice 633; F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; U Linderfalk, 'Cross-fertilisation in International Law' (2015) 84 Nordic Journal of International Law 428; V Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts: Procedure and Human Rights Aspects* (2nd edn Intersentia 2014) Chapter 25.

939 See Chapter 4, section 4.4.

acquire persons for the purpose of their exploitation. The Rome Statute views trafficking in the context of enslavement as a crime against humanity as tantamount to exercising 'powers' – which evidences the emphasis on criminalizing conduct that is exploitative in nature. This is how the second sentence in the Elements of Crimes' footnote can be understood. Moreover, with the exception of servile marriage, the Elements of Crimes inclusion of forced labor and the practices found in the Supplementary Slavery Convention (serfdom, debt bondage and child exploitation) *all involve the exploitation of another*. This conclusion is further bolstered when also taking into account the contextual elements of crimes against humanity which requires an 'attack'.[940] While I rejected that slavery (as defined in the Slavery Convention) requires the intent to exploit, the same cannot be said for enslavement after examining the Rome Statute, the Elements of Crimes and international law on the matter.

Others may not agree with my position. For example, Hall and Stahn conclude that the inclusion of trafficking in the Rome Statute's definition 'is significant since it precludes a perpetrator from claiming that he has not "enslaved" because he has not literally "put the person to work"' thereby separating the association that enslavement requires forced labor or slave output as various 'forms of trafficking can be assimilated to enslavement.'[941] That is an interesting characterization of trafficking's inclusion considering that trafficking does require the intention to exploit another, whereas the exercise of 'powers' does not.[942] Likewise, Bassiouni maintains that including 'the example' of trafficking in the definition of enslavement evidences that this crime 'encompasses not only the practice of "slave labor," but also practices that deny a person's self-ownership, even though such practices may not initially involve "slave labor."'[943]

Alternatively, if the defendant did not exploit or intend to exploit, then there must be evidence of the commodification of the alleged victim(s). This inclusion within the understanding of the crime of enslavement is clearly demonstrated by the Elements of Crimes which only listed examples of commodification including: 'purchasing, selling, lending or bartering such a person or persons' as satisfying the material element of the offense. All of these examples speak to the commodification of the victim as opposed to their subjection to exploitation.

Moreover, the Elements of Crimes' incorporation of slave trade (by reference to the Supplementary Slavery Convention) reinforces this point. Slave trade's definition includes 'all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged' thus evidencing a focus on commodification.[944] Likewise, the practice of servile marriage is included within this crime by way of the Supplementary Slavery Convention. Servile marriage comprises three practices: bride purchase, wife transfer and widow inheritance, all of which center on the ability to commodify another, not exploit them.[945]

My second observation is that the inclusion of trafficking in the Rome Statute's definition of enslavement confirms the broadening of the offense such that forms of victim acquisition can

940 See *infra*, subsection 5.4.1.

941 See also, Hall and Stahn (n 890) 262 [122]. See also, Bassiouni (n 912) 311; Bassiouni, *Historical Evolution and Contemporary Application* (n 912) 380.

942 See Chapter 4, subsection 4.2.2, 153-154.

943 Bassiouni, *Crimes Against Humanity in International Criminal Law* (n 914) 311; Bassiouni, *Historical Evolution and Contemporary Application* (n 914) 380.

944 Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Art 1(2) (Slavery Convention).

945 See Chapter 3, subsection 3.3.6.2.4.3.

satisfy the material element of the offense. As just mentioned above, regardless of which definition of trafficking is adopted, under international law, trafficking has always been understood to cover the *acquisition of persons* for exploitative purposes. Trafficking victims may suffer from various forms of 'deprivation of liberty' during their acquisition, and on their journey to their intended state of exploitation. For example, they can be abducted, confined or restrained without any control over their liberty or the duration of this deprivation. As such, victim acquisition can satisfy the required similar 'deprivation of liberty' over another as seen through the exercise of 'powers' thus meeting the material element of enslavement. It is this incorporation of trafficking within the crime of enslavement which I believe the second sentence in the Elements of Crimes' footnote was also trying to explain.

The argument that forms of victim acquisition are included within this offense is further bolstered by the Elements of Crimes' inclusion of slave trade. Slave trade's definition 'includes all acts involved in the capture' or acquisition of persons intended for a life of slavery.

It is this codified melding of attributes of slavery into the crime of enslavement with the addition of trafficking concepts that leads one like legal trafficking scholar Gallagher to conclude '[t]hat practices associated with trafficking are now a recognized part of international humanitarian law and criminal law is indisputable.'[946]

Gallagher suggests that the inclusion of trafficking in the definition of enslavement may evidence the evolution of this concept 'away from highly prescribed notions of property and ownership [eg, chattel slavery] and toward a more nuanced understanding, reflected in the definition of trafficking, of the many and varied ways in which individuals can and do exercise complete and effective control over others.'[947] My interpretation of the Rome Statute's definition of enslavement in light of the text of the definition, the Elements of Crimes and the state of international law[948] on enslavement is an evolution of traditional concepts of this crime. Considering my observations, the material element of this offense can be interpreted such that enslavement requires that:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over another; *OR*
2. The perpetrator imposed a similar deprivation of liberty over another as the exercise of 'powers' by:
    a. Exacting forced labor
    b. Slave trading
    c. Engaging in practices identified in the Supplementary Slavery Convention
        i. Debt bondage
        ii. Serfdom
        iii. Servile Marriage
        iv. Child Exploitation
    d. Trafficking in persons; *AND*
3. The exercise of 'powers' or imposition of a 'deprivation of liberty' over another must include their exploitation *or* an intent to exploit them, *or* result in their commodification.

Even though the material elements of enslavement in a case of trafficking can be explained, this crime's construction has been described by Robinson as 'somewhat convoluted and inelegant,

946 Gallagher, *The International Law of Human Trafficking* (n 825) 216.

947 ibid 217: It should be mentioned that Gallagher makes this point in the context of discussing trafficking as a crime against humanity and the case law of the ICTY in *Kunarac*.

948 Not including of course ICL enslavement jurisprudence which will be addressed in the following chapter.

involving a broad general test [the exercise of 'powers'], a restrictive-sounding list [as found in the Elements of Crimes], and an expansive footnote' – courtesy of the Rome Statute's drafting process.[949] Nevertheless Robinson avers that when taken in its entirety, this 'provision should capture with sufficient clarity those situations that objectively possess the character of enslavement.'[950] While this conclusion may be made outside of a courtroom, the failure to define 'powers' or 'trafficking in persons' within the definition or clarify whether or not enslavement is actually an umbrella offense can only aid in frustrating legal clarity concerning the legal confines of enslavement as a crime against humanity in practice.

5.4 The *Chapeau* Elements of Crimes Against Humanity in the Context of a Trafficking Prosecution before the ICC

In addition to its material elements, the Rome Statute characterizes enslavement as a 'crime against humanity', which thereby requires the perpetration of these material elements within the contextual or *chapeau* elements to satisfy this offense. As such, the following section will discuss these elements of crimes against humanity in the context of a trafficking prosecution before the ICC.

The Rome Statute outlines its definition of 'crimes against humanity' under Article 7 which requires the commission of an act, such as enslavement, 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'[951] The amount of research concerning the contextual elements of crimes against humanity and their interpretation by international courts and tribunals and by experts of ICL is extensive. It is therefore unnecessary to reproduce the work done in this field. Instead, it is the aim of this section to identify and evaluate potential issues concerning the ability to prosecute traffickers within the ICC's construct of enslavement as a crime against humanity which may arise when establishing the contextual elements of this crime.[952]

Although not the focus of this analysis, it should be briefly mentioned that there are additional considerations of admissibility that affect every case susceptible of falling within the ICC's jurisdiction. Article 17 of the Rome Statute codifies the ICC's 'admissibility test' which compromises three considerations.[953] These include an evaluation of the complementarity principle, the gravity threshold and considerations of double jeopardy.[954] Specifically, complementarity evaluates whether the situation under scrutiny is genuinely being investigated and/or prosecuted by a domestic system, which in turn dictates whether the ICC may hear the case.[955] Satisfying the 'gravy threshold' means that the actual case (ie, the alleged crimes and actions involved) are of

949 Robinson, 'Article 7(1)(c)' (n 878) 86.

950 ibid.

951 Rome Statute (n 820) Art 7(1).

952 It should be mentioned that even though this subsection cites to ICC cases law – these findings are generally consistent with the other contemporary ICL institutions including the ICTY, ICTR, SCSL and ECCC.

953 Schabas, *The International Criminal Court* (n 920) 336.

954 Proscribed in the Rome Statute (n 820) Art 20(3) and reconfirmed in Art 17(1)(c).

955 M Abdou, Commentary on Article 17 (Case Matrix Network) <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/#c1997> accessed 17 February 2016. See also, D Tolbert and LA Smith, 'Complementarity and the Investigation and Prosecution of Slavery Crimes' (2016) 14 Journal of International Criminal Justice 429.

sufficient seriousness to warrant action by the ICC.[956] As mentioned in this chapter's introduction, the OTP has also recently released a 'Policy Paper on Case Selection and Prioritisation'.[957] The OTP explained that when making its assessment to bring a case, its 'case selection criteria' includes an evaluation of the gravity of the crime, degree of responsibility of the alleged perpetrators and criminal charges.[958] The following subsections will however focus on the contextual elements of crimes against humanity as codified in the Rome Statute and interpreted by the ICC.

5.4.1 Attack Directed Against A Civilian Population

The first contextual requirement of crimes against humanity is that there is an 'attack directed against a civilian population.'[959] The Rome Statute has defined this concept to mean, 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population.'[960] The Elements of Crimes further states that the committed 'acts need not constitute a military attack.'[961] Robinson explains that this is 'one of the most important features' of crimes against humanity which insists perpetration can 'occur not only during armed conflict but also during times of peace or civil strife.'[962]

It is the perpetration of those acts enumerated under Article 7(1) which 'constitute the "attack" itself and, beside[s] the commission of the acts, no additional requirement for the existence of an "attack" should be proven.'[963] That is not to say however that evidence of the commission of the act, which in the case at hand would be enslavement, proves this element in its entirety.[964] The ICC has described an 'attack' to refer to a 'campaign or operation carried out against the civilian population.'[965] In terms of scale, the Court has held that 'where established that it involved

956 Abdou (n 955).

957 'Policy Paper on Case Selection and Prioritisation' (n 832).

958 ibid.

959 Rome Statute (n 820) Art 7.

960 ibid Art 7(2)(a).

961 Elements of Crimes (n 886) 5 [3].

962 D Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93(1) American Journal of International Law 43, 46

963 *Prosecutor v Bemba* (Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, PTC II, (15 June 2009) [75] (*Bemba* Confirmation of the Charges Decision); See also, *Prosecutor v Katanga* (Judgment pursuant to Art. 74 of the Statute) ICC-01/04-01/07, PTC II (7 March 2014) [1097], [1101] (*Katanga* Judgment), which held it may also include any form of violence. See also, *Prosecutor v Goudé* (Decision on the Confirmation of the Charges of the Prosecutor Against Blé Goudé) ICC-02/11-02/11, PTC I (11 December 2014) [125] (*Goudé* Confirmation of the Charges Decision)

964 *Bemba* Confirmation of the Charges Decision (n 963) [151]. See also J Nilsson, Commentary on Article 7 (Case Matrix Network) <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/#c1867> accessed 15 February 2016: Nilsson states that the PTC in *Bemba* 'merely intended to say that an attack must be composed of acts enumerated in Article 7(1) (as opposed to other acts).

965 *Situation in the Republic of Kenya* (Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19, PTC II (31 March 2000) [80] (Kenya Decision Pursuant to Article 15); *Bemba* Confirmation of the Charges Decision (n 963) [75]. See also, *Katanga* Judgment (n 961) [1101]; *Prosecutor v Gbagbo* (Decision on the Confirmation of the Charges of the Prosecutor Against Laurent Gbagbo) ICC-02/11-01/11, PTC I (12 June 2014) [209] (*Gbagbo* Confirmation of the Charges Decision; See also, Corrie (n 828).

such multiple commission of acts, a single event may well constitute an attack within the meaning of Article 7(2)(a), provided that the other elements of that article are met.'[966]

Furthermore, the attack in question must be 'directed against' the civilian population, which means that it 'must be the primary object of the attack and not just an incidental victim of the attack'.[967] Finally, the attack must be targeted 'against the civilian population as a whole and not merely against randomly selected individuals.'[968] This does not mean, however, that the *whole* civilian population in the area under attack must be targeted, but at least a discernible part.[969]

Concerning the concept of 'civilian population', the Court in *Bemba* explained that 'according to the well-established principle of international humanitarian law, "[t]he civilian population (...) comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants"'.[970] This characterization thereby excludes persons classified as non-civilians, such as military personnel.[971] However, the ICC has also consistently held that it 'considers that the potential civilian victims of a crime under article 7 of the Statute are groups distinguished by nationality, ethnicity or other distinguishing features'[972] which appears to at least consider the civilian population's group identity relevant – although this is unclear.[973]

The crime of human trafficking appears to generally fit within this contextual element considering it is not inherently linked to situations of armed conflict, the victim or target group of traffickers are generally civilians and the crime of trafficking is typically committed against a multiplicity of persons. Where issues may arise however is in the classification of the 'civilian population'. While traffickers target civilians, they cannot be said to typically target the 'population' as such. Furthermore, certain ethnic groups may be disproportionately affected by traffickers, but a contemporary understanding is that traffickers are more often than not, targeting vulnerable persons. Whether *vulnerability* can be a 'distinguishing feature' prompting the recognition of a population is yet to be seen – but it does not seem to fit within the current ICC jurisprudence which has consistently defined the civilian population within its jurisprudence based on ethnic, religious or political affiliations.[974]

In more egregious cases of trafficking, however, there does appear to be the targeting of a population which would clearly fit the parameters outlined by the ICC. For example, among a myriad of other crimes, reports indicate that since 2014, Boko Haram has abducted as many as

966 *Katanga* Judgment (n 963) [1101].

967 *Bemba* Confirmation of the Charges Decision (n 961) [76].

968 Kenya Decision Pursuant to Article 15 (n 963) [81].

969 *Bemba* Confirmation of the Charges Decision (n 961) [77]. See also, Nilsson (n 962).

970 *Bemba* Confirmation of the Charges Decision (n 961) [78].

971 A Cassese *et al* (rev), *Cassese's International Criminal Law* (3rd edn, OUP 2013) 106. See also, *Bemba* Confirmation of the Charges Decision (n 963) [78].

972 Kenya Decision Pursuant to Article 15 (n 965) [81]; *Bemba* Confirmation of the Charges Decision (n 963) [76]; *Prosecutor v Ruto and Sang* (Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against William Samoei Ruto and Joshua Arap Sang) ICC-01/09-01/11, PTC II (23 January 2012) [164] (*Ruto and Sang* Confirmation of the Charges Decision).

973 See also, RS Lee and H Friman (eds), *The International Criminal Court*: *Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 78: The delegates engaged in the drafting process on this contextual component of crimes against humanity 'agreed that the "civilian population" was a flexible test. Most delegations quickly agreed that this was too complex a subject and an evolving area in law, better left for resolution in case-law.'

974 This consideration also seems in conflict with judgments from the *ad hoc* tribunals. See for example, *Tadić* (Judgment) IT-94-1, T Ch (7 May 1997) [638]-[644].

2,000 women and girls.[975] It appears that these kidnappings would fit the definition of trafficking considering that these women and girls are alleged to be taken by force, arguably for the purpose of exploitation considering the accounts of their subjection to slavery (being 'sold at market') and use in (armed) conflicts.[976] The OTP has already released an Article 5 Report concerning the 'Situation in Nigeria'.[977] As it relates to Boko Haram and this contextual element, this report stated that the 'information available provides a reasonable basis to conclude that Boko Haram launched an attack directed at the civilian population in different parts of Nigeria'.[978]

5.4.2 Widespread or Systematic

It is also required that the attack in question be either widespread or systematic. Neither term is defined in the Rome Statute or Elements of Crimes. It is generally understood that the concept of 'widespread' utilizes a quantitative approach in measurement of the attack,[979] whereas the term 'systematic' denotes a qualitative assessment.[980] As explained by the PTC in the *Katanga and Ngudjolo* decision, 'the adjective "widespread" connotes the largescale nature of the attack and the number of targeted persons, whereas the adjective "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence'.[981] Even though only one of these criteria must be satisfied, Werle and Jessberger note that in practice, both of these characteristics are often present in the commission of crimes against humanity.[982]

An attack is considered 'widespread' by the ICC when it 'encompass[es] 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.'[983] Considering the notion of scale, the Court in *Bemba* held that the attack should therefore 'be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.'[984] The Court in *Gbagbo* relied upon 'the cumulative effect'

975 D Smith, Schoolgirls kidnapped by Boko Haram 'brainwashed to fight for group' *Guardian* (29 June 2015) <http://www.theguardian.com/world/2015/jun/29/schoolgirls-kidnapped-boko-haram-brainwashed-fight-group> accessed 8 February 2016. The ICC is looking into this group and has mentioned these kidnappings in their investigation. See, OTP, 'Report on Preliminary Examination Activities 2014' <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> accessed 8 February 2016, [177].

976 See, 'Boko Haram "to sell" abducted schoolgirls' *Aljazeera* (6 May 2014) <http://www.aljazeera.com/news/africa/2014/05/boko-haram-claims-nigeria-abductions-201455134957975542.html> accessed 8 February 2016; N Bajekal, 'Inside the Search for the Chibok Schoolgirls Abducted by Boko Haram' *Time* (23 April 2015) <http://time.com/3833024/chibok-boko-haram/> accessed 8 February 2016.

977 OTP, 'Situation in Nigeria, Article 5 Report' (5 August 2013) <https://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%2005%20August%202013.PDF> accessed 17 June 2016.

978 ibid [79].

979 However, the Court in the Kenya case stated that an assessment of a widespread attack 'is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts.' See, Kenya Decision Pursuant to Article 15 (n 965) [95].

980 Werle and Jessberger (n 900) 339-340 [895]-[896].

981 *Prosecutor v Katanga and Ngudjolo* (Decision on the confirmation of charges, *Katanga and Ngudjolo*) ICC-01/04-01/07, PTC I (30 September 2008) [394] (*Katanga and Ngudjolo* Confirmation of the Charges Decision).

982 Werle and Jessberger (n 900) 340 [897].

983 *Katanga and Ngudjolo* Confirmation of the Charges Decision (n 981) [395].

984 *Bemba* Confirmation of the Charges Decision (n 963) [83]. See also, *Ruto and Sang* Confirmation of the Charges Decision (n 972) [176]; *Gbagbo* Confirmation of the Charges Decision (n 965) [222].

of four factors in its determination of a 'widespread' attack which included: the large number of acts; the large number of individuals targeted and victimized; the extended period of time in which the acts were committed; and that the attacks affected an entire city whose inhabitants were more than three million.[985] While advocating a case-by-case basis approach in determining this contextual element, the Court in the *Situation in the Republic of Kenya* (*Kenya Decision*) affirmed that an attack can be 'widespread' due to either 'the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.'[986]

Although the ICC has yet to set a minimum number of victims to constitute an attack as 'widespread', it should be noted that in the *Kenya Decision*, the alleged number of victims was in the thousands and deemed to meet the 'widespread' threshold.[987] In *Katanga and Ngudjolo*, a victim count in the range of 200 hundred was not ruled upon by the Trial Chamber as it already determined the attack to be 'systematic' in nature and therefore did not need to consider the alternative requirement.[988] Still, it should be noted that the PTC did hold that the alleged attack in *Katanga and Ngudjolo's* case was widespread in the decision on the confirmation of the charges.[989] In making its determination of the attack as 'widespread', the PTC not only considered the charged event which amounted to 200 victims, but also the several hundreds of killings which occurred before and after the then charged incident. In *Ruto and Sang*, the PTC ruled that violence resulting in the death of over 230 people, injuries to 505 people and the displacement of more than 5000 and affecting a large geographical area amounted to a widespread attack.[990]

In discussing this *chapeau* element in the context of trafficking, Obokata has argued that the large number of people trafficked each year qualifies its perpetration as 'widespread'.[991] This mass cumulative assessment approach should however be rejected by the ICC. The attack(s) in question must be considered 'as part of' the same 'widespread or systematic attack'. While reports indicate that millions of people are trafficked each year, this is not done by the same group or even related trafficking organizations. Obokata's approach therefore runs the risk of failing to prove the 'nexus between the acts of the perpetrator and the attack' which is required.[992] Individual incidents can logically be considered as committed within the context of a 'widespread' attack depending upon 'the characteristics, the aims, the nature or consequences of the act.'[993] However, one cannot simply aggregate various unaffiliated trafficking syndicates to evidence a high number of victims to satisfy this *chapeau* element.[994]

Barring an instance of high volume trafficking, it would seem more likely that a case of human trafficking before the ICC would fit better within the context of a 'systematic' attack. The Court

985 *Gbagbo* Confirmation of the Charges Decision (n 965) [224]. See also, *Goudé* Confirmation of the Charges Decision (n 963) [131].

986 Kenya Decision Pursuant to Article 15 (n 965) [95]. Citations omitted.

987 ibid [130]-[131].

988 *Katanga and Ngudjolo* Confirmation of the Charges Decision (n 981) [1162].

989 ibid [408]-[411]

990 *Ruto and Sang* Confirmation of the Charges Decision (n 972) [177]-[178].

991 Obokata, 'Trafficking of Human Beings as a Crime against Humanity' (n 824) 453: 'it may reasonable be argued that trafficking of human beings can be elevated to a crime against humanity. As noted earlier, it is widespread; at least 800,000 people are trafficked worldwide annually, and virtually every State is affected.'

992 *Bemba* Confirmation of the Charges Decision (n 963) [84].

993 ibid [86].

994 An argument van der Wilt has also made. See, van der Wilt, *Unravelling the Concepts* (n 825) [23].

in the *Kenya Decision* explained that '"systematic" refers to the "organised nature of the acts of violence and the improbability of their random occurrence".[995] Furthermore, the court in *Katanga* described 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.[996]

Human trafficking is often perpetrated in an organized manner since different actors in the trafficking chain are responsible for different parts of the traffic (such as recruitment or transport). The Court in *Ruto and Sang* held that an attack can be deemed systematic when it is highly organized as evidenced by a 'preparatory phase' of the attack as well as the organized nature of the attack itself.[997] Similarly, the Court in *Goudé* held that an attack was 'systematic' when: preparations were made in advance; the attack itself was planned and coordinated; and, the acts revealed a clear pattern of violence directed at the targeted civilian population.[998] Identifying each of the traffickers' role in the perpetration of trafficking and outlining the trafficking process required to bring these trafficked persons from acquisition to their state of intended exploitation would therefore satisfy this *chapeau* requirement as it usually takes both planning and organization to perpetrate this crime.

5.4.3 In Pursuance or Furtherance of a State or Organizational Policy

Satisfying Article 7 of the Rome Statute also requires that the alleged 'attack' be 'pursuant to or in furtherance of a State or organisational policy'.[999] The Elements of Crimes explains that '[i]t is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.'[1000] This element necessitates further discussion on two issues in the context of a trafficking prosecution before the ICC: 1) interpreting the term 'organization' within the ICC's framework; and 2) understanding the term 'policy'.

5.4.3.1 Organization

The policy in question must be one derived from a state or organization. Although these terms are left undefined in the Rome Statute, the Court in *Katanga* held that the construction of Article 7 affirms that 'the organisation is not the State, as the text uses the conjunction "or" to denote that

995 Kenya Decision Pursuant to Article 15 (n 965) [96]. See also, *Katanga* Judgment (n 963) [1158]; *Ruto and Sang* Confirmation of the Charges Decision (n 972) [179].

996 *Katanga* Judgment (n 963) [1113].

997 *Ruto and Sang* Confirmation of the Charges Decision (n 972) [179].

998 *Goudé* Confirmation of the Charges Decision (n 963) [132].

999 Rome Statute (n 820) Art 7(2)(a).

1000 Elements of Crimes (n 886) 5 [3]. Note that this concept was also described in footnote 6 as such that '[a] policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

the concepts are and must remain distinct'.[1001] The concept of a 'state' is rather settled under international law.[1002] An understanding of 'state policy' has been discussed by the ICC and has yet to be contested.[1003] However, the notion of 'organization' or 'organizational policy' and its inclusion within the concept of crimes against humanity is not solidified in statute or jurisprudence.[1004]

In *Bemba*, PTC II did not distinguish between state and non-state actors explaining that the 'policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population.'[1005] The court in *Katanga and Ngudjolo* held similarly.[1006] While holding that such a determination 'must be made on a case-by-case basis', the ICC enumerated several considerations in the *Kenya Decision* when assessing whether a group can qualify 'as an organization under the Statute', including:

- Whether the group is under a responsible command, or has an established hierarchy;
- Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
- Whether the group exercises control over part of the territory of a State;
- Whether the group has criminal activities against the civilian population as a primary purpose;
- Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population;
- Whether the group is part of a larger group, which fulfills some or all of the abovementioned criteria.[1007]

Ultimately, the majority of this PTC bench determined 'that the formal nature of a group and the level of its organization should not be the defining criterion. Instead…a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values'.[1008] Concurring with this framework, the PTC in *Ruto and Sang* ruled that an 'organization' fits within the ICC's jurisdiction when evidence reveals that it 'was under responsible command and had an established hierarchy'[1009] and that it 'possess[es] the means to carry out a widespread or systematic attack against the civilian population'.[1010]

1001 *Katanga* Judgment (n 963) [1117].

1002 Werle and Jessberger (n 900) 342-343 [903]: It is understood that the 'term "state" is understood in the functional sense and, aside from the 194 states in the world, also includes stable entities that control areas de facto and exercise governmental functions there'.

1003 Corrie (n 828) citing *Prosecutor v Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, PTC I (4 March 2009) [79]-[89].

1004 *Kenya* Decision Pursuant to Article 15 (n 965) [93]. See also, C Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 Leiden Journal of International Law 855.

1005 *Bemba* Confirmation of the Charges Decision (n 963) [81]. Citations omitted.

1006 *Katanga and Ngudjolo* Confirmation of the Charges Decision (n 979) [396].

1007 Kenya Decision Pursuant to Article 15 (n 965) [93]: The Court went on to state that '[i]t it important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.' See also, *Ruto and Sang* Confirmation of the Charges Decision (n 972) [185]; Corrie (n 828).

1008 Kenya Decision Pursuant to Article 15 (n 965) [90]. See also, *Ruto and Sang* Confirmation of the Charges Decision (n 972) [184].

1009 *Ruto and Sang* Confirmation of the Charges Decision (n 972) [197].

1010 ibid [200].

In his dissenting opinion (*Kenya Decision*), the late Judge Hans-Peter Kaul rejected this broad interpretation of the majority, holding instead that the organization in question 'should partake of some characteristics of a State' thereby converting 'the private "organization" into an entity which may act like a State or has quasi-State abilities.'[1011] In an effort to identify these abilities, Judge Kaul enumerated the following 'characteristics':

- A collectivity of persons;
- Which was established an acts for a common purpose;
- Over a prolonged period of time;
- Which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level;
- With the capacity to impose the policy on its members and to sanction them; and
- Which has the capacity and means available to attack any civilian population on a large scale.[1012]

As such, Kaul explicitly held that 'groups of organized crime, a mob, groups of (armed) civilians or criminal gangs' would not 'reach the level' necessary to comply with the scope outlined in Article 7(2)(a).

Various scholars have interpreted the scope of an organization's inclusion within the realm of crimes against humanity differently.[1013] This topic has received attention from several experts in the field holding various perspectives along a continuum from Judge Kaul's more restrictive approach to the majority's holding in the *Kenya Decision*.[1014] As the Appeals Chamber of the ICC has yet to rule on this issue, – interpreting the confines of 'organization' within Article 7 is still unsettled.[1015]

Including organized crime and/or criminal gangs within the concept 'organization' under Article 7 is of extreme importance to trafficking prosecutions considering that this crime is often alleged to be committed by organized criminal groups. But even if one is to incorporate the majority's interpretation of 'organization' from the *Kenya Decision*, it greatly differs from the Convention on Transnational Organized Crime's (CTNOC) construct of 'organized criminal group', defined as:

> a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;[1016]

1011 *Situation in the Republic of Kenya* (Dissenting Opinion of Judge Hans-Peter Kaul, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19, PTC II (31 March 2000) [51] (Kaul Dissent).

1012 ibid [51]. Citations omitted.

1013 On these diverging interpretations, see ibid [50].

1014 MC Bassiouni, *Crimes Against Humanity in International Criminal Law* (n 914) 275; Schabas (n 920); LN Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 American Journal of International Law 334; G Werle and B Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or "State-like" Organization?' (2012) 10 Journal of International Criminal Justice 1151.

1015 See for example, *Gbagbo* Confirmation of the Charges Decision (n 965) [217]: The PTC refused to decide between the two interpretations of 'organization'.

1016 UNGA, UN Convention against Transnational Organized Crime (adopted by GA Res A/RES/55/25 on 8 January 2001, entered into force 29 September 2003) (2000) UN Doc A/55/383, Art 2(a).

There is a stark contrast between these two concepts. As such, van der Wilt rightly concludes that 'the vast majority of criminal organizations that engage in human trafficking would by no means meet the threshold. They would simply lack the resources, power and institutional features to carry out large scale attacks on the civilian population.'[1017]

This finding is not discouraging, but rather underscores that cases brought before the ICC must be of 'the most serious crimes of concern to the international community as a whole'.[1018] State-sponsored trafficking is undeniably included.[1019] The law is unsettled concerning the perpetration by other trafficking entities. Werle and Burghardt contend that 'if other actors succeed in carrying out such attacks, no normatively valid argument can be made against treating such acts as crimes against humanity that threaten world peace.'[1020]

While mass atrocity violence was historically perpetrated by state actors, modern manifestations of these crimes are also committed at the hands of militias, paramilitary units, terrorist groups and criminal networks which do not always, or consistently, fit within Judge Kaul's characterization of 'state-like' entities.[1021] Nevertheless, Article 7 appears to permit the ability to hold such perpetrators accountable. As far as the crime of trafficking is concerned, it must be in the context of the larger scale trafficking syndicates. Perhaps the inclusionary extent of Article 7 lies somewhere in between the CTNOC's concept of 'organized criminal group' and Judge Kaul's description of 'state-like' entities. It would therefore seem that (armed) groups like Boko Haram or IS (also referred to as ISIS or Daesh) who are reportedly engaged in trafficking and human exploitation (amongst a long list of other crimes), which cannot be considered as states, but are much larger and organized than required by the CTNOC, and also appear to possess several of the 'organization' qualities discussed by the ICC, would fit the concept of 'organization' as encompassed in Article 7.

5.4.3.2 Policy

The 'policy' aspect of this element was inserted as part of drafting negotiations which permitted the 'widespread or systematic' element's construction to be as 'an alternative, rather than cumulative' concept.[1022] It was also a logical inclusion according to Werle and Jessberger, considering that the commission of all prior crimes against humanity before international criminal courts and tribunals resulted from various 'criminal state policies'.[1023]

The ICC has considered the concept of 'policy' at length in various judgments which all hold consistent interpretations of this concept. For example, the ICC determined in *Katanga* that

1017 van der Wilt, *Unravelling the Concepts* (n 825) [21].

1018 Rome Statute (n 820) Preamble.

1019 That meets the other contextual elements of crimes against humanity.

1020 Werle and Burghardt (n 1014) 1166.

1021 ibid 1167. See also, *Goudé* Confirmation of the Charges Decision (n 963) [128]: The PTC held that it was 'satisfied that the pro Gbagbo forces, which included elements of the FDS, militia, mercenaries and pro-Gbagbo youth, and were led by Laurent Gbagbo and his inner circle, constituted an organisation within the terms of article 7(2)(a) of the Statute'.

1022 Werle and Jessberger (n 900) 340 [898]. See also, Robinson, 'Defining Crimes Against Humanity' (n 962) 48: This is not to say that this requirement was previously in the alternative in other jurisdictions, but rather, that the inclusion of a policy element apparently cemented this construction in the Rome Statute.

1023 Werle and Jessberger (n 900) 340-341 [899]-[900]. It should be noted however, that the *ad hoc* tribunals determined that this would not be an element in their consideration of crimes against humanity. See also, Robinson, 'Defining Crimes Against Humanity' (n 962) 48.

> in keeping with a plain meaning of the term placed in context, 'policy', within the meaning of article 7(2)(a) of the Statute, refers essentially to the fact that a State or organisation intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action. 'Policy' does not preclude a design adopted by a State or organization with regard to a certain population in a given geopolitical situation. The Chamber would emphasise, however, that the statutory framework does not require that a formal design exist, since explicitly advanced motivations are ultimately of little importance. In any event, the policy must always target a particular civilian population or a part thereof.[1024]

Furthermore, the Court in *Bemba* explained that '[t]he policy need not be formalised. Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.'[1025]

The Court in the *Kenya Decision* relied upon the ICTY's Trial Judgment in *Blaškić* which enumerated factual indicators of a 'policy', which include:

- the general historical circumstances and the overall political background against which the criminal acts are set;
- the establishment and implementation of autonomous political structures at any level of authority in a given territory;
- the general content of a political programme, as it appears in the writings and speeches of its authors;
- media propaganda;
- the establishment and implementation of autonomous military structures;
- the mobilisation of armed forces; temporally and geographically repeated and co-ordinated military offensives;
- links between the military hierarchy and the political structure and its political programme;
- alterations to the 'ethnic' composition of populations;
- discriminatory measures, whether administrative or other (banking restrictions, laissez-passer);
- the scale of the acts of violence perpetrated – in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.[1026]

It would seem however that these articulated determinants of a 'policy' are more aptly connected to state actors as opposed to non-state related organizations, which are the type of groups typically known for trafficking in persons. This list is, however, not exhaustive and does not preclude other policy considerations. Nevertheless, this list does appear to indicate an exclusion of non-state related organizations.

As noted in *Gbagbo*, neither the Rome Statute, nor the Elements of Crimes include 'a certain rationale of motivations of the policy as a requirement of the definition.'[1027] What is of primary

1024 *Katanga* Judgment (n 963) [1108]. Citations omitted.

1025 *Bemba* Confirmation of the Charges Decision (n 963) [81]. Citations omitted. See also, *Katanga and Ngudjolo* Confirmation of the Charges Decision (n 981) [396]; *Ruto and Sang* Confirmation of the Charges Decision (n 972) [210].

1026 Kenya Decision Pursuant to Article 15 (n 965) [87].

1027 *Gbagbo* Confirmation of the Charges Decision (n 965) [214].

importance is that the policy in question 'be directed to commit the *attack*'.[1028] And while not required, identifying the underlying motive may even assist in spotting links between the acts.[1029] The PTC Chamber in *Ruto and Sang* listed several examples of actions taken which evidences the implementation of a 'policy' within the meaning of Article 7 and could be relevant in a case of trafficking before the ICC, including:

- the appointment of commanders and divisional commanders responsible for the operations on the field
- the production of maps or literature which identifies areas most densely inhabited (and/or actual properties) by communities targeted for the 'attack' (eg, traffic and enslavement)
- the purchase of weapons as well as of material to produce crude weapons and their storage before the attack;
- the transportation of the perpetrators (traffickers) to and from the target locations; and
- the establishment of a stipendiary scheme and a rewarding mechanism to motivate the perpetrators (to traffic).

In the context of human trafficking, Kim avers that this crime intrinsically advances three policies: the collection of humans; to profit off of their exploitation; and, to foster demand for the trafficking economy.[1030] Furthermore, she explains that,

> Depending on the type of trafficking and intersections with culture, politics, and conflict, human trafficking may be enjoined with policies of using children as human body shields in armed conflict, supplying cheap human labor, supplying female bodies for male sexual pleasure (rape), or dominating a certain ethnic or cultural group.[1031]

It appears that the identification of a policy in the context of trafficking is identifiable and likely permissible considering the rather open and inclusive interpretations permitted by the Court. Moreover, many of the policy considerations mentioned by Kim were specifically listed by the OTP in their ongoing case against defendant Dominic Ongwen.[1032] For example, the OTP alleges that the defendant's plan included the abduction of 'girls and women to serve as domestic servants, forced exclusive conjugal partners (forced wives) and sex slaves in the Sinia brigade', for which the charges of enslavement as a crime against humanity were confirmed by the PTC.[1033]

I do not believe, however, that at this stage the perpetration of trafficking which is almost solely motivated by personal gain or profit would be enough of a 'policy' to fit within international criminal prosecutions. The notion of 'crimes against humanity' rises to the level of international concern because its criminal nature targets humanity. As such, crimes only 'committed for personal purposes (private gain, satisfaction of personal greed, desire for revenge, etc.)' do not fit within the current understanding of international crimes which permit international criminal

1028 *Ruto and Sang* Confirmation of the Charges Decision (n 972) [213].

1029 *Gbagbo* Confirmation of the Charges Decision (n 965) [214].

1030 Kim (n 825) 27.

1031 ibid 27-28.

1032 *Prosecutor v Ongwen* (Document Containing the Charges The Prosecutor Against Dominic Ongwen, *Situation in Uganda*) ICC-02/04-01/15) PTC II (22 December 2015) [129]-[133].

1033 ibid [129]. See also, *Prosecutor v Ongwen* (Decision on the Confirmations of the Charges against Dominic Ongwen) ICC-02/04-01/15, PTC II (23 March 2016) 99 [119] (Ongwen Confirmations of the Charges).

prosecutions.[1034] This is not to say however that in the future, the policy of 'making a profit at whatever cost' would be excluded from international criminal prosecutions. Werle and Jessberger explain that the international criminal dimension of crimes against humanity depends 'on the intensity of the violation of individual human rights'[1035] which can and do happen during the perpetration of crimes committed for personal gain. It is my position that at this point in time, ICL mechanisms do not envisage the prosecution of these types of offenders before their institutions.[1036] They should face prosecution before national criminal justice mechanisms.

5.4.4 With Perpetrator Knowledge of the Attack

The final contextual element is concerned with the requisite mental element for the commission of crimes against humanity. Specifically, it requires that the defendant *know* the act s/he committed is part of the widespread or systematic attack against the targeted civilian population.[1037] As explained in *Katanga*, this 'knowledge constitutes the foundation of a crime against humanity as it elucidates the responsibility of the perpetrator of the act within the context of the attack considered as a whole.'[1038] The Elements of Crimes elaborates on this mental element, explaining that it

> 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. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[1039]

In relying upon Article 30(3) which codifies the 'mental element' of crimes in the Rome Statute, the Court in *Bemba* affirmed 'that "'knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.'[1040]

The knowledge requirement appears to be lower than what is required by the duty to criminalize in the Palermo Protocol.[1041] Additionally, motive is to be considered irrelevant.[1042] And as Obokata explains, 'while all perpetrators must have the criminal intent, they may commit

1034 Cassese (n 971) 37.

1035 Werle and Jessberger (n 900) [873].

1036 While interesting, it is not the aim of this research to engage in a discussion on the theory of crimes against humanity. On this discussion, see D Luban, 'A Theory of Crimes Against Humanity' (2004) 29 Yale Journal of International Law 85; L May, *Crimes Against Humanity: A Normative Account* (CUP 2005); M Cupido, 'The Policy Underlying Crimes Against Humanity: Practical Reflections on A Theoretical Debate' (2011) Criminal Law Forum 275; P Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 Fordham International Law Journal 457; R Dubler, 'What's in a Name? A Theory of Crimes Against Humanity (2008) 15 Australian International Law Journal 85.

1037 Katanga Judgment (n 963) [1125].

1038 ibid.

1039 Elements of Crimes (n 886). See also, Katanga Judgment (n 963) [1125].

1040 *Bemba* Confirmation of the Charges Decision (n 963) [87].

1041 See Chapter 3, subsection 3.3.5.

1042 Katanga Judgment (n 963) [1125]. Moreover, except for persecution, a discriminatory intent is also not required in the perpetration of crimes against humanity. See also, Tadić (n 974) [305]

the act for a variety of reasons' – even personal or financial gain, as is often the case for human traffickers.[1043]

As discussed in Chapter 3, the intent of traffickers may be difficult to prove, especially if they are only responsible for certain portions of the offense, such as the recruitment or the transport. The ICC has however contemplated these types of issues in the context of crimes against humanity. Specifically, in *Katanga and Ngudjolo*, the Court held that the

> knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.[1044]

While many of these examples are most likely not useful in a case of trafficking, some are and other relevant concepts can be extrapolated from this finding. For example, presence at the scene and the exaction of an important role within the criminal campaign could be applicable in trafficking cases. And while many traffickers are not part of a 'military hierarchy', larger trafficking operations are part of organized criminal entities and often function on a hierarchical model using a chain of command scheme. The general lines of this holding, namely that the factual circumstances of a case can infer the level of intent required is important when imputing criminal liability to traffickers. Considering the knowledge requirement, proving the mental element in a case of trafficking before the ICC is feasible.

5.5 Concluding Remarks

After reviewing the material and contextual elements of enslavement as a crime against humanity, it is rather apparent that the substantive conduct we now associate with trafficking in persons (as discussed in Chapter 3), will generally fit within the material construct of enslavement, but the vast majority of trafficking perpetrations do not meet the *chapeau* elements of crimes against humanity. On this point, Tavakoli contends that the inclusion of trafficking within enslavement 'does not reflect the reality of the crime', and as such, the prosecution of traffickers under this construct is 'therefore of little use as a means by which to combat the overwhelming majority of trafficking cases'.[1045]

The current state of international criminal justice is intrinsically linked to the ICC's docket. This chapter has offered more than one interpretation to the inclusion of trafficking within the definition of enslavement found under Article 7(2)(c). I believe that the final interpretation is the one to be adopted, namely that enslavement should be considered an umbrella offense such that even if practices are known by another name under the law (eg, forced labor), it may constitute enslavement as a crime against humanity. The material element of enslavement is satisfied if 'powers'

1043 Obokata, 'Trafficking in Human Beings as a Crime Against Humanity' (n 824) 452. See also, *Prosecutor v Dragolijb Kunarac, Radomir Kovač, and Zoran Vuković* (Judgment) IT-96-23-T and IT-9623/1, T Ch (22 February 2001) [434] (*Kunarac* TJ). This however does not relieve satisfaction of the policy element.

1044 *Katanga and Ngudjolo* Confirmation of the Charges Decision (n 981) [402].

1045 Tavakoli (n 822) 81.

are exercised over another *or* a 'deprivation of liberty' similar to that of the exercise of 'powers' is imposed on another. Acts involved in the acquisition of another can satisfy this material element. Additionally, in any case of enslavement, the perpetrator must either have the intent to exploit, exploit another or treat the alleged victim like a commodity. I think this understanding of the Rome Statute's codification is the only one that makes sense given the wording of Article 7, the Elements of Crimes and an understanding of enslavement under international law.

However, as the law is codified, the ICC does not appear to be a real forum for trafficking prosecutions. This conclusion is based on the fact that the contextual requirements of crimes against humanity will preclude the majority of trafficking cases. While Robinson believes the addition of trafficking within the definition of enslavement 'highlights one of the most persistent forms' of this crime,[1046] – it is arguable that this addition has no real impact in ICL practice.

1046 Robinson, 'Article 7(1)(c)' (n 878) 85.

6 Enslavement and Sexual Slavery Jurisprudence from International Criminal Courts and Tribunals

6.1 Introduction

The primary research question of Part II of this project aims to determine whether enslavement as a crime against humanity has in fact incorporated the crime of trafficking within its construct. In order to make this determination in law, the preceding four chapters have examined international codifications and interpretations of practices including slavery, slave trade, enslavement, sexual slavery and trafficking, and attempted to determine their material relationships to one another. Regarding enslavement as a crime against humanity, Chapters 4 and 5 revealed that this crime appears to have incorporated other practices, including trafficking, within its legal construct. It is now time to see if this determination holds true in international legal practice. Accordingly, this chapter will examine ICL jurisprudence on enslavement. Considering the close statutory links between enslavement and sexual slavery, as revealed in the preceding two chapters, jurisprudence relating to both of these international crimes will be taken into account.[1047]

Chapter 6 will therefore consider whether international criminal justice – through the criminal qualifications of enslavement and sexual slavery – is in reality encompassing the crime of trafficking. This question is also important considering it raises issues of exercising jurisdiction over a crime which an institution may not expressly have jurisdiction over, thus endangering the principle of legal certainty.[1048] To date, defendants have been prosecuted for the crimes of enslavement and sexual slavery before various international and hybrid courts including the International Military Tribunal (IMT), the International Military Tribunal for the Far East (IMTFE), the subsequent Nuremberg trials held by the United States (US NMTs) the Women's International War Crimes Tribunal in Tokyo (Women's Tribunal),[1049] the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).[1050] As the International Criminal Tribunal for Rwanda (ICTR) did not hear a case involving charges of enslavement or sexual slavery, its jurisprudence is not studied in this chapter.

An examination of enslavement case law and to a lesser extent, sexual slavery jurisprudence will be the focus of this chapter. Accordingly, each crime will be addressed individually.[1051] Because

1047 While sexual slavery jurisprudence is examined, it is not the primary focus of this chapter.

1048 R Lanneau, 'What it Legal Certainty? A Theoretical Essay' (2013) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361630> accessed 26 October 2016.

1049 Although not an officially recognized international judicial institution, it still delivered a relevant judgment, which retains persuasive authority and is worth examining for several reasons articulated below in subsection 6.4.1.

1050 This chapter is not going to specifically address the prosecution of slavery as a war crime considering it was a judicial determination without much in the way of legal analysis relevant to the material elements of the offense. However, slavery has been charged in cases before the ICTY. These include: *Prosecutor v Krnojelac* (Judgment) IT-97-25-T, T Ch (15 March 2002) [357] (*Krnojelac* TJ) and *Prosecutor v Todović and Rašević* (Second Joint Amended Indictment) IT-97-25/1-PT, PTC (24 March 2006). The actual prosecution of Todović and Rašević were however transferred to and handled in national courts of Bosnia and Herzegovina.

1051 The exception to this is when discussing enslavement and deportation to slave labor before the WWII tribunals as those institutions failed to distinguish them in their judgments. See the discussion *infra* in subsection 6.3.1.

this chapter examines ICL cases from various jurisdictions, I will also separate the findings by each international institution. As such, this chapter is a rather dense read. However, it is a comprehensive examination of the state of international criminal jurisprudence regarding the international crime of enslavement and identifies important sexual slavery jurisprudence as well.

First, I will attempt to isolate the judiciaries' adoption or use of definitions of these offenses if they exist, especially when they are not codified in the institution's statute. This exercise will reveal a rather consistent use of the Slavery Convention's definition of 'slavery' as a source of legal inspiration in defining the material elements for the crimes of enslavement and sexual slavery.

Secondly, I will try to identify how these institutions actually interpreted the crimes of enslavement or sexual slavery and/or applied the law. The international judiciary has created its own test to determine the existence of enslavement and sexual slavery which includes an evaluation of so-called 'enslavement indicia' in light of the facts of each case. It must be mentioned that the enslavement indicia test is non-binding. While these factual indicators have been held to demonstrate the constituent elements of the crime of enslavement or sexual slavery, as revealed through an examination of each case, this test provides no precise formula in making that assessment.

As we will see, some of the indicia referenced and used to determine the perpetration of enslavement resemble the *actus reus* elements of the Palermo Protocol's definition of 'trafficking in persons'. For example, every ICL institution has held that *how one is acquired* and *the manner in which one is acquired* in a case alleging enslavement/sexual slavery are relevant indicia in assessing the perpetration of these crimes.

Additionally, these international courts and tribunals have neutralized any claim that consent is a valid defense to this crime. Specifically, this determination is coupled by the ICL judiciaries' observation that the perpetrators used various 'means' such as abusing a position of vulnerability of the victim or using threats of violence or violence against the victim, thereby making consent an 'irrelevant' factor to consider. This legal reasoning is patently similar to how consent is addressed in the Palermo Protocol.

Finally, in each and every international enslavement or sexual slavery prosecution to date, the defendants' exploitative intent, subjection of others to exploitation or commodification of their victims, was also a key component to the legal determination of the perpetration of these offenses. This component in enslavement's legal assessment is also very similar, if not identical to the third element of trafficking in persons.

After examining the case law, this chapter will engage in a collective discussion of these findings in light of the research question and offer some concluding remarks.[1052]

1052 It should be noted that the international crimes under study require satisfaction of both material and contextual elements depending on whether the offense is a war crime or a crime against humanity. This chapter is only concerned with addressing the material elements of the offense. Considering the current international legal landscape, if a trafficking case (charged as enslavement) is ever prosecuted before an international criminal institution, it will be the ICC. As such, contextual element considerations were addressed and confined to Chapter 5.

6.2 Enslavement Case Law[1053]

The first jurisprudence to be examined will focus on the crime of enslavement. As mentioned briefly in Chapter 4, international enslavement prosecutions first emerged with the trials emanating after World War II (WWII) under the codification of crimes against humanity before the IMT, US NMTs and the IMTFE.[1054] Subsequently, the crime against humanity of 'enslavement' has been codified in the statute of each and every international and hybrid judicial institution that presides or presided over cases of international crimes namely, the ICTY, ICC, SCSL, ICTR and ECCC.[1055]

As discussed in Chapter 4, apart from the ICC, the statutes of all of the other international criminal institutions do not include a definition of 'enslavement' therein, leaving the duty to *define* and interpret to the judiciary.[1056] To date, there have been two cases charging enslavement outright. I use the term 'outright' to denote ICL cases which have charged the crime of enslavement without any qualifications. The majority of cases charging 'enslavement' before international criminal institutions have done so on the basis that the perpetration of *forced or compulsory labor* fits within the legal parameters of enslavement as a crime against humanity, thus qualifying the application of the enslavement charge. The two enslavement 'outright' cases include the ICTY's collective prosecution of Dragolijb Kunarac, Radomir Kovač, and Zoran Vuković (hereafter referred to as '*Kunarac*') and the ICC's ongoing prosecution of Dominic Ongwen. For sake of clarity, I will first examine the enslavement 'outright' judgments. Thereafter, the cases which charged enslavement on the basis of perpetrating forced or compulsory labor will be discussed separately in section 6.3.

6.2.1 The ICTY: The *Kunarac* Case

Already identified as 'highly influential' and one of 'lasting importance', the *Kunarac* trial and appeals' judgments are arguably the most significant decisions rendered to date as to *how* the crime against humanity of enslavement is currently interpreted by ICL institutions.[1057] The *Kunarac* case stemmed from atrocities committed during the armed conflict between Bosnian Serbs and Bosnian Muslims in the early 1990s.[1058] From April 1992 until February 1993, Dragoljub Kunarac was the commander of a special reconnaissance unit in the Serbian Army operating in the town of

1053 The preliminary results of this research as it pertains to the case study of enslavement were presented at the 6th Annual Conference for the Netherlands Institute for Law and Governance: Comparative Law and Governance on 19 September 2014 and thereafter published. See, N Siller, 'The Prosecution of Human Traffickers? A Comparative Analysis Among International Courts and Tribunals' (2015) 2 European Journal of Comparative Law and Governance 236.

1054 See Chapter 4, section 4.4.

1055 UNGA Rome Statute of the International Criminal Court (17 July 1998) Art 7(1)(c) (Rome Statute); Statute of the International Tribunal for the Former Yugoslavia (approved on 25 May 1993 by UNSC Res 827) Art 5(c) (ICTY Statute); Statute of International Criminal Tribunal for Rwanda (decided on 8 November 1994 by UNSC Res 955) Art 3(c) (ICTR Statute); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusions of amendments as promulgated on 27 October 2004, NS/RKM/1004/006) Art 5 (ECCC Statute); UNSC, Statute of the Special Court for Sierra Leone (approved 16 January 2002 by UNSC Res 1315 (2000)) Art 2(c) (SCSL Statute).

1056 See Chapter 4, section 4.4.

1057 AT Gallagher, *The International Law of Human Trafficking* (CUP 2010) 217.

1058 *Prosecutor v Dragolijb Kunarac, Radomir Kovač, and Zoran Vuković* (Judgment) IT-96-23-T and IT-9623/1, T Ch (22 February 2001) [2] (*Kunarac* TJ).

Foča and its surrounding region.[1059] Serbian soldiers physically removed Muslim women and girls from their homes and detained them in buildings around town.[1060] Defendant *Kunarac* personally raped or was present during the rape and/or sexual assaults of many of these female captives.[1061] He also sexually abused several women and used them to perform household chores inside his residence.[1062]

In October 1992, co-defendant Radomir Kovač detained a twelve-year old girl and three other females in his home.[1063] He raped all of them and forced them to carry out household chores on his behalf.[1064] On multiple occasions, additional Serbian soldiers would visit Kovač's home to rape these females, or Kovač would transport them to endure sexual abuse in other locations.[1065] If they refused to engage in sexual acts, they were beaten.[1066] In December 1992, Kovač sold the twelve-year old girl to another soldier and she was never seen again.[1067] In February 1993, Kovač sold two of the other women to soldiers.[1068]

The third co-defendant and comrade, Zoran Vuković, was also a Serbian soldier operating in the Foča region. Like his co-defendants, on several occasions, Vuković abused, tortured and raped Muslim females in the region.

This brief factual summary forms much of the basis for the charge of enslavement. The defendants were charged and convicted of a multitude of crimes. Only defendants Kunarac and Kovač were charged with enslavement as a crime against humanity.[1069] In 2001, the Trial Chamber delivered its verdict, rendering convictions on the charge of enslavement.[1070] These convictions were challenged and upheld on appeal.

As the ICTY Statute does not define 'enslavement', the Trial Chamber first attempted to pinpoint the state of customary international law for definitional guidance. The Trial Chamber reasoned that it needed 'to look to various sources that deal with the same or similar subject matter'.[1071] Among a myriad of international instruments, the Trial Chamber also reviewed international instruments which referenced human trafficking, including:

> The Trial Chamber also notes the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), which includes the obligation that states parties suppress "all forms of traffic in women and exploitation of prostitution of women."

1059 ibid [3].

1060 ibid [4].

1061 ibid [4].

1062 ibid [6], [8].

1063 ibid [9].

1064 ibid.

1065 ibid.

1066 ibid.

1067 ibid [9], [42].

1068 ibid [9].

1069 The prosecuting body did not explain why Vukovic was not charged with enslavement but a distinguishing feature may be a lack of facts concerning this defendant's detainment of victims as well as his transfer of them (eg, selling) as if they were commodities.

1070 Defendant Vuković was charged and convicted of the crimes of rape and torture.

1071 *Kunarac* TJ (n 1058) [518].

> The 1989 Convention on the Rights of the Child also specifically forbids trafficking in children. Unlike the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the afore-mentioned treaties do not require a link between trafficking and prostitution.[1072]

After its review of international law, the Trial Chamber held that,

> enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person… the actus reus of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The mens rea of the violation consists in the intentional exercise of such powers.[1073]

When compared to the Slavery Convention's definition of 'slavery' which, as will be recalled, is 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised',[1074] it is evident that the ICTY essentially adopted the Slavery Convention's definition to interpret enslavement as a crime against humanity.[1075] This characterization was also upheld by the Appeals Chamber.[1076]

The adoption of a legal definition, however, does not necessarily guarantee that the legal determination in question will be based entirely on those identified definitional parameters. For example, the *ICTY in Kunarac* went beyond the definitional construct that it adopted while interpreting the crime of enslavement. Specifically, Trial Chamber II held that this crime may actually be 'broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law.'[1077] The Trial Chamber based this holding primarily on three observations: 1) prosecutions emanating after WWII 'included forced or compulsory labor under enslavement';[1078] 2) the ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind defined 'enslavement' as an umbrella offense incorporating the practices of forced or compulsory labor, slave trade, servitude and practices included in the Supplementary Slavery Convention (eg, servitude, servile marriage, child exploitation and debt bondage) within its understanding of the crime, as well as '*establishing* or maintaining over persons a status of slavery, servitude or forced labour';[1079] and, 3) how the Rome Statute defined 'enslavement' as a crime against humanity.[1080]

1072 ibid [536]. Citations omitted.

1073 ibid [539]-[540]. Citations omitted. See also, See also, G Boas, JL Bischoff and NL Reid, *Elements of Crimes Under International Law* (International Criminal Law Practitioner Library Series, Vol II CUP 2014) 66.

1074 Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 (Slavery Convention).

1075 *Kunarac* TJ (n 1058) [519]-[520].

1076 *Prosecutor v. Dragolijb Kunarac, Radomir Kovač, and Zoran Vuković* (Judgment) IT-96-23 and IT-96-23/1-A, A Ch (12 June 2002) [116]-[118] (*Kunarac* AJ).

1077 *Kunarac* TJ (n 1058) [541]. See also, H van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 Chinese Journal of International Law [14].

1078 *Kunarac* TJ (n 1058) [541].

1079 ibid [537]. Emphasis added.

1080 ibid [537], [541] and note 1333.

While the Trial Chamber did not specifically hold that enslavement encompasses trafficking, the three reasons it cited for holding that enslavement is broader than the Slavery Convention's construct of slavery all permit a reading that includes trafficking within this crime. As for the first reason, the prosecutions emanating after WWII will be discussed at length in subsection 6.3.2. But, these judgments expanded the concept of enslavement to not only include forced labor, but they also did not distinguish the crime of enslavement from deportation to slave labor. As such, assessing the commission of these crimes was conjoined. The crime of deportation to slave labor appears, by all accounts, to be a crime similar to trafficking in persons.[1081]

As it concerns the second reason, the ICTY's reliance on the ILC's drafted definition of 'enslavement' also permits a reading of this crime that encompasses trafficking in persons. As discussed in Chapter 4, acts involved in 'establishing' another into their subjection to slavery, servitude or forced labor involves their acquisition. Acts involved in the acquisition of persons for their subjection into exploitative practices thereby satisfies the material elements of enslavement, which is the same assessment one would make in determining the perpetration of trafficking in persons.[1082]

The third reason mentioned by the ICTY was only referenced in a footnote of the trial judgment. Specifically, the Trial Chamber determined that the Rome Statute's definition 'provide[s] some evidence of state opinio juris as to the relevant customary international law'.[1083] While the Trial Chamber did not elaborate further on this final observation, one could speculate that it referenced the Rome Statute's definition of 'enslavement' because it also uses the Slavery Convention's definition of 'slavery' to define the crime against humanity of enslavement. As discussed in Chapter 5, the Rome Statute also states that enslavement 'includes the exercise of such power in the course of trafficking in persons, in particular women and children' thereby widening the Slavery Convention's framework. The Rome Statute's expanded definition adds further credence to the ICTY's approach to its interpretation of enslavement and bolsters the argument that trafficking is included within this definitional 'broadening' of the offense. An argument that I have already made when interpreting Article 7(2)(c) in Chapter 5.[1084]

In embracing an expansive interpretation of the concept of enslavement, the Appeals Chamber in *Kunarac* held that it:

> accepts the chief thesis of the Trial Chamber that the traditional concept of slavery as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree.[1085]

1081 ibid [523].

1082 See Chapter 4, section 4.4.

1083 *Kunarac* TJ (n 1058) note 1333.

1084 See Chapter 5, subsection 5.3.2.3.

1085 *Kunarac* AJ (n 1076) [117]. Citations omitted.

Even though the ICTY uses the Slavery Convention's definition of 'slavery' to interpret 'enslavement', the Appeals Chamber held that enslavement as a crime against humanity encompasses crimes which international law has not traditionally classified as 'slavery' *per se*.[1086] This understanding is evidenced by the ICTY's holding that 'various contemporary forms of slavery' also fit within a broader interpretation of enslavement, without however, specifically identifying any.[1087] On this point, the Appeals Chamber commented that 'it is not possible to exhaustively enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea [referring to the crime of enslavement]; this Judgement is limited to the case in hand.'[1088] As inferred by the ICTY in its trial and appeals holdings, 'enslavement' as a crime against humanity appears to at least incorporate other offenses like forced or compulsory labor, servitude and slave trade.[1089] The inclusion of forced labor within the crime of enslavement was the most clearly articulated. Specifically, the Trial Chamber held that 'the exaction of forced or compulsory labor or service, often without remuneration and often, though not necessarily involving physical hardship' is an indication of enslavement.[1090]

The Trial Chamber's review of instruments referencing trafficking in its determination of the status of customary international law on the matter hints that trafficking may be included in the list of 'contemporary forms of slavery' satisfying the material elements of enslavement as a crime against humanity.[1091] Especially since the Trial Chamber specifically referenced UN documents which classified human trafficking as a 'contemporary form of slavery'.[1092]

The ICTY's holding in *Kunarac* also appears to interpret this offense on a gravity continuum in which a certain 'degree' of the 'destruction of the juridical personality' of another is required to constitute enslavement as an international crime. However, *where* this legal threshold exists is not made apparent– only that it must relate to the exercise of 'powers'.[1093]

Instead of explicitly assessing the facts of *Kunarac* in light of formally identified and exercised 'powers attaching to the right of ownership'– which would be consistent with the element it integrated into its own definition of 'enslavement', the ICTY determined 'that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber.'[1094] The *Kunarac* trial judgment's list of 'indicia of enslavement' included:

> elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the

1086 J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013).

1087 ibid.

1088 *Kunarac* AJ (n 1076) [119].

1089 *Kunarac* TJ (n 1058) [523]-[524], [527], [537].

1090 ibid [542]. See also, *Elements of Crimes Under International Law* (n 1073) 66-67.

1091 *Kunarac* TJ (n 1058) [536].

1092 ibid note 1323: 'The Working Group on Contemporary Forms of Slavery also recently adopted a recommendation stating that "transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights."' (citations omitted)

1093 *Kunarac* AJ (n 1076) notes 146-147.

1094 ibid [119]. See also, Gallagher, *The International Law of Human Trafficking* (n 1053) 185-186. Gallagher has characterized this finding as evidence of the evolution of law in practice.

> perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and *human trafficking*.[1095]

Whether these 'indicia of enslavement' could essentially indicate 'powers attaching to the right of ownership' is debatable. For example, the Trial Chamber's focus on control and duration is akin to the notion of 'powers' discussed in Chapter 4.[1096] It will be recalled that identified 'powers' include: use, management of use, entitlement to and profiting from one's use, transferability of use and duration.[1097] Many of the other indicia listed by the Trial Chamber are not 'powers', but illustrations of the various 'powers'. For example, the 'accruing of some gain to the perpetrator' is an example of the 'power': entitlement to and profiting from one's use.

Kunarac's list of 'indicia' largely resembles the way in which enslavement was described in the Rome Statute's Elements of Crimes. As discussed in Chapter 5, enslavement is described in the Elements of Crimes as follows: '[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.'[1098] This characterization also lists illustrations of *how* enslavement may manifest as opposed to identifying actual 'powers'. Listing examples of how persons may be transferred to another, as done in the Elements of Crimes is similar to the ICTY's reference to 'elements of control and ownership'. Where differences emerge, however, is that whereas the Rome Statute expressly includes trafficking in its definition of enslavement, the Trial Chamber in *Kunarac* identified trafficking as an 'indicium' – the implications of these different characterizations in law being unclear.

Nevertheless, the ICTY's inclusion of trafficking, or at least elements of trafficking, within enslavement is evident. The ICTY's explicit engagement with the term 'powers attaching to the right of ownership' considered that while the '"acquisition" or "disposal" of someone for monetary or other compensation is not a requirement for enslavement', it reasoned that '[d]oing so, however, is a prime example of the exercise of the right of ownership over someone'.[1099] This finding is noteworthy when considering the second research question under study. As discussed at length in Chapters 2-4, trafficking's focus criminalizes actions and methods used to *acquire* persons for the purpose of exploitation. The discussion about acquisition in the ICTY's judgment closely resem-

1095 *Kunarac* TJ (n 1058) [542] – [543]. Emphasis added.

1096 See Chapter 4, subsection 4.2.2.

1097 ibid.

1098 Elements of Crimes to the International Criminal Court, (adopted by the Assembly of State Parties First Session, 3-10 2002) ICC-ASP/1/3 (part II-B) UN Doc PCNICC/2000/1/Add.2 (2000), Art 7(1)(c)(1) (Elements of Crimes).

1099 *Kunarac* TJ (n 1058) [542]. As far as any other specific identification of 'powers' is concerned, the Trial Chamber held that '[t]he duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved'. In clarifying the law, the Appeals Chamber (n 1076) [118] explained that it 'will however observe that the law does not know of a "right of ownership over a person". Article 1(1) of the 1926 Slavery Convention speaks more guardedly "of a person over whom any or all of the powers attaching to the right of ownership are exercised." That language is to be preferred.'

bles the power of 'transfer of use'. However, it could be extrapolated from this finding that various types of victim acquisition, like what is seen in the 'acts' element of trafficking, may also be included as evidencing 'powers'.

Moreover, while the terms 'disposal' and 'exploitation' are not generally used as synonyms, there are parallels which can be drawn between the two concepts – especially so in *Kunarac* considering the context in which the term 'disposal' was used in the Trial Judgment. Specifically, the Trial Chamber used the term 'disposal' in reference to relinquishing possession of someone (typically for some form of gain) with the intent or knowledge that they would be 'reduced to slavery'– which the Palermo Protocol terms as a form of exploitation.[1100]

A major deviation from the identification of 'powers' within its list of indicia and a discussion which more closely resembles the crime of trafficking is the Trial Chamber's inclusion of the concept of consent. Determining that consent is irrelevant by way of a perpetrator's use of coercive means as expressed by the Trial Chamber seems to evidence a role for (negating) consent in the determination of this offense. I have previously argued that '"powers" solely assesses the slaver's actions and deeds. Whether the slave could even or did 'consent' does not factor into this legal determination.'[1101] That the Trial Chamber addressed consent in its judgment in an almost identical fashion to the Palermo Protocol's codification of trafficking is very interesting.

The defendants in *Kunarac* challenged their conviction for the crime of enslavement in part, based on the fact that the 'lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent'.[1102] The Appeals Chamber rejected this argument.[1103] Specifically, the Appeals Chamber held that it

> does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.[1104]

Mentioning that consent is more relevant from an evidentiary standpoint is also how the concept's role has been described in the context of trafficking. As I already explained in Chapter 3, consent as fashioned in the Palermo Protocol does not formally engage with this construct.[1105] As a matter of framework, consent is considered now 'more a matter of evidence and not of definition' since the defense of consent is negated within the definition, 'rendered meaningless', and therefore cannot

1100 *Kunarac* TJ (n 1058) [519], note 1248, [542].

1101 N Siller, '"Modern Slavery": Does International Law Distinguish between Slavery, Enslavement and Trafficking?' (2016) 14 Journal of International Criminal Justice 405, 424.

1102 *Kunarac* AJ (n 1076) [120].

1103 ibid.

1104 ibid.

1105 *Cf* UNODC Toolkit (n 356) 6: The UNODC claims that the negation of one's consent must validly exist throughout the entire process of trafficking to permit criminal liability. Therefore, consent given to comply at one stage of the trafficking process does not mean that it is given for all stages of the trafficking process.

legally succeed once perpetration of one of the enumerated 'means' is established.[1106]

Without refuting the Trial Chamber's list, the Appeals Chamber in its judgment seems to prefer a list of enslavement 'indicia' which included:

> the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[1107]

It is unclear as to what effect, if any, the Appeals Chambers' list of enslavement indicia had on the judgment. While shorter, the essence of the two indicia lists is similar. The focus appears to be on identifying the manner in which the defendants exerted control over their victims. Interestingly for the purposes of the present analysis, the indicia listed in the Appeals Chamber's judgment do not include 'human trafficking'.

While listing various 'indicia of enslavement', a legal determination of the commission of enslavement in *Kunarac* primarily boiled down to the ICTY's identification of facts which evidenced the victims' 'treatment as personal property',[1108] the defendants' autonomy over the victims' sexual activities[1109] and the victims' lack of freedom of movement.[1110] For example, with respect to defendant Kunarac, the Trial Chamber found that the alleged victims 'were denied any control over their lives by' the defendant considering that they were required 'to obey all orders, they had to do household chores and they had no realistic option whatsoever to flee the house… or to escape their assailants.'[1111] Furthermore, the ICTY found that these victims

> were subjected to other mistreatments, such as Kunarac inviting a soldier into the house so that he could rape [the victim(s)] for 100 Deutschmark if he so wished. On another occasion, Kunarac tried to rape [the victim(s)] while in his hospital bed, in front of other soldiers. The two women were treated as the personal property of Kunarac.[1112]

Likewise, regarding defendant Kovač's treatment of his victims, Trial Chamber II held that '[f]or all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property.'[1113]

In sum, the *Kunarac* case is important in understanding the law as it pertains to the international crime of enslavement. *Kunarac* was the first case to adjudicate on the crime of enslavement 'outright'. Additionally, the ICTY was the first ICL institution to define the crime of 'enslavement' within an ICL judgment. In doing so, the ICTY was the first to adopt or utilize the

1106 Chapter 3, subsection 3.3.4.1, 92. Citations omitted.

1107 *Kunarac* AJ (n 1076) [119].

1108 *Kunarac* TJ (n 1058) [738], [781].

1109 ibid [739], [741], [759], [781].

1110 ibid [740], [780].

1111 ibid [742].

1112 ibid [742].

1113 *Kunarac* TJ (n 1058) [781].

concept of 'slavery' as defined in the Slavery Convention to define 'enslavement' as a crime against humanity. Additionally, the ICTY held that the crime of enslavement is broader than the Slavery Convention's construct and encompasses some 'contemporary forms of slavery'. Although neither judgment explicitly held that trafficking was a 'contemporary form of slavery', it did reference to a document that does classify trafficking as such.

In making the legal determination as to the perpetration of enslavement, the ICTY introduced its own test: determining enslavement via various 'indicia'. Of particular interest in the context of determining the incorporation of trafficking within this crime is that the Trial Chamber's list of indicia actually included 'human trafficking.' While similar, the Trial and Appeals chambers nevertheless used different enslavement indicia lists in determining the guilt of both defendants on this charge. Even though the Appeals Chamber did not overturn the Trial Chamber's list of indicia, it did not include trafficking in its list of enslavement indicia. However, neither the Trial, nor the Appeals list of indicia was meant to be an exhaustive one.

Additionally, the Trial Chamber's determination that the consent of another is 'irrelevant' because of the perpetrator's use of coercive measures in its list of 'enslavement indicia' demonstrates a legal assessment which is identical to the assessment that one would use in a trafficking case. The Appeals Chamber held that consent (or rather, the negation of one's consent) is not an element of enslavement but rather, a relevant evidential consideration which makes sense considering the circumstances listed making consent 'irrelevant' were included in the Trial Chamber's list of indicia.

Lastly, relevant facts used to establish the perpetration of enslavement in both judgments included actions of victim 'acquisition' and 'disposal.' This point is significant considering that the crime of trafficking essentially centers on victim acquisition, which can encompass the 'acts' and 'means' elements of trafficking. According to the definition of trafficking, the first two elements are perpetrated for the purpose of the third element: exploitation. As previously discussed, the Trial Chamber's understanding of the concept of 'disposal' is almost identical to the understanding of the Palermo Protocol's definition of trafficking's 'for the purpose of exploitation' element. The Trial Chamber also commented that the exploitation of another is an indicium of enslavement.[1114] However, in similar fashion to the Palermo Protocol's definition of 'trafficking in persons', the Trial Chamber did not define 'exploitation'.

6.2.2 The ICC: The *Ongwen* Case

The second case before an international criminal justice institution to charge a defendant with enslavement 'outright' is from the ICC. The Office of the Prosecutor (OTP) charged the defendant, Dominic Ongwen, for his role in the crimes perpetrated by the Lord's Resistance Army (LRA) in northern Uganda between 1 July 2002 and 31 December 2005. Ongwen was surrendered to the ICC in January 2015.[1115] Among other offenses, Ongwen is charged with enslavement as a crime against humanity and sexual slavery as a war crime. The hearing on the confirmation of the charges for Ongwen took place between 21 and 27 January 2016. Pre-Trial Chamber (PTC) II released its decision on the confirmation of the charges on 23 March 2016 confirming the charges of enslavement and sexual slavery (among others), and holding the case over for trial.

With respect to defining 'enslavement', PTC II did not delve deeply into the elements of the

1114 ibid [542].

1115 *Prosecutor v Ongwen* (Decision on the Confirmations of the Charges against Dominic Ongwen) ICC-02/04-01/15, PTC II (23 March 2016) 5 [5] (*Ongwen* Confirmations of the Charges).

offense. This is likely due to the fact that the Rome Statute contains a definition of enslavement.[1116] Moreover, as this was a probable cause hearing, the court did not need to fully or deeply engage with the definition in this decision because questions of interpretation are dealt with in the merits phase of the proceedings. Nevertheless, the PTC consistently characterized the crime of enslavement as the 'exercise of any or all of the powers attaching to the right ownership' over the alleged victims[1117] which is in line with other instruments and the *Kunarac* judgments.

Considering the facts alleged in this case, the PTC addressed enslavement in two distinguishable contexts. The first involves allegations concerning four separate armed attacks against civilians who were then abducted and forced to carry looted goods to their abductors' (LRA) camps.[1118] The second context was characterized in the decision as the perpetration of 'sexual and gender based crimes' and concerns actions allegedly committed directly and indirectly by the defendant.[1119]

In the first context, the PTC confirmed the charges of enslavement. The PTC did not outline the legal concept of 'powers attaching to the right of ownership' in full. However, it did specify that the deprivation of liberty and exacting forced labor are considered 'powers'.[1120] 'Deprivation of liberty' was primarily determined in *Ongwen* through the (often forcible) abduction of civilians and their placement under armed guard.[1121] This characterization is similar to the crime of trafficking which includes *abduction* and the use of *force* in its list of 'means'. In some instances, children were also forcibly tied up with ropes.[1122] 'Forced labor' was not further elaborated upon in this context.

Essentially, the PTC found that acquiring and moving civilians through the threat or use of force for the purpose of subjecting them to forced labor was enough evidence to hold the material charge of enslavement for trial.[1123] This characterization is identical to the material elements of crime of trafficking. The 'act' in this case is the transport of persons. The 'act' was perpetrated through abductions and/or use or threat of force, thereby satisfying the 'means' element. Both of which were perpetrated so as to subject these civilians to forced labor which the Palermo Protocol identifies as a form of exploitation, thereby satisfying the third element of trafficking.

The second context for the charge of enslavement stems from allegations that the defendant perpetrated direct and indirect 'sexual and gender based crimes'. Among others, the defendant's direct conduct with seven females kept in his household forms the basis of the charges including enslavement as a crime against humanity, sexual slavery as a war crime, forced marriage as an inhuman act within crimes against humanity, torture and rape as both a crime against humanity and a war crime, forced pregnancy as a war crime and outrages upon personal dignity as a war crime.[1124] The relevant holdings on sexual slavery will be discussed below in subsection 6.4.3.

1116 Rome Statute (n 1055) Art. 7(2)(c): '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.

1117 *Ongwen* Confirmation of the Charges (n 1115) 75 [23], 79 [36], 83 [48], 87 [62].

1118 ibid 30 [67] – 39 [85].

1119 ibid 97 [117].

1120 ibid 75 [23], 79 [36], 83 [48], 87 [62].

1121 ibid 75 [23], 79 [36], 83 [48], 87 [62].

1122 ibid 79 [36].

1123 I would like to reiterate that enslavement is a crime against humanity which also requires satisfaction of contextual elements which I am not addressing in this chapter.

1124 *Ongwen* Confirmation of the Charges (n 1115) 97 [117].

While the PTC did not explicitly distinguish these offenses from one another in identifying the facts forming the basis for confirming each charge against Ongwen, it systematically referred to the defendant's 'exercise of powers attaching to the right of ownership' over each victim.[1125] The 'powers', or facts evidencing 'powers' identified by PTC II included: deprivation of liberty by being placed under armed guard, the imposition of conditions that made it impossible to escape and induced fear, exacting forced labor (eg, cooking, working in the garden, fetching and chopping wood, doing laundry and nursing Ongwen when he was injured), receipt of punishment for failure to work, subjection to physical violence and repeated rapes, subjection to viewing the executions of others and the reduction to servile status.[1126]

Ongwen was also charged with enslavement in the context of 'sexual and gender based crimes' which he did not personally commit. The material facts which form the basis for these charges include allegations that the defendant (and his co-perpetrators) 'pursued a common plan to abduct girls and women to serve as domestic servants, forced exclusive conjugal partners (forced wives) and sex slaves'.[1127] In confirming these charges for trial, the PTC held that

> Ongwen, through other LRA commanders and fighters exercised any or all of the powers attaching to the right of ownership over these women and girls. They deprived them of their liberty and exacted forced labour, reducing them to a servile status. The victims had no choice but to submit to rape, enslavement, sexual slavery and become forced wives. Non-compliance with demands for sex and the performance of domestic tasks resulted in severe beatings and other forms of abuse.[1128]

The PTC relied on facts which are in line with identified 'powers' including the *use* of these women and girls, *the management of their use* and the indefinite *duration* of this subjugation. The PTC also pointed to facts which are consistent with trafficking and the more expansive reading of Article 7(2)(c) which I discussed in Chapter 5.[1129] For example, Ongwen's purported plan involving the *abduction* of women and girls for the purpose of subjecting them to exploitation including forced labor and sexual abuse.

In sum, while this case is still in the early stages of international criminal prosecution, several interpretations of the crime of enslavement are nevertheless interesting in considering the incorporation of trafficking within this crime against humanity. The confirmation of these charges against Ongwen demonstrates a common interpretation of enslavement which was deemed perpetrated when the following factual circumstances (in whole or in part) were present: 1) control over freedom of movement, focusing on forcible victim acquisition and confinement; 2) lack of sexual autonomy; and, 3) subjection to forced labor and/or other forms of exploitation.
Although the PTC did not specifically adopt either of the enslavement indicia lists found in the *Kunarac* judgments, its reliance on similar factual indicators is evident. Moreover, the PTC confirmed the use of the Slavery Convention's construct of 'powers' to determine the existence of

1125 ibid 90 [70], 91 [77], 92, [86], 94 [95], 95 [104], 97 [116].

1126 ibid.

1127 ibid 99 [119].

1128 ibid 100 [121].

1129 See Chapter 5, subsection 5.3.2.3.

enslavement. This legal reasoning is also consistent with the codified definition of 'enslavement' under Article 7(2)(c) of the Rome Statute which was discussed at length in the previous chapter. The PTC's reliance on both the victim acquisition as well as subjection to various forms of treatment and abuse (for example forced labor and rape) further evidences the notion that trafficking, an offense concerned with human acquisition for the purpose of exploitation, is likely included within the material elements of enslavement as a crime against humanity.

6.3 Forced Labor Analogous to Enslavement Case Law

The following cases to be discussed also charged defendants with enslavement as a crime against humanity. While these defendants were charged with enslavement, the prosecution considered their offenses as the perpetration of forced or compulsory labor analogous, or amounting, to enslavement. Considering that this difference in characterization has affected the legal reasoning of several of the ICL institutions in their respective findings of enslavement, I have separated these cases from section 6.2 for sake of clarity.

6.3.1 Permitting A Charge of Enslavement Based on the Exaction of Forced or Compulsory Labor under ICL

The notion that exacting forced labor can amount to exercising 'powers' is an understanding included in international law as early as the Slavery Convention. Under its Article 5, the Slavery Convention states that States Parties agree 'to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.' Decades later, the ICTY in *Kunarac* recognized the connection between forced or compulsory labor and enslavement when it held in both its trial and appeals judgments that forced labor is an indicium of enslavement.[1130] The primary rationale for the ICTY's inclusion of forced or compulsory labor in the context of enslavement is due to its review of jurisprudence emanating after WWII. The IMT, IMTFE and US NMTs all rendered convictions on the crime against humanity of enslavement due either to the perpetration of Germany's so-called 'slave labor program' or Japan's use of forced and compulsory labor against its citizens and prisoners of war (POW).[1131]

Shortly after the *Kunarac* Trial Judgment was issued, the ICTY heard the case of *Krnojelac*. The defendant in this case was charged with enslavement on the basis that the forced labor exacted in the prison he oversaw amounted to enslavement as a crime against humanity. The Trial Chamber in *Krnojelac* adopted *Kunarac's* holding, – namely, that forced labor is an indicator of enslavement and used forced labor's inclusion within the enslavement indicia list as the legal basis to permit the incorporation of forced labor within the crime of enslavement.[1132] On this point, the Trial Chamber in *Krnojelac* explained that:

> International humanitarian law does not prohibit all labour by protected persons in armed conflicts. Generally, the prohibition is against *forced or involuntary labour*. It is clear

1130 *Kunarac* TJ (n 1058) [542]-[543]; *Kunarac* AJ (n 1076) [119].

1131 *Kunarac* TJ (n 1058) [523]-[527], [541]. The Trial Chamber also reviewed several IHL instruments pertaining to the confines of using forced labor during armed conflict.

1132 *Krnojelac* TJ (n 1050) [357]. See also, *Prosecutor v Brima, Kamara and Kanu* (the AFRC Accused) (Judgment) SCSL-04-16-T, T Ch II (20 June 2007) [742] (*AFRC* TJ).

> from the Tribunal's jurisprudence [referring to *Kunarac*] that 'the exaction of forced or compulsory labour or service' is an 'indication of enslavement', and a 'factor to be taken into consideration in determining whether enslavement was committed'. In essence, the determination of whether protected persons laboured involuntarily is a factual question which has to be considered in light of all the relevant circumstances on a case by case basis.[1133]

Applying the rationale in *Krnojelac*, the SCSL and ECCC have since explicitly referenced the ICTY's judgments in *Krnojelac* and/or *Kunarac* in their subsequent holdings that 'forced labor may also constitute enslavement.'[1134]

As stated earlier, the first international enslavement judgments were those adjudicating on atrocities committed during WWII. The statutes of the IMT, IMTFE and US NMT all individually codified 'enslavement' as a crime against humanity as well as 'deportation to slave labor' as a war crime without however defining either offense.[1135] Notwithstanding the contextual differences between a war crime and a crime against humanity, a plain reading of the title of each offense appears to substantively differentiate the two in that one is concerned with the treatment perpetrated against an individual which amounts to enslavement while the other focuses on the physical movement of persons to their intended state of slave labor. However, reference to the charge of 'deportation to slave labor' must be mentioned here because the IMT, IMTFE and the US NMTs often charged these offenses together and used the same evidence and analysis in the establishment of the defendants' guilt for both offenses. The legal findings for these offenses can therefore not be distinguished from one other.[1136] Consequently, these crimes must be addressed together. Therefore, for purposes of clarity, the following subsection (6.3.2) will first address the WWII tribunals' findings. Afterwards, subsection 6.3.3 will discuss the more contemporary judicial interpretations of forced labor analogous to enslavement from the ICTY, SCSL and ECCC.

6.3.2 The WWII Judgments

Those responsible for drafting the statutes for the post-WWII ICL institutions refrained from formally defining the crime of 'enslavement' therein. Likewise, those appointed to the judiciaries of these tribunals also failed to specifically define the crime of 'enslavement' within their judgments. The closest substantive description of 'enslavement' by the IMT was generally framed as 'compulsory labor'.[1137] Subsequent holdings from the US NMTs (which wholly relied on the IMT's judgment),

1133 *Krnojelac* TJ (1050) [357]. Emphasis in original text, citations omitted.

1134 *Prosecutor v KAING* Guek *Eav alias Duch* (Judgment) ECCC-001/18-07-2007, Trial Chamber, 26 July 2010 [344] (*Duch* TJ). See also, *Prosecutor v Taylor* (Judgment) SCSL-03-01-T, T Ch II (18 May 2012) [448] (*Taylor* TJ); *AFRC* TJ (1128) [748]; . *Prosecutor v Sesay, Kallon and Gbao (the RUF Accused)* (Judgment) SCSL-04-15-T, T Ch I (2 March 2009) [202] (*RUF* TJ). Note however that the judgments of the SCSL often used the terminology 'abductions and forced labor' in reference to this concept.

1135 Charter of the International Military Tribunal- Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), Nuremberg Trial Proceedings Vol. 1 (8 August 1945) Art 6 (b)-(c) (IMT Charter).

1136 An observation also made by the ICTY in *Kunarac* TJ (n 1058) [518]-[527].

1137 Judgment of the Nuremberg International Military Tribunal (1946) reprinted in *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 14 November 1945 - 1 October 1946 Vol. I (International Military Tribunal Nuremberg, Nuremberg 1947) <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf> accessed 20 July 2016, 64, 243, 329 (IMT Judgment).

interpreted the IMT's characterization of enslavement as 'compulsory uncompensated labor'.[1138] This understanding is most clearly articulated in the *Pohl et al.* Judgment:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – *compulsory uncompensated labor* – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[1139]

Prima facie, *Pohl et al* thereby seems to blatantly fuse its understanding of (uncompensated) 'forced labor', 'slavery' and 'enslavement' together.[1140] This is notwithstanding the fact that the *Pohl et al* judgment also inserted an additional term, 'involuntary servitude', without a corresponding definition, into the discussion.[1141]

All of the post-WWII judgments essentially convey the message that since everyone knows what enslavement is, it is unnecessary to define it or distinguish it from related crimes. Instead of differentiating enslavement from deportation to slave labor[1142] and/or outlining their respective attributes,[1143] the IMT Judgment focused first on establishing the existence of Germany's 'slave labor program', followed by identifying actions taken by the charged defendants to create and maintain it, thus establishing their respective criminal culpability and guilt for enslavement and/or deportation to slave labor. The 'slave labor program' and its criminal character were

1138 Although the IMT never used that specific phrase in its judgment, its use of 'compulsory labor' to describe the crime was frequent. See also, *US v. Oswald Pohl et al* (Judgment) US Military Tribunal Nuremberg (3 November 1947) <http://werle.rewi.hu-berlin.de/POHL-Case.pdf> accessed 20 July 2016, 64, 243-244, 321, 329, 332.

1139 ibid 15. Emphasis added. This characterization was relied upon in later judgments by the ICTY and SCSL. See for example, *RUF* TJ (n 1134) [203].

1140 It is unclear whether the legal concepts of 'enslavement' and 'forced labor' were merged by the IMT or US NMTs. This uncertainty has plagued scholarly discourse. For example, as Germany was a signatory of the Slavery Convention, Drescher avers that those defendants charged with the crime of enslavement had arguably been so on the basis that it violated the 1926 Slavery Convention. See, S Drescher, 'From Consensus to Consensus: Slavery in International Law' in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012) 100. On the same basis, Robertson however argues that it was the 1930 ILO Forced Labor Convention which 'justified the conviction at Nuremberg'. See, G Robertson, *The Struggle for Global Justice: Crimes Against Humanity* (4th edn, The New Press 2012) 340.

1141 *Pohl et* al (n 1138) 15.

1142 See IMT Judgment (n 1137) 51: The IMT's only acknowledgement of 'deportation to slave labor' as a separate offense from enslavement, was in regards to recognizing its criminality. Specifically, the IMT held 'deportation to slave labor' to be a criminal offense since its practice was: 'contrary to international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6 (b) of the Charter'.

1143 The US NMTs' holdings also grouped the crimes in similar fashion without regards to distinguishing them. For example, see *US vs. Carl Krauch et al.* (IG Farben Case) (Judgment) US Military Tribunal Nuremberg (30 July 1948) <http://werle.rewi.hu-berlin.de/IGFarbenCase.pdf> accessed 20 July 2016 (IG Farben) 1173: the tribunal held that, 'is enough to say here that the utilization of forced labor, unless done under such circumstances as to relieve the employer of responsibility, constitutes a violation…as war crimes and crimes against humanity the enslavement, deportation, or imprisonment of the civilian population of other countries. What we have said about the employment of involuntary foreign laborers is equally applicable to prisoners of war and inmates of concentration camps.'

primarily identified through various pieces of physical and testimonial evidence pertaining to the actions and words of the defendants. For example, in reference to Defendant Sauckel's role, the IMT described the 'slave labor program' as

> the mobilization of the labour resources available to the Reich. One of the important parts of this mobilization was the systematic exploitation, by force, of the labour resources of the occupied territories. Shortly after Sauckel had taken office, he ordered the governing authorities in the various occupied territories to issue decrees, establishing compulsory labour service in Germany… He described so-called 'voluntary' recruiting by 'a whole batch of male and female agents just as was done in the olden times for shanghai-ing.' That real voluntary recruiting was the exception rather than the rule is shown by Sauckel's statement on 1st March, 1944, that 'out of five million foreign workers who arrived in Germany not even 200,000 came voluntarily.'[1144]

Facts deemed particularly relevant by the IMT in its assessment that a 'slave labor program' existed included *how* the labor was obtained (ie, via force, deception, propaganda and various 'ruthless methods').[1145] For example, an important piece of evidence was an order issued to SD officers in Ukraine which read as follows:

> It will not always be possible to refrain from using force…When searching villages, especially when it has been necessary to burn down a village, the whole population will be put at the disposal of the Commissioner by force…As a rule no more children will be shot... If we limit harsh measures through the above orders for the time being, it is only done for the following reason…The most important thing is the recruitment of workers.[1146]

Other relevant factors found within the IMT Judgment for these charges included: the forcible transport of people to Germany to work,[1147] poor living conditions of workers,[1148] forced abortions (for female workers whose offspring would not meet a German purity standard),[1149] working long hours,[1150] insufficient food provisions for laborers,[1151] the administration of cruelty and suffering,[1152] the prohibition of workers to use transportation, enjoy entertainment or partake in worship,[1153] the right of employers to inflict corporal punishment[1154] and the ability to physically apprehend those 'absent from their place of work'.[1155] Of all of the evidence acknowledged by the IMT, proof

1144 IMT Judgment (n 1137) 136-137.

1145 ibid 243-244, 321, 332.

1146 ibid 245.

1147 ibid 281.

1148 ibid 260, 321.

1149 ibid 260.

1150 ibid at 260.

1151 ibid 260.

1152 ibid 322.

1153 ibid 260.

1154 ibid.

1155 ibid 267.

of the commission of these crimes appeared to hinge generally on: coerced (mass) movement, methods of recruitment (which included the use of deception, false promises, propaganda and threats), the extent of free choice enjoyed by the labor force, working conditions, the manner in which the 'laborers' were physically transported (referred to as 'compulsory deportation') and the purpose of their exploitation. Focusing on the ways and means used to acquire persons for the purpose of subjecting them to forced labor comprises the element of trafficking as codified in the Palermo Protocol.

In the subsequent proceedings of Nuremberg (US NMTs), the criminal character of the Nazi 'slave labor program', the 'deportation to slave labor' and the 'enslavement' of the identified victims was already deemed established by virtue of the IMT Judgment.[1156] However, the US NMTs' judgments also held that the failure to compensate 'constituted an integral part of the charge of slave labor.'[1157] Perhaps this clearer pronunciation was the result of defense efforts. The attorney for defendant Volk argued that it was 'very doubtful whether the mere use of prisoners for unpaid work alone is sufficient to comply with the definition of the crime of enforcing so-called slave labor.'[1158] In response, the Tribunal held: 'if forcibly depriving a man of his liberty, and then compelling him to work against his will without remuneration does not constitute slave labor, *then the term has no meaning whatsoever*.'[1159]

The practical onus of the prosecutor in each of the successive US NMT cases focused on establishing the culpability of each defendant 'by reason of actual perpetration, participation, or taking a consenting part therein' to permit a conviction for these offenses.[1160] In doing so, the various judgments focused on different facts deemed important in establishing the offenses of enslavement and deportation to slave labor. Of substantial significance in assigning guilt for these crimes were the *methods employed* by the German Army to '*recruit*' workers. For example, in *Milch*, criminal culpability depended upon 'whether or not the defendant Milch in this case knew that foreign slave labor and prisoners of war were being *procured* by Sauckel and used in the aircraft industry, which the defendant controlled.'[1161] This question was quickly answered in the affirmative via the fundamental role that Milch played on the Central Planning Board which,

> discussed at great length and in elaborate detail the problems involved in procuring sufficient foreign laborers for the German war effort. He [Milch] frankly disclosed the

1156 *Pohl et al* (n 1138) 16; *IG Farben* (n 1143) 1171; *US v Erhard Milch et al* (*Milch* Case) (Judgment) US Military Tribunal Nuremberg (16 April 1947) <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1002&context=nmt2> accessed 20 July 2016, 2500-2508 (*Milch*): The Tribunal noted, '[u]nder the provisions of Article X of Ordinance No. 7, these determinations of fact by the International Military Tribunal are binding upon this Tribunal "in the absence of substantial new evidence to the contrary." Any new evidence which was presented was in no way contradictory of the findings of the International Military Tribunal, but, on the contrary, ratified and affirmed them.'

1157 *Pohl et al* (n 1138) 223.

1158 ibid 78-79, 222.

1159 ibid. Emphasis added. The court made this same finding in the case of Defendant Baier (206): 'It is admitted by counsel that Baier knew the prisoners did riot receive wages. Being prisoners he knew they were deprived of their liberty. And all this adds up to slavery.' Additionally, with regards to defendant Mummenthey (233), it found: 'people, held in concentration camps against their will, were compelled to work without remuneration. This, *of course*, is slavery.' I have put of course in italics here because it highlights the fact that the case law is quite lapidary and unequivocal. In a way it seems to me that they are using common sense rather than legal reason.

1160 *Pohl et al* (n 1138) 22.

1161 *Milch* (n 1156) 2508. Emphasis added.

> cruel and barbarous methods used in forcing civilians of the eastern countries into the Reich for war work. He [Milch] related the difficulties and resistance which confronted him and the methods which he used and proposed to use in forcibly rounding up and transporting foreign workers. The advisability of using prisoners of war and inmates of concentration camps in the Luftwaffe was frankly discussed, with the defendant offering advice and suggestions as to the most effective methods to be used. In the face of this overwhelming evidence, disclosing page after page of discussion between Speer, Sauckel, and the defendant in which the defendant urged more severe and coercive methods of procuring foreign labor from the East, it would violate all reason to conclude that he had no knowledge of the source of this labor or of the methods used in procuring it. His [Milch] voice is constantly heard, pleading for more laborers from this source and clamoring for a larger share in Sauckel's labor pool.[1162]

Engaging in the procurement of slave laborers was of great importance in determining guilt for the crime of enslavement in the US NMTs' prosecution in the *Flick* case as well. All six defendants were businessmen operating primarily in the steel and coal industries and capitalizing off of the slave labor program as their primary source of 'employees'. All were charged with 'enslavement' as a crime against humanity as well as with 'deportation to slave labor' as a war crime, listed together under count one of the indictment.[1163] Although the crimes continued to remain undefined, the court held that

> the only question remaining for our decision with respect to this count is whether the defendants are guilty of having employed conscripted foreign workers, concentration camp inmate or prisoners of war allocated to them through the slave-labor program of the Reich under the circumstances of compulsion under which such employment came about.[1164]

In the *IG Farben* case, the 24 defendants charged had all been directors or managers of IG Farben, a large German conglomerate of various chemical firms which utilized a vast percentage of workers from the Nazi 'slave labor program'. In its judgment, the US NMTs referenced measures relied upon by the IMT focusing on the procurement of slave labor, noting that

> Manhunts took place in the streets, at motion picture houses, even at churches and at night in private houses of occupied countries, to meet the ever-increasing demands of the Reich for human labor. At least 5,000,000 persons were forcibly deported from the occupied territories to Germany to support its war efforts.[1165]

As the perpetration of slave labor was already proven by virtue of the IMT Judgment, the determination of guilt for these offenses appeared to rest with a finding of procurement of workers for the slave labor program through compulsion – in essence, the first two elements of 'trafficking in persons' as defined in the Palermo Protocol.

An emphasis on methods of procurement can also be said to exist in the IMTFE's findings of 'enslavement' and 'deportation to slave labor'. Although the labor policy was not as heavily

1162 ibid 2504-2505.

1163 *US v Friedrich Flick et al* (*Flick* Case) (Indictment) US Military Tribunal Nuremberg (3 March 1947) <http://digitalcommons.law.uga.edu/nmt5/1> accessed 20 July 2016, [1]-[7] (*Flick*).

1164 ibid.

1165 *IG Farben* (n 1143) 1172.

documented in the IMTFE Judgment, the Japanese were found to have 'decided upon a policy of employing prisoners of war and civilian internees on work directly contributing to the prosecution of the war, and having established a system to carry that policy into execution' without further description, definition or distinction.[1166] In the wake of labor shortages, POWs were transported to assist in mining, stevedoring, engineering and construction works.[1167] While the rigorous work regimen executed by the Japanese military was documented in the judgment which included the 'constant driving, beating and prodding of the sick and wounded prisoners and those suffering from malnutrition to force them to labor upon military works until they died from disease, malnutrition and exhaustion',[1168] it was *how* workers were obtained and restrained *in combination with* their subjection to forced labor under brutal conditions which satisfied the IMTFE's assessment for the perpetration of enslavement. The procurement of persons subjected to forced labor was therefore a contributing factor to the defendants' convictions for enslavement and deportation to slave labor.

The importance of procurement methods to the IMTFE in a finding of guilt for enslavement and deportation to slave labor was also highlighted in the tribunal's discussion of civilian labor procured by the Japanese during this time period. The recruitment of these workers was described by the IMTFE as 'accomplished by false promises, and by force. After being recruited, the laborers were transported to and confined in camps'.[1169] In fact, the only discussion from the IMTFE acknowledging the existence of enslavement of civilians was evidenced by deviant recruitment methods, confinement and the use of force. Again, it appears that the Tribunal focused just as much on the mechanism in which a person was brought to their intended state of exploitation (resembling the crime of deportation to slave labor and human trafficking), as to his or her actual treatment and subjection to forced labor to sustain the conviction. This finding further evidences the perceived judicial inclusion of offenses like trafficking within enslavement as a crime against humanity.

In sum, the IMT Judgment was the first to hold that exacting forced labor can amount to enslavement as a crime against humanity. The IMT, IMTFE and US NMT judgments all held that methods and manner of victim acquisition are relevant in proving the crimes of enslavement and deportation to slave labor. Specific evidence highlighted by these tribunals included the various defendants' use of force, coercion and deception to obtain 'employees' which are also recognized types of 'means' within the Palermo Protocol's definition of 'trafficking in persons'. However, in all of the judgments, the crime of enslavement was left undefined. Additionally, none of these ICL institutions distinguished the crime of enslavement from the crime of deportation to slave labor. As such, these findings must be used cautiously when used to determine the inclusion of trafficking within enslavement as a crime against humanity. Nevertheless, the WWII judgments unquestionably fused an understanding of the crime of enslavement/deportation to slave labor with what we now consider to be trafficking in persons, as codified in the Palermo Protocol.

The following subsection will also examine international cases of enslavement that were charged on the basis of the defendants' exaction of forced labor. These judgments however emanate from the contemporary international and hybrid criminal institutions.

1166 Judgment, International Military Tribunal for the Far East (4 November 1948) <http://werle.rewi.hu-berlin.de/tokio.pdf> accessed 20 July 2016, 52 (IMTFE Judgment).

1167 ibid 525.

1168 ibid.

1169 ibid 528.

6.3.3 Cases of Forced Labor Analogous to Enslavement before the ICTY, SCSL and ECCC

As described above, the WWII tribunals made great efforts to document the existence of the slave labor program which included facts relating to victim acquisition, treatment, working and living conditions. However, no effort was made to identify the actual elements of the offense of enslavement or distinguish it from the related offense of deportation to slave labor, which was also charged. It was only after the emergence of the contemporary international criminal courts and tribunals that explicit definitional constructs for the offense of 'enslavement' can be found within ICL judgments (as seen in *Kunarac*). The actual interpretation of enslavement by explicit reference to the exaction of forced labor has, however, materialized in its own way before several contemporary institutions. As such, the following subsections will separately examine the interpretation of this crime from the relevant institutions which include the ICTY, SCSL and ECCC.

6.3.3.1 The ICTY: The *Krnojelac* Case

The prosecution of defendant Krnojelac before the ICTY was the first after those emanating after WWII to proceed by analogy in prosecuting the defendant for the crime of enslavement based on allegations of exacting forced or compulsory labor. The charge of enslavement in this case derived primarily from allegations that, following the Serbian military occupation of the town of Foča, Muslim and other non-Serb men were arrested and imprisoned at the Kazneno-Popravni detention center (KP Dom), run by the defendant.[1170] In addition to a variety of other offenses, the defendant was charged with enslavement for exacting forced labor on those imprisoned at KP Dom.[1171]

In utilizing the findings made in *Kunarac*, Trial Chamber II in *Krnojelac* defined enslavement as the 'exercise of powers attaching to the right of ownership over another'.[1172] In cases of forced labor charged as enslavement, the Trial Chamber in *Krnojelac* also held that

> To establish the allegation that detainees were forced to work and that the labour detainees performed constituted a form of enslavement, the Prosecution must establish that the Accused (or persons for whose actions he is criminally responsible) *forced the detainees to work*, that he (or they) exercised any or all of the powers attaching to the right of ownership over them, and that he (or they) exercised those powers intentionally'[1173]

It therefore appears that the Trial Chamber included an additional element for cases of forced labor charged as enslavement: the victims are 'forced to work'.[1174] Instead of engaging with both of these identified components of the offense (eg, exercising 'powers' and 'forced work'), the Trial Chamber primarily focused on determining whether the work performed was in fact 'forced'.[1175] Considering the specific facts and circumstances in *Krnojelac*, the ICTY held that in determining

1170 *Krnojelac* TJ (n 1050) [2]-[3].

1171 ibid [10].

1172 ibid [350].

1173 ibid [358]. Emphasis added.

1174 ibid [358].

1175 ibid [359].

> whether an individual detainee was forced to work, the Trial Chamber considers the following factors to be relevant: the substantially uncompensated aspect of the labour performed, the vulnerable position in which the detainees found themselves, the allegations that detainees who were unable or unwilling to work were either forced to or put in solitary confinement, claims of longer term consequences of the labour, the fact of detention and the inhumane conditions.[1176]

This concept was interpreted by the ICTY in light of the International Covenant on Civil and Political Rights which considers 'involuntariness' as 'the fundamental definitional feature of "forced or compulsory labour"'.[1177] In relying on some of the Trial Chamber's enumerated 'indicia of enslavement' in *Kunarac*, the Trial Chamber in *Krnojelac* explained that generally, determining 'whether protected persons laboured involuntarily' could involve a factual consideration of the following circumstances:

> The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.[1178]

The Trial Chamber in *Krnojelac* thereby borrowed a segment of the enslavement indicia list from the *Kunarac* Trial Judgment *verbatim* and used it as an example test to determine (in) voluntariness of labor exacted.[1179] This is an interesting holding because whereas the Appeals Chamber in *Kunarac* held that consent was not an element of the offense of enslavement, the *Krnojelac* Trial Chamber found that it was, and used a part of the enslavement indicia list to then test for 'involuntariness'. The Trial Chamber in *Krnojelac* consistently focused on the voluntariness of the work performed, reiterating that '[t]he issue in every case is as already stated, whether the particular detainee had lost his choice to consent or to refuse the work he was doing.'[1180]

After hearing testimony, the Trial Chamber held that the majority of the victims' work was 'substantially uncompensated'.[1181] However, for most of the imprisoned victims, Trial Chamber II held that their circumstances did not fit within the crime of forced labor analogous to enslavement because there was no direct evidence of *force* or *an unwillingness of the victims to work* since many volunteered to work get out of their cells and/or receive extra food rations.[1182] This is a fascinating holding considering that the 'voluntariness' test Trial Chamber II proffered in its judgment specifically noted that the position of vulnerability of a person can make their verbal consent irrelevant. The relationship between the defendant and his subordinates (prison staff) and

1176 ibid [373]. The inclusion of victim 'vulnerability' factoring into the material assessment of the offense is also an interesting development considering that human trafficking often is perpetrated because the person is position of vulnerability is abused which was discussed in Chapter 3, subsection 3.3.4.4.

1177 ibid note 966. It is interesting to observe this international criminal justice institution's turn to human rights law for guidance. A practice also used by the *Kunarac* Trial Chamber in determining the definition of 'enslavement'.

1178 ibid [359] citing *Kunarac* TJ (n 1058) [542].

1179 ibid [359] citing *Kunarac* TJ (n 1058) [542].

1180 *Krnojelac* TJ (n 1050) [380]

1181 ibid [374].

1182 ibid [369], [376].

the victims (prisoners) exemplifies the position of power on one hand in direct contrast to the position of vulnerability for those subjected to labor on the other. An assessment often made in the determination of human trafficking. Specifically, the Trial Chamber held that

> There was no direct evidence adduced by the Prosecution that those who could not or were unwilling to work were forced to do so during the Accused's administration. Many of the Prosecution's witnesses expressed their own conclusions that this was the case, but no attempt was made to demonstrate the factual basis for those conclusions or that they applied to the period of the Accused's administration.[1183]

The Trial Chamber went on to discuss several witnesses' accounts of their concerns and fears that if they refused to work, it 'would have been a big risk', or it 'would only have worsened their position in the camp' or 'it would have been very risky to have refused, for a sanction of solitary confinement or forced labour would follow.'[1184] The Trial Chamber believed that while the detainees testified to instances of others being punished for refusal to work or that the detainees believed that their refusal would be too risky, it held that none of those allegations or beliefs could be verified by the facts and were thus dismissed by the Trial Chamber. In this ruling, the Trial Chamber in *Krnojelac* essentially held that a finding of the use or potential use of force or unwillingness of victims to work required an objective, as opposed to subjective finding by the trier of fact.

The Trial Chamber's finding that there was no force exerted failed to discuss the position of vulnerability of the prisoners were in when put to work, and any effect it may have had on the prisoners' ability to verbally refuse to labor. The Appeals Chamber rejected the Trial Chamber's reasoning, holding that

> a reasonable trier of fact should have arrived at the conclusion that the detainees' general situation *negated any possibility of free consent*. The Appeals Chamber is satisfied that the detainees worked to avoid being beaten or in the hope of obtaining additional food. Those who refused to work did so out of fear on account of the disappearances of detainees who had gone outside of the KP Dom. The climate of fear made the expression of free consent impossible and it may neither be expected of a detainee that he voice an objection nor held that a person in a position of authority need threaten him with punishment if he refuses to work in order for forced labour to be established. In such circumstances, the fact that a detainee raised an objection is immaterial in ascertaining whether it was truly impossible to object…The Appeals Chamber holds that the specific circumstances of the KP Dom detainees' prison life were therefore such as to make free consent impossible.[1185]

Yet, from the phrasing of this finding, it does not appear that the Appeals Chamber rejected the Trial Chamber's use of an objective approach in making this determination, but rather that it found that the Trial Chamber had incorrectly assessed the factual evidence on record. It should be mentioned however that the prosecution did not appeal the acquittal of the charge of enslavement as a crime against humanity. Instead, it appealed the acquittal of the charge of persecution as a

1183 ibid [376].

1184 ibid [376].

1185 *Prosecutor v Krnojelac* (Judgment) IT-97-25-A, A Ch (17 September 2003) [194]-[195] (*Krnojelac* AJ). Emphasis added.

crime against humanity based on the exaction of forced labor.[1186] Based on the findings above, the Appeals Chamber entered a conviction of forced labor as a form of persecution under crimes against humanity.

In sum, the holdings in *Krnojelac* appears to solidify that contemporary ICL institutions may indeed charge a defendant with enslavement as a crime against humanity based on the exaction of forced or compulsory labor. This finding further evidences that enslavement as a crime against humanity may be understood by the international judiciary as an umbrella offense. Nevertheless, the same general definition of enslavement is applied (namely, the exercise of powers attaching to the right of ownership over another) with the addition that the alleged victims were 'forced to work'.

The holdings in *Krnojelac* therefore appear to delineate judicial treatment in the way that enslavement 'outright' cases are treated from 'forced labor analogous to enslavement' cases before ICL institutions. Specifically, the ICTY has held that a different role exists regarding consent in cases of 'forced labor analogous to enslavement' versus enslavement 'outright' cases. Whereas the ICTY in *Kunarac* held that consent is not an element of the offense, the Trial Chamber in *Krnojelac* took a different approach. The Trial Chamber in *Krnojelac* cited to the portion of the enslavement indicia from *Kunarac*'s trial judgment pertaining to consent,[1187] holding that 'the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions' are circumstances one may consider using to determine whether the work in question was performed 'involuntarily'.[1188]

The Appeals Chamber in *Krnojelac* used that holding to overrule the Trial Chamber's findings in determining that all the prisoners in the KP Dom were subjected to forced labor considering the climate of fear within KP Dom, the position of authority of the prison personnel and the position of vulnerability of the prisoners subjected to labor which negated their free consent – thereby permitting the Appeals Chamber to classify the labor as *forced* or *involuntarily* performed. As such, determining the negation of one's consent or involuntariness of labor appears to be central consideration to establishing cases concerning forced labor, at least before the ICTY. However, as the Appeals Chamber was only tasked with addressing forced labor in the context of the crime of persecution, not enslavement, some ambiguity remains.

Including a role for consent with the crime of enslavement is very interesting in light of the research question posed. One of the essential elements of trafficking in persons, as defined in the Palermo Protocol, is the use of 'means'. Identified means include: 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'.[1189] This element was specifically written into the definition of

1186 The decision to appeal the persecution acquittal as opposed to enslavement acquittal is unclear.

1187 *Kunarac* TJ (1058) [542].

1188 *Krnojelac* TJ (1050) [359].

1189 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3 (Palermo Protocol).

trafficking so as to make the issue of consent in a case of trafficking 'irrelevant'.[1190] This same language was used by the ICTY in the context of a finding of enslavement. Finally, this holding is also interesting because the ICTY put forth the notion that determining the perpetration of enslavement must be made by the trier of fact using an objective approach.

6.3.3.2 The SCSL: The *AFRC*, *RUF* and *Taylor AFRC*

Additional cases charging forced labor as enslavement emanated from prosecutions before the first 'hybrid' international criminal tribunal: the SCSL. In these cases, however, the charge of enslavement was characterized as 'abductions and forced labour' within the pleadings and judgments.[1191] It is unclear why the offense was described in this way. For purposes of clarity, I will first briefly outline the factual background of this conflict which materialized in four separate prosecutions, three of which charged enslavement as a crime against humanity. Thereafter, I will focus on the crime of enslavement including the SCSL's adoption of a definition for the crime (as one does not exist in the SCSL Statute) and the relevant facts and legal analysis by the various chambers of the SCSL. These cases also involved (among others) charges of sexual slavery which I will address separately in subsection 6.4.2.

In 2000, the government of Sierra Leone requested the United Nations (UN) to establish 'a special court' responsible for addressing serious crimes committed against civilians and UN peacekeepers during the nation's decade-long civil war.[1192] The civil war began in 1991 with a military attack by an armed group known as the Revolutionary United Front (RUF).[1193] Over the years that followed, RUF military forces began to spread throughout the country creating various armed strongholds.[1194] As the government in power could not repel RUF forces, various civilian-led paramilitary pro-Government militias formed to fight on behalf of the government and 'became collectively known as the Civil Defence Forces ("CDF").'[1195] Peace talks between the government of Sierra Leone and RUF in 1996 led to the signing of the Abidjan Peace Accord, but this pact only resulted in a very brief ceasefire.[1196]

In May 1997, the President of Sierra Leone (Mr. Kabbah) and his government were overthrown by a different military and political force who called themselves the Armed Forces Revolutionary Council (AFRC).[1197] After seizing power, the AFRC invited the RUF to engage in a 'governing alliance', commonly called the 'Juanta' government or regime.[1198] This partnership

1190 ibid Art 3(b): '[t]he consent of a victim of trafficking in persons to the intended exploitation…shall be irrelevant where any of the means…have been used'

1191 *RUF* TJ (n 1134) [195]; *Taylor* TJ (n 1134) [445]; *AFRC* TJ (n 1132) [739], [1279].

1192 SCSL website, <http://www.rscsl.org/> accessed 18 April 2016: The SCSL finished its mandate in 2013. At present, the Residual Special Court for Sierra Leone operates 'to oversee the continuing legal obligations of this justice mechanism. The jurisdiction of the SCSL included was limited to (i) serious violations of international humanitarian law and Sierra Leonean law; (ii) Committed in the territory of Sierra Leone; (iii) Since 30 November 1996.

1193 *RUF* TJ (n 1134) [12]; *Taylor* TJ (n 1134) [18].

1194 *RUF* TJ (n 1134) [12]-[16].

1195 ibid [16].

1196 ibid [19]-[21].

1197 *AFRC* TJ (n 1132) [21].

1198 *RUF* TJ (n 1134) [22].

however eventually split in the spring of 1998.[1199] From 1997 until 2002, AFRC forces, RUF forces (sometimes jointly and other times separately), and CDF (along with other African forces backed by the overthrown government) perpetrated various crimes (against civilians and each other) and engaged various battles with each other throughout districts all over Sierra Leone.[1200] On 18 January 2002, 'a final cessation of hostilities was declared'.[1201]

Four separate cases were brought before the SCSL, divided according to the defendants' particular group affiliation during this armed conflict. As such, leaders of the RUF were tried together, leaders of the AFRC were tried together and leaders of the CDF were tried together. The final case charged then-Liberian president Charles Taylor, who was tried alone. Taylor's connection to this conflict was alleged (and later found) to have been formed when members of RUF (before its inception) trained with Taylor (amongst other revolutionaries) in Libya and they all 'agreed to assist each other in waging war' in their respective countries.[1202] Taylor was credited by the prosecution as being

> the 'father' or 'godfather' of the RUF in the sense that he created the RUF as a viable organised armed force; nurtured and sustained it by providing a secure training environment, supplies, instructors and new recruits; ensured its continued survival; taught it how to terrorise civilians; directed it in its first endevours, protected it from outside threats to its existence, and strengthened the basic unity of the group.[1203]

Among a myriad of crimes, three of these cases (*AFRC*, *RUF* and *Taylor*) charged the defendants with 'enslavement' as a crime against humanity. Trial Chamber I heard the *RUF* case (verdict rendered in 2009) and Trial Chamber II heard the *AFRC* (verdict rendered in 2007) and *Taylor* cases (verdict rendered in 2012).

With that brief factual background in mind, I will now discuss some of the relevant facts of these cases as they related to the charge of enslavement as a crime against humanity. The factual evidence which formed the basis for this charge's conviction before the SCSL was abundant and included the use of civilians to mine diamonds, carry loads, undertake domestic work, undergo military training and act as human shields.

Sierra Leone is rich in minerals including diamonds. The AFRC/RUF regime controlled many of these mines in various districts all over the country and used the mined diamonds as a source of income to finance their various military and political objectives.[1204] It was the mass and often forcible acquisition and use of forced labor at these various diamond mines which formed one of the grounds for the charge of enslavement as a crime against humanity.[1205] As it concerns diamond mining, some civilians were rounded up, while others were forcibly abducted and informed that on so-called 'government days' they were to go to the mines and mine diamonds for the

1199 ibid [33].

1200 ibid [35]-[40]

1201 ibid [44].

1202 *Taylor* TJ (n 1134) [22]-[23].

1203 ibid [25]. Citations omitted.

1204 *RUF* TJ (n 1134) [23]. This locations, called 'districts' include: Kenema, Kono, Koinadugu, Freetown, Western Area, Port Loko, Bombali and Kailahun.

1205 *AFRC* TJ (n 1132) [739].

RUF/AFRC regime.[1206] One witness described this process as follows: 'armed men…collected them at gunpoint. Once captured, the armed men tied the civilians together with their shirts and brought them to the mine where they were forced to work at gunpoint.'[1207] On 'government days', the civilians mined under the watchful eyes of armed guards from RUF and/or AFRC units.[1208] As described in the *RUF* case,

> Civilians were forced to labour in the presence of armed guards, who frequently beat or killed those who attempted to escape or committed other perceived breaches of the mining rules. Civilians were either not compensated at all for their work or given woefully insufficient compensation in the form of meagre food items. Civilians were treated cruelly through deprivation of food and medical assistance. Civilians were forced to work naked, enabling the guards to exercise psychological control over them. Civilians were not permitted to move freely on the mining sites, but rather were required to obtain permission.[1209]

All diamonds were handed over to the guards.[1210] It is estimated that over 1000 civilians mined on 'government days'.[1211] Civilians did not refuse to mine for diamonds on 'government days' because it was well known they would receive punishment in the form of beatings, and even death.[1212] Many of those who tried to escape the abduction process were executed.[1213]

In addition to forced mining, the charges of enslavement also stemmed from allegations of the widespread abductions of civilians and their use in forced domestic labor.[1214] Specifically, civilians were captured and forced to carry loads (eg, various supplies for fighters, ammunition, and food), under gunpoint for AFRC and/or RUF fighters.[1215] Civilians were also detained in buildings for days and/or months on end, subjected to regular beatings and 'required to go fishing, clean, carry goods and collect food', work on commanders' farms and/or build huts and guard posts without remuneration from the AFRC and/or RUF forces who were holding them captive under threat and/or use of force.[1216] Some of these civilians were also marked with 'RUF' or 'AFRC', carved into their bodies to prevent or deter escape.[1217] As described by witnesses in the *AFRC* case, '[i]t was the responsibility of the abducting commander to ensure that the civilians were "well-secured", which the witness explained meant that they could not escape.'[1218]

1206 *AFRC* TJ (n 1132) [1290]-[1291], [1294]-[1295], [1313]; *RUF* TJ (n 1134) [1119], [1328]; *Taylor* TJ (n 1134) [1617]-[1618].

1207 *AFRC* TJ (n 1132) [1297], [1314].

1208 ibid [1293].

1209 *RUF* TJ (n 1134) [1119].

1210 *AFRC* TJ (n 1132) [1299].

1211 *Taylor* TJ (n 1134) [1620].

1212 *AFRC* TJ (n 1132) [1292]-[1293], [1297]; *Taylor* TJ (n 1134) [1621].

1213 *AFRC* TJ (n 1132) [1313]-[1314]; *Taylor* TJ (n 1134) [1621], [1625], [1627], [1631], [1636], [1651].

1214 *AFRC* TJ (n 1132) [1279]-[1280].

1215 *AFRC* TJ (n1132) [1314]-[1315], [1326], [1330], [1338], [1340], [1344], [1356], [1359], [1379]; *RUF* TJ (n 1134) [1483], [1591]; *Taylor* TJ (n 1134) [155], [1662]-[1666], [1687]-[1688].

1216 *AFRC* TJ (n 1132) [1317], [1341], [1371], [1387]

1217 *Taylor* TJ (n 1134) [1689]-[1691], [2045].

1218 *AFRC* TJ (n 1132) [1380].

Civilians were also abducted to be used as human shields[1219] and/or forced to undergo military training and then merged into military units.[1220] As described in *Taylor*, many civilians were captured at gunpoint and 'forcibly initiated'.[1221] Those who refused were shot.[1222]

With the case background and factual information in hand, I will now turn to the law and analysis of the trial and appeals chambers on their respective findings of enslavement. The SCSL recalled *Kunarac's* definition of enslavement which embraced the concept of 'powers attaching to the right of ownership'.[1223] However, the SCSL formally adopted a definition which more closely resembles the Rome Statute's Elements of Crimes' conceptualization of enslavement.[1224] The chambers in the *AFRC* and *Taylor* cases each held that,

> the following specific elements of the crime of enslavement must be proved beyond reasonable doubt:
>
> i. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
>
> ii. The perpetrator exercised these powers intentionally.[1225]

With respect to the inclusion of forced labor within this offense, the SCSL unequivocally adopted the ICTY's holding that forced labor is an enslavement 'indicator' and charges of forced labor amounting to enslavement are permissible.[1226] Nevertheless, the SCSL's Appeals Chamber in the *RUF* case determined that 'enslavement is not an umbrella crime' such that if any other crimes, like forced labor, were charged as enslavement, the same test 'powers attaching to the right of

1219 *AFRC* TJ (n 1132) [1384]; *RUF* TJ (n 1134) [1591].

1220 *AFRC* TJ (n 1132) [1361]; *RUF* TJ (n 1134) [1487]-[1488]; *Taylor* TJ (n 1134) [1680].

1221 *Taylor* TJ (n 1134) [1667].

1222 ibid.

1223 *RUF* TJ (n 1134) [198]; *AFRC* TJ (n 1132) [744].

1224 Elements of Crimes (n 1098) Art 7(1)(c): The material element of enslavement is defined in element 1 as: 'The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.' As discussed in subsection 6.2.2, the ICC has interpreted the offense which also bears a resemblance to the Slavery Convention's definition of 'slavery'.

1225 *Taylor* TJ (n 1134) [446]; *AFRC* TJ (n 1128) [742]-[749]. Citations omitted. See also, *RUF* TJ (n 1134) [197]: the Trial Chamber adopted the same language in paragraph (i), but phrased the second (mental element) as '(ii) [t]he Accused intended to exercise the act of enslavement or acted in the reasonable knowledge that this was likely to occur.' The prosecution in *Taylor* proffered that this construction of the mental element should also be used by the Trial Chamber because it 'would be consistent with the mental elements of other crimes in the Statute, the approach of Trial Chamber I, and the ICC Statute' (*Taylor* TJ [449]). The Trial Chamber in *Taylor* however rejected the prosecution's argument holding that, 'this requirement is not supported by the *AFRC* Trial Judgment, which was not overturned on appeal on this point, nor by the jurisprudence of the Appeals Chamber of the ICTY. Such an expansion of the mental elements requirement/*mens rea* is unwarranted, as it is difficult to envisage what the requirement of 'acting in the reasonable knowledge that enslavement was likely to occur' would entail in the context of enslavement where the *actus reus* requires exercising the powers of ownership' (*Taylor* TJ [450], citations omitted).

1226 *AFRC* TJ (n 1132) [742], [748]; *Taylor* TJ (n 1134) [448]; RUF TJ (n 1134) [202].

ownership' was to be applied.[1227] In the *AFRC* case, the Trial Chamber also took care to specifically define 'forced labor'. Adopting the International Labor Organization's definition, the Chamber held that forced labor is 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'[1228]

Determining the existence of enslavement by way of 'abductions and forced labor' was held in each of these cases to be 'a factual determination that must be made in light of the indicia of enslavement'.[1229] The various indicia used by the SCSL were adopted from the ICTY judgments. The Trial Chambers in *RUF* and *Taylor* adopted the indicia affirmed by the Appeals Chamber in *Kunarac* which includes:

> control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[1230]

The Trial Chamber in the *AFRC* case however used the indicia adopted by the Trial Chamber in *Kunarac* which includes:

> elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[1231]

As discussed above in subsection 6.2.1, it is unclear why the Appeals Chamber in *Kunarac* preferred a different list of enslavement indicia from the one established by the Trial Chamber. As different Trial Chambers of the SCSL chose to adopt different lists of enslavement indicia from the ICTY, the potential for uncertainty in pinpointing facts deemed relevant to satisfy the element of 'powers attaching to the right of ownership' is greater. While these two lists are largely the same, the emphasis on consent and the inclusion of exploitation and human trafficking is only included within *Kunarac's* Trial Judgment.

In collectively evaluating the factual circumstances of these cases, the SCSL consistently determined that civilians' physical movement was controlled and that the AFRC/RUF's use and/or threat of violence during the monitoring of civilian miners/laborers amounted to a

1227 *Prosecutor v Sesay, Kallon and Gbao* (Judgment) (the RUF Accused) SCSL-04-15-A, A Ch (26 October 2009) [94] (*RUF* AJ).

1228 *AFRC* TJ (n 1132) [742].

1229 *RUF* TJ (n 1134) [202]. See also, *Taylor* TJ (n 1134) [448]; *AFRC* TJ (n 1132) [745].

1230 *RUF* TJ (n 1134) [199]; *Taylor* TJ (n 1134) [447].

1231 *AFRC* TJ (n 1132) [745].

deprivation of liberty.[1232] While abduction played a key role in the prosecution's allegation of enslavement, the Trial Chamber in *AFRC* held that abductions alone cannot constitute enslavement.[1233] This holding is similar to the way in which the crime of trafficking must be established. Recruitment or transfer of a person is not enough to constitute trafficking under the law. It must be an 'act' in combination with the perpetration of coercive behavior ('means' element) for the purpose of exploitation. The *RUF* Trial Chamber found that in addition to their method and manner of acquisition, 'the civilians worked under oppressive conditions – they were treated as slaves, forced to work without proper compensation or food and, in the event that civilians refused or were unable to work, they were beaten or executed.'[1234] Specifically, it was often the 'deprivation of liberty in an environment characterised by systematic violence and coercion' which led the SCSL to hold that the defendants committed enslavement as a crime against humanity.[1235]

In similar fashion to the findings of the ICTY in *Krnojelac*, cases of forced labor charged as enslavement before the SCSL required the prosecutor to prove that the accused forced the victims to work.[1236] In all cases, the SCSL also held that 'the subjective belief of labourers that they were forced to work is not sufficient to establish lack of consent, but must be supported by objective evidence.'[1237]As such, the consideration of evidence required the judiciary to search

> for objective indications that civilians were forced to work, such as threats or use of violence by the perpetrators and lack of compensation. Findings are made only where the Trial Chamber is satisfied beyond reasonable doubt that the civilians were forced to work by AFRC/RUF soldiers.[1238]

It therefore appears that there is a role for consent in the establishment of forced labor analogous to enslavement in prosecutions before the SCSL which must be found via an objective scrutiny of the facts. However, the SCSL has consistently held that the absence of consent is not an element of the crime of enslavement.[1239] Rather, consent is termed by the SCSL (just as it was in *Kunarac*) as 'a significant issue in terms of evidence of the status of the alleged victim'.[1240] Furthermore, the Trial Chamber in *RUF* also held that 'circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.'[1241] Specifically, the Trial Chamber in *RUF* found that '[a]lthough the absence of consent is not an element of the crime of enslavement, the Chamber finds that the conditions in which civilians worked at the mines cumulatively created an atmosphere of terror in which genuine consent was not possible.'[1242] As such, consent becomes irrelevant, just as it does in a case of trafficking in persons.

1232 *RUF* TJ (n 1134) [1485].

1233 *AFRC* TJ (n 1132) [1284]-[1285], [1329].

1234 *RUF* TJ (n 1134) [1326].

1235 *RUF* TJ (n 1134) [1121]. See also, *Taylor* TJ (n 1134) [1657].

1236 *AFRC* TJ (n 1132) [742], [748]; *RUF* TJ (n 1134) [202].

1237 *RUF* TJ (n 1134) [202]; *Taylor* TJ (n 1134) [448]; *AFRC* TJ (n 1132) [1283].

1238 *AFRC* TJ (n 1132) [1283].

1239 *AFRC* TJ (n 1132) [746]; *RUF* TJ (n 1134) [200]; *Taylor* TJ (n 1134) [447].

1240 *AFRC* TJ (n 1132) [746]; *RUF* TJ (n 1134) [200]; *Taylor* TJ (n 1134) [447].

1241 *RUF* TJ (n 1134) [200].

1242 ibid [1120].

To summarize the SCSL's findings on enslavement, there are similarities and differences with the manner in which enslavement was addressed before ICTY. Like the ICTY, the SCSL adopted a definition of 'enslavement' which is clearly inspired from the Slavery Convention's definition of 'slavery', but it borrowed the statutory construction found in the Rome Statute's Elements of Crimes. Like the holdings in *Krnojelac*, the SCSL determined than an objective approach is to be used when evaluating the facts of the case. While the SCSL recognized the ICTY's determination that forced labor can amount to enslavement, the SCSL held that in these cases it was the combination of abductions (evidencing the deprivation of freedom) in combination with the subjection to forced labor which amounted to enslavement as a crime against humanity. The emphasis on abduction and victim acquisition in the SCSL's assessment further evidences the potential inclusion of trafficking within the crime of enslavement for reasons I already outlined in the above subsections. Moreover, while the SCSL appeared to also agree with the *Krnojelac* case that cases of forced labor charged as enslavement must include the perpetration of forced labor, the SCSL rejected the notion that negating one's consent (evidence of force) was an element of the crime of enslavement.

6.3.3.3 The ECCC: Case 001 (The *Duch* Case)

The final institution which has heard the charge of enslavement (by way of exacting forced labor) as a crime against humanity is the ECCC. This institution is responsible for hearing cases against senior leaders of the Khmer Rouge regime. The Khmer Rouge were a political and military entity that took power and ruled in Cambodia from 17 April 1975 until they were overthrown on 7 January 1979.[1243] It is estimated that as many as '1.7 million people are believed to have died from starvations, torture, execution and forced labour during this period of 3 years, 8 months and 20 days.'[1244] The ECCC is considered an *ad hoc* Cambodian court with international participation (hybrid institution), whose subject matter includes international crimes as well as some offenses codified under the 1956 Cambodian Penal Code.[1245]

To date, the ECCC has opened four cases. Cases 001 and 002 have both charged defendants with several international crimes including the crime against humanity of enslavement. Case 001 is completed and will be the focus of this subsection. Case 002 is ongoing.[1246] Cases 003 and 004 are currently in the judicial investigation phase.

Case 001 charged the defendant, KAING Guek Eav (alias and hereinafter referred to as 'Duch') with various crimes against humanity and grave breaches of the 1949 Geneva Conventions.[1247] The relevant facts concerning the charge of enslavement primarily stem from the treatment exacted

1243 ECCC website, <http://www.eccc.gov.kh/en/about-eccc/introduction> accessed 3 October 2016.

1244 ibid.

1245 'ECCC at a Glance' <http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf> accessed 3 October 2016.

1246 Case 002 was severed into two cases (002/01 and 002/02) addressing different parts of the indictment. Defendants Knieu Samphan and Nuon Chea are standing trial. Defendant leng Sary passed away in 2013 and so the charges against him were terminated. Defendant Leng Thirith was found to be unfit to stand trial due to her advanced state of dementia.

1247 Duch was convicted of the following crimes against humanity: persecution on political grounds, extermination (including murder), enslavement, imprisonment, torture and other inhumane acts. Duch was also convicted with the following Grave breaches of the Geneva Conventions of 1949: willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial and unlawful confinement of a civilian.

upon persons[1248] detained at S-21 and S-24 who were forced to work. S-21 was a prison tasked primarily with detaining and interrogating those confined which included alleged political and military opponents.[1249] Over 12,000 individuals were detained at S-21 including civilians, soldiers, foreign nationals, S-21 staff members and their families.[1250] S-24 (also known as 'Prey Sar') was a 're-education camp'.[1251] S-24 also facilitated farming rice to supply S-21 and its various branch locations.[1252] Although the numbers are not exact, no fewer than 1,300 persons were sent to S-24.[1253] The defendant himself 'described the main purpose of the work undertaken by detainees at S-24 as "to have them work hard for the benefit of the Party, for the production of rice. And they had to learn to follow the superior and not to be rude or not to oppose the Party in any case whatsoever."'[1254] Regardless of their classification, the defendant admitted that those detained at S-24 were rarely 'released and that all were generally destined for execution'.[1255]

With respect to defining the crime of enslavement, the ECCC's Trial Chamber relied on the ICTY's interpretation in *Kunarac*, holding that enslavement is 'characterised by the exercise of any or all powers attaching to the right of ownership a person.'[1256] On Appeal, the Supreme Court Chamber specifically referenced the Slavery Convention's definition of 'slavery', holding that it 'has been consistently recognised as the basic formulation for the definition of enslavement as a crime against humanity under customary international law'.[1257] In reference to the level of intent required, the Trial Chamber held that '[i]t must be shown that the perpetrator intentionally exercised any or all of the powers attaching to the right of ownership.'[1258]

In determining the perpetration of enslavement, the ECCC also adopted the 'indicia of enslavement' test created by the ICTY in *Kunarac* using the Appeal Chamber's preferred list which includes:

> control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[1259]

1248 *Duch* TJ (n 1134) [196]: These 'detainees', as described in the judgment 'were largely comprised of the relatives or subordinates of people detained at the S-21 complex, and of combatants and personnel from ministries or from other public institutions.'

1249 ibid [150]-[155].

1250 ibid [140]-[141].

1251 ibid [192].

1252 ibid [226].

1253 ibid [202]: Those detained, who also included S-21 employees 'were known as "elements", and were divided into three groups: the first level, known as "better elements", were subjected to so-called "light tempering"; level two, or "fair elements", required only "intermediate" tempering, and level three ('bad elements'), required the harshest tempering.' [197]. 'Tempering' is a process in which detainees were required to participate in 'self-criticism meetings' [227].

1254 ibid [226].

1255 ibid [198].

1256 ibid [342].

1257 *Prosecutor v KAING* Guek *Eav alias Duch* (Judgment) ECCC-001/18-07-2007, Supreme Court Chamber, 3 February 2012 [131], [152]-[153] (*Duch* AJ).

1258 *Duch* TJ (n 1134) [345].

1259 *Duch* TJ (n 1134) [342]. See also, *Duch* AJ (n 1257) [147]-[148], [154]: who recounted both indicia lists found in *Kunarac* later agreeing with the Trial Chamber's list.

The ECCC also held that exacting forced or involuntary labor can constitute enslavement.[1260] In relying on the ICTY's holding in *Krnojelac* and the SCSL's holding in the *RUF* case, the ECCC found that '[w]hat must be established is that the relevant persons had no real choice as to whether they would work', thereby inferring that the prosecution must prove *forced* labor occurred.[1261] The ECCC held that this determination must be made via an assessment of the list of enslavement indicia referenced above.[1262]

Including the notion of 'choice to work' in its assessment of the case, as mentioned in the earlier case discussions, seems to imply that consent, or rather proving the negation of one's consent, plays a role in the determination of forced labor amounting to enslavement as a crime against humanity. However, in line with the ICTY's *Kunarac* case and the SCSL's findings, the ECCC explained that,

> Proof that the victim did not consent to being enslaved is not required, as enslavement is characterised by the perpetrator's exercise of power. The question of whether the victim has consented may however be relevant to determining if the perpetrator exercised these powers over the victim. The absence of consent may be presumed in situations where the expression of consent is impossible.[1263]

Specific facts relied upon by the ECCC in its finding of enslavement included the detainee's complete loss of freedom and the exaction of forced labor. Detainees could not move freely without authorization. Some detainees were shackled at night and all were 'strictly guarded day and night'.[1264] For example, one victim detained at S-24 described that

> She was obliged to work long hours and was shut in at night. She described her conditions as being 'like a prison without walls.' She had no rights or freedom and was not permitted to make any decision by herself. She was told where to work, and was obliged 'to abide by their orders', with 'no right to contest or challenge anything.'[1265]

As described by the defendant, those detained were subjected to 'extremely long hours of work which included early mornings and moonlit nights, as well as harsh working conditions, agreeing that there might have been some cases where detainees were used in place of farm animals for ploughing.'[1266] The type of work that the detainees were subjected to at S-21 and S-24 included the digging of dykes and canals, the building of damns, the creation of artwork, working as a mechanic and the transplantation of rice, all under close guarded supervision 'who by using force and insult, required them to work very hard.'[1267] It was also observed that the food distributed to the detainees considering the intensity of the hard labor was woefully inadequate.[1268]

1260 *Duch* TJ (n 1134) [344].

1261 *Duch* TJ (n 1134) [344] citing *Krnojelac* TJ (n 1050) [359]. See also, *RUF* TJ (n 1134) [202].

1262 *Duch* TJ (n 1134) [344].

1263 ibid [343].

1264 ibid [231].

1265 ibid [228].

1266 ibid [231].

1267 ibid [229]-[233].

1268 ibid [229].

All of those detained in S-21 reported knowing 'that if they did not produce work of the standard required, they would be punished in some unspecified way.'[1269] A similar sentiment was testified to by a victim detained in S-24 who explained that she was 'forced to pull a plough with three others, being beaten when she fell and when exhausted, being warned to "try to do [her] best" or she would disappear. This warning was reinforced when one of her co-workers became ill and disappeared.'[1270]

With respect to its legal analysis and subsequent finding of enslavement, the ECCC was quite succinct in the Trial Judgment holding that the:

> S-21 staff deliberately exercised total power and control over the S-24 detainees and over a small number of detainees assigned to work within the S-21 complex. These detainees had no right to refuse to undertake the work assigned to them, and did not consent to their conditions of detention… The Chamber therefore finds that their forced or involuntary labour, coupled with their detention, amounted to enslavement.[1271]

Without explaining why, the Trial Chamber only attributed guilt to the defendant for enslavement concerning 'the small number of detainees' who were subjected to forced labor within S-21 as opposed to all detainees.[1272]

The prosecution appealed this ruling claiming that the Trial Chamber incorrectly added an additional element to the crime of enslavement by 'requiring forced labour as an essential element of the crime.'[1273] Because the Trial Judgment adopted the definition that enslavement is 'the exercise of any or all powers attaching to the right of ownership a person' and listed many indicia of enslavement – forced labor only being one of many 'indicia', the Supreme Court Chamber rejected the prosecution's characterization.[1274] Furthermore, the Trial Chamber also stated (as also found in *Krnojelac*), that forced labor 'may *also* constitute enslavement.'[1275] Accordingly, the Supreme Court Chamber held that the Trial Chamber did not insert its own element into the crime. Rather, the Supreme Court Chamber characterized the Trial Chamber's decision as self-limiting due the Indictment (Amended Closing Order) which constricted its scope of consideration to detainees at S-21 and S-24 *who were forced to work*.[1276]

Before turning to the Supreme Court Chamber's discussion of enslavement, I wish to point out that the notion that forced labor may *also* constitute enslavement appears to more or less equate forced labor and enslavement with one another. That is different from holding that the exaction of forced labor is an indicium of enslavement. Nevertheless, the *Kunarac's* holding that forced labor is an enslavement indicium has led the ICTY in *Krnojelac*, the SCSL in *AFRC*, *RUF* and *Taylor* and the ECCC in *Duch* to understand the two concepts as synonyms – or perhaps, to hold that enslavement is an umbrella concept under which forced labor falls. There are some caveats. In *Krnojelac*, the ICTY found that forced labor can constitute enslavement; however, the SCSL held

1269 ibid [233].

1270 ibid [230].

1271 ibid [346].

1272 ibid [346].

1273 *Duch* AJ (n 1257) [117].

1274 ibid [124]-[126].

1275 ibid. Emphasis in original text.

1276 ibid [127] citing the Amended Closing Order [135].

in its cases that the combination of abductions and forced labor constituted enslavement; and at the ECCC, the Trial Chamber held that 'forced or involuntary labour, coupled with their detention, amounted to enslavement.'[1277]

Returning to the Supreme Court Chamber's judgment, it held that the Trial Chamber was not required to constrict itself to the indictment pursuant to Internal Rule 98(2).[1278] As such, the Supreme Court Chamber agreed to determine 'whether the Trial Chamber's full factual findings with respect to S-21 under other charges support a legal determination that all S-21 detainees were enslaved.'[1279] In its review of the law of enslavement, the Supreme Court Chamber affirmed the Slavery Convention's definition of 'slavery' as the definition of enslavement as a crime against humanity.[1280] Furthermore, the Chamber held that while the post-WWII tribunals did

> not expressly state the legal elements of enslavement…or interpret the definition articulated in the Slavery Convention…they provide substantive analyses from which subsequent international tribunals have discerned factors considered indicative of enslavement as a crime against humanity [referencing the ICTY's judgment in *Kunarac*].[1281]

Accordingly, the Supreme Court Chamber held that 'the conclusions reached by these post-World War II tribunals, coupled with the definition of slavery found in the Slavery Convention, evidence the state of customary international law relating to the definition of enslavement'.[1282] Recalling that the post-WWII tribunals held that the exaction of forced labor justified convictions for enslavement as a crime against humanity, the Supreme Court Chamber also appears to equate enslavement with slavery and forced labor.

Aspects of the WWII judgments extracted by the Supreme Court Chamber included: 'the extent, if at all, the labourers had free choice to work for the Germans; the conditions under which the labourers were transferred and treated; and the purpose for which the labourers were recruited and exploited.'[1283] Focusing in on these aspects of the judgment further highlights the substantive incorporation of trafficking which centers on victim movement and acquirement for exploitative purposes.

The Supreme Court Chamber agreed with its Trial Chamber's adoption of the 'enslavement indicia' from the ICTY,[1284] thus also appearing to adopt an objective approach in assessing the perpetration of this crime. Upon review of the Trial Judgment, the Supreme Court Chamber elaborated that

> although its restatement of certain *Kunarac* factors was proper, the Trial Chamber's analysis failed to prioritize explicitly the essence of the *mens rea* and the *actus reus* elements of enslavement as a crime against humanity, that is, the exercise over another human being of the powers that attach to *the right of ownership*.[1285]

1277 *Duch* TJ (n 1134) [346].

1278 *Duch* AJ (n 1257) [128].

1279 ibid.

1280 ibid [131].

1281 ibid [132].

1282 ibid.

1283 ibid [133], [139].

1284 ibid [154]-[155].

1285 ibid [155]. Emphasis in original text.

The Supreme Court Chamber then engaged with the concept of 'enslavement' as to be understood in a more contemporary society which has essentially extinguished the concept of 'chattel slavery', noting that exercising powers is now 'usually possible only within the margins of criminal activity and/or in the situation of failing or deficient state systems.'[1286] As such, the Supreme Court Chamber found that the law of enslavement requires one to

> above all identify the indicia of 'ownership', that is, facts pointing to the victim being reduced to a commodity, such that the person is an object of 'enjoyment of possession'; that she or he can be used (for example, for sexual purposes); economically exploited; consumed (for purposes of organ harvesting, for example); and ultimately disposed of. Clearly, the exercise over a person of powers attaching to ownership requires a substantial degree of control over the victim. There is no enslavement, however, where the control has an objective other than enabling the exercise of the powers attaching to ownership.[1287]

After considering the law of enslavement which included the international definition of enslavement (derived from the Slavery Convention) and the list of enslavement indicia, the Supreme Court Chamber held that the facts in *Duch* which were unrelated to exacting forced labor are not relevant to the charge of enslavement as the prosecution argued. Instead, the Supreme Court Chamber found that those detained in the prison who were not subjected to forced labor related to 'the policy of torture and extermination that existed, with imprisonment and maltreatment employed as means to achieve both objectives' – for which the defendant was also convicted.[1288]

Furthermore, the Supreme Court Chamber held that nowhere in the Trial Judgment's 'factual findings is there evidence of efforts by the Accused to accrue some gain from the totality of S-21 detainees or of otherwise treating them as [a] commodity.'[1289] As such, the Supreme Court Chamber dismissed the prosecution's appeal 'conclud[ing] that while the Accused's acts against S-21 detainees as detailed in the Trial Judgement were criminal, such acts, insofar as concerns the detainees not subjected to forced labour, did not amount to enslavement as a crime against humanity.'[1290] This finding is remarkable. While 'the accruing of some gain to the perpetrator' was included in the enslavement indicia list provided by the Trial Chamber in *Kunarac*, it appears that the Supreme Court Chamber of the ECCC subjected the qualification of enslavement to the enrichment (gain) of the perpetrators.

In sum, the ECCC's interpretation of enslavement as a crime against humanity is very interesting. The ECCC continues to link the Slavery Convention's definition of 'slavery' with the definition of 'enslavement' under ICL. As far as making a legal determination of this offense is concerned, the ECCC also continues to solidify the importance of the judgments in *Kunarac* and the use of enslavement indicia to assess the material elements of enslavement. In similar fashion to the SCSL and the *Kunarac* judgments, the absence of consent was deemed to not be an element of the offense. However, whereas the other forced labor analogous to enslavement judgments

1286 ibid.

1287 ibid [156].

1288 *Duch* AJ (1257) [165].

1289 ibid.

1290 ibid [166].

determined forced labor to be an element of enslavement when pleaded as such, the Supreme Court Chamber rejected that claim in the prosecution's appeal. The ECCC essentially held that forced labor and enslavement are congruent concepts. It also held that the defendant must accrue some gain or treat their victims like a commodity to satisfy the crime of enslavement; a condition which was not seen in any of the other ICL judgments.[1291]

A review of relevant enslavement jurisprudence in its entirety instigates issues worthy of discussion regarding whether human trafficking is incorporated into this crime. However, before this comprehensive discussion can take place, I must also briefly identify and examine sexual slavery jurisprudence. This case law is relevant considering the overlapping elements between enslavement and sexual slavery and the understanding among ICL institutions that sexual slavery is a more specific form of enslavement – essentially, enslavement of a sexual nature.

6.4 Sexual Slavery Case Law

Only two of the international judicial institutions codify 'sexual slavery' as its own offense. As previously discussed in Chapter 4, the Rome Statute identifies sexual slavery both as a crime against humanity and a war crime, while the SCSL Statute codifies it under crimes against humanity. This is not to say however that the international judiciary considers sexual slavery to be a new crime. As articulated by the SCSL in the *RUF* case, the Trial Chamber explained that in its view

> sexual slavery is a particularised form of slavery or enslavement and acts which could be classified as sexual slavery have been prosecuted as enslavement in the past. In the *Kunarac* case, for instance, the Accused were convicted of the offences of enslavement, rape and outrages on personal dignity for having detained women for months and subjected them to rape and other sexual acts. In that case, the ICTY Appeals Chamber emphasized that "it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape.'[1292]

Instead, particular crimes including sexual slavery have been specifically codified in some of the more contemporary ICL institutions' statutes 'to draw attention to serious crimes that have been historically overlooked and to recognise the particular nature of sexual violence that has been used, often with impunity, as a tactic of war'.[1293]

No greater example of failing to recognize the perpetration of sexual exploitation during war or initiate international criminal justice proceedings is that of the atrocities committed against the so-called 'comfort women' of WWII. This section will begin with an examination of the mass sexual slavery committed by the Japanese military forces and the judgment of the Women's Tribunal,

1291 See Chapter 5, subsection 5.3.2.3. This finding however does bring further credibility to my interpretation of enslavement as codified in the Rome Statute.

1292 *RUF* TJ (n 1134) [155] citing *Kunarac* AJ (n 1076) [186]. A sentiment also expressed in *AFRC* TJ (n 1132) [705]-[706]. See also, *The Prosecutors and the Peoples of the Asia-Pacific Region v Hirohito Emperor Showa et al* (Judgment) PT-2000-1-T, T Ch (4 December 2001) [587] <http://www.internationalcrimesdatabase.org/Case/981/The-Prosecutors-and-the-Peoples-of-the-Asia-Pacific-Region/> accessed 20 July 2016 (Women's Tribunal Judgment).

1293 *RUF* TJ (n 1134) [156].

rendered more than 50 years after the commission of these atrocities. Afterwards, and in similar fashion to the forced labor analogous to enslavement subsection, the remainder of section 6.4 will examine and review judgments from the contemporary ICL institutions including the ICC and SCSL, which have heard cases charging sexual slavery. It should be mentioned that this subsection does not go as in-depth as the enslavement sections, but rather, is intended to further evidence the consistent treatment of these crimes with one another and their connections to the material elements of trafficking in persons.

6.4.1 The 'Comfort Women' of WWII

One of the most regrettable omissions from WWII prosecutions pertains to any real acknowledgment or attempt to seek justice relating to the 'comfort women system' imposed by the Japanese military.[1294] The only reference to this practice in the IMTFE Judgment stands in a singular line which appears as if to reference an isolated incident in the Changsha region in which the Japanese 'recruited women labor on the pretext of establishing factories. They forced the women thus recruited into prostitution with Japanese troops.'[1295]

In reality, the first 'comfort house'[1296] was established in the early 1930s and the system grew and expanded throughout the duration of the war.[1297] Estimates of the amount of victims are over 100,000 Burmese, Indonesian, Chinese, Japanese, Korean, Taiwanese and Filipino women and girls who were coerced into a system which supplied recreational sex to Japanese troops.[1298] The failure to prosecute offenders for these crimes before the IMTFE[1299] is also rather shocking considering that the United States had knowledge of the comfort system's existence and its many victims and played a key role in setting up the IMTFE, building the criminal cases and prosecuting the offenders.

1294 K Watanabe, 'Trafficking in Women's Bodies, Then and Now: The Issue of Military "Comfort Women"' 20 (4) *Peace and Change* (1995) 501, 503: The term, 'comfort women' comes from the literal Japanese translation, *Jugun Ianfu*. A term which replaced its earlier label, *Teishintai*, meaning 'voluntary labor corps'.

1295 IMTFE Judgment (n 1166) 499.

1296 Branded by Fan as a 'rape center' or 'pay-to-rape center'. See MDM. Fan, 'The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery' (2002) 27 The Yale Journal of International Law 395, 396.

1297 AR Ahmed, 'The Shame of Hwang v. Japan: How the International Community has Failed Asia's "Comfort Women"' (2004-2005) 14 Texas Journal of Women and the Law 121, 123; SJ Vanderweert, 'Seeking Justice for Comfort Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts' (2001-2002) *27* North Carolina Journal of International Law & Comparative Regulation 141, 148; Fan (n 1292) 399-400. See also, KD Askin 'Comfort Women: Shifting Shame and Stigma from Victims to Victimizers' (2001) 1 International Criminal Law Review 5, 14-15: Askin also criticizes the use of the term 'prostitution' as opposed to 'sexual slavery' to describe the situation of the 'comfort women'- 'linking the activity to 'prostitution' attempts to transform the crime into something which may have some form of legitimacy by inferring that choice was involved, as if the women and girls participated without coercion or force, received some sort of compensatory benefit, were free and able to leave anytime they chose, or were able to dictate the nature or terms of the sexual services (such as requiring condom use, limiting their number of partners, refusing to participate in certain forms of sex, rejecting persons using physical violence, or demanding specific compensation terms).'

1298 PV Sellers, 'Wartime Female Slavery: Enslavement?' (2011) 44 Cornell International Law Journal 115, 117-118. See also, Watanabe (n 1290) 503; Vanderweert (n 1293) 145.

1299 CS Soh, 'Japan's Responsibility Toward Comfort Women Survivors' (2001) Japan Policy Research Institute Working paper No. 77 <http://www.icasinc.org/2001/2001l/2001lcss.html> accessed 27 July 2015.

Methods used to acquire women and girls for work at 'comfort stations' included kidnappings and abductions in military raids, recruitment through false promises of work in other fields (such as nursing, waitressing, domestic work, typists and factory work), unlawful arrests and conscription from civilian internment camps within Japanese occupied territories.[1300] Korean women and girls were also purchased by managers of comfort stations from their families; the negotiated price depended upon the 'girl's character, appearance, and age'.[1301]

Military 'comfort stations' were implemented using rules which 'established hours of operation, fees, sanitation standards, and times when different ranks of soldiers and officers could visit the stations.'[1302] These regulations even articulated the percentage that the woman in question could retain. However, '[t]he amount the woman actually kept often was close to zero because of purported cash advances for the costs of clothing, cosmetics, medical treatment for illness or pregnancy, and pretextual forced savings or contributions to "national defense"'.[1303]

Regardless of its omission in the IMTFE Judgment, evidence of the 'comfort system' has been heavily documented. Japanese officials attempted to rewrite history such that these women were actually 'prostitutes who had volunteered their services as a part of the war effort.'[1304] Japan denied these grievous atrocities for years, only admitting to their existence in 1992 after a history professor discovered several government documents in Japan's Self Defense Force library in Tokyo.[1305]

In August 1993, the Japanese government finally issued an apology after the Ministry of Foreign Affairs of Japan conducted an official study into Japan's role 'on the issue of "comfort women".'[1306] In a statement, the Chief Cabinet Secretary Yohei Kono admitted that this study revealed

> that comfort stations were operated in extensive areas for long periods, it is apparent that there existed a great number of comfort women. Comfort stations were operated in response to the request of the military authorities of the day. The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women. The recruitment of the comfort women was conducted mainly by private recruiters who acted in response to the request of the military. The Government study has revealed that in many cases they were recruited against their own will, through coaxing, coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitments. They lived in misery at comfort stations under a coercive atmosphere.[1307]

1300 Ahmed (n 1297) 124; CM Argibay, 'Sexual Slavery and the "Comfort Women" of World War II' (2003) 21 Berkeley Journal of International Law 375, 378-379. See also, Soh (n 1299).

1301 Argibay (n 1300) 378.

1302 Vanderweert (n 1297) 150-151; Fan (n 1296) 400.

1303 Fan (n 1296) 400.

1304 Sellers (n 1298). See also, R Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 McGill Law Journal 217, 223; Ahmed (n 1293) 127; Vanderweert (n 1297) 155.

1305 Watanabe (n 1294) 504; Argibay (n 1300) 377.

1306 See Statement by the Chief Cabinet Secretary Yohei Kono on the result of the study on the issue of 'comfort women' (4 August 1993) < http://www.mofa.go.jp/policy/women/fund/state9308.html> accessed 25 April 2016.

1307 ibid.

In spite of its official study, Japan refused to accept any legal or financial responsibility for these crimes.[1308] In December 2015, however, an agreement between Japan and South Korea was reached in which Japan made an apology and pledged an 8.3 million (USD) payment as reparations.[1309]

As far as legal action is concerned, other than a miniscule factual reference in the IMTFE Judgment for which no charges were brought, the crimes committed against the women and girls forced into the comfort station system have yet to be addressed by an internationally recognized tribunal.

The majority of civil claims made before national courts have also found little recourse in addressing these crimes.[1310] For example, a claim brought by survivors before a United States District Court was initially dismissed on the basis that Japan's 'forced prostitution is an exercise of sovereign power rather than a brutal commodification of women's bodies' or an international crime.[1311] As Ahmed contends, '[w]hat was lost in the neglect of the post-war tribunals was an occasion to tell the world the story of the "comfort system" and have it included as a valid part of the collective memory of the war.'[1312]

The only criminal case charging an international crime for offenses of this nature was heard before a Dutch military court. In 1946, the Netherlands Temporary Court-Martial at Batavia heard a case charging forced prostitution as a war crime in relation to the enforced prostitution of Dutch women and girls by defendant Washio Awochi.[1313] The defendant ran a hotel in Batavia, Japan from 1943 to 1945.[1314] Specifically,

> The accused was charged with having 'in time of war and as a subject of a hostile power, namely Japan,' and 'owner of the Sakura-Club, founded for the use of Japanese civilians,' committed 'war crimes by, in violation of the laws and customs of war, recruiting [Dutch] women and girls to serve the said civilians or causing them to be recruited for the purpose, and then under the direct or indirect threat of the Kempei (Japanese Military Police) should they wish to leave, forcing them to commit prostitution with the members of the said club,' which the women and girls 'were not able to leave freely.'[1315]

The defendant admitted to running a brothel but claimed that 'he had done so under orders of the Japanese authorities.'[1316] The defendant was convicted of this war crime.

1308 Watanabe (n 1294) 504.

1309 C Sang-Hun, 'Japan and South Korea Settle Dispute Over Wartime "Comfort Women"' *The New York Times* (28 December 2015) <http://www.nytimes.com/2015/12/29/world/asia/comfort-women-south-korea-japan.html?_r=0> accessed 25 April 2016.

1310 Vanderweert (n 1297) 160-164, 175-181.

1311 Fan (n 1296) 397. See also, *Hwang Geum Joo v. Japan*, 172 F Supp 2d 52 (DDC 2001).

1312 Ahmed (n 1297) 129.

1313 Trial of Washio Awochi (case note) Netherlands Temporary Court-Martial at Batavia (25 October 1946) printed in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (Vol XIII, His Majesty's Stationary Office 1949) <https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-13.pdf> accessed 20 July 2016, 122.

1314 ibid 122

1315 ibid 122. See also, unknown 'Documents detail how Imperial military forced Dutch females to be "comfort women"' *The Japan Times* (7 October 2013) <http://www.japantimes.co.jp/news/2013/10/07/national/documents-detail-how-imperial-military-forced-dutch-females-to-be-comfort-women/#.Vx3Ahk1-Nzk> accessed 25 April 2016.

1316 ibid 122

It was not until 2000 that a coalition of NGOs instituted the Women's Tribunal, a symbolic people's tribunal 'established as a result of the failure of states to discharge their responsibility to accord justice.'[1317] The Women's Tribunal heard an extensive amount of victim and witness testimonies and reviewed the documented evidence.[1318] Although the judgment rendered, which attributed legal responsibility to Japan and its emperor, is not legally binding, 'the scholarly repute of the judges that issued it' has enabled it to bear 'significant persuasive authority in international law.'[1319] Moreover, since the Women's Tribunal utilized international law as it existed during WWII and at the time of the IMTFE's decision, the judgment provides further insight as to the legal relationship between sexual slavery, enslavement, trafficking and ICL.

The main crimes allegedly perpetrated by the accused defendants before the Women's Tribunal included rape and sexual slavery as crimes against humanity.[1320] To identify a prosecutorial basis in law relevant to the crime of sexual slavery at the time these offenses were perpetrated, the Women's Tribunal relied specifically on five sources: the Slavery Convention, the 1907 Hague Convention V, the Forced Labor Convention, 'the suppression of trafficking' (including the 1904, 1910, 1921 and 1933 Conventions), and the concept of '[en]forced prostitution as a war crime'.[1321] After reviewing these instruments, the Women's Tribunal held that 'in 1946 there was an ample basis under international law to prosecute Japanese officials for the crime of sexual slavery'.[1322]

In defining 'sexual slavery' over the relevant period (1937-1945), the Women's Tribunal adopted the Slavery Convention's definition of 'slavery' holding that 'it provides the overarching and enduring element of slavery' which 'incorporates both the chattel and forced labour concepts…and applies with full force to sexual slavery.'[1323] The Women's Tribunal determined that the *actus reus* element of 'sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy.'[1324] The *mens rea* was characterized by the court as 'the intentional exercise of such powers'.[1325]

Additionally, the Women's Tribunal's interpreted the Slavery Convention as a whole (encompassing both slavery and slave trade), determining that acts involved in the acquisition of persons for the purpose of enslaving also constituted sexual slavery.[1326] It also specifically found 'that control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership.'[1327]

The Women's Tribunal held that guilt would be established in determining the '"comfort system" was a system of sexual slavery'.[1328] In similar fashion to the above referenced enslavement cases,

1317 Askin (n 1297) 6.

1318 Ahmed (n 1297) 147.

1319 ibid.

1320 Women's Tribunal Judgment (n 1292) [20]-[24].

1321 ibid [587]-[607].

1322 ibid [607]. The Women's Tribunal then reviewed the IMT and IMTFE's codification and interpretation of 'enslavement' as a crime against humanity [608]-[614].

1323 ibid [619].

1324 ibid [620].

1325 ibid.

1326 ibid [619]-[620].

1327 ibid [620].

1328 ibid.

this determination was also made in a finding of 'indicia of sexual slavery and their application to the "comfort system"'.[1329] The Women's T Tribunal did not limit itself to fixed factors. Without explaining why, the Women's Tribunal did not explicitly adopt one of the *Kunarac* enslavement 'indicia' lists. Rather, it created its own list of indicators which included: involuntary procurement, treatment as disposable property, restriction of fundamental rights and basic liberties, absence of consent or conditions where consent is possible, forced labor and discriminatory treatment.[1330] Facts identified by the Women's Tribunal that 'powers' were exercised in light of the identified indicia were overwhelming. Evidence included the manner and methods of procurement used, the confinement of these women and girls, the Japanese demands of obedience and subservience, the subjection to rapes, various forms of sexual violence, torture, mutilation and punishment if orders were disobeyed; as well as the women and girls' subjection to 'invasive and inhumane medical examinations' and medical treatments and exposure to sexually transmitted diseases, subjection to unwanted pregnancies, forced abortions or the giving up of the birthed children and 'by killing them or abandoning them when their services were no longer of use.'[1331]

Several of the facts relied upon in a finding of sexual slavery evidence elements of trafficking in persons. For example, 'involuntary procurement' satisfies the first two elements of trafficking. All of which, as found in the judgment were perpetrated for the purpose of sexually exploiting these women and girls which satisfies the third element of trafficking.

In reviewing evidence demonstrating these indicia, the Women's Tribunal held 'that the Japanese government and military exercised the powers attaching to the right of ownership over the girls and women in the "comfort system"'.[1332] Interestingly, the Women's Tribunal also found that the process used by the Japanese to obtain these women and girls (such as, kidnapping, 'recruiting' and transporting) 'was in itself a form of slave trade, and in violation of customary international law prohibiting the slave trade and trafficking in women and children.'[1333]

In sum, the Women's Tribunal applied the relevant law as it existed during WWII to determine that the acts committed against comfort women were international crimes at the time of their commission. In doing so, the Women's Tribunal referenced the formative international trafficking instruments as relevant. In similar fashion to all of the other contemporary courts and tribunals discussed above in defining 'enslavement', the Women's Tribunal held that the definition of 'sexual slavery' is also based on the Slavery Convention's definition of 'slavery'. Even though it offered its own list of enslavement indicia, the substance of the Women's Tribunal's findings did not depart from the contemporary case law of the ICTY, SCSL or ECCC. It did however more explicitly link the crimes of sexual slavery and human trafficking with one another.

6.4.2 The SCSL: The *AFRC*, *RUF* and *Taylor Cases*

The factual basis for enslavement and sexual slavery related crimes charged against defendants

1329 ibid [640].

1330 ibid [641]-[661]. See also, Argibay (n 1300) 388.

1331 Women's Tribunal Judgment (n 1292) [664].

1332 ibid [662]-[664].

1333 ibid [663].

tried before the SCSL cases were discussed above in the enslavement section.[1334] The specific charge of 'sexual slavery' before the SCSL pertained to 'the abduction and use as sexual slaves of women and girls' in various districts all over Sierra Leone.[1335] One of the most egregious examples of this is the RUF and AFRC leadership's promotion of 'sexual violence and slavery by promulgating "Operation Pay Yourself", in which fighters were encouraged to take anything they wanted from the civilians, including wives, who were perceived as chattel.'[1336]

All three cases included charges of sexual slavery as a crime against humanity against the defendants; however, only the *RUF* and *Taylor* judgments rendered convictions for this crime. The Trial Chamber in the *AFRC* case "dismissed"/"struck out" this charge for being 'duplicitous' because it was charged in the same count as 'any other form of sexual violence'.[1337]

On appeal of that holding, the Appeals Chamber in *AFRC* believed that the Trial Chamber should have addressed sexual slavery and dismissed 'any other form of sexual violence' to remedy this duplicity in charging.[1338] Regardless, the Appeals Chamber determined it was unnecessary to 'substitute a conviction for sexual slavery as the Trial Chamber relied upon the evidence of sexual slavery to enter convictions for Count 9 which charged the offence of "outrages upon personal dignity"'.[1339] As all three cases discussed substantive legal aspects of the law of sexual slavery, all three cases will be briefly examined in this subsection.

Turning now to the law, 'sexual slavery' as a crime against humanity was identically identified in each case before the SCSL as containing three elements:

i. The Accused exercised any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
ii. The Accused caused such person or persons to engage in one or more acts of a sexual nature; and
iii. The Accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur.[1340]

The *actus reus* elements (i-ii) mirror those found in the Rome Statute's Elements of Crimes which have been described by the SCSL to require 'first, that the Accused exercised any or all of the powers attaching to the right of ownership over a person or persons (the slavery element) and second, that the enslavement involved sexual acts (the sexual element).'[1341]

The SCSL addressed the material *actus reus* elements separately. The Trial Chambers in *RUF*

1334 See *supra* subsection 6.3.3.2.

1335 *RUF* TJ (n 1134) [152]; *Taylor* TJ (n 1134) [124]; *Prosecutor v Taylor* (Judgment) SCSL-03-01-A, A Ch (26 September 2013) [264] (*Taylor* AJ).

1336 *Taylor* AJ (n 1335) [266].

1337 *AFRC* TJ (n 1132) [92]-[95], [696]. See also, the Partly Dissenting Opinion of Justice Doherty on Count 7 (sexual slavery) and Count 8 ('forced marriages) [12]. Justice Doherty dissented with respect to the majority's decision to dismiss Count 7 in its entirety stating that the Trial Chamber should have only considered the charge of sexual slavery.

1338 *Prosecutor v Brima, Kamara and Kanu* (the AFRC Accused) (Judgment) SCSL-04-16-A, A Ch (22 February 2008) [109]-[110] (*AFRC* AJ).

1339 ibid.

1340 *RUF* TJ (n 1134) [158]; *AFRC* TJ (n 1132) [708]; *Taylor* TJ (n 1134) [418].

1341 *RUF* TJ (n 1134) [159]; *Taylor* TJ (n 1134) [419].

and in *Taylor* both explained that the first element of sexual slavery is satisfied via a finding of enslavement indicia as confirmed by the Appeals Chamber of the ICTY in *Kunarac*.[1342] However, in *Taylor*, the Trial Chamber explained that the offered list of indicia 'is by no means exhaustive' and that the concept of 'powers' does not differentiate 'between the forced sexual and non-sexual acts'.[1343] While the Trial Chamber in the *AFRC* case did not list any 'powers' in its discussion of sexual slavery, it similarly held that 'powers of ownership listed in the first element of sexual slavery are non-exhaustive.'[1344] Furthermore, the *AFRC* judgment discussed that this element provides for

> no requirement for any payment or exchange in order to establish the exercise of ownership. Deprivation of liberty may include extracting forced labour or otherwise reducing a person to servile status. Further, ownership, as indicated by possession, does not require confinement to a particular place but may include situations in which those who are captured remain in the control of their captors because they have nowhere else to go and fear for their lives. The consent or free will of the victim is absent under conditions of enslavement.[1345]

As for the second (sexual) element, these judgments did not elaborate on the law. The only further description that the Trial Chambers included is located in the *RUF* and *Taylor* judgments which held that '[t]he acts of sexual violence are the additional element that, when combined with evidence of slavery, constitutes sexual slavery.'[1346]

Regarding the interpretation of this offense and an application of the law to the facts, the SCSL engaged with the crime of 'sexual slavery' in similar fashion to its interpretation of 'enslavement'. For example, in reference to victim Kamara and in making a determination of sexual slavery, the Trial Chamber found that

> members of the AFRC/RUF intentionally exercised powers of ownership over Kamara by depriving her of her liberty through her abduction and detention; by exacting forced labour from her by forcing her to carry a load; and that she was forced to engage repeatedly in acts of a sexual nature by multiple members of the group. The Trial Chamber finds from Kamara's testimony of her inability to refuse to submit to these acts and from the environment of violence and coercion that Kamara did not consent to these acts.[1347]

This is only one example of many in which the SCSL relied upon the manner and method of acquisition as evidence of powers attaching to the right of ownership.[1348] The forcible acquisition

1342 *RUF* TJ (n 1134) [160]

1343 *Taylor* TJ (n 1134) [420], [428]. This however is likely the case considering that the *RUF* and *AFRC* cases also included charges of forced marriage whereas the *Taylor* case did not – but it did hear evidence of 'forced marriages' which the Chamber used in its determination of the charge of sexual slavery.

1344 *AFRC* TJ (n 1132) [709].

1345 ibid. (citations omitted). See also, *Taylor* TJ (n 1134) [420].

1346 *RUF* TJ (n 1134) [162]; *Taylor* TJ (n 1134) [421].

1347 *Taylor* TJ (n 1134) [1143], [1043], [1073], [1132], [1188].

1348 ibid [1127] in which the court relies upon evidence of victim Gbamanja's 'capture' and subjection to an 'environment of violence and coercion.'

of victims coupled with their detention and subjection to sexual exploitation was held to satisfy the material elements of sexual slavery. This assessment also satisfies the act, means and purpose elements of trafficking in persons.

The SCSL also discussed the concept of consent and its role within the crime of sexual slavery. In *RUF*, the Trial Chamber cited to *Kunarac* when it

> emphasise[d] that the lack of consent of the victim to the enslavement or to the sexual acts is not an element to be proved by the Prosecution, although whether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership.[1349]

This reasoning is essentially identical to the SCSL's findings on the charge of enslavement as a crime against humanity. Nevertheless, in reference to sexual slavery, the Trial Chamber in *Taylor* held that '[t]he primary characteristic of enslavement is the absence of the consent or free will of the victim.'[1350] The judiciaries' focus on facts evidencing a lack of consent in the context of sexual slavery is a frequent occurrence. In *Taylor* for example, the Trial Chamber found that sexual acts were perpetrated upon the victims 'under the threat of force'[1351] and/or that consent was not given.[1352] It is unclear why the judiciary made more of an effort to point out the lack or impossibility of consent freely given. However, the SCSL's treatment of consent essentially being irrelevant due to the coercive measures taken by the defendant evidences its treatment as is done in the codification of trafficking in persons.

In sum, the SCSL's treatment of the crime of sexual slavery confirms its elemental relationship with enslavement. Sexual slavery is interpreted in the same manner by the SCSL which has embraced a definition of the exercise of 'powers' over another. Sexual slavery is then understood as a more specific form of enslavement requiring the additional perpetration of a sexual element for completion of the offense. The sexual slavery discussions before the SCSL also highlighted the fact that victim acquisition is included within the offense when coupled with coercive measures and the sexual exploitation of the victim—a material assessment which almost mirrors the Palermo Protocol's construct of trafficking in persons. While the negation of consent was rejected by the SCSL as being an element of the offense, each judgment nevertheless took great care in finding that consent was not or could not be freely given.

6.4.3 The ICC: The *Katanga*, *Ntaganda*, *Ngudjolo* and *Ongwen* Cases

As far as ICC jurisprudence is concerned, prosecutions from the *Situation in Uganda* (defendants Katanga, Ngudjolo, Ntaganda) and the *Situation in the Democratic Republic of the Congo* (defendant Ongwen) have charged their respective defendants with the crime of sexual slavery. The status of Ongwen's prosecution was already explained in detail in subsection 6.2.2.

1349 *RUF* TJ (n 1134) [163].

1350 *Taylor* TJ (n 1134) [420].

1351 ibid [1060].

1352 ibid [1127].

Defendants Katanga and Ngudjolo were acquitted of the charge of sexual slavery.[1353] With respect to the prosecution of Ntaganda, the PTC confirmed all charges (which included a count of sexual slavery) on 9 June 2014. Ntaganda's trial began on 2 September 2015 and is ongoing. Even though two of the active cases are in early stages of criminal prosecution and the other two resulted in acquittals on the charge of sexual slavery, the ICC has nevertheless addressed, albeit not in great detail, the material elements of 'sexual slavery', which will be addressed below.

'Sexual slavery' is codified as a crime against humanity under Article 7(1)(g) and as a war crime under Articles 8(2)(b)(xxii) and 8(2)(e)(vi). As discussed in Chapter 5, although left undefined in the Rome Statute, actual elements of these offenses can be found in the Elements of Crimes. In *Katanga*, the Trial Chamber discussed the material elements of the war crime of sexual slavery (under Article 8(2)(e)(vi)) and of the crime against humanity of sexual slavery (Article 7(1)(g)) simultaneously. In relying on the Elements of Crimes' definitions, the Court held that the material elements of sexual slavery are identical in the context of a war crime or crime against humanity and include:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.[1354]

The use of this definition also evidences that, with respect to the material elements, the ICC uses identical elements for enslavement and sexual slavery, but for the additional requirement for the crime of sexual slavery that '[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature.'[1355] The parallels between sexual slavery and enslavement is further confirmed in practice considering the PTC in *Katanga and Ngudjolo* found 'that although sexual slavery is included as a separate offence in article 7(1)(g) of the [Rome] Statute, it may be regarded as a particular form of enslavement'.[1356]

The ICC has interpreted the concept of 'powers attaching to the right of ownership' in the context of sexual slavery, such that they 'must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which

1353 Ngudjolo was acquitted of all charges on 18 December 2012. On 27 February 2015, this decision was upheld on appeal. Katanga was found guilty of some offenses but acquitted on the count of sexual slavery on 7 March 2014. This judgment is final.

1354 *Prosecutor v Katanga* (Judgment pursuant to Art. 74 of the Statute) ICC-01/04-01/07, PTC II (7 March 2014) [974] (*Katanga* Judgment) (*Katanga* Judgment). See also, Elements of Crimes (n 1094) Arts 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2. Moreover, the same footnote reads: 'Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.'

1355 Elements of Crimes (n 1094) Arts 8(2)(b)(xxii)-2, 7(1)(g)-2, 8 (2)(e)(vi)-2. See also, *AFRC* TJ (n 1132) [708] which adopted the ICC's definition of 'sexual slavery'.

1356 Decision on the confirmation of charges, *Katanga and Ngudjolo* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, [430] (hereafter '*Katanga and Ngudjolo* Confirmation of the Charges Decision'). See also, M O'Brien, '"Don't kill them, let's choose them as wives": the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law' (2016) 20 The International Journal of Human Rights 389, 394.

entails his or her deprivation of any form of autonomy.'[1357] In *Ntaganda*, the PTC held that assessing a case of sexual slavery necessitates an examination of the 'nature of such relationship' between the victim and perpetrator 'by considering various factors collectively'.[1358] These 'factors' are the ones previously identified by the Trial Chamber in *Katanga* (who relied in part on the indicia cited in *Kunarac* and the SCSL judgments), and include:

> detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account.[1359]

The Court in *Katanga* also held that exercising powers does not require any 'commercial transaction' and the inability of the victim to change his or her status is of great importance in determining the existence of sexual slavery.[1360] The PTC in *Katanga and Ngudjolo* also held that practices involving the 'deprivation of liberty', as listed in the Elements of Crimes could, depending on the circumstances, be incorporated into the crime of sexual slavery.[1361]

In similar fashion to the ICTY in *Kunarac*, the ICC seems to broaden the construct of slavery as defined in the Slavery Convention when using it to interpret the crime of sexual slavery. Specifically, the ICC held in *Katanga and Ngudjolo* that the crime of sexual slavery may also manifest in the form of

> forced labour or otherwise reducing a person to a servile status as defined in the 'Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.' The Supplementary [Slavery] Convention lists institutions or practices which include debt bondage, serfdom, forced marriage practices and forms of child labour, which constitute particular forms of enslavement.[1362]

When isolating the factual circumstances which signified exercising these 'powers' in a case of sexual slavery, the Trial Chamber in *Katanga* and the PTC in *Ntaganda* essentially pointed to the following: victim acquisition (in the form of capture), exploitation of the victims' vulnerability, no freedom of movement and often times actual confinement/incarceration, subjection to forced labor, subjection to physical abuse (beatings), the rhetorical branding of these victims as 'wife'

1357 *Katanga* Judgment (n 1354) [975]. This characterization is perhaps the closest we have seen to identifying 'powers' as discussed in Chapter 4.

1358 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Ntaganda* (ICC-01/04-02/06), Pre-Trial Chamber II, 9 June 2014, [53] (*Ntaganda* Confirmation of the Charges Decision). Citation omitted.

1359 *Katanga* Judgment (n 1354) [976]. See also, *Ntaganda* Confirmation of the Charges Decision (n 1358) note 209.

1360 *Katanga* Judgment (n 1354) [976]. Of interest is that the court used the term 'servitude' when talking about the inability to change one's status.

1361 *Katanga and Ngudjolo* Confirmation of the Charges Decision (n 1356) [430]. The same footnote is included for each count of sexual slavery in the Elements of Crimes. .

1362 ibid.

which in fact, meant a loss of all sexual autonomy and the victims' treatment as physical property.[1363] Again we see an ICL institution referencing the acquisition stage as being encompassed within this international crime, even though the Slavery Convention's definition does not appear to contemplate this inclusion. Acquisition is a key attribute of the crime of trafficking. In the cases before the ICC, acquisition coupled with subjection to exploitation satisfied the material elements of enslavement. This assessment further evidences that the material elements of trafficking in persons appear to fit within the construct of enslavement.

The main difference between this jurisprudence and trafficking's codified is that the facts in each sexual slavery (and enslavement) case to date have included the perpetration of actual exploitation and not just the 'intent to exploit'. This may lead one to question whether only possessing the intent to exploit could be enough to satisfy the material element of the offense thus permitting the inclusion of trafficking. I do not however consider this an issue of the material elements. The intent to exploit satisfies material element of the offense. Nevertheless it is doubtful that a case in which exploitation was not exacted will ever appear before the ICC considering the gravity threshold requirement for admissibility.

It should also be mentioned that as far as interpreting the second material element of 'sexual slavery' is concerned, the Court found that it

> concerns the victim's ability to decide the conditions in which he or she engages in sexual activity. In that respect it considers that the notion of sexual slavery may also encompass situations where women and girls are forced to share the existence of a person with whom they have to engage in acts of a sexual nature.[1364]

In sum, the ICC's codification of the crime of sexual slavery has clear connections to the definition of 'slavery' found in the Slavery Convention. The ICC did not explicitly adopt either of the enslavement indicia lists found in the *Kunarac* judgments to determine what factual circumstances satisfy the 'powers' element of sexual slavery. The ICC's legal reasoning is nevertheless consistent with assessments from other ICL institutions. In fact, the characterizations used by the ICC in its assessment of the crime of sexual slavery most closely resemble 'powers' as discussed in Chapter 4. This is particularly well illustrated by the ICC's reference to the 'use' and 'disposal' of a person and a victim's lack of control concerning the 'duration' of their subjection to sexual slavery.[1365]

In line with the *Kunarac* holdings, the ICC has expressly held that concepts known by different names under international law, for example, forced labor, serfdom, debt bondage and/or servile marriage, could satisfy the material elements of this offense thereby broadening the legal confines of sexual slavery, while also holding that sexual slavery is a particular form of enslavement. The ICC thereby reaffirms the position that enslavement as a crime against humanity is an umbrella

1363 *Katanga* Judgment (n 1354) [985]-[986], [1000]-[1009], [1011]-[1018], citations omitted: For example, as described in the *Katanga* Judgment [520], 'With regard to sexual violence against women belonging to the enemy group, it appears that it was a frequent practice to capture them and turn them into sex slaves.' See also, Katanga at [1001]: '[i]n the view of the Chamber, in the case at bar, the fact that the combatants declared that the civilians captured in Bogoro and brought to their camps were "their wives" does show they all harboured the intention to treat the victims as if they owned them and obtain sexual favours from them.' See also, *Ntaganda* Confirmation of the Charges Decision (n 1358) [54]-[57], [81]-[82].

1364 *Katanga* Judgment (n 1354) [978]. Citations omitted.

1365 See Chapter 4, Table 4.1. 'Powers' include: use, management of one's use entitled to and profiting from the use, transferability of use and duration.

offense covering different types of exploitation as well as the acquisition stage of sexual slavery. As the ICC considered victim acquisition and abuse of their position of vulnerability relevant in a finding of sexual slavery, trafficking in persons for purposes of sexual exploitation may also fit within the broadening of this international crime.

6.5 ICL Jurisprudence: The Disintegration of Legal Boundaries between Enslavement and Trafficking in Persons?

Up to this point, Chapter 6 has identified and examined the relevant enslavement and sexual slavery ICL jurisprudence focusing on two points of interest: (1) the international institutional adoption of definitions for these crimes; and, (2) judicial interpretations of these crimes (in light of the facts and circumstances of each case) which permitted a finding of the material elements of these offenses.

Each of these judicial institutions is independent of one another and were/are tasked with adjudicating on atrocities concerning different political, historical and factual circumstances. It should be mentioned that these institutions have no duty to review or consider jurisprudence outside of its institution. Regardless, the factual similarities and consistent judicial analyses between these institutions in making a finding of enslavement and/or sexual slavery is rather remarkable. Moreover, there is clearly an open dialog between these international courts and tribunals. The most notable consistencies include the adoption of legal definitions for these crimes which were inspired by the Slavery Convention's definition of 'slavery'; and the implementation of similar methodologies to determine the perpetration of enslavement or sexual slavery via the application of an indicia test.

With the relevant information extracted from this jurisprudence, it is now important to question whether this examination has revealed anything in relation to the second objective of this project, namely, – determining the incorporation of trafficking within the crime against humanity of enslavement. I believe this exercise has highlighted several reasons which would lead one to conclude that trafficking has been incorporated within the material elements of enslavement as a crime against humanity, which are discussed in the following subsections.

6.5.1 Classifying Enslavement as an Umbrella Offense and Identifying Substantive Links between Enslavement/Sexual Slavery and Trafficking

After reviewing these judgments, it appears that enslavement as a crime against humanity is largely understood as an umbrella offense. As pointed out by the SCSL, this is not to say that some measure of 'powers' or evidence of the deprivation of liberty need not be exercised in all instances of enslavement, but rather, that various practices known by other names in law (eg, forced labor) can be held to be enslavement as a crime against humanity pending satisfaction of the material and contextual elements of the offense. In addition to forced labor, sexual slavery is identified as a specific form of enslavement. And, as articulated by these ICL institutions, it is likely that enslavement also covers practices outlined in the Supplementary Slavery Convention (which include: debt bondage, serfdom, child exploitation and servile marriage) as well as slave trading.

The ICTY also held in *Kunarac* that other 'contemporary forms of slavery' fit within this definition. The judgment did not elaborate on that concept and so we do not know precisely what that means. However, and as mentioned earlier, the Trial Chamber in *Kunarac* did comment

that the 'transborder trafficking of women and girls for sexual exploitation' was identified by the Working Group on Contemporary Forms of Slavery as a 'contemporary form of slavery'.[1366]

Additionally, there are other material references made which links enslavement and sexual slavery to trafficking. Aside from the post-WWII tribunals, every institution adopted a definition of enslavement and/or sexual slavery which closely resembles the Slavery Convention's definition of 'slavery' insofar as they focus on the exercise of 'powers attaching to the right of ownership'.[1367] Nevertheless, before coming to this conclusion on the law and in search of customary international law defining these concepts, both the ICTY and the Women's Tribunal examined international trafficking instruments in a way that demonstrates at least a perceived link between trafficking, enslavement and sexual slavery.

While the post-WWII tribunals did not mention trafficking, they did not see the need to separate 'deportation to slave labor', a crime which closely resembles trafficking in persons, from the crime of enslavement. Moreover, the Trial Chamber in *Kunarac*, Trial Chamber II of the SCSL in the *AFRC* case and the Supreme Court Chamber of the ECCC in *Duch* all identified human trafficking as an indicium of enslavement.

Finally, and as discussed in greater detail in Chapter 5, the Rome Statute has codified the link between enslavement and trafficking by including 'trafficking in persons' within its definition of this offense. The Elements of Crimes further solidifies that link in reference to the crimes of enslavement and sexual slavery. The Trial Chamber in the *AFRC* and *Taylor* cases have used the Elements of Crimes to the Rome Statute as interpretative guidance when attempting to ascertain the material confines of a similar 'deprivation of liberty', which included reference to the trafficking language in the SCSL judgments.

Although mere references to trafficking does not solidify its sweeping material inclusion into the crime of enslavement, its frequent association with this international crime is noteworthy in making the overall assessment of trafficking's inclusion.

6.5.2 The Judicial Incorporation of Victim Acquisition and the Intent to Exploit within the Crime of Enslavement

Instead of explicitly identifying 'powers' and examining the case at hand in light of them, the judicial methodology of each institution adopted what is often referred to as 'enslavement indicia' to ascertain a finding of enslavement and/or sexual slavery. Whether the concepts of 'indicia' and 'powers' are understood synonymously by the judiciary is unknown. However, I would argue they are largely not considering what these 'powers' are, as discussed in Chapter 4. Instead, the vast majority of the identified indicia are examples of 'powers attaching to the right of ownership' over another. What is relevant for purposes of this research question is that the content of these indicia lists closely resemble a large portion of terms contained within the Palermo Protocol's definition of 'trafficking in persons'.

Particularly important is the fact that every institution discussed the method and manner in which victims were procured. Each ICL court or tribunal then held that victim acquisition in combination with their exploitation as forced laborers or sexual slaves amounted to the

1366 *Kunarac* TJ (n 1058) note 1323 citing Report of the Working Group on Contemporary Forms of Slavery on its twenty-third session (E/CN.4/Sub.2/1998/14), recommendation 4.

1367 *Taylor* TJ (n 1134) [446]; *AFRC* TJ (n 1132) [742],[749], n 1068; *RUF* TJ (n 1134) [158]-[160], [197]-[198]; *Krnojelac* TJ (n 1050) [350], [358]; *Duch* TJ (n 1134) [342]-[345]; *Duch* AJ (n 1257) [131], [152]; Rome Statute (n 1055) Art 7.

perpetration of the material elements of enslavement and/or sexual slavery. I will first discuss the acquisition part of this assessment and then turn to a discussion on exploitation.

Considering that the actual definition of enslavement focuses on the exercise of 'powers', how or under what circumstances a person was obtained for the purpose of their enslavement would appear to be irrelevant. This idea was also discussed in Chapters 4 and 5.[1368] The acquirement of civilians (eg, via capture, recruitment or transport) through various means and methods (eg, abduction, the use or threat of force or coercion) was however repeatedly used as a main piece evidence in every single enslavement and sexual slavery case to date and was held to constitute a 'deprivation of liberty'. This finding is critical to the research question insofar as deviant acquisition methods comprise the first two elements of the crime of trafficking in persons. In practice, this finding therefore blurs the definitional contours between crimes targeting victim procurement including trafficking in persons and slave trading with enslavement and sexual slavery.

The SCSL clarified that abductions alone cannot amount to enslavement. The ICTY also stated that the 'mere ability to buy, sell, trade, or inherit a person or his labour is insufficient to establish enslavement, the actual occurrence of such actions would be relevant.'[1369] These findings are also in line with the Palermo Protocol's construction of trafficking in that victim acquisition must be perpetrated *for the purpose of* exploitation.

Resolving the issue of exploitation is a little more problematic. According to ICL jurisprudence, a deprivation of liberty combined with victim subjection to exploitation, such as the exaction of forced labor (whether it be domestic, mining, farming, carrying or any other type of labor) or engagement in sexual activities will constitute enslavement or sexual slavery. Based on this finding, there may be a material divergence between enslavement and trafficking (as defined in the Palermo Protocol). Whereas the enslavement and sexual slavery jurisprudence appears to require victim subjection to some form of actual exploitation, this is not a requirement of the offense of trafficking in persons.

I would argue however that any perceived requirement of one's subjection to exploitation is due to the facts of the cases that have appeared before the various courts and tribunals to date and not the law. A determination that a victim is required to be subjected to exploitation is not settled in the ICL jurisprudence. For example, in cases of *forced labor* charged as enslavement, the ICTY and SCSL held that the exaction of forced labor was required. Before the ECCC, the Supreme Court Chamber rejected the inclusion of this requirement holding instead that forced labor is one of many indicia which could amount to enslavement. Instead, it found that the defendant must 'accrue some gain' or otherwise treat the victim as a commodity in order for the crime of enslavement to apply. The other institutions have only addressed the crime in light of the facts before it which have all included instances of exploitation. In my opinion, the perpetration of exploitation does not appear to be a requirement to satisfy the material elements of the offense, but will factor in when considering the gravity threshold of cases appearing before international criminal justice institutions.

In general, these judicial findings are consistent with my interpretation of the Rome Statute's definition of enslavement. Enslavement appears to require the 1) exercise of 'powers' or a similar 'deprivation of liberty'; and 2) that the perpetrator intend to exploit, exploit *or* treat their victim like a commodity. As such, it is likely that the perpetration of trafficking would fit within this framework.

1368 See Chapter 4, section 4.4; Chapter 5, section 5.3.

1369 *Kunarac* TJ (n 1058) [543].

6.5.3 The Role of Consent in a Case of Enslavement

Further evidence of the blurring of these material legal boundaries and the incorporation of trafficking within enslavement as a crime against humanity concerns the perceived role of consent. The discussions relating to consent in the determination of enslavement or sexual slavery within the judgments reviewed in Chapter 6 are very similar to that of a trafficking case. As discussed above, other than the ICTY in *Krnojelac*, every other ICL institution expressed that, due to the nature and circumstances of the cases (eg, defendants inducing a climate of fear, placing victims in a vulnerable position), the consent of the victim was made 'irrelevant'. Specifically, within its list of indicia and on the concept of consent, the Trial Chamber in *Kunarac* stated that

> The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.[1370]

The SCSL and ECCC have also adopted this holding on consent in the context of enslavement and sexual slavery. This interpretation bears a striking resemblance to the construction of consent in the Palermo Protocol. Regarding the crime of trafficking, Article 3(b) of the Palermo Protocol states that 'The consent of a victim of trafficking in persons to the intended exploitation…shall be *irrelevant* where any of the means set forth in subparagraph (a) have been used'.[1371] The 'means' listed in subparagraph include: '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'.[1372] As such, the defense of consent seems to be eliminated in the same manner among charges of enslavement, sexual slavery and trafficking in persons.

While every institution has held that consent (or rather, the negation of one's consent) is not an element of the offense, their basis for this statement almost always hinged on the fact that consent in the context of enslavement or sexual slavery is made irrelevant considering the nature of the work involved and/or the circumstances created by the defendant. Discussions on this point also resolved that the court can consider the force used or involuntariness of the work performed as evidence of enslavement.

The only judgment that seemed to require the negation of consent was in the case of forced labor analogous to enslavement before the ICTY. In *Krnojelac*, the Trial Chamber held that '[t]he issue in every case is as already stated, whether the particular detainee had lost his choice to consent or to refuse the work he was doing.'[1373] As such, one of the key and required enslavement indicia was proof of force or circumstances in which consent could not be given freely. The rationale in *Krnojelac* seems to be the most logical considering that in cases of forced labor charged as enslavement, the element of *force* should be proven and a defense to force could be consent. I think that the SCSL and the ECCC found it difficult to reconcile *Kunarac's* holding that consent is irrelevant with *Krnojelac's* holding that it was an element of the offense because the SCSL and

1370 *Kunarac* TJ (n 1058) [542]- [543].

1371 Palermo Protocol (n 1189) Art 3(b). Emphasis added.

1372 ibid Art 3(a).

1373 *Krnojelac* TJ (n 1050) [380].

ECCC did not consider that *Kunarac* was an enslavement 'outright' case whereas *Krnojelac* charged forced labor amounting to enslavement. As such, the SCSL and ECCC's holdings now frustrate legal consistency regarding the role consent plays in cases of forced labor charged as enslavement.

6.6 Concluding Remarks

Upon a review of this jurisprudence, this chapter concludes with the position that the international judiciary has already identified enslavement as an umbrella offense. The grouping of offenses and the failure to distinguish between terms and crimes began with the first enslavement judgments from WWII. The post-WWII tribunals failed to define 'enslavement', 'deportation to slave labor' and 'compulsory labor' or distinguish these concepts from one another. Even with the identification of international instruments and definitions (eg, Slavery Convention) in the more contemporary ICL institutions, the judicial practice of operating outside of the definitional framework of 'powers' has continued.

In relation to the inclusion of trafficking, the various ICL institutions' use several forms of the *actus reus* elements of the law of trafficking in the context of enslavement and sexual slavery, culminating in the apparent disintegration of legal boundaries between these offenses. The international jurisprudence to date relies upon evidence regarding the *manner and method one is acquired for enslavement/sexual slavery* as well as the specific circumstances of the victim after they have been acquired to determine the perpetration of enslavement and/or sexual slavery. As a result, it is unclear as to the precise space the law of trafficking already occupies in ICL but it appears to fit under this umbrella crime.

While this practice may frustrate legal certainty and notions of due process, it cannot be said that a failure to redress such crimes (as in the case of the 'comfort women') is preferred. However and more importantly, all of these ICL institutions apply very similar methodologies in their legal reasoning. As such, in the context of an ICL prosecution for enslavement or sexual slavery, it may perhaps be the wiser option for legal practitioners and the judiciary not to think of a practice as 'forced labor' or 'trafficking' or 'enslavement', but evaluate the facts of the case to determine whether the perpetrator 1) exercised of 'powers' or a similar 'deprivation of liberty'; and 2) that the perpetrator intended to exploit, exploited *or* treated their victim like a commodity. If so, then the material elements of enslavement as a crime against humanity are satisfied.

7 Conclusion

The aim of this thesis was two-fold: 1) clarify the international definition of 'trafficking in persons'; and 2) determine the applicability of trafficking within international criminal law – in the specific context of ascertaining whether the crime against humanity of enslavement has incorporated human trafficking within its construct. This concluding chapter reviews the overall findings for these questions.

7.1 Clarifying the international definition of 'trafficking in persons'

In an attempt to resolve any definitional ambiguities, part I of this research project examined thoroughly the international laws of human trafficking from its inception through its current construction in the Palermo Protocol. As detailed in Chapter 2, human trafficking has been a definable concept since its introduction into international law at the beginning of the twentieth century. While the concept's name changed over time from 'white slave traffic' to 'traffic in women and children' to 'traffic in persons', each trafficking instrument outlined conduct constituting the practice of human trafficking.

Upon a closer examination of each instrument in combination with their respective preparatory works, it is evident that the international legal definition of trafficking has evolved over time. In 1904, trafficking encompassed the procurement of white/European women and girls for 'immoral purposes' (prostitution) abroad. In order for women of 'full age' to be considered victims of traffic under this definition, evidence of 'abuse or compulsion' was also required.

The 1910 Convention's construct of trafficking was very similar to that of the 1902 Draft Convention. The dichotomy between women and girls under age versus those of 'full age' was codified and 21 years became the specified 'full age' designation. Additionally, a more expansive list of methods of acquisition for women of 'full age' was contained within in the defining article and included: fraud, means of violence, threats, abuse of authority, or any other method of compulsion. Finally, the 1910 Convention's definition of trafficking included inter and intra state movement within its framework.

In 1921, the concept of trafficking retained its definitional parameters, but the scope of application changed such that men and boys under 22 years of age were covered by the instrument and the 'full age' designation for women increased to 22 years. Moreover, the race or ethnicity of the alleged victim was no longer relevant to the assessment.

The 1933 Convention's construct of the offense remained consistent with previous international instruments except for one aspect. It removed that methods of acquisition were required at all in order to comply with the definition. This definitional subtraction thereby removed any potential defense on the grounds of consent for traffickers, making consent an irrelevant factual consideration under the law.

The final formative instrument was the 1949 Convention. It retained the same definition of trafficking but actually used the term prostitution instead of 'immoral purposes'. The instrument used gender neutral language throughout. The 1949 Convention also added other offenses within the anti-trafficking effort which included the exploitation of the prostitution of others and the facilitation of prostitution.

While I was able to pinpoint the definition of trafficking in each of these formative anti-trafficking instruments, determining the state of international anti-trafficking law at the end of the

twentieth century was nevertheless difficult. This struggle was due to a couple of factors. First, the rather abysmal ratification status of the 1949 Convention prevented it from harnessing any real international instrumental legitimacy and effect. As such, whether the definition of trafficking also included men of all ages or the anti-trafficking effort included crimes involving the exploitation of another's prostitution and the facilitation of brothels is questionable. Second, other international instruments began to recognize that the crime of trafficking included the acquisition of children for purposes other than prostitution. These instruments thereby, albeit tangentially, altered the perception of what trafficking was from all of the preceding formative anti-trafficking instruments.

Chapter 3 then turned to examine the current international trafficking instrument: the Palermo Protocol. The primary undertakings of Chapter 3 included: (1) clarifying the Palermo Protocol's relationship to its parent instrument, the CTNOC; and (2) defining each term contained within the Palermo Protocol's definition of 'trafficking in persons' in its Article 3(a).

A review of the operative articles from the CTNOC and the Palermo Protocol in combination with their preparatory works reveal that trafficking is in fact fully encompassed by the Palermo Protocol's defining article. Accordingly, the Palermo Protocol's discussion of transnationality and involvement by an organized criminal group relates only to the duties that States Parties have to criminalize trafficking domestically and cooperate with other nations in transnational trafficking investigations and prosecutions, but does not affect the definition of the offense.

In regards to its definition, the Palermo Protocol *explicitly* defines 'trafficking in persons' under its Article 3(a) as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[1374]

The 'act' and 'means' elements each include a qualifying list of undefined terms. As such, each term within these first two elements was scrutinized and demarcated.

The Palermo Protocol does not define 'exploitation'. Instead, Article 3(a) states that 'exploitation' can be understood, 'at a minimum' to include: '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.'[1375] In an effort to understand these terms, each concept was discussed in the context of trafficking based on the form of exploitation's international instrument of origin.

As it concerns trafficking's third element, not only were the forms of exploitation in need of instrumental clarity, but discussing the level of intent required to attribute criminal accountability within this offense has to date, been grossly overlooked. As such, Chapter 3 attempted to determine how 'for the purpose of' can be understood as the *mens rea* element of the offense. It is clear that *dolus directus* of the first degree ('concrete intent' or purpose) unquestionably satisfies this *mens rea* element of trafficking. Depending on the domestic codification, this crime may also include *dolus directus* of the second degree (awareness of an inevitable outcome). However, any

1374 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3 (Palermo Protocol).

1375 ibid.

lower level of intent such as *dolus eventualis* appears to run contrary to the plain language of, 'for the purpose of' as codified in the Palermo Protocol.

As the Palermo Protocol's definition has either been adopted verbatim in domestic criminal codes, or is used as a source of legislative inspiration for national anti-trafficking laws, Chapter 3 unpacked all the Article 3(a)'s terms contained in the definition to bring greater clarity and workability of this construct in practice. The aim of this effort was to curtail the alleged hardship in prosecuting traffickers because this crime is difficult to understand.

7.2 The Applicability of Trafficking within International Criminal Law: Incorporating Trafficking within the Crime against Humanity of Enslavement

With the international definition of 'trafficking in persons' clarified in law, Part II of this research project endeavored to determine whether the international crime against humanity of enslavement has incorporated the crime of trafficking within its construct. The leap between these research questions however required an intermediary step. There are perceived substantive relationships between various concepts including trafficking, slavery, slave trade, sexual slavery and enslavement. Some of these concepts including slavery, slave trade and trafficking in persons, are defined in (public) international law instruments, whereas others like enslavement and sexual slavery are codified offenses within international criminal law statutes. Before exclusively delving into international criminal law (ICL), Chapter 4 identified the international legal definitions of those listed concepts and crimes and determined whether such practices are distinguishable from one another in law.

This exercise revealed material similarities between slavery, sexual slavery, enslavement, slave trade and trafficking. Specifically, the Slavery Convention's codification of the concept of 'slavery' has had a profound influence on the ICL definitions of 'sexual slavery' and 'enslavement' as they all share in a similar definition. Nevertheless, each of these practices/crimes are in fact distinguishable from one another in law. Whereas the international codification of slavery describes the circumstance a person finds him or herself in as a result of another's exercise of 'powers' over them, enslavement is a codified criminal offense concentrated on the exercise of those 'powers'. Substantively speaking, sexual slavery is a more specific form of enslavement, addressing the criminality of exercising 'powers' which causes one to engage in act(s) of a sexual nature.

In similar fashion to slavery's codification, the slave trade was a concept defined in an international instrument, not criminalized in an international criminal court or tribunal's statute. Slave trade is not concerned with the exercise of 'powers', but rather, with the processes used (with the intent) to reduce another person into a situation of slavery. Based on its elements, slave trade appears to be a more specific form of trafficking in persons. However, trafficking (in adults) not only requires the action taken, but that some form of 'means' is used like force or the abuse of a position of vulnerability to evidence that consent was not given (freely). Moreover, whereas the slave trade is exclusively concerned with the facilitation of one to a condition of slavery, trafficking in persons' 'purpose' is broader: exploitation. The Palermo Protocol confirms that exploitation covers more practices than slavery.

Chapter 4 also uncovered that the legal construct of 'enslavement', which is principally used in the context of crimes against humanity, may in fact encompass other forms of conduct not traditionally considered as enslavement *per se* due to its characterization as an umbrella offense. This finding developed as a result of the ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code) which defined 'enslavement' to mean:

> establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour).[1376]

This 1996 Draft Code, however, remained a draft. As such, the notion that enslavement could be construed as an umbrella offense in law needed further supporting evidence from other more concrete sources of international law.

Considering that enslavement is not formally defined anywhere else besides within the Rome Statute of the International Criminal Court (ICC), Chapter 5 examined exclusively this codification. Article 7(2)(c) of the Rome Statute defines 'enslavement' as: '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.'[1377]

The Rome Statute's definition of 'enslavement' does not appear to define enslavement as an umbrella offense. However, a review of the Elements of Crimes to the Rome Statute does reveal that enslavement is construed as a broader concept in ICL. The Elements of Crimes elucidates that the crime of enslavement encompasses traditional notions of chattel slavery, but also includes acts used by perpetrators to acquire, transfer and transport slaves. For example, the buying, selling or bartering of another person. Moreover, and in line with the findings of Chapter 4, practices not traditionally or legally identified as slavery *per se*, such as servile marriage or debt bondage were also identified in the Elements of Crimes as having the potential to satisfy the material element of this offense.

The notion that enslavement can be construed as an umbrella offense thereby permits one to consider whether trafficking fits under the umbrella. More relevant, however, is the fact that the Rome Statute's definition of enslavement actually includes the phrase 'trafficking in persons'. This inclusion is unique to international (criminal) law codifications of enslavement.

A review of the Rome Statute in conjunction with its drafting history and the Elements of Crimes to the Rome Statute sheds little to no light on why the term 'trafficking in persons' was included into the definition or what that inclusion means in practice. So how then, can the inclusion of the phrase in enslavement's definition, 'and includes the exercise of such power in the course of trafficking in persons, in particular women and children' be understood? Is this a blanket inclusion of trafficking into the crime of enslavement or is such a material inclusion conditional – and if so, conditioned on what?

Under international law, trafficking and enslavement appeared to be distinguishable concepts. A purely textual examination of the Rome Statute permits discernibility between the concepts: offenders can exercise 'powers' when they traffic in persons and when they do so in the context of crimes against humanity… they fall within this legal framework. But, to read in additional elements to the crime of enslavement as a textual approach requires (act, means, purpose, exercise of powers) would seem contrary to the drafters intent as well as contrary to common sense.

In using a more holistic approach that takes the inclusion of trafficking within enslavement's

1376 ILC 1996 Draft Code of Crimes, II (2) *ILC Yearbook*.

1377 UNGA, Rome Statute of the International Criminal Court (adopted 17 July 1998 by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) UN Doc A/Conf.183/9 (1998), 2187 UNTS 3, Art 7. Emphasis added.

definition, the Elements of Crimes and international law addressing enslavement collectively into account, I believe that the inclusion of trafficking serves a different function. This belief is held considering the two substantive observations I made in Chapter 5. First, that the 'powers' or a similar 'deprivation of liberty' exercised must at least be with the *intent to exploit* or that *exploitation occurs*, or that the that the victim is *commodified*. And second, that the crime of enslavement also encompasses *the acquisition of persons* for the purpose of exploitation.

My first observation is based on the fact that trafficking, all of the practices incorporated by reference to the Supplementary Slavery Convention and all of the 'examples' of 'powers' listed in the Elements of Crimes either require the intent to exploit, exploitation or the commodification of the victim. Similarly and secondly, the inclusion of trafficking, slave trade and the methods of victim transfer listed in the elements of crimes leads me to observe that victim acquisition falls within the material elements of the offense.

With this understanding of trafficking's inclusion into the Rome Statute's definition, the material elements of enslavement as a crime against humanity can be understood as:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over another; *OR*
2. The perpetrator imposed a similar deprivation of liberty over another as the exercise of 'powers' by:
    a. Exacting forced labor
    b. Slave trading
    c. Engaging in practices identified in the Supplementary Slavery Convention
        i. Debt bondage
        ii. Serfdom
        iii. Servile Marriage
        iv. Child Exploitation
    d. Trafficking in persons; *AND*
3. The exercise of 'powers' or imposition of a 'deprivation of liberty' over another must include their exploitation *or* an intent to exploit them, *or* result in their commodification.

This research also highlights that regardless of the consequences of trafficking's inclusion, the phrase 'trafficking in persons' needs to be defined. In my opinion, and although they have no obligation to do so, the ICC should adopt the Palermo Protocol's definition of 'trafficking in persons' primarily because the Palermo Protocol's definition of 'trafficking in persons' is the universally recognized definition of this crime. Furthermore, the adoption of the Palermo Protocol's construct will bridge a gap between international law and human rights law and serve to harmonize concepts known to both realms of international law. A practice which has already been done in the Malabo Protocol. Moreover, it appears that drafters of the Rome Statute and/or the Elements of Crimes to the Rome Statute were aware that a trafficking-specific instrument was underway at the time of the Rome Statute's finalization and so the decision was left, in part, to use that future instrument (the Palermo Protocol) to define the concept.

If a trafficking prosecution comes before the ICC however the largest legal hurdles will arise in proving the contextual elements of crimes against humanity. The often organized nature of trafficking can satisfy the *systematic* (as opposed to widespread) element of crimes against humanity. However, proof pertaining to a state or organizational policy will likely be the most challenging element to satisfy. Trafficking is often committed by organized criminal groups, but the majority of trafficking syndicates will likely not meet the 'organizational policy' threshold required by crimes against humanity. While the legal bright line for what constitutes an 'organization' is yet to be set in

stone by the ICC, we know it is somewhere in between a 'state-like entity' and a group that enjoys 'an established hierarchy' and 'possess[es] the means to carry out a widespread or systematic attack against the civilian population'. While the jurisprudence and the literature appear to converge towards an interpretation of 'organization' which focuses on the capacity of the perpetrator (as primarily discussed in the *Katanga* Judgment), future research is needed in this area of the law. A more concrete understanding of what types of organizations/organizational structures could cross the threshold from transnational to international thus satisfying this contextual element would be helpful for practitioners.

Considering that the Rome Statute contains the only codified definition of 'enslavement' under ICL, an examination of ICL enslavement jurisprudence was also seminal in determining whether trafficking can be widely considered included within the crime against humanity of enslavement, or, if it is only included in the context of an ICC enslavement prosecution. As sexual slavery has been held to be a form of enslavement, both enslavement and sexual slavery judgments were examined. Chapter 6 therefore ascertained how enslavement and sexual slavery, as codified crimes, are regarded by international criminal justice institutions.

In similar fashion to the Rome Statute's definition of 'enslavement', every contemporary ICL institution adopted a definition of enslavement derived from the Slavery Convention's definition of slavery – focusing on the exercise of 'powers attaching to the right of ownership' over another. None of the ICL institutions however defined 'enslavement' as contained in the Rome Statute which explicitly includes the phrase 'trafficking in persons'.

In reviewing the judicial methodology used in a finding of enslavement, each court or tribunal has largely strayed from explicitly identifying 'powers attaching to the right of ownership,' in favor of utilizing a judicially constructed test to make a finding of enslavement and sexual slavery. This legal methodology was attributed to the International Military Tribunal (IMT) in its adjudication of the crimes of enslavement and deportation to forced labor. The ECCC has since described the IMT's legal approach as providing 'substantive analyses from which subsequent international tribunals have discerned factors considered indicative of enslavement as a crime against humanity.'[1378] The ICTY in *Kunarac* used the IMT's findings of enslavement when it fashioned the indicia of enslavement test. Since the *Kunarac* Judgment, the SCSL and ECCC have also employed the 'indicia of enslavement' approach to determine the perpetration of enslavement under ICL. While the ICC did not explicitly adopt either list from the *Kunarac* judgments, it has essentially applied the same legal methodology in assessing the crime of enslavement.

In reviewing the various institutions' actual application of the law of enslavement to the facts, the connection between trafficking and enslavement (as well as sexual slavery) holds. There are remarkable consistencies among the types of facts that these judiciaries relied upon in their findings of enslavement and/or sexual slavery which thereby become relevant when determining whether trafficking has been incorporated into the crime of enslavement. The most apparent include: (1) the importance in methods and manners of victim acquisition; and (2) considerations of consent.

Each and every ICL institution has held that the circumstances by which a person was acquired for their enslavement is relevant and aids in determining whether the elements of the crime were committed. Facts including recruitment, transport, and abduction – and the circumstances of those forms of victim acquisition including the *use* or threat of force, deception and abuse of power

1378 *Prosecutor v KAING* Guek *Eav alias Duch* (Judgment) ECCC-001/18-07-2007, Supreme Court Chamber, 3 February 2012 [132]. This is also evidenced in the ICTY's judgment in *Kunarac* which engaged in an in-depth review of the WWII judgments before fashioning its 'indicia of enslavement' test.

or of the position of vulnerability of the victims – were consistently used to form the basis of an enslavement conviction before every ICL institution. These factors are also the first two elements of human trafficking. Moreover, in each enslavement case, victim acquisition was performed for the purpose of subjecting those persons acquired into forced or compulsory labor and/or sexual exploitation (rape, sexual slavery and/or forced marriage) which would also satisfy the third element of trafficking in persons – even further evidencing the disintegration of legal boundaries between the crimes of enslavement and trafficking.

As far as consent is concerned, its inclusion within the enslavement and sexual slavery judgments is quite interesting. Consent and any role it may play is not contemplated in the Slavery Convention's definition of 'slavery' or within the conceptualization of exercising 'powers attaching to the right of ownership' over another. Nevertheless, each institution discussed consent in the context of enslavement or sexual slavery. Eventually, the judiciary dealt with consent in an almost identical fashion to the way it is addressed in the Palermo Protocol. The judiciaries' identification of the defendants' use of forms of the 'means' element of trafficking (eg, use or threat of force or abuse of a position of vulnerability) in the enslavement cases led every contemporary ICL court and tribunal (apart from the Trial Chamber in *Krnojelac*) to hold that consent was '*irrelevant*', even in cases charging *forced* labor as analogous to enslavement.

This consistency in legal application evidences a common understanding in the interpretation of the crime of enslavement. Because the relied upon indicia of enslavement essentially comprises the elements of trafficking in persons as codified in the Palermo Protocol, it may be concluded that ICL institutions already consider the incorporation of trafficking within enslavement as a crime against humanity. This conclusion is further supported by the fact that enslavement is treated as an umbrella offense. Forced labor, debt bondage, servile marriage, serfdom, child exploitation and slave trading have all already been held in one way or another as fitting under the umbrella of enslavement. Considering the similarity of these offenses with trafficking, why then, would human trafficking's inclusion be any different?

Of all of the research undertaken in Part II, there are four main arguments that support, and in my opinion, solidify trafficking's incorporation within enslavement as a crime against humanity.[1379] First, a thorough understanding of the Rome Statute's definition of 'enslavement' – the only codified definition of enslavement within ICL includes trafficking in persons. Second, international criminal jurisprudence has also found that human trafficking is included within the crime of enslavement.[1380] Third, by way of their judicial methodology, each and every ICL institution has held that the 'acts' and 'means' involved in (slave) acquisition (as found in the codified definition of trafficking in for persons) for the purpose of exploitation satisfies the elements of enslavement. Finally, enslavement has been held to be an umbrella offense. The legal concept of 'slave trading' has already been held to fall within enslavement and is almost identical to the crime of trafficking.

Considering that my interpretation of enslavement as codified in the Rome Statute was also essentially used by each and every ICL institution in their finding of enslavement as a crime against humanity, I believe the law has incorporated trafficking in persons within the material elements of this international offense.

The findings in Part II of this project can be seen as controversial. I am the first to acknowledge this. Concluding that the crime of trafficking in persons is incorporated within enslavement as a crime against humanity is of course not deprived of certain limits. This research project is not

1379 Again, I stress here that I am talking about the material, as opposed to contextual elements of enslavement.

1380 See Chapter 6, section 6.5. The ICTY's Trial Chamber in *Kunarac* and the SCSL's Trial Chamber in the *AFRC* case held that human trafficking is an indicium of enslavement

concerned with what the law should be, but rather, what it is. An examination of international law and international criminal jurisprudence raises interpretive concerns. They leave me questioning why international criminal law has succumbed to the disintegration of legal boundaries between enslavement, a crime addressing one of the worst forms of human exploitation with trafficking, a crime targeting the mechanism offenders use to bring a person into a state of exploitation. Consequently, the blurring of these substantive legal boundaries may serve to elevate more ordinary crimes such that they may be prosecuted before international criminal institutions. What does this consequence say about the status of international criminal justice? Has the inclusion of trafficking trivialized enslavement as a crime against humanity?

The limited findings in Part II of this project perhaps also lead to wider questions in need of further examination. For example, can an international crime really incorporate what is usually seen as a transnational crime? It will also be of interest to see whether these findings foreshadow the legal method which will be used if and when the charge of enslavement as a crime against humanity is applied to human traffickers. This might not be too theoretical a question at a time when the ICC's 'Draft Policy on Children',[1381] specifically mentions the trafficking of children, that the Malabo Protocol includes the crimes of trafficking in persons and enslavement using the Rome Statute's definition[1382] and when the newly created Kosovo Specialist Chambers[1383] are due to try human traffickers in the upcoming years?

1381 OTP, 'Draft Policy on Children' (June 2016), 19 < https://www.icc-cpi.int/iccdocs/otp/22.06.2016-Draft-Policy-on-Children_ENG.pdf> accessed 19 July 2016.

1382 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, *Assembly/AU/Dec.529(XXIII) (2014)*.

1383 Law No. 05/L-053, Law On Specialist Chambers and Specialist Prosecutor's Office, Art 7 <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf> accessed 19 May 2016 (Law No.05/L-053).

Selected Bibliography

This selected bibliography lists academic works appearing in the footnotes, as well as other, though not all, major works which were consulted in this study.

– – 2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery in Allain J (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

– – Boko Haram "to sell" abducted schoolgirls' *Aljazeera* (6 May 2014) <http://www.aljazeera.com/news/africa/2014/05/boko-haram-claims-nigeria-abductions-20145513495797542.html> accessed 8 February 2016.

– – 'Diplomatic Conferences' <http://www.un.org/law/diplomaticconferences/> accessed 15 February 2016.

– – 'Documents detail how Imperial military forced Dutch females to be "comfort women"' *The Japan Times* (7 October 2013) <http://www.japantimes.co.jp/news/2013/10/07/national/documents-detail-how-imperial-military-forced-dutch-females-to-be-comfort-women/#.Vx3Ahk1-Nzk> accessed 25 April 2016.

– – ECCC at a Glance (April 2014) <http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf> accessed 17 May 2016.

– – Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) UN Doc A/CONF.183/10.

– – 'Human trafficking: the modern day slave trade' (Thompson Reuters Foundation) <https://www.youtube.com/watch?v=g0xWMXaYdBk> accessed 28 October 2015.

– – Introduction to the ECCC <http://www.eccc.gov.kh/en/about-eccc/introduction> accessed 17 May 2016.

– – 'Key Moments in the Establishment of the International Criminal Court: A Timeline of the Establishment and Work of the International Criminal Court' (Coalition for the International Criminal Court (CICC) Fact Sheet) <http://www.iccnow.org/documents/ICC_Timeline_updated_0708.pdf> accessed 15 February 2016.

– – 'Modern Slavery' *BBC News* <http://www.bbc.co.uk/ethics/slavery/modern/modern_1.shtml> accessed 28 October 2015.

– – Statement by the Chief Cabinet Secretary Yohei Kono on the result of the study on the issue of 'comfort women' (4 August 1993) <http://www.mofa.go.jp/policy/women/fund/state9308.html> accessed 25 April 2016.

– – Statement of the Chief Prosecutor of the Special Investigative Task Force (29 July 2014) <http://www.recom.link/wp-content/uploads/2014/07/Download-full-statement-here.pdf> accessed 19 May 2016.

– – Statement by the Special Rapporteur on contemporary forms of slavery, including its causes and consequences at the 30th session of the United Nations Human Rights Council (14 September 2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16440&LangID=E> accessed 26 October 2015.

– – 'Trafficking and Slavery Fact Sheet' (Free the Slaves) <https://www.freetheslaves.net/wp-content/uploads/2015/02/FTS_factsheet-Nov17.2.pdf> accessed 28 October 2015.

– – UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June – 17 July 1998) UN Doc A/CONF.183/13 (Vol. II).

– – UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June – 17 July 1998) UN Doc A/CONF.183/13 (Vol. III).

– – UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 (2014).

Abdou M, Commentary on Article 17 (Case Matrix Network) <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/#c1997> accessed 30 September 2016.

Abraham G, 'Africa's Evolving Continential Court Structures: At the Crossroads?'(2015) Occasional Paper 209 <http://www.saiia.org.za/occasional-papers/669-africa-s-evolving-continental-court-structures-at-the-crossroads/file> accessed 2 January 2017.

Abramson K, 'Beyond Consent: Towards Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' (2003) 44 Harvard International Law Journal 473.

Ahmed AR, 'The Shame of Hwang v. Japan: How the International Community has Failed Asia's "Comfort Women"' (2004-2005) 14 Texas Journal of Women and the Law 121.

Allain J, 'The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade' (2007) 78(1) British Yearbook of International Law 342.

– – 'The Definition of "Slavery" in General International Law and in Crime of Enslavement within the Rome Statute' (2007) Guest Lecture Series of the Office of the Prosecutor <https://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf> accessed 1 October 2016.

– – *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Vol. 1 (Martinus Nijhoff Publishers 2008).

– – 'The Definition of Slavery in International Law' (2009) 52(2) Howard Law Journal 257.

– – 'On the Curious Disappearance of Human Servitude from General International Law' (2009) 11 Journal of the History of International Law 303.

– – Book Review of Trafficking in Human Beings: Modern Slavery by Silvia Scarpa, 20 European Journal of International Law (2009) 447.

– – (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

– – 'The Legal Definition of Slavery into the Twenty-First Century' in Allain J (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

– – *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013).

– – 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 14 Albany Government Law Review 1.

– – *The Law and Slavery: Prohibiting Human Exploitation* (Brill/Nijhoff 2015).

– – and Bales K, 'Slavery and its Definition' (2012) 14 Global Dialogue 1.

– – and Hickey R, 'Property and the Definition of Slavery' (2012) 61 International and Comparative Law Quarterly 915.

Ambos K, 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law View Point' (1996) 7 European Journal of International Law 519.

Ammer C, *The American Heritage Dictionary of Idioms* (Houghton Mifflin Co. 2016) <http://dictionary.reference.com/browse/in-the-course-of> accessed 16 February 2016.

Amnesty International, 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' (2016) <file:///X:/My%20Downloads/AFR0130632016ENGLISH%20(1).PDF> accessed 2 January 2017.

– – 'Making the Right Choices-Part I- Defining the Crimes And Permissible Defences And Initiating A Prosecution' (1 January 1997) <http://www.iccnow.org/documents/ALMakingRightChoises97PartI.pdf> accessed 6 May 2016.

Anderson S, 'Coercion' in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy Archive* (Spring 2014) <http://plato.stanford.edu/archives/spr2014/entries/coercion/> accessed 10 November 2015.

Andrees, B, 'Defending Rights, Securing Justice: The International Labour Organization's Work on Forced Labour' (2016) Journal of International Criminal Justice 343.

Argibay CM, 'Sexual Slavery and the "Comfort Women" of World War II' (2003) 21 Berkeley Journal of International Law 375.

Aronowitz AA, 'Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets that Drive It and The Organisations that Promote It' (2001) 9 European Journal on Criminal Policy and Research 163.

– – and Isitman E., 'Trafficking of Human Beings for the Purpose of Organ Removal: Are (International) Legal Instruments Effective Measures to Eradicate the Practice?' (2013) 1 Groningen Journal of International Law 74.

Aptel C, 'Child Slaves and Child Brides' (2016) 14 Journal of International Criminal Justice 305.

Askin KD, 'Comfort Women: Shifting Shame and Stigma from Victims to Victimizers' (2001) 1 International Criminal Law Review 5.

Aston J and Paranjape V, 'Human Trafficking and its Prosecution: Challenges of the ICC' Social Sciences Research Network.

Atak I and Simeon JC, 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' (2014) 12 Journal of International Criminal Justice 1019.

Badar ME, *The Concept of Mens Rea in International Criminal Law* (Hart 2015).

Bajekal N, 'Inside the Search for the Chibok Schoolgirls Abducted by Boko Haram' *Time* (23 April 2015) <http://time.com/3833024/chibok-boko-haram/> accessed 8 February 2016.

Bales K, *Ending Slavery: How we Free Today's Slaves* (University of California Press 2007).

– – 'Introduction' in Nowakowski A (ed), *Human Rights and Contemporary Slavery* (University of Denver 2008).

– – and Lize S, 'Trafficking in Persons in the United States: A report to the National Institute of Justice' Croft Institute for International Studies, University of Mississippi (original May 2004, Revised August 2005).

Balos B, 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' (2004) 27 Harvard Women's Law Journal 138.

Barry K, *Female Sexual Slavery* (New York University Press 1979).

Bassiouni MC, 'Enslavement as an International Crime' (1991) 23 New York University Journal of International Law and Politics 445.

– – *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers 1992).

– – 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law and Contemporary Problems 65.

– – *The Statute of the International Criminal Court: A Documented History* (Transnational Publishers, Inc. 1998).

– – *Crimes Against Humanity in International Criminal Law* (2nd edn, Kluwer Law International 1999).

– – *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011).

Bedont B, 'Gender Provisions' in F Lattanzi and W Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Vol. I, il Sirente, 1999).

Bell EA, *War On The White Slave Trade* (The Charles C. Thompson Co. 1909).

Bellows J, *Dictionary of French and English, English and French* (London Longmans 1919).

Bhabha J, 'Looking Back, Looking Forward: The UN Trafficking Protocol at Fifteen' (2015) 4 Anti-Trafficking Review 3.

Bhoola U and Panaccione K, 'Slavery Crimes and the Mandate of the United Nations Rapporteur on Contemporary Forms of Slavery' (2016) 14 Journal of International Criminal Justice 363.

Boas G, Bischoff JL and Reid NL, *Elements of Crimes Under International Law* (International Criminal Law Practitioner Library Series, Vol II CUP 2014)

Boister N, *An Introduction to Transnational Criminal Law* (OUP, Oxford 2012).

Brand MC, 'International Cooperation and the Anti-Trafficking Regime' (2010) Refugee Studies Center, University of Oxford, Working Paper Series No. 71.

Bravo KE, 'Exploring the Analogy between Modern Trafficking in Human Beings and the Transatlantic Slave Trade (2007) 25 Boston University International Law Journal 207.

Brooks-Gordon B *et al* (eds), *Death Rites and Rights* (Hart Publishing 2007).

Brownlie I, *Principles of Public International Law* (6th edn, OUP 2003).

Bruch EM, 'Models Wanted: The Search for and Effective Response to Human Trafficking' (2004) 40 Stanford Journal of International Law 3.

Buckland WW, *The Roman law of slavery: The condition of the Slave in private law from Augustus to Justinian* (3rd edn, The Lawbook Exchange Ltd. 2007).

Byron C, War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court (Manchester University Press 2009).

Cairns JW, 'The Definition of Slavery in Eighteenth-Century Thinking' in Allain J (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

Capron AM and Delmonico FL, 'Preventing Trafficking in Organs for Transplantation: An Important Facet of the Fight Against Human Trafficking' (2015) 1 Journal of Human Trafficking 56.

Cassese A *et al*, *Cassese's International Criminal Law* (3rd edn, OUP 2013).

CICC, 'History of the ICC: Preparatory Committee' <http://www.iccnow.org/?mod=prepcommittee> accessed 15 February 2016.

Clark MA, 'Vulnerability, prevention and human trafficking: the need for a new paradigm', in UNODC, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UNODC 2008).

Chaudury V, 'Argentina Uncovers Patients Killed for Organs' (1992) 34 British Medical Journal 1073.

Chuang JA, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 Harvard Human Rights Journal 65.

– – 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 The American Journal of International Law 609.

– – 'The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"' (2015) 5 Anti-Trafficking Review 146.

Cimiotta E, 'The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo: The "Regionalization" of International Criminal Justice in Context' (2016) 14 Journal of International Criminal Justice 53.

Citroni G, 'The Specialist Chambers of Kosovo: The Applicable Law and the Special Challenges Related to the Crime of Enforced Disappearance' (2016) 14 Journal of International Criminal Justice 123.

Cockayne J, 'The Anti-Slavery Potential of International Criminal Justice' (2016) 14 Journal of International Criminal Justice 469.

CoE, Parliamentary Assembly, Report Doc 12462 7 Jan 2011 <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12608&lang=en> accessed 19 May 2016.

– – and UN, 'Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs' (2009).

Copelon R, Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law (2000) 46 McGill Law Journal 217.

Corrie K, 'Could the International Criminal Court Strategically Prosecute Modern Day Slavery?' (2016) 14 Journal of International Criminal Justice 285.

Cross ME, 'Equipping the Specialist Chambers of Kosovo to Try Transnational Crimes' (2016) 14 Journal of International Criminal Justice 73.

Cryer R *et al*, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014).

Cupido M, 'The Policy Underlying Crimes Against Humanity: Practical Reflections on A Theoretical Debate' (2011) Criminal Law Forum 275.

Davidson T, *Chambers Twentieth century Dictionary of the English Language* (W&R Chambers 1903) 732.

Decaux E, 'The Place of Human Rights Courts and International Criminal Courts in the International System' (2011) 9 Journal of International Criminal Justice 597.

de Frouville O, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment (2011) 9 Journal of International Criminal Justice 633.

Del Ponte C, *Madame Prosecutor - Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (2nd edn, Other Press 2009).

de Hoogh AJJ, 'The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective' (1991) 42 Austrian Journal of Public International Law 183.

Demleitner NV, 'Forced Prostitution: Naming an International Offense' (1994) 18 Fordham International Law Journal 163.

Dempsey MM, Hoyle C. and Bosworth M., 'Defining Sex Trafficking in International and Domestic Law: Mind the Gaps' (2012) 26 Emory International Law Review 137.

Ditmore M and Wijers M, 'The negotiations on the UN Protocol on Trafficking in Persons' (2003) 4 NEMESIS 79.

Doezema J, 'Who Gets to Choose? Coercion, Consent and the UN Trafficking Protocol' (2002) 10 Gender and Development 20.

– – *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books Ltd. 2010).

Drescher S, 'From Consensus to Consensus: Slavery in International Law' in Allain J (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

Dubler AR, 'Immoral Purposes: Marriage and the Genus of Illicit Sex' (2006) 115 The Yale Law Journal 756.

Dubler R, 'What's in a Name? A Theory of Crimes Against Humanity (2008) 15 Australian International Law Journal 85.

Duffy H, 'Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution' (2016) 14 Journal of International Criminal Justice 375.

Elliot J, *The Role of Consent in Human Trafficking* (Routledge 2015).

Estes RJ and Weiner NA, 'The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico' (2001) University of Pennsylvania School of Social Work.

Equality Now, 'Position Paper on the ICC' (April 1995) <http://www.iccnow.org/documents/1PrepCmtDraftStatute.pdf> accessed 15 February 2016.

Fan MDM, 'The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery' (2002) 27 The Yale Journal of International Law 395.

Farrell A *et al*, 'Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases (2012) <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf> accessed 17 September 2015.

Farrior S, 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential' (1997) 10 Harvard Human Rights Journal 213.

Fischer-Tiné H, 'White women degrading themselves to the lowest depths: European networks of prostitution and colonial anxieties in British India and Ceylon ca. 1880-1914' (2003) 40 The Indian Economic and Social History Review 163.

Fournet C, *International Crimes: Theories, Practice and Evolution* (Cameron May 2006).

– – and Siller N, '"We Demand Dignity for the Victims" – Reflections on the Legal Qualification of the Indecent Disposal of Corpses (2015) 15 International Criminal Law Review 896.

Francis LP and Francis JG, Stateless Crimes, Legitimacy, and International Criminal Law: The Case of Organ Trafficking (2010) 4 Criminal Law and Philosophy 283.

Gallagher A, 'Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage' in LN Sadat and MP Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M Cherif Bassiouni* (Martinus Nijhoff Publishers 2008).

– – 'Human Rights and Human Trafficking: Quagmire of Firm Ground? A Response to James Hathaway' (2009) 49 Virginia Journal of International Law 789.

– – *The International Law of Human Trafficking* (CUP 2010).

Gold F, 'Redefining the Slave Trade: The Current Trends in International Trafficking of Women' (2003) 11 University of Miami International and Comparative Law Review 99.

Grundell LR, 'EU Anti-Trafficking Policies: from Migration and Crime Control to Prevention and Protection (May 2015) Policy Brief.

Hagar GJ, *The New University Dictionary: Illustrated* (World Syndicate 1920).

Hall CK and Stahn C, 'Article 7' in Triffterer O and Ambos K (eds), *Rome Statute of the International Criminal Court: A Commentary* (CH Beck, Hart, Nomos 2016).

Halling M, 'Push the Envelope—Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity' (2010) 23 Leiden Journal of International Law 827.

Harris HW, *Human Merchandise: A study of the International Traffic in Women* (Ernest Benn Ltd. 1928).

Hathaway JC, 'The Human Rights Quagmire of "Human Trafficking"'(2008) 49 Virginia Journal of International Law 1.

Helmholz RH, 'The Law of Slavery and the European *Ius Commune*' in Allain J (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

Henckaerts J and L Doswald-Beck L (eds), ICRC, *Customary International Humanitarian Law*, Volume II: Practice (CUP 2005).

–– and Doswald-Beck L (eds), ICRC, *Customary International Humanitarian Law*, Volume I: Rules (3 edn, CUP 2009).

Hepburn WM, 'International Legislation on Social Questions' (1931) 9 New York University Law Quarterly Review 203.

Heller KJ, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011).

Hickey R, 'Seeking to Understand the Definition of Slavery' in Allain J (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

Honoré A, 'The Nature of Slavery' in Allain J (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012).

Hughes DM, 'A Resolution drafted by Donna M. Hughes, submitted by the Coalition Against Trafficking in Women to the United Nations Working Group on Contemporary Forms of Slavery' (May 1998) <http://www.uri.edu/artsci/wms/hughes/ppr.htm> accessed 13 November 2015.

Human Rights Watch, 'Commentary for the Preparatory Committee on the Establishment of an International Criminal Court' <http://www.iccnow.org/documents/1PrepCmtCommentaryHRW.pdf> accessed 15 February 2016.

Huntley SS, 'The Phenomenon of "Baby Factories" in Nigeria as a New Trend in Human Trafficking' (2013) International Crimes Database Brief.

Hwang P, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 Fordham International Law Journal 457.

International Bureau, 'For the Suppression of the White Slave Traffic' 1911 (located at the Women's Library at the LSE- ref No. 4IBS/3/1/06).

– – 'Report of Preparatory Conference for the Suppression of Traffic in Women and Children' held 11-12 October 1923 (London).

ICRC, Customary IHL Database 'Rule 94: Slavery and the slave trade in all their forms are prohibited' <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule94> accessed 17 May 2016.

International Federation for the Abolition of State Regulation of Vice 'Report of the Portsmouth Conference' held 15-18 June 1914 (Printed by Harrison & Sons, Ltd. 1914).

ILO, A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work 2005 (2005).

– – Eradication of Forced Labour: International Labour Conference (2007).

– – Combatting Forced Labour: A Handbook for Employers and Businesses (2008).

– – Forced Labour and Trafficking, A Casebook of Court Decisions: A training Manual for Judges, Prosecutors and Legal Practitioners (2009).

– – Operational indicators of trafficking in human beings (Results from a Delphi survey implemented by the ILO and European Commission 2009).

Irwin MA, '"White Slavery" as metaphor: anatomy of a moral panic' (1996) Ex Post Facto: The History Journal 5.

Jannson DB, *Modern Slavery: A comparative Study of the Definition of Trafficking in Persons* (Brill 2014).

Jonas DS and Saunders TN, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43(3) Vanderbilt Journal of Transitional Law 565.

Jones-Pauly CC, 'Report on Anti-Trafficking Laws in Six Countries (Austria, Belgium, Czech-Republic, Federal Republic of Germany, Italy, Poland) and Compliance with the International Conventions against Trafficking' (1999).

Jordan A, 'UN Trafficking Protocol: An Imperfect Approach' (2010) Issue Paper 1, Center for Human Rights and Humanitarian Law at American University Washington College of Law.

Kangaspunta K, 'Was Trafficking in Persons Really Criminalised?' (2015) 4 Anti-Trafficking Review 80.

Kaye J and Winterdyk J, 'Explaining Human Trafficking' in J Winterdyk *et al* (ed.) *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012).

Kelly E, 'International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter' (2013) 54 Boston College Law Review 1317.

Kim J, 'Prosecuting human trafficking as a crime against humanity under the Rome Statute' (2011) Columbia Law School Gender and Sexuality Online.

Kress C, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision' (2010) 23 Leiden Journal of International Law 855.

Lanneau R, 'What it Legal Certainty? A Theoretical Essay' (2013) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361630> accessed 26 October 2016.

Lawyers Committee for Human Rights, 'Establishing an International Criminal Court: Major Unresolved Issues' (1996) <http://www.iccnow.org/documents/2PrepCmtEstablishICCLCHR.pdf> accessed 15 February 2016.

League of Nations, 'Records of the International Conference on Traffic in Women and Children'.

League of Nations Diplomatic Conference on the Establishment of the International Convention for the Suppression of Traffic in Women and Children' held 30 June-5 July 1921.

– – Temporary Slavery Commission Report to the Council, LoN Doc A.19.1925.VI (1925).

– – Joint Session of the Traffic in Women and Children Committee and the Child Welfare Committee and Session of the Traffic in Women and Children Committee (19 May 1933) LoN Doc C.306.1933.IV.

– – 'Records of the Diplomatic Conference concerning the Suppression of Traffic in Women of Full Age' held 9-11 October 1933 LoN Doc C.649.M.310.1933.IV.

– – Advisory Committee on Social Questions 'Report of the Sub-Committee entrusted with drawing up the Second Draft of a Convention for Suppressing the Exploitation of the Prostitution of Others' (15-19 June 1937) LoN Doc C.331.M.223.1937.IV.

Lee RS and Friman H (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001).

Limoncelli SA, 'International Voluntary Associations, Local Social Movement on State Paths to the Abolition of Regulated Prostitution in Europe, 1875-1950', (2006) 21 International Sociology 31.

– – *The Politics of Trafficking, The First International Movement to Combat the Sexual Exploitation of Women* (Stanford University Press 2010).

Linderfalk U, 'Is the Hierarchal Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting Rules of Interpretation' (2007) Netherlands International Law Review 133.

– – 'Cross-fertilisation in International Law' (2015) 84 Nordic Journal of International Law 428.

Louise S, *Human Trafficking: A Global Perspective* (CUP 2010).

Luban D, 'A Theory of Crimes Against Humanity' (2004) 29 Yale Journal of International Law 85.

Luscombe B, 'Inside the Scarily Lucrative Business Model of Human Trafficking' *Time Magazine* (20 May 2014) <http://time.com/105360/inside-the-scarily-lucrative-business-model-of-human-trafficking/> accessed 15 January 2016.

Malpani R, 'Legal Aspects of Trafficking for Forced Labour Purposes in Europe' (2006) ILO Working Paper/ILO Cod. Declaration/WP.48.2006.

Martinez JS, 'Antislavery Courts and the Dawn of International Human Rights Law' (2008) 117 Yale Law Journal 550.

– – *The Slave Trade and the Origins of International Human Rights Law* (OUP 2012).

Marty D, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Inhuman Treatment of people and illicit trafficking in human organs in Kosovo, Draft report by Mr Dick Marty, AS/Jur (2010) 46, 12 December 2010, Ajdoc46 2010.

Mattar MY, 'The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case?' (2002) The Protection Project, 2002)

– – 'Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 Tulane Journal of International and Comparative Law 1.

May L, *Crimes Against Humanity: A Normative Account* (CUP 2005).

McCarthy LA, 'Human Trafficking and the New Slavery' (2014) 10 Annual Review of Law and Social Science 221.

McClean D, *Transnational Organized Crime: A Commentary on the UN Conventions on its Protocols* (OUP 2007).

Miers S 'Contemporary Forms of Slavery' (1996) 13(3) Slavery and Abolitions 238.

Ministère Des Affaires Étrangères, *Documents Diplomatiques. Conférence Internationale Pour La Répression De La Traite Des Blanches* (Paris Imprimerie Nationale 1902).

– – *Documents Diplomatiques. Deuxième Conférence Internationale Pour La Répression De La Traite Des Blanches* (Paris Imprimerie Nationale 1910).

Mninde-Silungwe F, 'Trafficking in Persons (Article 28J) and Trafficking in Drugs (Article 28K)' in G Werle and M Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo*

Protocol (Asser Press and Springer 2017) 109-123.

Moran CF, 'Human Trafficking and the Rome Statute of the International Criminal Court' (2014) 3 The Age of Human Rights Journal 32.

Morehouse C, 'Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany' (DPhil thesis, Humboldt University 2008).

Moshan BS, 'Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity' (1998) 22 Fordham International Law Journal 154.

Munro VE, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 Akron Law Review 923.

Nanda VP and Bassiouni MC, 'Slavery and Slave Trade: Steps toward Eradication' (1972) 12(2) Santa Clara Lawyer 424.

National Vigilance Association, 'The White Slave Trade: Transactions of the International Congress On the White Slave Trade, Held in London On the 21st, 22nd, and 23rd of June, 1899 at the invitation of the National Vigilance Association' (first published prior to 1923, Amazon.co.uk, Ltd./Marston Gate, no reprint date given).

Negri S, 'Transplant Ethics and the International Crime of Organ Trafficking' (2016) 16 International Criminal Law Review 287.

Nilsson J, 'Commentary on Article 7' (Case Matrix Network) <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/#c1867> accessed 15 February 2016.

Obokata T, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) 54 International and Comparative Law Quarterly 445.

– – *Transnational Organised Crime in International Law* (Hart 2010).

– – 'Human Trafficking' in Boister N and Currie RJ (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015).

O'Brien M, 'Prosecuting Peacekeepers in the ICC for Human Trafficking' (2006) 1 Intercultural Human Rights Law Review 28.

– – '"Don't kill them, let's choose them as wives": the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law' (2016) 20(3) The International Journal of Human Rights 386.

O'Connell Davidson J, *Modern Slavery: The Margins of Freedom* (Palgrave McMillian 2015).

OHCHR, 'Report of the Working Group on Contemporary Forms of Slavery' (13 June 1995) UN Doc E/CN.4/Sub.2/1995/28/Add.1.

– – 'Report of the Working Group on Contemporary Forms of Slavery' (20 July 1999) E/CN.4/Sub.2/1999/17.

– – 'Report of the Working Group on Contemporary Forms of Slavery' (16 July 2001) E/CN.4/Sub.2/2001/30.

– – 'Contemporary Forms of Slavery' (Fact Sheet No. 14) <http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf> accessed 17 May 2016.

– – 'Human Rights and Human Trafficking, Fact Sheet No. 36' (2014) <http://www.ohchr.org/Documents/Publications/FS36_en.pdf> accessed 6 November 2015.

OSCE 'Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings' (2013).

OTP, 'Report on Preliminary Examination Activities' (2014).

– – 'Strategic Plan 2016-2018' (6 July 2015) <http://www.pgaction.org/pdf/OTP-Draft-Strategic-Plan-2016-2018.pdf> accessed 22 September 2015.

– – 'Draft Policy on Children' (June 2016) <https://www.icc-cpi.int/iccdocs/otp/22.06.2016-Draft-Policy-on-Children_ENG.pdf> accessed 19 July 2016.

– – 'Policy Paper on Case Selection and Prioritsation' (September 2016) <file:///X:/My%20Downloads/20160915_OTP-Policy_Case-Selection_Eng%20(1).pdf> accessed 28 September 2016.

Panjabi RKL, 'The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century' (2010) 28 Pace Environmental Law Review 1.

Pati R, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks Ground in *Rantsev v Cyprus and Russia*' (2011) 45 Boston University International Law Journal 106.

Pesman AM, 'Prosecuting human trafficking cases as a crime against humanity?' (2012) <http://dare.uva.nl/cgi/arno/show.cgi?fid=462894> accessed 15 February 2016.

Pietrobon A, 'Challenges in Implementing the European Convention against Trafficking in Human Organs' (2016) 29 Leiden Journal of International Law 485.

Plant R, 'Modern Slavery: The concepts and their practical implications' (2014) ILO Working Paper Series.

– – 'Forced Labour, Slavery and Human Trafficking: When do definitions matter?' (2015) 5 Anti-Trafficking Review 153.

Pocar F, 'Human Trafficking: A Crime Against Humanity' in EU Savona and S Stefanizzi (eds), *Measuring Human Trafficking* (Springer 2007).

Preparatory Committee on the Establishment of an International Criminal Court, 'Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996' (7 May 1996) UN Doc A/AC.249/1.

– – 'Draft Consolidated Text' (20 February 1997) UN Doc A/AC.249/1997/WG.1/CRP.5.

– – 'Decisions taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' <http://www.iccnow.org/documents/DecisionsTaken11to21Feb97.pdf> accessed 15 February 2016.

– – 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' UN Doc A/Conf. 183/2/ Add.1 (1998).

Rao SS, *Trafficking of Children for Sexual Exploitation: Public International Law 1864-1950* (OUP 2013).

Rassam AY, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law' (1999) 39 Virginia Journal of International Law 303.

Raymond JG, 'The New UN Trafficking Protocol' (2002) 25 Women's Studies International Forum 491.

Reanda L, 'Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action' (1991) 13 Human Rights Quarterly 202.

Rijken C, *Trafficking in Persons: Prosecution from a European Perspective* (TMC Asser Press 2003).

–– (ed), *Combatting Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers 2011).

Robertson G, *The Struggle for Global Justice: Crimes Against Humanity* (4th edn, The New Press 2012).

Robinson D., 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93(1) American Journal of International Law 43.

– – 'Article 7(1)(c) – Crime Against Humanity of Enslavement' in RS Lee and H Friman (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001).

Rodenhauser T, 'Beyond State Crimes: Non-State Entities and Crimes against Humanity' (2014) 27 Leiden Journal of International Law 913.

Rodríguez García M, 'The League of Nations and the Moral Recruitment of Women' (2012) 57 IRSH 97.

– – 'On the Legal Boundaries of Coerced Labor' in van der Linden and Rodríguez García (eds), *On Coerced Labor: Work and Compulsion after Chattel Slavery* (Brill Publishers 2016).

Roth V (ed), *Defining Human Trafficking and Identifying its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff 2012).

Sadat LN, 'Crimes Against Humanity in the Modern Age' (2013) 107 American Journal of International Law 334.

Sang-Hun C, 'Japan and South Korea Settle Dispute Over Wartime "Comfort Women"' *The New York Times* (28 December 2015) <http://www.nytimes.com/2015/12/29/world/asia/comfort-women-south-korea-japan.html?_r=0> accessed 25 April 2016.

Scarpa S, *Trafficking in Human Beings: Modern Slavery* (OUP 2008).

– – 'The Definition of Trafficking in Adult Persons for Various Forms of Exploitation and the Issue of Consent: A Framework Approach that Respects Peculiarities' (2013) 1 Groningen Journal of International Law 153.

Schabas WA, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 Leiden Journal of International Law 847.

– – *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010).

– – 'Synergy or Fragmentation? International Criminal Law and the European Court of Human Rights' (2011) 9 Journal of International Criminal Justice 609.

Schindler D and Toman J, *The Laws of Armed Conflicts* (Martinus Nihjoff Publisher 1988).

Sellers PV, 'Wartime Female Slavery: Enslavement?' (2011) 44 Cornell International Law Journal 115.

Shaw MN, *International Law* (7th edn, CUP 2014).

Siller N, 'The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals' (2015) 2 European Journal of Comparative Law and Governance 236.

– – 'Modern Slavery: Does International Law Distinguish Between Slavery, Enslavement and Trafficking' (2016) 14 Journal of International Criminal Justice 405.

– – '"Modern Slavery": The Legal Tug-of-War between Globalization and Fragmentation' in M van der Linden and M Rodríguez García (eds), *On Coerced Labor: Work and Compulsion after Chattel Slavery* (Brill Publishers 2016).

Skrivankova K, 'Between Decent Work and Forced Labour: Examining the Continuum of

Exploitation' (2010) Joseph Rowntree Foundation.

Smith CJ and Kangaspunta S, 'Defining Human Trafficking and Its Nuances in a Cultural Context' in J Winterdyk *et al* (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012).

Smith D, 'Schoolgirls kidnapped by Boko Haram "brainwashed to fight for group"' *Guardian* (29 June 2015 <http://www.theguardian.com/world/2015/jun/29/schoolgirls-kidnapped-boko-haram-brainwashed-fight-group> accessed 8 February 2016.

Soh CS, 'Japan's Responsibility Toward Comfort Women Survivors'(2001) Japan Policy Research Institute Working paper No. 77.

Sterio M, 'The Evolution of International Law' (2008) 31 Boston College International and Comparative Law Review 213.

Stoyanova V, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' (2013) 5 Amsterdam Law Forum 64.

Tarver JC, *The Royal Phraseological English-French, French-English Dictionary* (Vol. 2, Dulau 1879).

Tavakoli N, 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime' (2009) 9 International Criminal Law Review 77.

The Protection Project, 'Reporting on the Status of Trafficking in Women in Accordance with Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women: Guidelines on the Interpretation of the Text of Article 6 of the Convention' (20 July 2012).

Tochilovsky V, *The Law and Jurisprudence of the International Criminal Tribunals and Courts: Procedure and Human Rights Aspects* (2nd edn Intersentia 2014).

Tolbert D and Smith LA, 'Complementarity and the Investigation and Prosecution of Slavery Crimes' (2016) 14 Journal of International Criminal Justice 429.

Tulkens F, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577.

UN Economic and Social Council, 'Draft Convention of 1937 for the Suppressing the Exploitation of the Prostitution of Others' (4 September 1947) UN Doc E/574.

– – 'Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict' (22 June 1998) UN Doc E/CN.4/Sub.2/1998/13.

– – 'Report of the Ad Hoc Committee on Slavery (Second Session) (4 May 1951) UN Doc E/1988.

UNGA 'Traffic in Women and Girls' (23 December 1994) UN Doc A/RES/49/166.

– – 'Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime' (1 June 1999) UN Doc A/AC.254/16.

– – 'Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Consideration of the additional international legal instrument against trafficking in persons, especially women and children' (4 April 2000) UN Doc A/AC.254/4/Add.3/Rev.6.

– – 'Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions' (3 November 2000) UN Doc A/55/383/Add.1.

UN.GIFT, 'Trafficking for Organ Trade' <http://www.ungift.org/knowledgehub/en/about/trafficking-for-organ-trade.html> accessed 17 May 2016.

UNHRC, 'Report of the Special Rapporteur on contemporary slavery' (twenty-first Session) (10 July 2012) UN Doc A/HRC/21/41.

UNODC, Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2004).

– – *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006).

– – Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings (2nd edn, 2008).

– – Anti-human trafficking manual for criminal justice practitioners, Module 1: Definitions of trafficking in persons and smuggling of migrants (2009).

– – Anti-human trafficking for criminal justice practitioners, Module 4: Control methods in trafficking in persons (2009).

– – International Framework for Action: To Implement the Trafficking in Persons Protocol (2009).

– – Combatting Trafficking in Persons: A Handbook for Parliamentarians (2009).

– – Model Law against Trafficking in Persons (2009) V.09-81990 (E).

– – Guidance Note on "abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2012).

– – Issue Paper: Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons (2013).

– – Global Report on Trafficking in Persons (2014).

– – Issue Paper: The Role of "Consent" in the Trafficking in Persons Protocol (2014).

– – The Role of Recruitment fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons (2015).

– – Issue Paper: The Concept of "Exploitation" in the Trafficking in Persons Protocol (2015).

– – Catalogue of Materials: Global Programme against Trafficking in Persons & Global Program against Smuggling of Migrants (last updated November 2015) <http://www.unodc.org/documents/human-trafficking/2015/UNODC_Catalogue_of_Materials.pdf> accessed 20 May 2016.

UN Secretary-General 'Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude' (27 January 1953) UN Doc E/2357.

– – 'Secretary-General's Bulletin on protection from sexual exploitation and abuse' (9 October 2003) UN Doc ST/SGB/2003/13.

United States Delegation, 'For Annex to Statute: Elements Related to Article on Crimes Against Humanity' (Draft Proposal 27 March 1996) <http://www.iccnow.org/documents/USCrimes AgainstHumanity.pdf> accessed 15 February 2016.

United States Department of State, Trafficking in Persons Report (2014) <http://www.state.gov/j/tip/rls/tiprpt/2014/> accessed 3 Octoboer 2016.

– – Trafficking in Persons Report (2015) <https://www.state.gov/documents/organization/245365.pdf> accessed 3 October 2016.

– – Trafficking in Persons Report (2016) <https://www.state.gov/documents/organization/258876.pdf> accessed 3 October 2016.

United States Immigration Commission (1907-1910), *Steerage Conditions, Importation and Harboring of Women for Immoral Purposes, Immigrant Homes and Aid Societies, Immigrant Banks* (digitized by Microsoft corp., HardPress Publishing Miami, 2007 – original publication 1911).

United States Mission to the United Nations, 'Statement by the President of the Security Council on Trafficking in Persons in Situations of Conflict (16 December 2015) <http://usun.state.gov/remarks/7052?mc_cid=5c1e51c8fa&mc_eid=726f9f8f81> accessed 15 January 2016.

United States Reference Paper, Elements of Offenses for the International Criminal Court (27 March 1998) <http://www.iccnow.org/documents/USElementsofOffensesMarch98.pdf> accessed 15 February 2016.

Vanderweert SJ, 'Seeking Justice for Comfort Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts' (2001-2002) 27 North Carolina Journal of International Law and Commercial Regulation 141.

van der Wilt H, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 Chinese Journal of International Law para.

– – 'Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?' ACIL Research Paper 2014-07.

– – 'Expanding Criminal Responsibility in Transnational and International Organised Crime' (2016) 4 Groningen Journal of International Law 1.

– – 'Slavery Prosecutions in International Criminal Jurisdictions' (2016) 14 Journal of International Criminal Justice 269.

Vijeyarasa R and Bello y Villarino JM, 'Modern-Day Slavery: A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of *Tang* and *Rantsev*' (2012) 9 Journal of International Law and International Relations 38.

Wade M, 'Prosecution of Trafficking in Human Beings Cases' in J Winterdyk *et al* (ed), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012).

Washburn J, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11 Pace International Law Review 361.

Watanabe K, 'Trafficking in Women's Bodies, Then and Now: The Issue of Military "Comfort Women"' (1995) 20(4) *Peace and Change* 501.

Watson A, *Roman Slave Law* (John Hopkins University 1987).

Weatherall T, *Jus Cogens: International Law and Social Contract* (CUP 2015).

Webster's Handy American Dictionary: Illustrated (MA Donohue & Co; Rev. and enl. edn, 1900).

– – *Webster's Revised Unabridged Dictionary* (1913).

– – *Webster's New World Law Dictionary* (Wiley Publishing, Inc., Hoboken 2010).

Weissbrodt, D and Anti-Slavery International, 'Abolishing slavery and its Contemporary Forms' OHCHR (2002) UN Doc HR/PUB/02/4.

Werle G and Vormbaum M (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press and Springer 2017).

– – and Jessberger F, *Principles of International Criminal Law* (3rd edn, OUP 2014).

– – and Burghardt B, 'Do Crimes Against Humanity Require the Participation of a State or 'State-like' Organization?' (2012) 10 Journal of International Criminal Justice 1151.

Wertheimer A, *Exploitation* (Princeton University Press 1999).

Wessely IE (1841-1900), Tolhausen L, Payn G and Heymann E, *Handy Dictionary of the English and French Languages* (McKay n.d.).

West's Encyclopedia of American Law (2nd edn, The Gale Group, Inc., 2008).

Winterdyk J *et al* (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012).

Wijers M, 'Analysis of the Definition of Trafficking in Human Beings in the Palermo Protocol' (2005) Report upon request of UNDP Belarus.

– – 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' (2015) 4 Anti-Trafficking Review 56.

Williams S, 'The Specialist Chambers of Kosovo: The Limits of Internationalization?' (2016) 14 Journal of International Criminal Justice 25.

Women's Caucus Advocacy in ICC Negotiations, 'Recommendations & Commentary for Elements Annex Part I' (Submitted to the 29 November- 17 December Prep Com) <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/111999pc/elannex1.html> accessed 6 May 2016.

Women's Caucus for Gender Justice in the International Criminal Court, 'Recommendations and Commentary for December 1997 PrepCom On the Establishment of An International Criminal court United Nations Headquarters December 1-12, 1997' <http://www.iccnow.org/documents/5PrepComRecommWomensC.pdf> accessed 15 February 2016.

World Health Organization, 'Global Glossary of Terms and Definitions on Donation and Transplantation' (2009).

Zimmerman A, 'The Creation of a Permanent International Criminal Court' (1998) 2 Max Planck Yearbook of United Nations Law 169.

Table of Cases

International /Hybrid Courts and Tribunals

Extraordinary Chambers in the Courts of Cambodia (ECCC)

Case 001

Prosecutor v KAING Guek Eav (*alias 'Duch'*) (Judgment) ECCC 001/18-07-2007, T Ch (26 July 2010)

Prosecutor v KAING Guek Eav (*alias 'Duch'*) (Judgment) ECCC 001/18-07-2007, Sup Ct Ch (3 February 2012)

International Court of Justice (ICJ)

Aegean Sea Continental Shelf Case (*Greece v Turkey*) (Merits) [1978] ICJ Rep 3

Anglo-Iranian Oil Co. Case (*United Kingdom v Iran*) [1953] ICJ Rep 104

Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*) (Second Phase) [1970] ICJ Rep 3

Competence of the General Assembly for the Admission of a State to the United Nations Case (*advisory opinion*) [1950] ICJ Rep 4

Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*) (Judgment) [2009] ICJ Rep 213

Jurisdictional Immunities of the State (*Germany v. Italy: Greece Intervening*) (Judgment) [2012] ICJ Rep 99

International Criminal Court (ICC)

Situation in the Central African Republic (ICC-01/05)
Jean-Pierre Bemba Gombo (ICC-01/05-01/08)

Prosecutor v Bemba (Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, PTC II, (15 June 2009)

Situation in the Cote d'Ivorié (ICC-02/11)
Laurent Gbagbo and Charles Blé Goudé (ICC-02/11-01/05)

Prosecutor v Gbagbo (Decision on the Confirmation of the Charges of the Prosecutor Against Laurent Gbagbo) ICC-02/11-01/11, PTC I (12 June 2014)

Prosecutor v Goudé (Decision on the Confirmation of the Charges of the Prosecutor Against Blé Goudé) ICC-02/11-02/11, PTC I (11 December 2014)

Situation in Darfur, Sudan (ICC-02/05)
Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09)

Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, PTC I (4 March 2009)

Situation in the Democratic Republic of the Congo (ICC-01/04)
Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

Prosecutor v Katanga and Ngudjolo (Decision on the confirmation of charges, *Katanga and Ngudjolo*) ICC-01/04-01/07, PTC I (30 September 2008)

Germain Katanga (ICC-01/04-01/07)

Prosecutor v Katanga (Judgment pursuant to Art 74 of the Statute) ICC-01/04-01/07, PTC II (7 March 2014)

Bosco Ntaganda (ICC-01/04-02/06)

Prosecutor v Bosco Ntaganda (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda) ICC-01/04-02/06-309, PTC II (9 June 2014)

Situation in the Republic of Kenya (ICC-01/09)

Situation in the Republic of Kenya (Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19, PTC II (31 March 2000)

Situation in the Republic of Kenya (Dissenting Opinion of Judge Hans-Peter Kaul, Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19, PTC II (31 March 2000)

William Samoei Ruto and Joshua Arap Sang (ICC-01/09-01/11)

Prosecutor v Ruto and Sang (Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against William Samoei Ruto and Joshua Arap Sang) ICC-01/09-01/11, PTC II (23 January 2012)

Situation in Uganda (ICC-02/04)
Dominic Ongwen (ICC-02/04-1/15)

Prosecutor v Ongwen (Document Containing the Charges The Prosecutor Against Dominic Ongwen, *Situation in Uganda*) ICC-02/04-01/15) PTC II (22 December 2015)

National Military Tribunals

Netherlands Temporary Court-Martial at Batavia

Trial of Washio Awochi (case note) Netherlands Temporary Court-Martial at Batavia (25 October 1946) printed in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (Vol XIII, His Majesty's Stationary Office London 1949) <https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-13.pdf> accessed 20 July 2016

United States of America Military Tribunals (Control Council Law No. 10)

US v Oswald Pohl et al. (Judgment) US Military Tribunal Nuremberg (3 November 1947) <http://werle.rewi.hu-berlin.de/POHL-Case.pdf> accessed 20 July 2016

US v Carl Krauch et al. (IG Farben Case) (Judgment) US Military Tribunal Nuremberg (30 July 1948) <http://werle.rewi.hu-berlin.de/IGFarbenCase.pdf> accessed 20 July 2016

US v Erhard Milch et al. (Milch Case) (Judgment) US Military Tribunal Nuremberg (16 April 1947) <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1002&context=nmt2> accessed 20 July 2016

US v Friedrich Flick et al. (*Flick* Case) (Indictment) US Military Tribunal Nuremberg (3 March 1947) <http://digitalcommons.law.uga.edu/nmt5/1> accessed 20 July 2016

National Decisions and Judgments

Australia

Regina v. Tang, High Court of Australia (28 August 2008) HCA 39

The United States of America

United States v La Jeune Eugenie, 26 Federal Case Reports 832 (1822)

United States v. Bitty, 208 U.S. 393, 401 (1908)

Caminetti v. United States, 242 U.S. 470 (1917)

Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir. 2001)

John Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002)

Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001)

Table of Instruments

African Charter on the Rights and Welfare of the Child (entered into force 29 November 1999) Organization of African Unity Doc CAB/LEG/24.9/49 (1990).

Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council of Germany, No. 3, Berlin, 31 January 1946. *Excerpts reprinted in* Ratner SR and Abrams JS, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, (2nd edn, OUP 2001).

American Convention on Human Rights ('Pact of San Jose') (adopted by the Organization of American States on 22 November 1969, entry into force 18 July 1978).

Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, 82 UNTS 279. *Reprinted in* (Supp. 1945) 39 American Journal of International Law 257.

Charter of the International Military Tribunal for the Far East, 19 January 1946, United Nations Treaties and Other International Acts Series 1589.

Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Council of Europe Convention against Trafficking in Human Organs (adopted on 9 July 2014, open for signature) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c53a2> accessed 20 May 2016.

Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, ETS 197, 16.V.2005 (adopted 16 May 2005, entered into force 1 February 2008)

Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse (entered into force 12 July 2007) CETS 201.

Council of Europe, Convention on the Prevention of Terrorism, (adopted 16 May 2005, entered into force 1 June 2007) ETS 196.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos 11 and 14 Council of Europe on 4 November 1950) ETS 5.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 21 March 1950) 96 UNTS 271.

Convention on the Elimination of Discrimination of All Forms of Discrimination Against Women, United Nations (adopted 18 December 1979 by GA Res 34/80, entry into force 3 September 1981) 1249 UNTS 13.

Convention on the Rights of the Child, United Nations (adopted and opened for signature, ratification or accession 20 November 1989 by the GA Res 44/25, entry into force 2 September 1990) 1577 UNTS 3.

Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (25 October 2007, entered into force 1 July 2010) ETS 201, 25.X.2007.

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

Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden) relative to the Universal Abolition of the Slave Trade (signed at Vienna, 8 February 1815) 63 CTS 473.

Directive 2011/36/EU 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 [2001] OJ L 101/1.

Elements of Crimes of the International Criminal Court, (adopted by the Assembly of State Parties First Session, 3-10 2002) ICC-ASP/1/3 (part II-B) UN Doc PCNICC/2000/1/Add.2 (2000).

General Act of the Conference of Berlin, relative to the Development of Trade and Civilization in Africa; the free navigation of the River Congo, Niger, etc., 26 February 1885, C 4361 1885 (General Act), in E. Hertslet, *The Map of Africa by Treaty,* vol. 2 (3rd edn, HMSO, 1909) 128, 468; Gavin & Betley (1973) 288.

General Act for the Repression of African Slave Trade (adopted on 2 July 1890 by the Anti-Slavery Conference held in Brussels from 18 November 1899 to 2 July 1890) *reprinted* in the Official Records of the United Nations Conference on the Law of the Sea, Vol. (Preparatory Documents) UN Doc A/CONF.13/7 (1958).

General Orders No. 100: The Lieber Code Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863. Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing Office. <http://avalon.law.yale.edu/19th_century/lieber.asp#art23> accessed 12 December 2015.

Geneva Convention (I) for the Amelioration of the Condition Wounded and Sick in Armed Forces in the Field (12 August 1949).

Geneva Convention (II) for the Amelioration of the Condition Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 August 1949).

Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949).

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

Hague Convention Respecting the Laws and Customs of War on Land (Hague II) (29 July 1899) 32 Stat. 1803 Treaty Series 403.

Hague Convention Respecting the Laws and Customs of War on Land (Convention N. IV) (18 October 1907).

International Agreement for the Suppression of the 'White Slave Traffic,' (adopted 18 May 1904, entered into force 18 July 1905) 1 LNTS 83.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (entered into force 16 December 1966) 993 UNTS 3.

International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1910, entered into force 8 August 1912) 3 LNTS 278.

International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415.

International Convention for the Suppression of the Traffic in Women of Full Age (adopted 11 October 1933, entered into force 24 August 1934) 150 LNTS 43.

ILC, Draft Code of Crimes against the Peach and Security of Mankind (with commentaries) (1996) II (2) Yearbook of International Law Commission.

ILC, Draft Statute for an International Criminal Court with commentaries (1994) II(2) Yearbook of the International Law Commission.

ILC, Statute of the ILC (1947) (adopted by GA Res 174 (III) on 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981) <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/statute/statute.pdf&lang=EF> accessed 20 May 2016.

ILO Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) C105.

ILO Convention on the Worst Forms of Child Labour (17 June 1999) C182.

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusions of amendments as promulgated on 27 October 2004, NS/RKM/1004/006)

Law No. 04/L-274, On Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo (23

April 2014) <http://www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf> accessed 19 May 2016.

Law No. 05/L-053 of 3 August 2015, on the SC and SPO <http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf> accessed 19 May 2016.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography (opened for signature 16 March 2001, entered into force 18 January 2002) UN Doc A/RES/54/263.

Organization of American States Inter-American Convention on International Traffic in Minors (opened for signature 18 March 1994, entered into force 15 August 1997) OASTS 79; 33 ILM 721.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977).

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.529(XXIII) (2014).

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/53/383 (2000).

Protocol of 2014 to the Forced Labour Convention (adoption 11 June 2014) P029.

Rome Statute of the International Criminal Court (adopted 17 July 1998 by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) UN Doc A/Conf.183/9 (1998), 2187 UNTS 3.

Statute of the International Court of Justice (18 April 1946) 33 UNTS 993.

Statute of the International Tribunal for the Former Yugoslavia (approved on 25 May 1993 by UNSC Res 827, as last amended on 22 May 2013) UN Doc S/RES/827.

Statute of International Criminal Tribunal for Rwanda (decided on 8 November 1994 by UNSC Res 955, as last amended on 7 July 2009) UN Doc S/RES/955.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force 30 April 1957) 226 UNTS 3.

UNGA Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) 521 UNTS 231.

UNGA Declaration of the Rights of the Child (20 November 1959) A/RES/1386(XIV).

UNGA International Convention against the Recruitment, Use, Financing and Training of Mercenaries (4 December 1989) UN Doc A/RES/44/34.

UNGA UN Convention against Transnational Organized Crime (adopted on 8 January 2001 by GA Res A/RES/55/25).

UNGA Optional Protocol on the Involvement of Children in Armed Conflict (adopted and opened for signature, ratification and accession on 25 May 2000 by GA Res A/RES/54/263, entered into force on 12 February 2002) UN Doc A/54/49 (2000).

UNICEF, The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups (2007).

UNSC, Statute of the Special Court for Sierra Leone (approved 16 January 2002 by UNSC Res 1315 (2000)), UNTS 138.

Vienna Convention on the Law of Treaties (entered into force 23 May 1969) 1155 UNTS 331.

English Summary

Human trafficking is an international phenomenon in which issues involving human rights, migration, labor, global economics and criminal justice emerge. This thesis focuses on the criminal justice response. In 2000, the United Nations Office on Drugs and Crime (UNODC) introduced the Convention against Transnational Organized Crime (CTNOC). Supplemented by three protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) codified a criminal justice response to human trafficking by way of domestic criminalization of the offense. Under its Article 3(a) the Palermo Protocol defines the offense of 'trafficking in persons' as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[1384]

Despite the Palermo Protocol's overwhelming adoption by states and inclusion of this crime within national criminal codes around the world, domestic conviction rates for the crime of trafficking continue to remain alarmingly low. Evidently, criminalization in and of itself cannot ensure justice through law.

One of the most prevalent reasons offered for this prosecutorial deficiency is the lack of understanding with respect to the legal definition of 'trafficking in persons'. Many states have used the Palermo Protocol's construct or some variation of its Article 3 to define their national trafficking offense. However, all of the terms contained in the international definition of 'trafficking in persons' are left undefined– an omission which has found its way into domestic trafficking law and it attributed for definitional and interpretational misunderstandings of this offense.

Rhetoric used in and outside of the law addressing human trafficking further compounds issues of legal clarity. Concepts including, but not limited to: human trafficking, slavery, modern slavery, enslavement, forced labor, (enforced) prostitution, servitude and slave trade, are often used as synonyms, without any regard to the legal disorder this oratorical contamination may cause. While many of these terms possess their own distinct legal definitions under international law, others do not. The term, 'modern slavery' is not presently a legal term of art under international law. Nevertheless, that fact has not restrained academics, practitioners or institutions from its widespread usage. The need for definitional clarity is evident. Therefore, the first research inquiry discussed in Part I of this dissertation discerns a thorough, elemental and critical understanding of the international definition of 'trafficking in persons'.

The Palermo Protocol is credited for codifying the first international definition of trafficking, but this contention discounts over a century's worth of international trafficking instruments. Understanding this crime and its construction under international law requires a thorough examination of all relevant international instruments and accompanying *travaux préparatoires*. As such, Chapter 2 provides for a comprehensive account of the legal history of international

1384 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3 (Palermo Protocol).

trafficking instruments and their interpretation throughout the last 120 years. The product of this research identifies and charts the definitional evolution of trafficking throughout time. Specifically, this examination uncovers valuable information as to previous definitions and meanings of terms contained within the formative international trafficking instruments, giving due consideration to the historical and political contexts of the time.

Chapter 3 then turns to examine the current international definition of 'trafficking in persons' as enshrined in the Palermo Protocol. Generally understood, the crime of trafficking is comprised of three elements: (1) an 'act' (recruitment, transportation, transfer, harboring or receipt of persons); (2) a 'means' (via 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); both committed, (3) for the purpose of exploitation. The Palermo Protocol does not define 'exploitation'. Instead, Article 3(a) states that 'exploitation' can be understood, 'at a minimum' to include: '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.'

A combination of at least one term from each element amounts to the legal qualification of trafficking. Through a meticulous assessment of the current trafficking literature in combination with a textual analysis of Article 3(a)'s terms, Chapter 3 attempts to carefully define each term in the definition of 'trafficking in persons' and contextualize its practical application. As it concerns trafficking's third element, not only were the forms of exploitation in need of instrumental clarity, but discussing the level of intent required to attribute criminal accountability within this offense has to date, been grossly overlooked. As such, Chapter 3 attempted to determine how 'for the purpose of' can be understood as the *mens rea* element of the offense. It is clear that *dolus directus* of the first degree ('concrete intent' or purpose) unquestionably satisfies this *mens rea* element of trafficking. Depending on the domestic codification, this crime may also include *dolus directus* of the second degree (awareness of an inevitable outcome). However, any lower level of intent such as *dolus eventualis* appears to run contrary to the plain language of, 'for the purpose of' as codified in the Palermo Protocol.

Chapter 3 also endeavors to clarify any obligations imposed in light of the instrumental relationship between the Palermo Protocol and the CTNOC. These considerations include whether a transnational component also exists to statutorily satisfy the offense and/or whether perpetration must involve an organized criminal group. In sum, Part I aims to provide a comprehensive and clear understanding of the definition of 'trafficking in persons' as defined under international law from its inception until now.

After clarifying the Palermo Protocol's definitional contours, the second aim of this study endeavors to understand the applicability of this offense within international criminal law (ICL). The actual criminalization of trafficking is domestic. Trafficking in persons is classified (by way of the CTNOC) as a transnational organized crime. Nevertheless, there is an ever growing belief that human traffickers can and should be prosecuted before the International Criminal Court (ICC). Those in favor primarily base their claim on the fact that the Rome Statute references 'trafficking in persons' within its definition of 'enslavement' as a crime against humanity. Specifically, Article 7(2)(c) states:

> '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*.[1385]

1385 UNGA Rome Statute of the International Criminal Court (17 July 1998) (Rome Statute). Emphasis added.

Of significance is that human trafficking is not codified as its own offense within the Rome Statute, or in any other statute of the current or previously operating international criminal institutions. It is only mentioned *within* the Rome Statute's definition of 'enslavement' as a crime against humanity. Consequently, the second question posed in Part II this research project cannot isolate the role of trafficking within ICL. Rather, it must inquire whether the international crime against humanity of enslavement has, in fact, incorporated the crime of 'trafficking in persons' within its legal framework.

In an effort to answer this question, this thesis examines the legal relationship between the laws of enslavement and human trafficking: (1) as codified in their respective international instruments; (2) within statutes of international judicial institutions (focusing on the ICC) and; (3) via an examination of enslavement and sexual slavery jurisprudence from international and hybrid criminal courts and tribunals.

The leap between the research questions in Part I and II of this project required a transitional step. There are perceived substantive relationships between various concepts including trafficking, slavery, slave trade, sexual slavery and enslavement. Some of these concepts including slavery, slave trade and trafficking in persons, are defined in (public) international law instruments, whereas others like enslavement and sexual slavery are codified offenses within international criminal law statutes. Before exclusively delving into international criminal law (ICL), Chapter 4 identifies the international legal definitions of those listed concepts and crimes and determined whether such practices are distinguishable from one another in law.

With this legal definitional demarcation in mind and considering that enslavement is not formally defined anywhere else besides within the Rome Statute of the International Criminal Court (ICC), Chapter 5 examines the Rome Statute's codification. As mentioned earlier, Article 7(2)(c) defines 'enslavement' as a crime against humanity. This definition includes the phrase 'trafficking in persons'. Via a textual analysis of this codification as well as a review of the *chapeau* elements of crimes against humanity, Chapter 5 attempts to ascertain any legitimacy in the argument that the crime of trafficking has been incorporated into the Rome Statute's codification of enslavement. A meticulous examination of the Rome Statute in combination with its Elements of Crimes and international law on enslavement leads the author to conclude that trafficking has been incorporated within this codification.

If a trafficking prosecution comes before the ICC however the largest legal hurdles will arise in proving the contextual elements of crimes against humanity. The often organized nature of trafficking can satisfy the *systematic* (as opposed to widespread) element of crimes against humanity. However, proof pertaining to a state or organizational policy will likely be the most challenging element to satisfy. Trafficking is often committed by organized criminal groups, but the majority of trafficking syndicates will likely not meet the 'organizational policy' threshold required by crimes against humanity. While the legal bright line for what constitutes an 'organization' is yet to be set in stone by the ICC, we know it is somewhere in between a 'state-like entity' and a group that enjoys 'an established hierarchy' and 'possess[es] the means to carry out a widespread or systematic attack against the civilian population'.

Considering that the Rome Statute contains the only codified definition of 'enslavement' under ICL, an examination of ICL enslavement jurisprudence is also seminal in determining whether trafficking can be widely considered included within the crime against humanity of enslavement, or, if it is only included in the context of an ICC enslavement prosecution. Accordingly, Chapter 6 examines enslavement and sexual slavery jurisprudence from currently operating and previous international and hybrid international courts and tribunals.

In similar fashion to the Rome Statute's codification of enslavement, each international judgment (post those issued for the crimes committed during World War II) has also defined 'enslavement' using the Slavery Convention's definition of 'slavery' as its foundation, but unlike

the Rome Statute, none of them included trafficking language.[1386] As sexual slavery has been held to be a form of enslavement, both enslavement and sexual slavery judgments were examined. Chapter 6 therefore attempts to ascertain how enslavement and sexual slavery, as codified crimes, are regarded by international criminal justice institutions.

Evaluating the manner in which the international judiciary interprets the international crime of enslavement reveals fascinating findings as it concerns the legal relationship between this crime and trafficking. Remarkably, elements of 'trafficking in persons' as defined in the Palermo Protocol, as well as attributes of the charged offense (enslavement and sexual slavery) are often jointly and indistinguishably relied upon in determining a defendant's guilt.

In reviewing the judicial methodology used in a finding of enslavement, each court or tribunal has largely strayed from explicitly identifying 'powers attaching to the right of ownership,' in favor of utilizing a judicially constructed test ('indicia of enslavement') to make a finding of enslavement and sexual slavery. There are remarkable consistencies among the types of facts that these judiciaries relied upon in their findings of enslavement and/or sexual slavery which thereby become relevant when determining whether trafficking has been incorporated into the crime of enslavement. The most apparent include: (1) the importance in methods and manners of victim acquisition; and (2) considerations of consent.

Each and every ICL institution has held that the circumstances by which a person was acquired for their enslavement are relevant and aids in determining whether the elements of the crime were committed. These factors are also the first two elements of human trafficking. Moreover, in each enslavement case, victim acquisition was performed for the purpose of subjecting those persons acquired into forced or compulsory labor and/or sexual exploitation (rape, sexual slavery and/or forced marriage) which would also satisfy the third element of trafficking in persons – even further evidencing the disintegration of legal boundaries between the crimes of enslavement and trafficking.

As far as consent is concerned, its inclusion within the enslavement and sexual slavery judgments is quite interesting. Consent and any role it may play is not contemplated in the Slavery Convention's definition of 'slavery' or within the conceptualization of exercising 'powers attaching to the right of ownership' over another. Nevertheless, each institution discussed consent in the context of enslavement or sexual slavery. Eventually, the judiciary dealt with consent in an almost identical fashion to the way it is addressed in the Palermo Protocol. The judiciaries' identification of the defendants' *use* of forms of the 'means' element of trafficking (eg, use or threat of force or abuse of a position of vulnerability) in the enslavement cases led every contemporary ICL court and tribunal (apart from the Trial Chamber in *Krnojelac*) to hold that consent was '*irrelevant*', even in cases charging *forced* labor as analogous to enslavement.

This consistency in legal application evidences a common understanding in the interpretation of the crime of enslavement. Because the relied upon indicia of enslavement essentially comprises the elements of trafficking in persons as codified in the Palermo Protocol, it may be concluded that ICL institutions already consider the incorporation of trafficking within enslavement as a crime against humanity. This conclusion is further supported by the fact that enslavement is treated as an umbrella offense. As a result of the findings in Part II, the thesis concludes with the argument that trafficking's material incorporation within the crime against humanity of enslavement may have, in fact, already happened under international criminal law.

1386 Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 (Slavery Convention). Article 1(1) of the Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

Dutch summary

Mensenhandel is een internationaal fenomeen dat vragen oproept met betrekking tot mensenrechten, migratie, arbeid, de wereldeconomie en het strafrecht. Dit promotieonderzoek richt zich op de strafrechtelijke reactie op mensenhandel. In 2000 introduceerde het VN-Bureau voor Drugs en Misdaad (United Nations Office on Drugs and Crime, UNODC) het Verdrag tegen grensoverschrijdende georganiseerde misdaad (Convention against Transnational Organized Crime, CTNOC). Dit Verdrag werd aangevuld met drie protocollen. Het Protocol inzake de voorkoming, bestrijding en bestraffing van mensenhandel, in het bijzonder vrouwenhandel en kinderhandel (Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, hierna: Palermo Protocol) bevat een opdracht aan de bij het verdrag aangesloten staten tot het invoeren van een nationale strafbaarstelling van mensenhandel. Artikel 3 onder a van dit Protocol definieert het misdrijf 'mensenhandel' daarbij als volgt:

> het werven, vervoeren, overbrengen van en het bieden van onderdak aan of het opnemen van personen, door dreiging met of gebruik van geweld of andere vormen van dwang, ontvoering, bedrog, misleiding, machtsmisbruik of misbruik van een kwetsbare positie of het verstrekken of in ontvangst nemen van betalingen of voordelen teneinde de instemming van een persoon te verkrijgen die zeggenschap heeft over een andere persoon, ten behoeve van uitbuiting.[1387]

Ofschoon een groot aantal landen over de gehele wereld zich verbond aan het Palermo Protocol is het aantal veroordelingen wegens mensenhandel in die landen alarmerend laag gebleven. Dit laat duidelijk zien dat met de enkele introductie van wetgeving nog geen gerechtigheid kan worden gegarandeerd.

Eén van de belangrijkste redenen voor het lage aantal succesvolle vervolgingen ter zake van mensenhandel is de onduidelijke wettelijke definitie van dit delict. Bij het ontwerpen van een nationale strafbaarstelling namen veel landen de strafbaarstelling van het Palermo Protocol over of ontwierpen een variant op artikel 3. Echter, alle bestanddelen die deel uitmaken van die internationale strafbaarstelling zijn op zichzelf niet eenduidig gedefinieerd. Deze omissie werkt door in de nationale wetgeving over mensenhandel, hetgeen heeft geleid tot een wirwar aan definities en interpretaties van dit delict.

Een retorisch gebruik van het begrip mensenhandel, zowel binnen als buiten het recht, heeft vervolgens bijgedragen aan verdere onduidelijkheid over de inhoud van dit juridische begrip. Termen als mensenhandel (*human trafficking*), slavernij (*slavery*, *enslavement*), moderne slavernij (*modern slavery*), dwangarbeid (*forced labor*), (gedwongen) prostitutie *((enforced) prostitution*), onderworpenheid (*servitude*) en slavenhandel (*slave trade*) worden vaak door elkaar gebruikt als synoniemen, zonder rekening te houden met de verwarring die dit voor de juridische betekenis en reikwijdte van het begrip tot gevolg kan hebben. Ofschoon een aantal van die gebezigde termen een eigen, wettelijke strafbaarstelling kent binnen het internationale recht, geldt dat niet voor alle begrippen. Zo is de term 'moderne slavernij' vooralsnog geen zelfstandig juridisch begrip binnen het internationale recht. Toch heeft dit rechtsgeleerden, praktijkjuristen en rechterlijke instanties

1387 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, aanvulling op de United Nations Convention against Transnational Organized Crime (aangenomen op 15 november 2000, i.w.tr. 25 december 2003 (2000) UN Doc A/53/383, art. 3 (Palermo Protocol).

niet weerhouden om dit begrip veelvuldig te gebruiken. Hieruit blijkt duidelijk dat er behoefte bestaat aan duidelijkheid. De eerste onderzoeksvraag van Deel 1 van deze dissertatie betreft daarom een diepgaand, elementair en kritisch onderzoek naar de internationale definitie van 'mensenhandel'.

Van het Palermo Protocol wordt wel aangenomen dat deze de eerste internationale strafbaarstelling van mensenhandel bevat. Die aanname miskent evenwel het bestaan van ruim honderd jaar aan verscheidene internationale rechtsbronnen waarin dit begrip eveneens voorkomt. Het verkrijgen van inzicht in dit misdrijf en de internationaalrechtelijke strafbaarstelling of definitie daarvan vereist een diepgaand onderzoek naar die internationale rechtsbronnen en de totstandkomingsgeschiedenis daarvan. Daarom voorziet Hoofdstuk 2 in een volledig overzicht van de ontwikkeling van die internationale rechtsbronnen die betrekking hebben op mensenhandel en de interpretatie daarvan gedurende de afgelopen 120 jaren. Dit hoofdstuk brengt daarmee de ontwikkeling van de definitie van mensenhandel door de tijd heen in beeld. In het bijzonder verschaft dit onderzoek waardevolle informatie over eerdere definities en betekenissen van begrippen die zijn opgenomen in de internationale rechtsbronnen betreffende mensenhandel. Daarbij is steeds rekening gehouden met de historische en politieke context van de tijd.

Hoofdstuk 3 onderzoekt vervolgens de huidige internationale strafbaarstelling van 'mensenhandel' zoals opgenomen in het Palermo Protocol. In het algemeen neemt men aan dat deze strafbaarstelling uit drie bestanddelen bestaat: (1) een daad (het werven, vervoeren, overbrengen van en het bieden van onderdak aan of het opnemen van personen); (2) een middel (dreiging met of gebruik van geweld of andere vormen van dwang, ontvoering, bedrog, misleiding, machtsmisbruik of misbruik van een kwetsbare positie of het verstrekken of in ontvangst nemen van betalingen of voordelen teneinde de instemming van een persoon te verkrijgen die zeggenschap heeft over een andere persoon), en (3) ten behoeve van uitbuiting. Het Palermo Protocol geeft geen definitie van uitbuiting. In plaats daarvan stelt artikel 3 onder a dat onder uitbuiting mede kan worden verstaan: 'ten minste de uitbuiting van prostitutie van anderen of andere vormen van seksuele uitbuiting, gedwongen arbeid of diensten, slavernij of praktijken die vergelijkbaar zijn met slavernij, onderworpenheid of de verwijdering van organen.'

Het vervullen van ten minste één term uit elk bestanddeel levert een juridische kwalificatie van mensenhandel op. Door het bestuderen van de bestaande literatuur over mensenhandel in combinatie met een tekstuele analyse van de bestanddelen van artikel 3 onder a is in Hoofdstuk 3 getracht elke term uit de strafbaarstelling van mensenhandel nauwkeurig te definiëren, onder meer om de toepassing van dit begrip voor de rechtspraktijk te verhelderen. Voor wat betreft het derde bestanddeel (uitbuiting) bestond niet alleen behoefte aan een verduidelijking van de vormen van uitbuiting; ook aan een bespreking van de vereiste opzetgradatie voor strafrechtelijke aansprakelijkstelling was voorbij gegaan. Daarom is in Hoofdstuk 3 een poging ondernomen om vast te stellen wat 'ten behoeve van' betekent als subjectief bestanddeel van het delict mensenhandel. Het is duidelijk dat *dolus directus of the first degree* (*concrete intent*, of opzet als bedoeling) zonder enige twijfel voldoet aan het subjectieve vereiste voor mensenhandel. Afhankelijk van de nationale strafbaarstelling kan dit misdrijf ook *dolus directus of the second degree* (bewustheid van een onvermijdelijk gevolg) bevatten. Echter, elke lagere gradatie van het opzet, zoals voorwaardelijk opzet (*dolus eventualis*), is in strijd met de letterlijke tekst 'ten behoeve van', zoals vastgelegd in het Palermo Protocol.

In Hoofdstuk 3 is tevens getracht de verhouding tussen het Palermo Protocol en het CTNOC te verduidelijken voor wat betreft de door deze rechtsbronnen gestelde verplichtingen in het kader van mensenhandel. De relevante onderzoeksvragen betreffen de kwestie of het delict mensenhandel een grensoverschrijdende component moet bevatten en/of onder het plegen van

dit delict het begaan van dit delict door een georganiseerde criminele groep moet worden verstaan. Kortom, Deel I van dit onderzoek heeft tot doel een uitgebreid en duidelijk inzicht te verschaffen in de strafbaarstelling van mensenhandel in het internationale recht, vanaf zijn oorsprong tot nu.

Na de verduidelijking van de strafbaarstelling van het Palermo Protocol, richt het tweede deel van deze studie zich op de vraag of het delict mensenhandel ook gelding heeft binnen de context van het internationaal strafrecht. De eigenlijke strafbaarstelling van mensenhandel is de nationale strafbaarstelling; de CTNOC classificeerde mensenhandel als een grensoverschrijdend georganiseerd misdrijf. Niettemin groeit steeds meer de overtuiging dat mensenhandelaren kunnen en moeten worden vervolgd voor het Internationaal Strafhof. De voorstanders daarvan baseren zich vooral op het feit dat in het Statuut van Rome mensenhandel deel uitmaakt van de strafbaarstelling van slavernij als misdrijf tegen de menselijkheid. In het bijzonder luidt artikel 7 lid 2 onder c als volgt:

> (…) betekent "slavernij" de uitoefening op een persoon van een of alle bevoegdheden verbonden aan het recht van eigendom, met inbegrip van de uitoefening van dergelijke bevoegdheid en *bij mensenhandel, in het bijzonder handel in vrouwen en kinderen*.[1388]

Van belang is dat mensenhandel niet als een zelfstandig delict is opgenomen in het Statuut van Rome of in enig ander verdrag van de huidige of vroegere internationale instellingen of organisaties. Mensenhandel wordt in het Statuut van Rome slechts genoemd *als onderdeel van* de strafbaarstelling van 'slavernij' als een misdrijf tegen de menselijkheid. Dat maakt dat de tweede onderzoeksvraag van Deel II van deze studie niet louter betrekking heeft op de plaats van mensenhandel binnen het internationale strafrecht; die tweede onderzoeksvraag richt zich juist op de vraag of het internationale misdrijf 'slavernij' in feite het misdrijf 'mensenhandel' omvat.

Om die vraag te beantwoorden is in deze studie de juridische verhouding tussen de strafbaarstellingen van slavernij en van mensenhandel onderzocht: (1) zoals deze zijn neergelegd in de bijbehorende internationale rechtsbronnen, (2) binnen de statuten van de internationale justitiële instellingen (daarbij gericht op het Internationaal Strafhof) en (3) via een onderzoek van de rechtspraak over slavernij en seksuele slavernij afkomstig van internationale en hybride strafhoven en tribunalen.

De overgang van de onderzoeksvragen die worden besproken in deel I en deel II van deze dissertatie vereist een tussenstap. Verschillende begrippen zoals de begrippen mensenhandel, slavernij, slavenhandel en seksuele slavernij vertonen materieelrechtelijke overeenkomsten. Sommige begrippen – onder meer mensenhandel (trafficking), slavernij (*slavery, enslavement*), slavenhandel (*slave trade*) en seksuele slavernij (*sexual slavery*) zijn voorzien van een definitie in (publiekrechtelijke) internationale rechtsbronnen, en andere – zoals slavernij (*enslavement*) en seksuele slavernij (*sexual slavery*) – zijn als misdrijven opgenomen in internationaal strafrechtelijke statuten. Voordat het onderzoek zich zuiver toespitst op het internationaal strafrecht, worden in Hoofdstuk 4 de internationaalrechtelijke definities van die begrippen en misdrijven uiteengezet en wordt vastgesteld of deze juridisch gezien van elkaar kunnen worden onderscheiden.

Nadat deze begrippen zijn afgebakend en is geconcludeerd dat slavernij nergens officieel gedefinieerd is behalve in het Statuut van Rome, wordt in Hoofdstuk 5 de strafbaarstelling van dit Statuut bestudeerd. Zoals hiervoor reeds aangegeven, wordt 'slavernij' in artikel 7 lid 2 onder c gedefinieerd als een misdrijf tegen de menselijkheid. Deze definitie bevat het begrip 'mensenhandel'. Door middel van een tekstuele analyse van deze strafbaarstelling, evenals een onderzoek naar de

1388 Statuut van Rome inzake het Internationaal Strafhof (17 juli 1998). Cursivering door auteur.

bestanddelen van misdaden tegen de menselijkheid, is in Hoofdstuk 5 getracht op te helderen of mensenhandel deel uitmaakt van de strafbaarstelling van slavernij zoals opgenomen in het Statuut van Rome.

De meest problematische juridische obstakels bij een vervolging wegens mensenhandel voor het Internationaal Strafhof bestaan uit het bewijzen van de objectieve bestanddelen van misdaden tegen de menselijkheid. Het doorgaans georganiseerde karakter van mensenhandel kan het bestanddeel *stelselmatig* (in tegenstelling tot wijdverbreid) wel vervullen, maar het bewijs dat een staat dan wel een georganiseerde groepering verantwoordelijk is voor het misdrijf is lastig aan te tonen. Mensenhandel wordt vaak gepleegd door georganiseerde criminele groeperingen, maar de meerderheid van die groeperingen zal waarschijnlijk niet voldoen aan het criterium van het voeren van een 'beleid (…) dat het plegen van een dergelijke aanval tot doel heeft', hetgeen vereist wordt door de strafbaarstelling van misdrijven tegen de menselijkheid. De juridische scheidslijn tussen wat wel en niet onder het begrip 'organisatie' valt, is nog niet uitgekristalliseerd door het Internationaal Strafhof. Wel weten we dat het hier gaat om iets wat tussen een 'staat-achtige entiteit' en een groep die 'een gevestigde hiërarchie' (*an established hierarchy*) in zit en 'de middelen [bezit] om een wijdverbreide of stelselmatige aanval tegen de burgerbevolking uit te voeren' (*possess[es] the means to carry out a widespread or systematic attack against the civilian population*).

Omdat het Statuut van Rome de enige definitie van 'slavernij' binnen het internationaal strafrecht bevat, is een analyse van de rechtspraak over slavernij binnen het internationaal strafrecht eveneens fundamenteel voor het beantwoorden van de vraag of mensenhandel in het algemeen binnen slavernij valt als misdrijf tegen de menselijkheid of dat mensenhandel slechts deel uitmaakt van een vervolging wegens slavernij voor het Internationaal Strafhof. Daarom is in Hoofdstuk 6 de rechtspraak over slavernij en seksuele slavernij afkomstig van nu bestaande en vroegere internationale en hybride strafhoven onderzocht.

Net als de strafbaarstelling van slavernij (*enslavement*) in het Statuut van Rome, is de definitie van dit begrip in elk internationaalrechtelijk arrest (gewezen na de arresten betreffende misdrijven die zijn gepleegd tijdens de Tweede Wereldoorlog) ook gebaseerd op het Verdrag inzake de slavernij. Echter, anders dan het Statuut van Rome bevat geen van deze arresten de term mensenhandel.[1389] Omdat seksuele slavernij wordt begrepen als een vorm van slavernij, is de rechtspraak van zowel slavernij als seksuele slavernij bestudeerd. In Hoofdstuk 6 is dan ook geprobeerd om na te gaan hoe de misdrijven slavernij en seksuele slavernij zijn beoordeeld door de internationale strafhoven.

Het onderzoek naar de interpretatie van het internationale misdrijf slavernij door de internationale strafhoven laat interessante resultaten zien waar het de verhouding tussen dit misdrijf en het misdrijf van mensenhandel betreft. Opvallend is dat de hoven in hun arresten bij het vaststellen van de schuld van de verdachte zowel op de bestanddelen van mensenhandel (zoals gedefinieerd in het Palermo Protocol) als op de bestanddelen van het ten laste gelegde delict (slavernij dan wel seksuele slavernij) teruggrijpen.

Uit het bestuderen van de juridische methodologie die is toegepast in veroordelingen wegens slavernij blijkt dat alle hoven of tribunalen het bestanddeel 'bevoegdheden verbonden aan het recht van eigendom' niet hebben verduidelijkt. In plaats daarvan passen zij hun eigen juridische toetsingscriteria ('*indicia of enslavement*') toe om vast te stellen of sprake is van slavernij dan wel seksuele slavernij. Er zijn opmerkelijke overeenkomsten tussen het type feiten (of feitelijke vaststellingen) waarop de verschillende hoven hun veroordelingen wegens slavernij dan wel

1389 Verdrag inzake de slavernij (Convention to Suppress the Slave Trade and Slavery), van 25 september 1926, i.w.tr. op 9 maart 1927, 60 LNTS 253. Artikel 1 (1) van dit Verdrag definieert slavernij als 'de staat of toestand van een persoon over wien eigendomsrechten, hetzij in vollen omvang, hetzij in beperkte mate, worden uitgeoefend.'

seksuele slavernij baseerden, die om die reden van belang zijn om vast te stellen of mensenhandel onderdeel uitmaakt van het misdrijf slavernij. De meest duidelijke zijn onder meer: (1) het belang van de methoden om slachtoffers te werven, en (2) overwegingen die de instemming van het slachtoffer betreffen.

Alle internationale strafhoven oordeelden dat de omstandigheden waaronder een persoon werd geworven ten behoeve van slavernij van belang zijn en helpen bij het vaststellen of de bestanddelen van dat misdrijf zijn vervuld. Deze factoren vormen ook de eerste twee bestanddelen van mensenhandel. Verder vond in elke slavernij-zaak het werven van slachtoffers plaats met als doel hen te onderwerpen aan dwangarbeid dan wel seksuele uitbuiting (verkrachting, seksuele slavernij dan wel gedwongen huwelijken). Hiermee wordt ook het derde bestanddeel van mensenhandel vervuld, waarmee eveneens wordt aangetoond dat de juridische grenzen tussen slavernij en mensenhandel vaag zijn.

Interessant is dat in de arresten over slavernij en seksuele slavernij de 'instemming' wordt besproken. Instemming en de rol die deze kan spelen maken geen deel uit van de strafbaarstelling van 'slavernij' in het Verdrag inzake de slavernij en vallen ook niet binnen het uitoefenen van 'bevoegdheden verbonden aan het eigendomsrecht' over een ander. Toch bespreekt iedere rechterlijke instantie de 'instemming' in het kader van slavernij of seksuele slavernij. Ten slotte bespreken de gerechtshoven 'instemming' op bijna identieke wijze als de wijze waarop het Palermo Protocol dit vereiste aanhaalt. De vaststelling van de strafhoven dat de verdachte *gebruik* heeft gemaakt van de 'middelen' die als bestanddeel van mensenhandel zijn genoemd (bijv. het gebruik van of de dreiging met geweld of misbruik van een kwetsbare positie) in de rechtspraak over slavernij maakte dat ieder hedendaags internationaal strafhof en tribunaal (afgezien van de *Trial Chamber* in *Krnojelac*) oordeelde dat instemming '*irrelevant*' was, zelfs in zaken waarin *dwang*arbeid als slavernij ten laste was gelegd.

Deze consistentie in de toepassing van de strafbaarstelling geeft blijk van eenzelfde interpretatie van het misdrijf slavernij. Omdat de toetsingscriteria voor slavernij in wezen de bestanddelen van mensenhandel omvatten zoals die zijn neergelegd in het Palermo Protocol, kan worden geconcludeerd dat internationale strafhoven aannemen dat mensenhandel deel uitmaakt van het delict slavernij (*enslavement*) als misdrijf tegen de menselijkheid. Deze conclusie steunt voorts op het feit dat slavernij wordt toegepast als een overkoepelend delict. Als uitkomst van de bevindingen die zijn weergegeven in Deel II, sluit deze studie af met de stelling dat de materieelrechtelijke incorporatie van mensenhandel binnen het delict slavernij als misdrijf tegen de menselijkheid in het internationaal strafrecht mogelijk reeds een feit is.

About the Author

Nicole Siller received her Bachelor of Arts (Hons) from Purdue University (2004) and her Juris Doctorate from the University of Toledo College of Law (2008).

In 2008, Siller was appointed Assistant District Attorney in Philadelphia, Pennsylvania USA. She personally prosecuted a voluminous amount of cases involving the crimes of attempted murder, firearms offenses, assault, drug trafficking, sexual offenses and theft/ fraud offenses. Her final assignment was a specialized position responsible for the vertical prosecution of all nonfatal shootings committed in southwest Philadelphia. Due to the nature and circumstances of these crimes, Siller was also an active member of an FBI Task Force investigating dangerous criminal organizations and gangs. This collaboration led to the successful investigation and prosecution of complex and challenging cases involving violent offenders at the state and federal levels.

In 2013, Siller was awarded a fellowship to pursue doctoral research in the realm of transnational organized crime at the University of Groningen in the Netherlands. During her doctoral studies Siller has published several journal articles on legal issues relating to human trafficking. She is also the creator and Executive Editor of the *Journal of Trafficking and Human Exploitation*.

After her doctoral studies, Siller will join the law faculty of Deakin University in Melbourne, Australia.