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# **Charting the International Legal Framework Applicable to Modern Day Human Trafficking**

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## **Abstract**

This thesis argues that the international legal framework applicable to human trafficking is inadequate to address contemporary challenges. It also explains why and how human trafficking is a controversial phenomenon due to its complex nature, which is shaped by real-world incidences. Overall, this thesis stresses that human trafficking is real, and that survivors are human beings, who do matter.

Drawing on international law, in order to capture the inadequacy of international legal framework, this thesis discusses the definition of human trafficking in comparison to the terms modern-day slavery and migrant smuggling, and considers obligations to protect, including identification and non-criminalisation of human trafficking victims. In the context of definitional analysis, this thesis not only looks at the international legal regulations pertaining to related phenomena, but also critically reviews international law to help address how human trafficking is defined and understood by the international community, including the media, scholars and international courts, alongside real-world incidents.

The definition of human trafficking and obligations to protect are evidently interrelated; without defining human trafficking, identification of trafficking victims, as required by the obligations of protection, is not possible. In this respect, there are two main aspects in which international law does not adequately respond to human trafficking crimes: defining human trafficking and identifying its 'victims'/survivors, as is explained in this thesis.

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<<http://www.refworld.org/docid/3b00f2275b.html>> accessed 19 August 2017.

*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (A/RES/40/173), 9 December 1988.

*Convention on the Rights of the Child* (1577 UNTS 3) done 20 November 1989, entered into force 2 September 1990 (CRC).

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UNHCR, *Guiding Principles on Internal Displacement* 22 July 1998 ADM 1.1, PRL 12.1, PR00/98/109 <<http://www.refworld.org/docid/3c3da07f7.html>> accessed 13 August 2017.

ILO *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* C182, 87<sup>th</sup> ILC session 17 June 1999, entered into force 19 November 2000 (Worst Forms of Child Labour Convention).

*Resolution on Traffic in Women and Girls* (A/RES/55/67) 31 January 2001.

*Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography* GA Res 54,263, Annex 1, 54 UN GAOR Supp. No. 49 7 UN Doc. A/54/49, Vol. III (2000), done 25 May 2000, entered into force 18 January 2002 (CRC Optional Protocol).

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*UN Convention Against Transnational Organised Crime* (2225 UNTS 209) done 15 November 2000, entered into force 29 September 2003 (Organised Crime Convention).

*EU Brussels Declaration on Preventing and Combating Trafficking in Human Beings* 29 November 2002, 14981/02 (Brussels Declaration).

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* A/RES/55/2515 entered into force 25 December 2003 (Trafficking Protocol).

*Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime* 15 November 2000, GA Res 55/25 Annex III, UN GAOR, 55<sup>th</sup> Sess., Supp. No 49, at 62, UN Doc. A/45/49 (Vol I) (2001) entered into force 28 January 2004 (Migrant Smuggling Protocol).

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*Protocol of 2014 to the Forced Labour Convention* 103<sup>rd</sup> ILabC Session done 11 June 2014, entered into force 9 November 2016.



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## Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Ekin Deniz HORZUM



## Definitions/Abbreviations

ECHR	European Court of Human Rights.
EU	European Union.
HT/THB	Human Trafficking/Trafficking of Human Beings.
ICC	International Criminal Court.
ICTY	International Criminal Tribunal for the former Yugoslavia.
ILO	International Labour Organisation.
IOM	International Organisation for Migration.
NGO	Nongovernment organisation.
OHCHR	Office of the United Nations High Commissioner for Human Rights.
UN	United Nations.
UNHCR	United Nations High Commissioner for Refugees.
UNICEF	United Nations Children's Fund.
UN.GIFT.HUB	United Nations Global Initiative to Fight Human Trafficking.
UNHCR	United Nations High Commissioner for Refugees.
UNODC	United Nations Office on Drugs and Crime.

# 1 Introduction

## 1.1 Abstract

This chapter introduces the overall view of human trafficking through real-world examples, including comprehensive information about why trafficking is a modern-day phenomenon, the root causes of trafficking and the major reasons why human trafficking is a complex issue. Finally, it sets forth the research question and objectives of this thesis.

## 1.2 The Anatomy of Human Trafficking

### 1.2.1 Human Trafficking as a Modern-Day Phenomenon

Human trafficking is a pervasive contemporary phenomenon. This term describes the process of moving people within and between countries for the express purpose of exploiting them.<sup>1</sup> Human trafficking is also described as ‘the unlawful, clandestine movement of persons across national boundaries, whether coercive or consensual, and irrespective of gender, age, or reason, for trans-boundary movement’.<sup>2</sup>

There are numerous reasons behind the trafficking of women, men and children, although the potential for financial profit is a motivating factor in every case.<sup>3</sup> In 2016 UN Secretary-General Ban Ki-moon at the high-level event ‘In Stronger Partnership and Coordination to Stop Human Trafficking: Eradicating Modern-Day Slavery through Sustainable Development’, in New York, declared UN’s

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<sup>1</sup> Anne T Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage’ in L N Sadat & M P Scarf (eds), *The Theory and Practices of International Criminal Law: Essays in Honour of M Cherif Bassiouni* (Leiden, Martinus Nijhoff, 2008), 397.

<sup>2</sup> Cherif Bassiouni et al, ‘Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st century’ (2010) 81(3) *Revue Internationale de Droit Pénal* 417, at 418.

<sup>3</sup> Joy N Ezeilo, ‘Achievements of the Trafficking Protocol: Perspectives from the former UN Special Rapporteur on Trafficking in Persons’ (2015) 4 *Anti-Trafficking Review* 144, at 144-49.

adamance about the necessity of eliminating human trafficking,<sup>4</sup> yet there is no region in the world that is not somehow connected to this problem.<sup>5</sup>

Virtually every country is affected by human trafficking because a country can serve as ‘a country of *origin*, a country of *destination*, and a country of *transit*.’<sup>6</sup>

This does not mean, of course, that all countries are equally occupied or involved in the same way. One major focal point has been child trafficking in West Africa, which has attracted considerable international interest, including widely disseminated reports on the horrors of “slave boats”.<sup>7</sup>

As can be seen, human trafficking has a global effect. However, defining human trafficking and, in relation, identifying and protecting victims of human trafficking has been problematic under international law. As is analysed and explained in the following paragraphs and related chapters, the scope of human trafficking is ‘confused’ due to some overlapping aspects with the terms modern-day slavery and migrant smuggling. International legal rules considered alongside related contemporary incidents show that human trafficking as a modern day phenomenon is regulated as a transnational organized crime, different from slavery and migrant smuggling.

## 1.2.2 Contemporary Human Trafficking Incidents

This section introduces some major contemporary examples of human trafficking.

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<sup>4</sup> United Nations Meeting Coverage & Press Releases, ‘Promoting Rights Central to Strategy for Ending Trafficking in Human Beings, Secretary-General Tells Event on Eradicating ‘Modern-Day Slavery’ (9 February 2016) <<http://www.un.org/press/en/2016/sgsm17524.doc.htm>> accessed 6 March 2016.

<sup>5</sup> *ibid.*

<sup>6</sup> John Winterdyk & Benjamin Perrin & Philip Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (CRC Press, 2012), 9.

<sup>7</sup> Joel Quirk, *The Anti-Slavery Project from the Slave Trade to Human Trafficking* (University of Pennsylvania Press, 2011), 229.

See also Alja Klopčič, ‘Trafficking in Human Beings in Transition and Post-Conflict Countries’ (2004) 1(1) *Human Security Perspectives* 7; Benjamin Perrin, ‘Just Passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons’ (2010) 7(1) *European Journal of Criminology* 11.

The Mediterranean crisis is currently one of the main human trafficking challenges worldwide,<sup>8</sup> as this crisis has dominated contemporary knowledge about this phenomenon. As such, in 2016, for many the word ‘refugee’ evoked images of Syria, from where millions fled persecution and conflict. Note that ‘[a]bout 350,000 migrants and refugees have arrived in the European Union so far [in 2016], a sharp decline from 2015 when more than 1 million people arrived, according to the EU border control agency.’<sup>9</sup> The UNHCR has noted that by the end of 2014, Syria had become the world’s top source country of refugees, overtaking Afghanistan.<sup>10</sup> The crisis has not only affected the lives of people living in the region, but also those in refugee camps. The message carried by refugees crossing the Mediterranean to arrive on the shores of Europe is that ‘if you don’t solve problems, problems will come to you’, as UN High Commissioner for Refugees Filippo Grandi said in a news briefing.<sup>11</sup> In such cases, individuals fleeing war-torn lands are often unable to enter other countries through conventional paths, because they do not have valid documents to claim asylum. Such an unlawful, unconventional journey to escape armed conflict is oftentimes facilitated by human smugglers. Initially, some politicians such as Ed Miliband, Federica Mogherini, Yvette Cooper, William Hague and the current UK Prime Minister Theresa May were recorded on different occasions having used the terms ‘trafficker’ and ‘smuggler’ interchangeably when referring to individuals transporting refugees across the Mediterranean. The latter has caused confusion about the context of human trafficking.<sup>12</sup> In fact, migrant smuggling and human trafficking have explicit and different legal meanings, as is explained in Chapter III. For current purposes, however, it can be said that incidents of trafficking as a result of the Mediterranean crisis take

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<sup>8</sup> Adrian Edwards, ‘Global Forced Displacement Hits Record High’ *UNHCR News* (20 June 2016) <<http://www.unhcr.org/uk/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html>> accessed 21 December 2016.

<sup>9</sup> Al Jazeera, ‘2016: Refugee Arrivals Fall as Deaths Hit Record’ (18 December 2016) <<http://www.aljazeera.com/news/2016/12/refugees-mediterranean-161218084101126.html>> accessed 19 December 2016.

<sup>10</sup> See UNHCR, ‘World at War - Forced Displacement in 2014’ (UNHCR Global Trends, 2015) <<http://www.unhcr.org/556725e69.pdf>> accessed 19 December 2016.

<sup>11</sup> Stephanie Nebehay, ‘Record 65.3 Million People Displaced, often Face Barriers: UNHCR’ *Reuters* (20 June 2016) <<http://www.reuters.com/article/us-refugees-un-idUSKCN0Z60BN>> accessed 9 October 2016.

<sup>12</sup> Aidan McQuade, ‘Migrant Crisis: Smuggling or Trafficking? Politicians Don’t Seem to Know’ *The Guardian* (22 April 2015) <<https://www.theguardian.com/global-development/2015/apr/22/migrant-crisis-smuggling-trafficking-politicians-dont-seem-to-know>> accessed 1 October 2016; Theresa May, ‘My Government Will Lead the Way in Defeating Modern Slavery’ *The Telegraph* (30 July 2016) <<http://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/>> accessed 8 October 2016.

place at the destination country, and include incidents of sexual assault (i.e. sex trafficking) against women smuggled across the Mediterranean Sea from war-torn lands.<sup>13</sup>

Other cases of human trafficking include the National Human Rights Commission in Thailand denouncing labour exploitation of a hundred fishermen who had been kept in captivity for three years, working without payment in Indonesian waters.<sup>14</sup> Hundreds of Rohingya men were sold through a trafficking network to work on Thai fishing boats, providing fish for other countries across the world.<sup>15</sup>

In recent years, migrant workers from Kyrgyzstan have travelled to Kazakhstan in search of employment.<sup>16</sup> As Human Rights Watch has reported, employers confiscated their passports, did not provide written employment contracts, did not pay regular wages, cheated them of earnings and forced them to work excessively long hours.<sup>17</sup> In Russia's construction sector, thousands of workers from Tajikistan and Kyrgyzstan have been abused and deceived.<sup>18</sup> Although not all forced labour is an outcome of human trafficking, most cases of human trafficking that result in forced labour have to do with migration, exploitative labour contract systems and organised criminal trafficking.<sup>19</sup> In such cases, private actors or organised criminal groups recruit migrant workers by

<sup>13</sup> Lisa De Bode, 'EU Refugee Crisis Heightens Sex Trafficking Concerns, Officials Warn' *Al Jazeera America* (20 October 2015) <<http://america.aljazeera.com/articles/2015/10/20/eu-refugee-crisis-boosts-sex-trafficking.html>> accessed 1 October 2016.

<sup>14</sup> Maria Beatriz Alvarez & Edward J Alessi, 'Human Trafficking is More than Sex Trafficking and Prostitution: Implications for Social Work' (2012) 27(2) *Journal of Women and Social Work* 142, at 143.

<sup>15</sup> Emanuel Stoakes & Chris Kelly & Annie Kelly, 'Revealed: How the Thai Fishing Industry Traffics, Imprisons and Enslave' *The Guardian* (20 July 2015) <<http://www.theguardian.com/global-development/2015/jul/20/thai-fishing-industry-implicated-enslavement-deaths-rohingya>> accessed 29 June 2016; Al Jazeera, 'Rohingya Face Myanmar 'Ethnic Cleansing': UN Official' (25 November 2016) <<http://www.aljazeera.com/news/2016/11/rohingya-face-myanmar-ethnic-cleansing-official-161125065731036.html>> accessed 13 December 2016.

<sup>16</sup> Human Rights Watch Summary and Key Recommendations, "'Hellish Work" - Exploitation of Migrant Tobacco Workers in Kazakhstan' (14 July 2010) <<https://www.hrw.org/report/2010/07/14/hellish-work/exploitation-migrant-tobacco-workers-kazakhstan>> accessed 29 June 2016.

<sup>17</sup> *ibid.*

<sup>18</sup> Human Rights Watch, 'Are You Happy to Cheat Us? - Exploitation of Migrant Construction Workers in Russia' (10 February 2009) <<https://www.hrw.org/report/2009/02/10/are-you-happy-cheat-us/exploitation-migrant-construction-workers-russia>> accessed 17 March 2016.

<sup>19</sup> ILO Working Group on Trafficking, *Human Trafficking and Forced Labour Exploitation - Guidelines for Legislation and Law Enforcement, Special Action Programme to Combat Forced Labour* (Geneva, ILO, 2005) <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_081999.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081999.pdf)> accessed 29 June 2016.

persuading them with false assurances of lucrative jobs, with the ultimate aim of exploitation and trafficking.<sup>20</sup>

Furthermore, similar to the vulnerabilities of Syrian refugees who have no choice but to leave their country, many young women devastated by the earthquake in Nepal, April 2015, were targeted by human traffickers supplying a network of brothels across South Asia.<sup>21</sup> In this region, traffickers bribed border police to transport girls to India.<sup>22</sup> Likewise, North Korean women were recruited, transferred and sold to Chinese men for the purpose of marriage.<sup>23</sup> Human trafficking occurred as a result of many girls fleeing their homes, among economic difficulties and fear, to protect themselves from honour killings, and eventually, they were trapped by sex traffickers.<sup>24</sup>

The plenitude of these examples shows that human trafficking has become a trade so lucrative that it knows no borders, and does not discriminate between countries. Trafficking is neither limited by geography nor by the range of acts that it encompasses. Take for example trafficking in central Mexico, which has been linked to US cities such as Atlanta and New York.<sup>25</sup> Therefore, human trafficking happens not only in impoverished countries where civil and human rights may be regularly infringed, but also in 'industrialised' countries such as Canada, the United States, and many Western European nations.<sup>26</sup> It includes the selling of girls' virginity in Cambodia where trade in virgins are initiated by their

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<sup>20</sup> Kathleen Kim, 'Psychological Coercion in the Context of Modern Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking' (2007) 38(3) *University of Toledo Law Review* 941, at 941-45.

<sup>21</sup> Jason Burke, 'Nepal Quake Survivors Face Threat from Human Traffickers Supplying Sex Trade' *The Guardian* (London, 5 May 2015) <<http://www.theguardian.com/world/2015/may/05/nepal-quake-survivors-face-threat-from-human-traffickers-supplying-sex-trade>> accessed 29 June 2016.

<sup>22</sup> Human Rights Watch/Asia, *Rape for Profit - Trafficking of Nepali Girls and Women to India's Brothels* (Human Rights Watch, 1995) <<https://www.hrw.org/reports/1995/India.htm>> accessed 29 June 2016.

<sup>23</sup> Julian Ryall, 'Escape from North Korea: 'I was Sold into Slavery and Forced to Have an Abortion'' *The Telegraph* (Tokyo, 16 February 2015) <<http://www.telegraph.co.uk/women/womens-life/11393645/North-Korea-escapee-I-was-sold-into-slavery-and-forced-to-have-an-abortion.html>> accessed 30 May 2016.

<sup>24</sup> Note that honour killings mean 'the killing of a female, typically by a male perpetrator, because of perceived or actual misconduct of the victim who has dishonoured or shamed her family and clan by actually or allegedly committing an indiscretion'; Lindsey N Devers & Sarah Bacon, 'Interpreting Honor Crimes: The Institutional Disregard towards Female Victims of Family Violence in the Middle East' (2010) 3(1) *International Journal of Criminology and Sociological Theory* 359, at 359-71.

<sup>25</sup> Rafael Romo, 'Human Trafficking Survivor: I was Raped 43,200 Times' *CNN* (11 November 2015) <<http://edition.cnn.com/2015/11/10/americas/freedom-project-mexico-trafficking-survivor/>> accessed 15 March 2016.

<sup>26</sup> Winterdyk & Perrin & Reichel (n 6) 11.

mothers,<sup>27</sup> to the entrapment of men who are forced to work in inhumane conditions,<sup>28</sup> to the capturing of children to turn them into fighters during armed conflict.

Witnesses and relatives told Human Rights Watch that two tribal militias (Hashad al-Asha`ri) recruited as fighters at least seven children from the Debaga camp on August 14, 2016, and drove them to a town closer to Mosul, where Iraqi Security Forces (ISF) are preparing for an offensive to drive the Islamic State, also known as ISIS, from the city.<sup>29</sup>

Human trafficking embraces the deception of poor and uneducated people in Nepal and Southeast Asia in order to steal their kidneys,<sup>30</sup> and sexual exploitation of young boys who are taken home by men for sexual pleasure in Afghanistan - commonly known as *bacha bazi* (playing with boys).<sup>31</sup> Thus, no matter what shape it takes, as previously discussed, trafficking encompasses a great variety of 'jobs', including sex work and/or illegal farm labour, as well as domestic servants or child soldiers.<sup>32</sup> However, one common thread remains among all these diverse examples: the ones victimised by traffickers are often the most vulnerable members of society.

For current purposes, it should be emphasised that in this chapter different forms of trafficking and root causes of human trafficking are discussed broadly. These examples range from child recruitment during armed conflict to economic and social reasons, leading to exploitation of human beings in a much broader sense. Such an expanded approach to trafficking crimes is sometimes criticised as 'expansionist creep'.<sup>33</sup> This thesis exemplifies trafficking occurrences along such a wide spectrum because it aims to build a foundation for the analysis

<sup>27</sup> Abigail Haworth, 'Virginity for Sale: Inside Cambodia's Shocking Trade' *The Guardian* (6 July 2014) <<http://www.theguardian.com/society/2014/jul/06/virginity-for-sale-cambodia-sex-trade>> accessed 2 February 2016.

<sup>28</sup> ILO, 'Forced Labour, Human Trafficking and Slavery' <<http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>> accessed 19 January 2016.

<sup>29</sup> Human Rights Watch, 'Iraq: Militias Recruiting Children - before Mosul, All Sides Should Demobilize Child Soldiers' (Middle East/North Africa Iraq, 30 August 2016) <<https://www.hrw.org/news/2016/08/30/iraq-militias-recruiting-children>> accessed 19 September 2016.

<sup>30</sup> Sugam Pokharel, 'Nepal's Organ Trail: How Traffickers Steal Kidneys' *CNN* (15 July 2015) <<http://edition.cnn.com/2014/06/26/world/asia/freedom-project-nepals-organ-trail/>> accessed 4 March 2016.

<sup>31</sup> Rustam Qobil, 'The Sexually Abused Dancing Boys of Afghanistan' *BBC* (South Asia, 8 September 2010) <<http://www.bbc.co.uk/news/world-south-asia-11217772>> accessed 10 September 2016; PBS Frontline Documentary, *The Dancing Boys of Afghanistan* (2010).

<sup>32</sup> Winterdyk & Perrin & Reichel (n 6) 8.

<sup>33</sup> See Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609.

conducted in Chapter III about the definition of human trafficking under international law and its interpretation in comparison to related phenomena. Examples of contemporary human trafficking incidents can include e.g., modern-day slavery or migrant smuggling. Considering this, this chapter sets forth different contemporary incidents that can be interpreted in a broader sense as trafficking without providing its formulation under international law. Later in Chapter III, the definition of human trafficking, its meaning, how it is perceived by the media, scholars and international judgements, and consequences of such interpretations are analysed in detail. Given the fact that human trafficking is a topical issue, the following section considers the scale of human trafficking.

### 1.2.3 Scale of Human Trafficking

This section aims to analyse the data collection challenges around measuring human trafficking- it thus looks at human trafficking data estimations, and then considers why these estimates cannot be confirmed.

It is asserted that women, men and children are trafficked into a wide range of economic sectors and for different purposes. E.g., in 2005, research by the ILO showed that 12.3 million workers were in forced labour,<sup>34</sup> equal to the population of Greece or Senegal.<sup>35</sup> ‘At least 168 million children around the world work, more than half of them in dangerous conditions’, reports the ILO.<sup>36</sup>

Yet often numbers in the hundreds of thousands are offered as rough estimates, and indeed no one really knows how many people are trafficked across borders per year.<sup>37</sup> Due to the irregular and clandestine nature of trafficking no accepted exact number of ‘incidents of human trafficking occurring in the world

<sup>34</sup> ILO, *A Global Alliance against Forced Labour Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva, ILO, 2005) <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_081882.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf)> accessed 19 September 2016.

<sup>35</sup> Johannes Koettl, ‘Human Trafficking, Modern Slavery, and Economic Exploitation - a Discussion on Definitions, Prevalence, Relevance for Development, and Roles for the World Bank in the Fight Against Human Trafficking’ (2009) SP Discussion Paper 0911, 3 <<http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0911.pdf>> accessed 24 April 2017.

<sup>36</sup> Al Jazeera, ‘Who’s Responsible for Child Slavery?’ (12 June 2016) <<http://www.aljazeera.com/programmes/insidestory/2016/06/160612193954607.html>> accessed 19 September 2016.

<sup>37</sup> Sara Dillon, ‘What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children’ (2008) 17 *UCLA Women’s Law Journal* 121, at 121.

or precise demographics of its victims' can be confirmed.<sup>38</sup> Nonetheless, the public is informed with inexact numbers that the number of trafficking victims worldwide is huge, that the problem is steadily growing and that after drug trafficking it is the second largest criminal enterprise in the world.<sup>39</sup> Indeed, plainly exaggerated statistical figures, as exemplified above, often appear in various awareness campaigns.<sup>40</sup> Even conservative appraisals suggest that at least 2.5 million people have been lured or forced across international borders or trafficked within their home countries every year.<sup>41</sup> Kevin Bales, in his book *Disposable People: New Slavery in the Global Economy*, claimed that there were 27 million slaves worldwide, including trafficked victims forced to work under threat of violence, for no pay.<sup>42</sup> It was also asserted that 'human trafficking ha[d] affected more victims than the Holocaust, Rwanda, the War in Iraq, the Korean War, the Vietnam War, and both World Wars combined.'<sup>43</sup> However, Bales purportedly no longer stands by his estimate of 27 million, stating that his statistics date from the 1990's.<sup>44</sup> Indeed, as will be explained henceforth, attaining accurate data on human trafficking can be quite problematic.

The wording used to indicate number of trafficked persons often revolves around 'estimations' because the way these numbers are calculated remains uncertain. Even the ILO number, which is considered the best estimate available and is based on systematic methodology, cannot accurately reflect the global scope of

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<sup>38</sup> Protection Policy and Legal Advice Section (PPLAS) & Division of International Protection Services (DIPS), 'Refugee Protection and Human Trafficking - Selected Legal Reference Materials' (1<sup>st</sup> ed, UNHCR, 2008), 11 <<http://www.refworld.org/docid/498705862.html>> accessed 22 December 2016.

<sup>39</sup> Ronald Weitzer, 'Rethinking Human Trafficking' (2013) 37(2) *Dialect Anthropol* 309, at 312.

<sup>40</sup> Andreas Schloenhardt & Paris Astill-Torchia & Jarrod M Jolly, 'Be Careful What You Pay for: Awareness Raising on Trafficking in Persons' (2012) 11(2) *Washington University Global Studies Law Review* 415, at 415.

<sup>41</sup> Koettl (n 35) 3.

<sup>42</sup> Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press, 2012); E Benjamin Skinner, *A Crime So Monstrous: A Shocking Exposé of Modern-Day Sex Slavery, Human Trafficking and Urban Child Markets* (Mainstream Publishing, 2008), 17.

<sup>43</sup> Skinner (n 42) 17; Jane Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' (Columbia Law School Gender and Sexuality Online, 2011) <<http://ssrn.com/abstract=1779263>> accessed 10 April 2017; Ann Jordan, 'Slavery, Forced Labour, Debt Bondage, and Human Trafficking: From Conceptual Confusion to Targeted Solutions' (Program on Human Trafficking and Forced Labour - Center for Human Rights and Humanitarian Law, Issue Paper 2, 2011), 1 <<http://traffickingroundtable.org/wp-content/uploads/2012/07/Issue-Paper-2-Slavery-Forced-Labor-Debt-Bondage-and-Human-Trafficking.pdf>> accessed 30 June 2016.

<sup>44</sup> Glenn Kessler, 'Why You Should Be Wary of Statistics on 'Modern Slavery' and 'Trafficking' *Washington Post* (24 April 2015) <<https://www.washingtonpost.com/news/fact-checker/wp/2015/04/24/why-you-should-be-wary-of-statistics-on-modern-slavery-and-trafficking/>> accessed 22 August 2016.

the problem.<sup>45</sup> In some incidents, data on adult and child victims is sometimes not separated due to a lack of records of victims' ages, which causes uncertainty as to whether victims are children, teenagers or adults.<sup>46</sup>

The challenges in performing investigative research on human trafficking are not few. As such, Dijk and Mierlo examined the link between corrupt practices among public officials and the failure to implement national policies against human trafficking.<sup>47</sup> These investigations suggest that it is difficult to obtain data on human trafficking and detect corrupt practices, since no official database exists and there has been no attempt to distinguish and classify different types of corrupt practices involved.<sup>48</sup> Although quantitative data may be seen as a sure way of measuring and defining a problem, an inquiry into 'how many people are trafficked' would likely not be enough in reaching realistic results.<sup>49</sup> Such a question could elicit many different answers, such that competing narratives may cloud the truth rather than producing factual results.<sup>50</sup> Gallagher mentions this very problem in her article 'The Global Slavery Index Is Based on Flawed Data - Why No One Does Say So?'<sup>51</sup> She notes that trafficking was the focus of a major social movement that 'according to the publicity of its self-proclaimed leaders, [was] uniting millions of individuals against the scourge of "modern slavery"'.<sup>52</sup> Andrew Forrest, who established 'Walk Free' in 2012, committed himself to eliminating 'slavery' in his lifetime.<sup>53</sup> Forrest underlined the importance of accurate statistics, stating that 'if you can't measure it, it doesn't exist'.<sup>54</sup> Yet as Gallagher underlines, the data provided by indices such as 'Walk Free' is unreliable, and the methodology is

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<sup>45</sup> Jordan (n 43) 1.

<sup>46</sup> *ibid* 9.

<sup>47</sup> Jan Van Dijk & Fanny Klerx-Van Mierlo, 'Indicators of Corruption: Further Explorations of the Link between Corruption and Implementation Failure in Anti-Trafficking Policies' (2010) Working paper International Victimology Institute (INTERVICT), University of Tilburg, the Netherlands <<http://lastradainternational.org/Isidocs/indicators%20of%20corruption.%20link%20between%20corruption%20and%20trafficking.pdf>> accessed 30 June 2016.

<sup>48</sup> Andrea Cirineo & Sacco Studnicka, 'Corruption and Human trafficking in Brazil: Findings from a Multi-Modal Approach' (2010) 7(1) *European Journal of Criminology* 29, at 31.

<sup>49</sup> David Nelken, 'Human Trafficking and Legal Culture' (2010) 43 *Israel Law Review* 479, at 494.

<sup>50</sup> *ibid* 494.

<sup>51</sup> Anne T Gallagher, 'The Global Slavery Index Is Based on Flawed Data – Why No One Does Say So?' *The Guardian* (28 November 2014) <<https://www.theguardian.com/global-development/poverty-matters/2014/nov/28/global-slavery-index-walk-free-human-trafficking-anne-gallagher>> accessed 22 August 2016.

<sup>52</sup> *ibid*.

<sup>53</sup> See Walk Free Foundation <<http://www.walkfreefoundation.org/>> accessed 23 July 2017.

<sup>54</sup> Gallagher, 'The Global Slavery Index is Based on Flawed Data – Why No One does Say So?' (n 51).

crude: ‘random sample surveys in seven countries and derived data involving three others, supplemented by existing survey data of highly variable quality from a further nine.’<sup>55</sup>

Another similar critical analysis was made by Vries and Dettmeijer-Vermeulen in their article ‘Extremely Wanted: Human Trafficking Statistics – What to Do with the Hodgepodge of Numbers’. They state that despite an internationally accepted legal definition of the Trafficking Protocol, in practice, what constitutes such trafficking is interpreted differently.<sup>56</sup> As a result, states could possibly mix data on the different situations covered by human trafficking, as opposed to smuggling migrants and irregular immigration. Without a common conceptual and legal framework, international collaboration is difficult.<sup>57</sup> In cases of misunderstanding, the lack of shared definitions prevents accurate data-collection, and many countries mix trafficking, smuggling and irregular migration in their official data-collection efforts.<sup>58</sup> Indeed, as van Dijk explains, statistics are produced by different organisations, such as Eurostat (Directorate-General of the European Commission), each of which have different interpretations of who to include in their statistics.<sup>59</sup>

The concern is whether the meaning of the concept of an identified or presumed victim given by this kind of organisation is in fact incontestable among all other organisations, researchers and states on an international level. In order to overcome these haphazard figures,<sup>60</sup> in 2009, the ILO and the European Commission jointly developed a list of 16 indicators of human trafficking to reflect ‘a consensus among European experts about the indicators which should be used to characterise elements of human trafficking definition for data

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<sup>55</sup> *ibid.*

<sup>56</sup> Leke DeVries & Corinne Dettmeijer-Vermeulen, ‘Extremely Wanted: Human Trafficking Statistics—What to Do with the Hodgepodge of Numbers?’ in Kristiina Kangaspunta (guest ed), *Researching Hidden Populations: Approaches to and Methodologies for Generating Data on Trafficking in Persons* (vol 8, UNODC Forum on Crime and Society, 2015), 19.

<sup>57</sup> Sheldon X Zhang & Li Cai, ‘Counting Labour Trafficking Activities: An Empirical Attempt at Standardised Measurement’ in Kangaspunta (guest ed), *Researching Hidden Populations: Approaches to and Methodologies for Generating Data on Trafficking in Persons* (n 56), 37ff.

<sup>58</sup> *ibid.* 41.

<sup>59</sup> Jan van Dijk, ‘Estimating Human Trafficking Worldwide: A Multi-Mode Strategy’ in Kangaspunta (guest ed), *Researching Hidden Populations: Approaches to and Methodologies for Generating Data on Trafficking in Persons* (n 56), 1.

<sup>60</sup> Jo Goodey, ‘Data on Human Trafficking: Challenges and Policy Context’ in Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 6), 40.

collection purposes'.<sup>61</sup> If provided data was reliable and replicable through the constant application of quality methodology, then it would be more efficient to rely on numbers to 'talk' about human trafficking.<sup>62</sup>

In this light, despite vigorous claims to the contrary, there are still no precise numbers.<sup>63</sup> As the Unicef Innocenti Research Centre concludes:

There is a dramatic absence of harmonised and systematic data collection, analysis and dissemination at all levels-international, regional, and national. Few reliable estimates exist of the magnitude of the phenomenon.<sup>64</sup>

The following reasons may be to blame: Methodological weaknesses; gaps in data; variance in country-level data due to a lack of reliability and comparability; the nature of human trafficking, which is hidden and complex, perpetrated by organised, opportunistic criminals.<sup>65</sup>

One solution to these shortcomings could be developing indicators to definitively characterise elements of human trafficking for the purpose of more effective data collection.<sup>66</sup> Yet, due to the continued inconsistency between different forms of data analysis and the complexity of the practice of human trafficking as a whole, such idealised data collection still remains conjecture.<sup>67</sup> Nonetheless, the fact that accurate figures are not easy to come by in trafficking, does not take away from the fact that the practice remains a worldwide travesty, seriously harming millions all across the globe.<sup>68</sup> Thus, this thesis does not aim to question how many people are trafficked per year; rather, its scope pertains to

<sup>61</sup> UNODC, 'Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons' (2013) Issue Paper, 23 <[http://www.unodc.org/documents/human-trafficking/2012/UNODC\\_2012\\_Issue\\_Paper\\_-\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability.pdf](http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf)> accessed 30 June 2016.

<sup>62</sup> Zhang & Cai (n 57) 37-56.

<sup>63</sup> Anne T Gallagher & Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking Lessons From the Front Line' (2008) 18(3) *International Criminal Justice Review* 318, at 319.

<sup>64</sup> UNICEF Innocenti Research Centre, *Child Trafficking In Europe: A Broad Vision to Put Children First* (UNICEF, 2008), iv <[https://www.unicef-irc.org/publications/pdf/ct\\_in\\_europe\\_full.pdf](https://www.unicef-irc.org/publications/pdf/ct_in_europe_full.pdf)> accessed 19 September 2016.

<sup>65</sup> Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (1<sup>st</sup> ed, Oxford University Press, 2013), 143.

<sup>66</sup> UNODC, 'Abuse of a Position of Vulnerability and Other "Means" Within the Definition of Trafficking in Persons' (n 61) 23.

<sup>67</sup> Ronald Weitzer, 'Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation' (2011) 101(4) *Journal of Criminal Law and Criminology* 1337, at 1347.

<sup>68</sup> See Harmenvan van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 *Chinese Journal of International Law* 297.

the inquiry of why individuals are trafficked, specifically noting major root causes of trafficking from a contemporary perspective. Thus, the next section examines these root causes in detail, addressing why they have helped turn trafficking into such a prevalent modern-day phenomenon.

### **1.2.4 Major Root Causes of Human Trafficking as Contemporary Challenges**

Human trafficking intersects with a wide range of different causes, some of which may be socially tolerated and/or legally regulated, and others which may be illegal and socially contested.<sup>69</sup> As such, it has many root causes, most of which are interconnected and mutually reinforcing. Note that root causes of human trafficking are also explained as ‘push and pull factors’, which have an impact on the desire to leave the country and make a destination country inviting.<sup>70</sup> However, it is impossible to identify any one main root cause. Resultantly, international law does not address core reasons and convergence between human trafficking and other causes in great detail. Poverty, for instance, is one of the main causes of human trafficking; yet it is mentioned only within a single sentence in Article 9 of the 2000 UN Trafficking Protocol.<sup>71</sup> Article 9 of the Protocol states that ‘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’. With the understanding that there is no definitive way to identify ‘root causes of human trafficking’, in the following paragraphs this thesis addresses some major contributors, many of which - including poverty - are global contemporary challenges in their own right.

The root causes for trafficking, which represent contemporary global challenges, form the ‘external objective factors of human trafficking’. Nonetheless, the ‘internal subjective factors’, which relate to personal traits of human trafficking victims, such as lack of intelligence, naivety or ignorance, are also to be

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<sup>69</sup> Julia O’Connell Davidson, ‘New Slavery, Old Binaries: Human Trafficking and the Borders of “Freedom”’ (2010) 10(2) *Global Networks a Journal of Transnational Affairs* 244, at 249.

<sup>70</sup> Kevin Bales, ‘What Predicts Human Trafficking’ (2007) 31(2) *International Journal of Comparative and Applied Criminal Justice* 269, at 269-79.

<sup>71</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* A/RES/55/2515 entered into force 25 December 2003 (Trafficking Protocol) [emphasis added].

considered as root causes of human trafficking. Yet, as is explained in detail in relation to victim identification in Chapter IV, the latter factors are only interrelated with the ways in which traffickers ‘hook’ their victims to lure them into the process of trafficking.

Furthermore, this thesis also posits trafficking as a form of ‘structural violence’, referring to types of violence stemming from systematic social institutions or structures that result in people experiencing hardship, violence or social injustice.<sup>72</sup> These factors are closely related to the ‘contemporary challenges’ or ‘external factors’ that make trafficking possible. In many instances, such external factors as poverty, hunger and infrastructural shortcomings represent a kind of violence against the individual.<sup>73</sup> Human trafficking is not only intertwined with, but is also the outcome of such violence. For instance, poverty or gender discrimination in home countries, act as major motivating factors in pushing individuals to leave home in search of work.<sup>74</sup> Eventually, some of these people end up trafficked, as forced labourers for example. Indeed, this kind of analysis assumes the root causes of human trafficking to centre around broad economic, social and environmental factors that cause vulnerability to certain groups, making them much more prone to trafficking. These factors remain as key players, even though their individual influence may vary depending on the specific gender, social and economic factors at hand in a particular situation.

Having gone through this brief analysis, the major external objective factors which are seen as root causes of trafficking are detailed in the following paragraphs.

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<sup>72</sup> Pardis Mahdavi, *Gridlock: Labor, Migration, and Human Trafficking in Dubai* (Stanford University Press, 2011), 95.

See also Nancy Scheper-Hughes & Carolyn Sargent (eds), *Small Wars: The Cultural Politics of Childhood* (University of California Press, 1998).

<sup>73</sup> Mahdavi (n 72) 95.

See also Paul Farmer, *Infections and Inequalities: The Modern Plagues* (University of California Press, 2000); Philippe Bourgois, *In Search of Respect: Selling Crack in El Barrio* (Cambridge University Press, 1996).

<sup>74</sup> Mahdavi (n 72) 96.

### 1.2.4.1 Corruption and Trafficking

Corruption undermines human security, prevents free and independent media and can cause violent backlash against investigative press.<sup>75</sup> Corruption is also one of the motivating factors behind human trafficking. What makes corruption one of the challenging root causes of human trafficking is that it is easily conducted behind closed doors. Since corruption investigation is a politically sensitive issue, governments are often hesitant to do so, because either it may reveal their incapability in disciplining their agencies, or it may reveal the government's own involvement in corrupt practices.<sup>76</sup>

It is also important to note that even when qualitative research has been used to collect qualitative data, such as from observations, interviews and documentary evidence,<sup>77</sup> governments' hesitation in releasing/compiling such data means that there is still no official database or any concrete attempt to classify different types of corrupt practices as they pertain to trafficking. For this reason, even though a variety of different sources, such as NGO reports, official statistics, newspaper articles and surveys have demonstrated findings on corruption by state officials; information is still scarce.

In recent years, however, the subject of human trafficking has received considerable attention, helping to transform this sensitive issue (corruption) from being a taboo.<sup>78</sup> This opening has led to additional international and regional documents, as well as international jurisprudence, which have further confirmed the undeniable link between human trafficking and corruption. Such literature includes but is not limited to the *Brussels Declaration*,<sup>79</sup> the *UN*

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<sup>75</sup> Louise Shelley, 'Restoring Trust for Peace and Security' (14<sup>th</sup> International Anti-Corruption Conference, Bangkok, Thailand, 10-13 November 2010), 2 <<http://iacconference.org.s3-website-eu-west-1.amazonaws.com/documents/LouiseShelleypeaceandsecurity14IACC.pdf>> accessed 23 July 2017.

<sup>76</sup> International Council on Human Rights Policy & Transparency International the Global Coalition Against Corruption, *Corruption and Human Rights - Making the Connection* (International Council on Human Rights Policy, 2009), 1 <[http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf)> accessed 23 July 2017.

<sup>77</sup> *ibid* 1.

<sup>78</sup> International Council on Human Rights Policy & Transparency International the Global Coalition against Corruption (n 76) 1.

<sup>79</sup> EU *Brussels Declaration on Preventing and Combating Trafficking in Human Beings* 29 November 2002, 14981/02 (Brussels Declaration).

*Trafficking Principles and Guidelines*,<sup>80</sup> the *UN Convention against Corruption*.<sup>81</sup> Furthermore, the *Organised Crime Convention* in Article 8 addresses trafficking-related corruption under the title 'criminalisation of corruption' by requiring states to take strong measures to criminalise all forms of corrupt practices when committed by public officials and to ensure that states' laws are harmonised so as to facilitate cooperation. In the *Rantsev v. Cyprus v. Russia* case, it was also stressed that states must regulate businesses that are used as a cover for trafficking, ensure that immigration rules do not encourage or facilitate trafficking, and take effective steps to protect the human rights of current and potential trafficking victims.<sup>82</sup> Some reports indicate that in certain areas, officials accept bribes in order to ignore violations, which in turn creates a safe haven for traffickers who take advantage of bribery and chronic poor law enforcement.<sup>83</sup> In the case of post-war Bosnia, court documents and UN international records obtained by Human Rights Watch indicate extensive police complicity and corruption, which made trafficking possible and highly profitable.<sup>84</sup> This is further illustrated in India, where local officials patronised brothels and protected brothel owners and traffickers, as Human Rights Watch reported. Brothel owners paid protection money and bribed police to prevent raids and to bail out underage girls who were arrested.<sup>85</sup> In Nepal, border police were bribed to allow traffickers to transport girls to India.<sup>86</sup> Court documents and UN internal records obtained by Human Rights Watch report that since the local police patronised brothels, this sent a message to the women that it would be futile to go to the police, as the police were on the side of the owners.<sup>87</sup> Likewise, in Cameroon, the local police commissioners blocked investigations

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<sup>80</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (E/2002/68/Add.1, OHCHR, 2002) <<http://www.refworld.org/docid/3f1fc60f4.html>> accessed 1 September 2017.

<sup>81</sup> *UN Convention Against Corruption* (2349 UNTS 41) done 31 October 2003, entered into force 14 December 2005 (Convention Against Corruption).

<sup>82</sup> *Rantsev v Cyprus v Russia* Application no 25965/04 (ECHR, 7 January 2010), para 285.

<sup>83</sup> Kalen Fredette, 'Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation' (2009) 17(101) *Cardozo Journal of International & Comparative Law* 101, at 122.

<sup>84</sup> Martina Vandenberg, 'Complicity, Corruption, and Human Rights: Trafficking in Human Beings' 34(3) *Case Western Reserve Journal International Law* 323, at 325.

<sup>85</sup> Human Rights Watch, 'Nepali Women and Girls Trafficked to India' <<https://www.hrw.org/legacy/about/projects/womrep/General-138.htm>> accessed 10 April 2017.

<sup>86</sup> Human Rights Watch, *Rape for Profit Trafficking of Nepali Girls and Women to India's Brothels* (vol 12, no 5, Asia, 1995) <<https://www.hrw.org/reports/1995/India.htm>> accessed 9 March 2017.

<sup>87</sup> Vandenberg (n 84) 323.

into child trafficking.<sup>88</sup> Furthermore, in early 2004, abuses by peacekeepers in the UN Mission in the Democratic Republic of the Congo made international headlines and were subsequently the subject of UN Security Council meetings and US congressional hearings: 'UN peacekeepers threatened UN investigators investigating allegations of sexual misconduct in Congo and sought to bribe witnesses to change incriminating testimony, a confidential U.N. draft report says.'<sup>89</sup>

In light of these examples, this thesis argues that corrupt practices by public officials undermine anti-trafficking policies in source, destination and transit countries.<sup>90</sup> It is important to note that when it comes to trafficking, the feeling of distance from the community of vulnerable people they are supposed to keep safe may facilitate the police's ability to commit corruption.<sup>91</sup> Additionally, police officers in certain countries may also be tempted to behave in a corrupt fashion due to a lack of adequate laws that could serve to counteract trafficking practices.<sup>92</sup> Thus, corruption by relevant officials can be one of the factors facilitating victims' movements within a country and across borders. Such actors include but are not limited to the police, customs officers, visa officers or embassy staff, immigration services, local officials, intelligence and security services, national or international armed forces, and individuals in the private sector, including travel agencies, airlines, the transportation sector, financial institutions and banks.<sup>93</sup> Corruption can take many forms, including bribery. For instance, bribes can be given to consular staff, airline personnel and immigration officers in order to make them smuggle trafficked victims across borders. Such a practice means turning a blind eye to traffickers' practices, which in turn leaves victims unidentified and unprotected. Officials can ignore or tolerate trafficking,

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<sup>88</sup> Transparency International - The Global Coalition against Corruption, 'Corruption and Human Trafficking' (2011) Working Paper 03/2011, 2  
<[http://issuu.com/transparencyinternational/docs/ti-working\\_paper\\_human\\_trafficking\\_28\\_jun\\_2011?mode=window&backgroundColor=%23222222](http://issuu.com/transparencyinternational/docs/ti-working_paper_human_trafficking_28_jun_2011?mode=window&backgroundColor=%23222222)> accessed 22 August 2016.

See also Nancy E Marion, *Federal Government and Criminal Justice* (1<sup>st</sup> ed, United States, Palgrave Macmillan, 2011).

<sup>89</sup> Colum Lynch, 'U.N. Sexual Abuse Alleged in Congo Peacekeepers Accused in Draft Report' *Washington Post* (16 December 2004) <<http://www.washingtonpost.com/wp-dyn/articles/A3145-2004Dec15.html>> accessed 10 April 2017.

<sup>90</sup> Jan Van Dijk & Fanny Klerx-Van Mierlo, 'Revisiting the Link between Corruption Prevalence and Implementation' (2013) 7(2) *International Perspectives in Victimology* 1, at 3.

<sup>91</sup> Peter Bell & Mark Lauchs & Mitchell Congram, *Policing Transnational Organised Crime and Corruption* (1<sup>st</sup> ed, Palgrave Macmillan, 2013), 30.

<sup>92</sup> *ibid* 30.

<sup>93</sup> *ibid* 7.

as well as participate in or organise trafficking via corrupt practices. Thus, unless countries have a collective response to combat trafficking and a well-adjusted system to prevent its officials from taking part in corrupt practices, police - who may in fact themselves be involved in such corruption - cannot locate and close down routes for traffickers.<sup>94</sup>

Corruption is not the only motivating factor of trafficking crimes. Armed conflict and economic, social, political and legal factors are other major contributing factors, as detailed in the upcoming section.

#### 1.2.4.2 Trafficking in Armed Conflict

Trafficking in armed conflict is one of the major sources of contemporary human trafficking across the globe. Civilians face different types of danger in the living conditions created by armed conflict and its aftermath, such as poverty, chaos and displacement.<sup>95</sup> In the devastating fallout of armed conflict, people can become subjects of rape, assault and exploitation. In fact, it can be argued that in many regions of armed conflict civilians suffer more than armed combatants.<sup>96</sup> With an understanding that armed conflict is closely tied to human trafficking, this thesis will consider some examples of organ trafficking, sex trafficking and child recruitment in areas affected by armed conflict.

In the Security Council's 7442<sup>nd</sup> meeting, the following was addressed:

Because war is not just the clinical fulfilment of some military or strategic objective; war, in the killing zone, often means a gruesome showcasing of human cruelty, for reasons we still do not yet properly understand. Why does it have to be violent to civilians and non-combatants?<sup>97</sup>

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<sup>94</sup> Sally Ramage, 'Tackling the Trafficking of Women and Children: A Report from the Capita Anti-People Trafficking Conference' (2006) *Criminal Law* 162, at 166.

<sup>95</sup> Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24(2) *International Journal Refugee Law* 181, at 181.

<sup>96</sup> See Samuel V Jones, 'Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (2010) *Utah Law Review* 1143.

<sup>97</sup> OHCHR News & Events, 'Security Council Briefing By Zeid Ra'ad Al Hussein High Commissioner For Human Rights On Small Arms: The Human Cost of Illicit Transfer, Destabilising, Accumulation and Misuse of Small Arms and Light Weapons, 13 May 2015 New York' <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15957&LangID=E>> accessed 13 August 2017.

Indeed for instance, after the 2003 Iraq invasion, civilians were vulnerable to trafficking because of several coercive factors, such as economic hardship, persecution and terrorism.<sup>98</sup> Thus, Iraq became a source of human trafficking victims who were transported to neighbouring countries.<sup>99</sup>

In February 2015, Iraqi Ambassador Mohamed Alhakim requested the UN Security Council to investigate the deaths of 12 doctors in Mosul, Iraq, claiming that they were killed by Isis after refusing to remove organs from dead bodies.<sup>100</sup> It was also reported by a former Isis prisoner that doctors of Isis were ‘harvesting healthy prisoners’ [organs] and using them as a living blood bank’.<sup>101</sup> Those doctors ‘were forced to remove organs during or immediately following the executions of [Isis] prisoners of war, which included Iraqi people across religious and ethnic divides: Sunni, Shia, Christian and Turkmen.’<sup>102</sup> The UN special convoy handling Iraq declared that such claims would be investigated, especially considering the US State Department’s statement indicating ‘no reason to doubt’ reports about organ trafficking committed by Isis, and fatwas branded by Isis sent over Twitter to inform Isis combatants.<sup>103</sup> In this regard, Scheper-Hughes, for example, has concluded that fresh kidneys from ‘the brain dead or from those executed with the assistance of trained organ harvesters [were] the blood diamonds of illicit and criminal trafficking.’<sup>104</sup>

War also stimulates trafficking of women and girls, as wartime conflict breeds ‘an obsession with sex in a community of men (...) deprived of usual social and

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<sup>98</sup> Amal Sakr, ‘Iraq a Hotbed of Human Trafficking’ *Al Monitor Iraq Pulse* (20 January 2014) <<http://www.al-monitor.com/pulse/originals/2014/01/iraq-human-trafficking-absence-law.html#>> accessed 12 July 2016.

<sup>99</sup> *ibid.*

<sup>100</sup> Ray Sanchez, ‘United Nations Investigates Claim of ISIS Organ Theft’ *CNN* (New York, 19 February 2015) <<http://edition.cnn.com/2015/02/18/middleeast/isis-organ-harvesting-claim/>> accessed 6 December 2016.

<sup>101</sup> Jake Burman, ‘ISIS ‘Doctors’ Harvesting Healthy Prisoners’ ORGANS and Using Them As Living Blood Bank’ *Sunday Express* (1 October 2015) <<http://www.express.co.uk/news/world/609158/ISIS-harvest-organs-Doctors-Escape-Abo-Rida-Syria-Terrorism-Surgeons>> accessed 3 February 2017.

<sup>102</sup> Nancy Scheper-Hughes, ‘Terrorist Necropolitics: Allegations of Organ Theft of Executed Captives by ISIS Through An Anthropological Perspective’ (*Harvard International Review*, 28 July 2015) <<http://hir.harvard.edu/terrorist-necropolitics-allegations-of-organ-theft-of-executed-captives-by-isis-through-an-anthropological-perspective/>> accessed 15 September 2016.

<sup>103</sup> *ibid.*

<sup>104</sup> Nancy Scheper-Hughes, ‘Human Traffic: Exposing the Brutal Organ Trade’ (*New Internationalist Magazine People, Ideas and Action for Global Justice*, 1 May 2014) <<https://newint.org/features/2014/05/01/organ-trafficking-keynote/>> accessed 10 March 2017.

emotional outlet.’<sup>105</sup> As Mary Beard and Virginia Woolf stated, misogyny has been infused in militaristic discourse.<sup>106</sup> In Bosnia, for example, a 26-year-old mother of two was raped daily, and subjected to the trauma of physical and psychological torture: ‘Look at how many children you can have. Now you are going to have our children. You are going to have our little Chetniks’; the Chetniks shouted at young Muslim women who were held with their infants, as one survivor narrated.<sup>107</sup> Related examples of the sexual exploitation of women and girls in armed conflict are considered in Chapter III, as they pertain to the slavery/trafficking analysis. Such contemporary incidents can be understood as either ‘slavery’ or ‘trafficking’, leading to a definitional quagmire. Thus it is not easy to distinguish the two terms without discussing their overlapping aspects and how they are each regulated under international law.

Recently, the Security Council drew attention to the impact of trafficking in armed conflict on women and children, considering their vulnerability to sexual and gender-based violence.<sup>108</sup> The Security Council expressed its intention of addressing this ‘impact, including, as appropriate, in the context of its Working Group on Children and Armed Conflict, within its mandate, and in the framework of its agenda to prevent and address sexual violence in armed conflict.’<sup>109</sup>

Demand for young people for illicit purposes is high in times of armed conflict, and is not limited to sexual exploitation. Children are also used as child soldiers, camel jockeys, for begging, or to work on construction sites and plantations. Traffickers find means to exploit the desperation of vulnerable children who are in fact already affected the most by the violence that prevails during and after armed conflict.<sup>110</sup> It should be added that child trafficking in conflict is more complex than it seems due to multidisciplinary human rights law and

<sup>105</sup> Joshua S Goldstein, *War and Gender How Gender Shapes the War System and Vice Versa* (1<sup>st</sup> published, Cambridge University Press, 2001), 333.

<sup>106</sup> *ibid* 371.

<sup>107</sup> Robert Fisk, ‘The Rapes Went on Day and Night’ *The Independent* (8 February 1993) <<http://www.independent.co.uk/news/world/europe/bosnia-war-crimes-the-rapes-went-on-day-and-night-roberrfisk-in-mostar-gathers-detailed-evidence-of-the-systematic-sexual-assaults-on-muslim-women-by-serbian-whiteeagle-gunmen-1471656.html>> accessed 3 February 2017.

<sup>108</sup> UN Meetings Coverage & Press Release, ‘(PM) Security Council Presidential Statement Says Human Trafficking Might Constitute War Crimes, as Members Consider Issue for First Time’ (16 December 2015) <<https://www.un.org/press/en/2015/sc12165.doc.htm>> accessed 23 July 2017.

<sup>109</sup> *ibid*.

<sup>110</sup> Harriet Sherwood, ‘Unaccompanied Young Refugees in Europe at Risk from Criminal Gangs’ *The Guardian* (Madrid, 1 November 2015) <<http://www.theguardian.com/world/2015/nov/01/unaccompanied-young-refugees-europe-traffickers>> accessed 6 March 2016.

development issues, including poverty and population displacement.<sup>111</sup> Usually, children are recruited or kidnapped by armed militias and used as suicide bombers or human shields, while ‘[o]thers are compelled to work as porters, cooks, guards and messengers, or are forced to commit crimes, such as looting and physical and sexual violence’.<sup>112</sup> Zainab Bangura, the former UN Special Representative of the Secretary General for Sexual Violence in Conflict, reported that ‘she ha[d] seen a ‘price list’ for child slaves that ha[d] been circulated amongst Isis fighters in Syria and Iraq.’<sup>113</sup> In this statement, the exploitation of children in this region is described as ‘slavery’, whereas ‘trafficking’ is said to constitute instances when parents tried to get their children away from a situation in which they could be sold for their organs. As mentioned, a comparative analysis of ‘trafficking’ versus ‘slavery’ appears in Chapter III, using contemporary examples.

In most cases, child trafficking in armed conflict occurs through recruitment of children as soldiers. Trafficking for the purpose of using children as soldiers is also a form of ‘mind trafficking,’<sup>114</sup> because, through manipulation tactics imposing the dichotomy of ‘kill or be killed’, these children become empty shells full of acquired dispositions, beliefs, and memories.<sup>115</sup> Child soldiers are trained to be fearless, and to become killing machines. They kill, maim and dismember their own friends and relatives, and are often under the influence of drugs to help remove their inhibitions.<sup>116</sup>

*Article 3(a) of the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* stresses that forced or

<sup>111</sup> Sandrine Valentine, ‘Trafficking of Child Soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict’ (2003) 9 *New England Journal International & Comparative Law* 109, at 109.

<sup>112</sup> OHCHR News & Events, ‘Statement by Maria Grazia Giammarinaro Special Rapporteur on Trafficking in Persons, Especially Women and Children at the 71st Session of the General Assembly’ (New York, 28 October 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20793&LangID=E>> accessed 23 July 2017.

<sup>113</sup> Faith Karimi & Greg Botelho, ‘ISIS Putting Price Tags on Children, U.N. Says’ *CNN* (6 February 2015) <<http://edition.cnn.com/2015/02/06/world/isis-children-torture/>> accessed 15 March 2016.

<sup>114</sup> Ayesha Ahmad, ‘Mind Trafficking: Child Soldiers in Africa’ *The Human Trafficking Project* (2 July 2008) <<http://www.traffickingproject.org/2008/07/mind-trafficking-child-soldiers-in.html>> accessed 26 March 2017.

<sup>115</sup> Zeno Vendler, ‘Understanding People’ in Richard A Shweder & Robert A Levine (eds), *Culture Theory: Essays On Mind, Self, And Emotion* (1<sup>st</sup> published, Cambridge University Press, 1984), 211.

<sup>116</sup> Susan Tiefenbrun, ‘Child Soldiers, Slavery and the Trafficking of Children’ (2007) 31(2) *Fordham International Law Journal* 415, at 425.

compulsory recruitment of children for use in armed conflict is ‘one of the worst forms of child labour’.<sup>117</sup> Child soldiers are mainly recruited at the age of 15, but some are recruited even earlier,<sup>118</sup> despite the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, also known as OPAC (2000) prohibiting the conscription and participation of children under the age of 18 in hostilities (Articles 1 and 2).<sup>119</sup> Further examples of children in armed conflict include Burundi during the conflict between Tutsi and Hutu dominated opposition groups; Colombia, where children were recruited by the armed opposition group FARC (the Revolutionary Armed Forces of Colombia—People’s Army); Uganda, where the LRA (the Lord’s Resistance Army) committed atrocities against children; and Rwanda, where over 20,000 children engaged in the hostilities.<sup>120</sup> In 2014, UNICEF reported that Syria was one of the most dangerous places in the world to be a child, and approximately one in ten Syrian refugee children in the region were engaged in child labour or/and forcibly recruited as child soldiers,<sup>121</sup> even though Syria had already enacted anti-human trafficking legislation.<sup>122</sup> In the current crisis in Syria, Isis has exploited children as combatants or in supporting servitude roles: as spies, executioners, preachers, soldiers, suicide bombers, and sex slaves, as well as veiling them and keeping them indoors.<sup>123</sup> Such vulnerable children are also at risk of being kidnapped to harvest their organs (organ trafficking) and then returned to their families in Damascus.<sup>124</sup>

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<sup>117</sup> ILO *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* C182, 87<sup>th</sup> ILC session 17 Jun 1999, entered into force 19 November 2000 (Worst Forms of Child Labour Convention).

Similarly, the CRC addresses protection of children from child military recruitment and participation in armed conflict. *Convention on the Rights of the Child* (1577 UNTS 3) done 20 November 1989, entered into force 2 September 1990 (CRC), art 38.

<sup>118</sup> Valentine (n 111) 119.

<sup>119</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (A/RES/54/263) done 25 May 2000, entered into force 12 February 2002 (OPAC).

<sup>120</sup> Valentine (n 111) 126.

<sup>121</sup> Fahdah Fahd Al Saud, ‘Children’s Rights: Syrian Refugee Camps, Childhood Under fire?’ (2015) 8 *Journal of Politics & Law* 228, at 232.

<sup>122</sup> See Mohamed Y Mattar, ‘Human Rights Legislation in the Arab World: A Case of Human Trafficking’ (2011) 33(1) *Michigan Journal of International Law* 101.

<sup>123</sup> James Cockayne & Summer Walker, ‘Fighting In Conflict Human Trafficking 10 Ideas for Action by the United Nations Security Council’ (2016) United Nations University Workshop Report, 8 <<https://unu.edu/fighting-human-trafficking-in-conflict>> accessed 15 May 2017.

<sup>124</sup> Beri Mohammed, ‘Organ Trafficking Emerges in Syria’s Damascus’ *Ara News* (6 April 2015) <<http://aranews.net/2015/04/organ-trafficking-emerges-in-syrias-damascus/>> accessed 8 November 2015.

In summary, this section has demonstrated some major contemporary incidents of trafficking crimes as they pertain to times of conflict, notably organ trafficking, sex trafficking and recruitment of child soldiers. The goal has been to demonstrate how armed conflict stands as one of the major root causes of human trafficking. The following section explains other key systematic issues pertaining to economic, social, political and legal factors that enable traffickers' activities.

#### **1.2.4.3 Economic, Social, Political and Legal Factors as Reasons of Trafficking**

Human trafficking is not only a moral problem, it also reveals many inter-related economic, social, legal and political problems that lead to its global proliferation. Case in point, the political challenges in Egypt between 2009 and 2014 brought suffering not only to its own people, but also to hundreds of African refugees who in wanting to immigrate to Israel ended up as hostages on the Sinai Peninsula, becoming trapped by traffickers.<sup>125</sup> The 2014 Human Rights Watch Report stated that since mid-2010, Sudanese traffickers have been kidnapping Eritreans in Eastern Sudan and selling them to Egyptian traffickers in Sinai in order to extort large sums of money from the victims' relatives.<sup>126</sup> In Europe, these incidences were first identified by Father Zerai Mussie, a Rome-based Catholic priest of Eritrean descent, who had been contacted by hostages in Sinai who were asking for help in the collection of ransom for their release. He addressed the problem at a hearing in the European Parliament in Brussels on 29 November 2010.<sup>127</sup>

Further, another contributing factor to increased trafficking is certain states' ineffective policies which end up opening the door for such a practice. For example, in some countries, such as UK, trafficked persons are treated as illegal

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<sup>125</sup> Human Rights Watch, *"I Wanted to Lie Down and Die" - Trafficking and Torture of Eritreans in Sudan and Egypt* (Human Rights Watch, 2014) <<http://www.refworld.org/docid/52fe17884.html>> accessed 13 August 2017.

<sup>126</sup> Rachel Humphris, *Refugees and the Rashaida: Human Smuggling and Trafficking from Eritrea to Sudan and Egypt* (Human Rights Watch, USA, 2013) <[https://www.hrw.org/sites/default/files/reports/israel0914\\_ForUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/israel0914_ForUpload_1.pdf)> accessed 22 August 2016.

<sup>127</sup> Mirjam van Reisen & Conny Rijken, 'Sinai Trafficking: Origin and Definition of a New Form of Human Trafficking' (2015) 3(1) *Social Inclusion* 113, at 114.

aliens or criminals.<sup>128</sup> Consequently, victims are thus more likely to be recycled into other forms of trafficking or criminality.<sup>129</sup> Victims can find themselves arrested, deported and unprotected in the face of further threats.<sup>130</sup> The case of Thai fishing vessels in contemporary time is a good example of how states' policies create a gateway for traffickers. As such, the EU has called Thailand a 'non-cooperating' country because of its poor monitoring of fishing vessels.<sup>131</sup> Up to sixty percent of human trafficking victims in the country have witnessed a murder by boat captains.<sup>132</sup> According to the UN Inter-Agency Project on Human Trafficking (UNIAP), for most men working on the boats, beatings and killings are a regular part of their lives at sea.<sup>133</sup>

In relation to the effect of state policies pertaining to trafficking, in most cases the state is an additional culprit to the employer, pimp or trafficker in denying access to basic social rights, including but not limited to necessary medical treatment. Even if traffickers themselves did not deny access to certain basic rights, the state might very well do that for them.<sup>134</sup> Furthermore, it is important to note that in seeking to prevent human trafficking, it matters not only what governments do, but also how they do it in terms of the options and punishments available to them.<sup>135</sup> For instance, migrant workers without papers have to be protected by states against exploitation, as was ruled in a recent case by the European Court of Human Rights in favour of 42 Bangladeshis with undocumented status. The Court ordered the Greek state to pay damages of up

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<sup>128</sup> Paul Peachey, 'Slavery Victims Are Being Jailed for Crimes They Were Forced to Commit, Warns Anti-Slavery Tsar' *Independent* (18 October 2015) <<http://www.independent.co.uk/news/uk/crime/slavery-victims-are-being-jailed-for-crimes-they-were-forced-to-commit-warns-anti-slavery-tsar-a6698996.html>> accessed 22 August 2016.

<sup>129</sup> Vandenberg (n 84) 329.

<sup>130</sup> *ibid* 329.

<sup>131</sup> Dean Irvine & Saima Mohsin & Kocha Olarn, 'Seafood from Slavery: Can Thailand Tackle the Crisis in Its Fishing Industry?' *CNN* (17 May 2015) <<http://edition.cnn.com/2015/05/11/asia/freedom-project-thailand-fishing-slave-ships/>> accessed 30 May 2015.

<sup>132</sup> Adam Janofsky, 'Thailand: The Overfishing Underclass' *Pulitzer Center on Crisis Reporting* (31 August 2012) <<http://pulitzercenter.org/reporting/thailand-overfishing-human-trafficking-shrimp-exporting-aquaculture>> accessed 18 September 2016.

<sup>133</sup> *ibid*.

<sup>134</sup> Bridget Anderson & Rutvica Andrijasevic, 'Sex, Slaves, and Citizens: The Politics of Anti-Trafficking' (2008) 40 *Soundings* 135, at 142.

<sup>135</sup> Jonathan Todres, 'Taking Prevention Seriously: Developing a Comprehensive Response to Child Trafficking and Sexual Exploitation' (2010) 43(1) *Vanderbilt Journal of Transnational Law* 1, at 28.

to €16,000 (£13,750) each for having ‘failed in its obligations to prevent the situation of human trafficking.’<sup>136</sup>

In other cases, one of the main challenges in addressing the problem of trafficking is deception of potential ‘migrants’ over the conditions to be expected in the place of destination.<sup>137</sup> Restrictions on working permission in destination countries and people’s lack of knowledge about such restrictions before arrival give rise to practices such as *kafala*, which creates opportunities for employers to take away workers’ passports and traffic them for forced labour.<sup>138</sup> Due to such visa restrictions, migrants and particularly refugees are rendered more vulnerable to exploitative employment relationships. As such certain migrants’ lack of status when residing within states without a visa can cause trafficking for forced labour exploitation, for instance.

In some cases, free waged workers face the choice between starving and undertaking difficult and dangerous work, which they would not otherwise agree to perform.<sup>139</sup> Nelken narrates the case of a Chinese worker who was kept in a basement with no air circulation, out of sight, for a lengthy period. The judge in this case asked this worker what it was like to live day by day in those conditions, and he described it as an impossible way of living. After hearing his experience, the judge asked him how he could survive such life-threatening circumstances. His reply was nothing but a summary of the discussed root causes of human trafficking: ‘It is still better than living in China.’<sup>140</sup> Likewise, in Thailand, the notion of ‘need’, in whatever circumstances or region, plays an important role in driving the human trade. As victims already suffer from poverty and its resulting difficult living conditions, they are left with little choice but to tolerate the abuse.

<sup>136</sup> Helena Smith, ‘Bangladeshi Fruit Pickers Shot at by Greek Farmers Win Human Rights Case’ *The Guardian* (30 March 2017) <<https://www.theguardian.com/world/2017/mar/30/bangladeshi-strawberry-pickers-shot-at-by-greek-farmers-win-european-rights-case>> accessed 27 April 2017; Vladislava Stoyanova, ‘Irregular Migrants and the Prohibition of Slavery, Servitude, Forced Labour & Human Trafficking under Article 4 of the ECHR’ (*EJIL: Talk!*, 2017) <<https://www.ejiltalk.org/irregular-migrants-and-the-prohibition-of-slavery-servitude-forced-labour-human-trafficking-under-article-4-of-the-echr/>> accessed 27 April 2017.

<sup>137</sup> UNODC, ‘Abuse of a Position of Vulnerability and Other “Means” Within the Definition of Trafficking in Persons’ (n 61).

<sup>138</sup> Pardis Mahdavi & Christine Sargent, ‘Questioning the Discursive Construction of Trafficking and Forced Labor in the United Arab Emirates’ (2011) 7(3) *Journal of Middle East Women’s Studies* 6, at 11.

<sup>139</sup> Julia O’Connell Davidson, ‘New Slavery, Old Binaries: Human Trafficking and the Borders of “Freedom”’ (2010) 10 (2) *Global Networks a Journal of Transnational Affairs* 244, at 246.

<sup>140</sup> Nelken (n 49) 483.

Human trafficking is rooted in economic, social, political and legal factors in its occurrence and fuelled by trafficked individuals' anxiety, fear and uncertainty in its maintenance. It is the coalescing of these factors that creates lucrative opportunities for traffickers.<sup>141</sup> For instance, some victims of domestic worker exploitation are terrified of their captors as well as law enforcement officials, due to negative experiences with law enforcement and other government officials in their countries of origin. Even if such victims do reach the police, as Gretchen Sodurland notes in her article, any resulting rescue operation may very well lead to arrest, abuse and even deportation.<sup>142</sup>

The root causes of human trafficking connect to a range of problems that have grown alongside increasing globalisation and the expansion of modern, liberal societies.<sup>143</sup> Furthermore, another side effect of 'globalization' has been the expansion of 'sex tourism', including by paedophiles travelling opportunistically worldwide. Furthermore, human trafficking has also expanded due to decreasing transportation costs.<sup>144</sup> 'Consumers' continuously seek cheap goods and services, and this is no exception when it comes to paedophiles or anyone else seeking to buy sex- the availability and accessibility of sexual benefit provides an ample supply which in turn fuels the demand.<sup>145</sup>

The complexity and multiplicity of the root causes of human trafficking mean that the response to such an issue must also be complex and look at multiple perspectives. In addition, these demonstrated root causes of human trafficking also form the foundation for the main argument of this thesis that human trafficking is a growing contemporary issue as it is continuously being fed by certain root causes. As such, yet another important factor augmenting contemporary trafficking practices connects to the current refugee crisis. In this regard, the ongoing global refugee crisis thus can be addressed as another one of

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<sup>141</sup> Luz Estella Nagle, 'Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude' (2008) 26(1) *Wisconsin International Law Journal* 131, at 146.

<sup>142</sup> See Gretchen Soderlund, 'Running from the Rescuers: New U.S. Crusades against Sex Trafficking and the Rhetoric of Abolition' (2005) 17(3) *National Women's Studies Association Journal* 64.

<sup>143</sup> Julia O'Connell Davidson, 'Modern Slavery': A Response to Rahila Gupta' *Open Democracy* (10 February 2016) <<https://www.opendemocracy.net/beyondslavery/julia-oconnell-davidson/modern-slavery-response-to-rahila-gupta>> accessed 1 September 2016.

<sup>144</sup> Louise Shelley, *Human Trafficking - A Global Perspective* (1<sup>st</sup> published, Cambridge University Press, 2010), 3.

<sup>145</sup> *ibid* 3.

the main causes of human trafficking.<sup>146</sup> For instance, Lebanon has witnessed a rise in child labour due to refugees who have fled the war in neighbouring Syria.<sup>147</sup> Refugees who are separated from their economic and social support struggle with limited opportunities to provide for their families, making them highly susceptible to deception and exploitation. Once they reach their destination states, such refugees can be deported due to their illegal status, causing re-victimisation within their home states. This faulty cycle makes it easier for traffickers to offer the trap of ‘a better life abroad’ to people desperate to get out of their current situation.<sup>148</sup>

Evidently, it can be concluded that the major root causes that are addressed in this chapter are interrelated in one way or another. One such example would be the connection between the Russian-Afghan war of 1979 with poverty among women and children in the following years. Afghanistan has been a scene of continuous conflict since its invasion by the Soviet Union, such that the war caused many women to lose their husbands.<sup>149</sup> These widows suffered social exclusion, and were no longer considered desirable by men. They were therefore not qualified to marry again, leaving them no option but to become beggars, consequently affecting the future of their children, who often had to follow suit.<sup>150</sup> As such, a UNICEF estimation of the ‘percentage of children aged 5-14 suggests that at least 30% were involved in illegal child labor in 2011’.<sup>151</sup>

This chapter has shown how living through economic factors such as poverty, social factors such as exclusion, and political factors such as faulty state policies can accumulate to have devastating effects on individuals, leaving them vulnerable to trafficking. It is important to understand the notion of trafficking together with its root causes comprehensively, in order to define and combat

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<sup>146</sup> Human Rights Watch, ‘Europe’s Refugee Crisis- An Agenda for Action’ (16 November 2015) <<https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>> accessed 24 February 2016.

<sup>147</sup> ILO, ‘ILO Response: Syrian Refugee Crisis’ <<http://www.ilo.org/beirut/areasofwork/syrian-refugee-crisis/lang--en/index.htm>> accessed 9 August 2016.

<sup>148</sup> Kevin Hyland, ‘There’s Only One Group Who Benefits From The Refugee Crisis: Human Traffickers’ *Independent* (25 May 2016) <<http://www.independent.co.uk/voices/theres-only-one-group-benefitting-from-the-refugee-crisis-human-traffickers-a7048436.html>> accessed 22 August 2016.

<sup>149</sup> Elif Erdogan et al, ‘Breaking the Stigma against Child Sex Trafficking and Bacha Bazi in Afghanistan’ (2016) <<https://sites.psu.edu/raymondfriendportfolio/wp-content/uploads/sites/49680/2016/04/Final-Draft-Bacha-Bazi.pdf>> accessed 21 June 2017.

<sup>150</sup> *ibid* 6.

<sup>151</sup> *ibid* 6.

such a complex phenomenon, which can be seen as a transnational crime. The complexity of human trafficking and the major reasons that contribute to this complexity are further explained in the following section.

### 1.2.5 Complexity of Human Trafficking

Human trafficking is a multifaceted phenomenon: it constitutes a transnationally coordinated and continually morphing chain of activities.<sup>152</sup> It involves international human rights law and it is an issue of migration and transnational organised crime. Furthermore, trafficking of persons comes in many forms, including forced labour, sex trafficking, migrant workers' debt bondage and forced child labour, which is why it is enmeshed with a host of other transnational movements and criminal activities. The latter also means that although past campaigns have placed a strong emphasis on trafficking of women for the purpose of sexual exploitation - as this issue is indeed sensational, alluring and fetishistic<sup>153</sup> - in fact, the borders of trafficking extend to many other forms of non-sexual exploitation. This thesis argues that although the complexity of trafficking derives from its multifaceted nature, at its core its complexity is 'formed' by its overlapping aspects with related phenomena, particularly slavery and migrant smuggling, which is explained in depth in Chapter III. Considering trafficking as a multifaceted phenomenon, its complexity is shaped through constant slippage between slavery and illegal immigration.<sup>154</sup> For instance, after the adoption of the Trafficking Protocol in 2000, the term human trafficking has been used by government officials, international organisations, NGOs and the media interchangeably with many other phrases connected to the above-mentioned phenomena.<sup>155</sup> Due to the 'fuzzy and unworkable distinctions between trafficking, smuggling and migration' in the context of international law, such links between human trafficking and other illegal movements have conspired to complicate the

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<sup>152</sup> See Pinghua Sun & Yan Xie, 'Human Trafficking and Sex Slavery in the Modern World' (2014) 7 *Albany Government Law Review* 91.

<sup>153</sup> Dina Francesca Haynes, 'The Celebritisation of Human Trafficking' (2013) 653 *The ANNALS of American Academy of Political and Social Science* 25, at 25.

<sup>154</sup> Anderson & Andrijasevic (n 134) 138.

<sup>155</sup> Gallagher, 'Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labour and Debt Bondage' (n 1) 397.

understanding of who counts as a trafficked person.<sup>156</sup> Thus, the line in the sand between ‘trafficked’ and ‘not trafficked but just-the-regular-kind-of-exploitation of migrants’ is blurred.<sup>157</sup> This is due to the different interpretations of legal rules by some scholars and international jurisprudence on who is trafficked or who is not trafficked but exploited as a working migrant.<sup>158</sup> Such related issues around ‘trafficking versus smuggling’ are also discussed in Chapter III. Similarly, as is explained in Chapter III, human trafficking is often referred to as modern-day slavery. Note that ‘it has only been a little more than a decade since the international community committed to confront what Kevin Bales (2007) and Kara (2009), among others, have referred to as modern-day slavery (the “oldest oppression”)’.<sup>159</sup> In addition, trafficking is also regarded as an exemplar of the globalisation of crime, as a gross human rights violation or as synonymous with prostitution and as a human rights issue.<sup>160</sup> This is why criminologists Farrell and Pfeffer, who looked at trafficking case files in 12 US counties, concluded that the ‘local police [were] confused about what human trafficking [was]’.<sup>161</sup> Indeed, it is not an easy task to distinguish human trafficking from other exploitative acts, considering the multifaceted nature of this phenomenon. The problem is that unless it is determined whether or not an act can be regarded as trafficking, victims cannot be identified and protected properly. Thus, another one of the main objectives of this thesis is to create the opportunity for such identification and protection by providing the right definitions. Considering the importance and the linkage of victim protection to the complexity of human trafficking, in Chapter III the phenomena of smuggling and slavery are explained and linked to the issue of definitional analysis under international law.

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<sup>156</sup> Bridget Anderson & Julia O’Connell Davidson, ‘Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study’ (2003) 15 *IOM Migration Research Series* 5, at 7.

<sup>157</sup> Anderson & Andrijasevic (n 134) 141.

<sup>158</sup> UN News Centre, ‘Migrant Workers in the Middle East Often Exploited, UN Reports at Human Trafficking Conference’  
<[http://www.un.org/apps/news/story.asp?NewsID=44604#.Vscjq\\_mLSig](http://www.un.org/apps/news/story.asp?NewsID=44604#.Vscjq_mLSig)> accessed 1 July 2016.

<sup>159</sup> Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (n 6) 1.

See also Kevin Bales & Ron Soodalter, *The Slave Next Door Human Trafficking and Slavery in America Today, with a New Preface* (University of California Press, 2009); Anna Jonsson (ed), *Human Trafficking and Human Security* (Routledge Taylor & Francis Group, 2009); Bales, *Disposable People: New Slavery in the Global Economy* (n 42).

<sup>160</sup> Maggy Lee, ‘Contested Definitions of Human Trafficking’ in *Trafficking and Global Crime Control* (1<sup>st</sup> published, Sage Publications, 2011), 20.

<sup>161</sup> Amy Farrell & Rebecca Pfeffer, ‘Policing Human Trafficking: Cultural Blinders and Organisational Barriers’ (2014) 653 (1) *The ANNALS of the American Academy of Political and Social Science* 46, at 46.

## 1.3 Research Objectives and Methodology

### 1.3.1 Research Objectives

This thesis sets out to investigate one overarching question: whether the international legal framework applicable to human trafficking is appropriate to deal with the modern-day phenomenon of trafficking in its various occurrences. This thesis's research question is also motivated by the following questions: 'where is justice?'; '[b]ut there is one thing I couldn't understand. What had happened to us? How did we start selling our own girls? How did we make profit from deceit and violence?'<sup>162</sup> In seeking to answer the research question, this thesis proceeds in five steps (chapters) and directs its focus on some major central challenges detailed in the following paragraphs.

In the first chapter, this thesis gave a background of human trafficking, as it currently exists as a complex, confusing modern-day phenomenon.

In the second chapter, this thesis will look at the international legal framework applicable to human trafficking. This chapter initially traces the genesis of an applicable legal framework by looking at the emergence and development of human trafficking as a concept of public international law. Later, it considers a set of issues and contemporary incidents linked to them in order to decide whether the international legal rules are appropriate to deal with new challenges.

On this basis, in the third chapter, this thesis looks at definitional issues around human trafficking as a central challenge. Even though international law defined human trafficking in 2000 under the Trafficking Protocol, its definition has not resolved the many definitional debates in terms of distinguishing 'trafficking' from related phenomena, particularly 'slavery' and 'migrant smuggling'.<sup>163</sup> This analysis aims to look at the definitional quagmire pertaining to human

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<sup>162</sup> UN Meetings Coverage & Press Releases, 'Security Council Condemns Human Trafficking in Strongest Terms, Unanimously Adopting Resolution 2331 (2016)' (20 December 2016) <<http://www.un.org/press/en/2016/sc12647.doc.htm>> accessed 24 April 2017.

See also Jonathan Todres, 'Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking' (2011) 89(2) *North Carolina Law Review* 447.

<sup>163</sup> Liz Kelly, *Fertile Fields: Trafficking in Persons in Central Asia* (International Organization for Migration, 2005), 69.

trafficking,<sup>164</sup> and to demonstrate how international law deals with the complex social phenomena involved, while considering contemporary challenges. In order to achieve this objective, this chapter seeks to address the following topics: how scholars, media and international judgements interpret international law definitions of trafficking, slavery and smuggling, particularly considering the resemblance between these acts. In other words, we seek to examine how the law deals with disentangling the phenomena of slavery and smuggling in comparison to trafficking, and whether it is done in a satisfactory way.

The reason for building the initial analysis on these three steps - anatomy of human trafficking, setting forth the legal framework of human trafficking and definitional analysis - is to discuss another major issue pertaining to trafficking in the next chapter, as the fourth step: the obligation of protection, which mainly looks at the importance of identification and non-criminalisation of trafficked victims. As will be discussed in regards to the definitional analysis of human trafficking, without defining such incidents, e.g., whether they constitute trafficking, slavery or smuggling, we cannot really know who is trafficked and who the victims are in need of protection. Initially, this chapter investigates whether any absolute profile of victims exists, especially considering human trafficking as a crime difficult to pin down.<sup>165</sup> It is a possibility to be avoided that victims are further hurt/victimised by certain misconceptions and thought practices around the concept of trafficking whereby people/institutions blame them for being trafficked, or for particular things they did/had to do while they were being trafficked. This stresses the idea of a doubled suffering, or compounded suffering, where the suffering of being trafficked is made worse/more complicated by the suffering caused by people's perceptions of or reactions to that crime/suffering.<sup>166</sup> Next, this chapter looks at the international legal rules to understand how/whether international law has been developed in ways that identify victims of human trafficking. Indeed, what matters to victims is not whether what they have gone through constitutes

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<sup>164</sup> ILO, 'Discussing The Legal Definitions of Human Trafficking, Forced Labour and Slavery' (A Discussion by Jean Allain, Anne Gallagher, Babu Mathew & Thiago Gurjao Alves Ribeiro, 8 July 2014) <<https://www.youtube.com/watch?v=4p8zLhea1Y>> accessed 19 October 2016.

See also Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7(1) *Albany Government Law Review* 112.

<sup>165</sup> Connor J Baer, 'A Firm Foundation a Defence of the UN Trafficking Protocol' (2012) 3 *Grove City College Journal of Law & Public Policy* 103, at 111.

<sup>166</sup> Luis CdeBaca, 'Successes and Failures in International Human Trafficking Law' (2011) 33 *Michigan Journal International Law* 37, at 39.

slavery, trafficking or falls under another legal description or label. No matter how trafficking is regulated under international law, traffickers are in it for money,<sup>167</sup> and victims are there to be exploited: 'they just happen to be human beings'.<sup>168</sup> Yet, as mentioned above, it remains essential to identify such practices, i.e., whether they constitute trafficking, in order to better assist and protect victims, because in each case 'the difference in terms of entitlements owned to the trafficked individual' would be substantial.<sup>169</sup> Case in point, in order to refer a person to a shelter, the police must be convinced that the evidence suggests that the person is a human trafficking victim.<sup>170</sup> Besides, in cases of being referred to a shelter, 'the statement of [human trafficking] victim is (...) the primary evidence to prove the guilt of the offender.'<sup>171</sup> Thus, states have to train their personnel to identify human trafficking victims in such a way as to not make any woman 'fallen' nor any man 'illegal', by recognising each individual's inalienable rights.<sup>172</sup> Linked to the issue of victim identification is the fact that many victims may be 'assumed' to be criminals first and foremost, such as prostitutes, beggars, thieves and so on. In these cases, this belief may be instilled by traffickers who tell their victims that authorities will charge them, are corrupt and not to be trusted.<sup>173</sup> Thus, victims are often told they will be arrested and either sent back or prosecuted if they are discovered.<sup>174</sup> Victims may fear being prosecuted for illegal entry or for offences, they may have been forced to commit.<sup>175</sup> Yet the fact is that victims of human trafficking are mostly 'forced' to violate the law rather than making an active choice, whether such crime is committing pickpocketing, theft, credit card and cheque fraud,

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<sup>167</sup> Ryszard Piotrowicz, 'THB in 2016 – Where are we, where have we been and where are we going?' (Keynote Speech, TRACE Workshop, 2016) <[http://trace-project.eu/wp-content/uploads/2016/03/TRACE-Stockholm\\_Piotrowicz.pdf](http://trace-project.eu/wp-content/uploads/2016/03/TRACE-Stockholm_Piotrowicz.pdf)> accessed 28 March 2017.

<sup>168</sup> *ibid.*

<sup>169</sup> Anne T Gallagher, *The International Law of Human Trafficking* (1<sup>st</sup> published, Cambridge University Press, 2010), 278.

<sup>170</sup> Daphna Hacker & Orna Cohen, 'The Shelters in Israel for Survivors of Human Trafficking' (2012) Research Report, 58 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2070787](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2070787)> accessed 6 July 2016.

<sup>171</sup> Annette Herz, 'Human Trafficking and Police Investigations' in Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (n 6), 133.

<sup>172</sup> CdeBaca (n 166) 41.

<sup>173</sup> UNODC – UN GIFT, 'Anti-Human Trafficking Manual For Criminal Justice Practitioners - Module 4: Control Methods in Trafficking in Persons' (New York, UN, 2009), 4 <[https://www.unodc.org/documents/human-trafficking/TIP\\_module4\\_Ebook.pdf](https://www.unodc.org/documents/human-trafficking/TIP_module4_Ebook.pdf)> accessed 19 April 2017.

<sup>174</sup> The Anti Trafficking Monitoring Group, *In The Dock. Examining the UK's Criminal Justice Response to Trafficking* (Anti-Slavery International for The Anti-Trafficking Monitoring Group, 2013).

<sup>175</sup> *ibid.* 4.

transporting drugs, or prostitution.<sup>176</sup> In such cases of status-related offences, it is important not to hold victims criminally responsible, only then can re-victimisation of trafficked persons be prevented and available protection given to them. Since the issues of identification and non-criminalisation of human trafficking victims are interrelated as central challenges of the obligation of protection, this chapter conducts its analyses around these two major subjects.

This thesis employs an approach of unfolding sequential layers pertaining to three major issues, namely the definitional quagmire and the identification and non-criminalisation of victims of human trafficking in the context of the obligation of protection. The aim is to conclude its analysis on international law around human trafficking in the last chapter, as the fifth step. The final chapter considers alignment of international human trafficking law and asks whether, based on the findings, international law around human trafficking is adequate for facing modern-day challenges. It also sets forth where current approaches are/are not in alignment with international law and what could/should be done to improve the situation.

### **1.3.2 Thesis Methodology**

This thesis, in order to address the issues detailed above and resolve the ensuing research questions, adopts a methodology which includes:

A critical analysis of the current international legal rules pertaining to human trafficking;

A desk review of relevant literature, including scholars' approaches and international jurisprudence in relation to human trafficking;

A survey of significant ongoing issues affecting human trafficking practices.

The thesis represents a legal analysis on human trafficking, employing comparative and socio-legal methods, and considering both law and practice as necessary.

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<sup>176</sup> See UNODC – UN GIFT, 'Anti-Human Trafficking Manual for Criminal Justice Practitioners - Module 4: Control Methods in Trafficking in Persons' (n 173).

## 2 The International Legal Framework Applicable to Human Trafficking

### 2.1 Abstract

The following chapter analyses the emergence of human trafficking as a concept within public international law and the ensuing genesis of an applicable legal framework seeking to address the issue. The discussion alludes to the various narratives that have shaped normative developments in this regard, and traces the progress of the relevant legal framework pertaining to human trafficking.<sup>1</sup>

### 2.2 Structure of International Human Trafficking Law

#### 2.2.1 First Steps towards Regulation of a New Phenomenon

Human trafficking has been at the centre of a variety of national and international responses, such that the face of human trafficking - what it looks like, how it is defined, who a trafficked person is - has evolved over time. In this context, the analysis in this section considers international law regulations in order to understand how and when human trafficking first became recognised within a legal framework, and how it was approached and regulated at the level of international law.

This thesis posits that the framework for international human trafficking law has been highly influenced by the international movement to abolish white slavery.<sup>2</sup> As is explored in more detail below, ‘trafficking’ relating to human beings ‘came into international use in the early 20th century in connection with white slavery: a term that was initially used to refer to forcible or fraudulent recruitment to prostitution’.<sup>3</sup> Indeed, the current understanding of human ‘trafficking has evolved out of a history of international legal mechanisms of addressing four key types of harm’: chattel slavery and later other forms of slavery and servitude; prostitution - in particular white slavery; labour violations; and organised

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<sup>1</sup> Anne T Gallagher, *The International Law of Human Trafficking* (1<sup>st</sup> published, Cambridge University Press, 2010), 55.

<sup>2</sup> *ibid* 55.

<sup>3</sup> *ibid* 13.

crime.<sup>4</sup> In this section, regulations pertaining to white slavery are set forth as the genesis of current international law to do with human trafficking.

The earliest uses of the term ‘human trafficking’ were confined to a very narrow and specific context, namely the sexual exploitation of white women. As such, in 1873, a report presented to the International Medical Congress called for an end to state regulation of prostitution through brothels.<sup>5</sup> Allain concludes that this attempted ban forms the origin of human trafficking in international law as it represents ‘an effort not to end prostitution but to uphold honour of women through suppression of the “white slave” trade’.<sup>6</sup> In addition, in 1877 the International Abolitionist Federation at Geneva brought further global attention to the effort to abolish state regulation of prostitution and the trafficking of women for prostitution.<sup>7</sup> Radhika Coomaraswamy, former UN Special Rapporteur on Violence against Women, phrased these early campaigns as follows: ‘anti-trafficking movements have been driven by perceived threats to the “purity” or chastity of certain populations of women, notably white women’.<sup>8</sup>

Furthermore, in 1899, the International Congress met to oppose white slavery.<sup>9</sup> Reformers in the congress perceived human trafficking as follows:

We want to destroy this traffic (...) Traffic consists of three parts; first, there is supply; second, there are traffickers; and third, there must be a demand (...) [E]verything that can be done (...) to improve women’s position (...) will cut off the supply (...) [S]trike at the supply, strike at the traffickers, but strike also at the demand for the victims.

The 1904 International Congress finally adopted the first international agreement to address trafficking; it aimed to suppress the white slave trade by directly addressing the trafficking of white women.<sup>10</sup> As such, in Articles 1 to 4, the 1904 *Agreement for the Suppression of White Slave Trade* covered situations in which women were forced and/or deceived into prostitution. One of the most

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<sup>4</sup> Cherif Bassiouni et al, ‘Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st century’ (2010) 81 *Revue Internationale de Droit Pénal* 417, at 418.

<sup>5</sup> Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2013), 341.

<sup>6</sup> *ibid* 341.

<sup>7</sup> Michael J Palmiotto (ed), *Combating Human Trafficking: A Multidisciplinary Approach* (CRC Press -Taylor & Francis Group, 2015), xviii.

<sup>8</sup> Allain (n 5) 341.

<sup>9</sup> Palmiotto (n 7) xviii.

<sup>10</sup> *ibid* xviii.

significant aspects of the latter agreement was its transnational nature, as demonstrated by it addressing cross-border prostitution.<sup>11</sup>

Further, in 1910 *the International Convention for the Suppression of the White Slave Traffic* was amended to regulate punishment for ‘procurers who assisted in trafficking girls under 20 years of age through threats, violence, or fraud’.<sup>12</sup>

References limiting ‘trafficking’ to white slavery were abandoned in 1927, as the problem was now seen in a wider scope due to new social understandings.<sup>13</sup> In order to address these gaps, in 1921 and then in 1933, the *International Convention for the Suppression of the Traffic in Women and Children* and the *International Convention for the Suppression of the Traffic in Women of Full Age* were adopted.

The 1921 Convention focused on combating trafficking through the prosecution of procurers, the licensing and supervising of employment agencies, and the protection of immigrant women and children.<sup>14</sup> The Convention fell short, however, ‘because it failed to contain measures for monitoring or enforcing international commitments and left states to determine implementation measures.’<sup>15</sup> Nonetheless, the 1921 Convention represented an overall improvement in many respects including recognising that women and children of any race could be trafficked, as opposed to it only being problematic with white women. This was a big step forward.<sup>16</sup>

The 1933 *Convention for the Suppression of the Traffic in Women of Full Age* further expanded trafficking prohibitions to include trafficking for all ‘sexual purposes’, including but not limited to prostitution.<sup>17</sup> Yet, the 1933 Convention

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<sup>11</sup> Allain (n 5) 342.

<sup>12</sup> Bassiouni et al (n 4) 417-91.

See *International Convention for the Suppression of the White Slave Traffic* (3 LNTS 278) done 4 May 1910, entered into force 8 August 1912.

<sup>13</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 14.

<sup>14</sup> See Bassiouni et al (n 4).

See *International Convention for the Suppression of Traffic in Women and Children* (9 LNTS 415) done 30 September 1921, entered into force 15 June 1922, amended by a Protocol approved by the General Assembly on 20 October 1947 (53 UNTS 13).

<sup>15</sup> Bassiouni et al (n 4) 438.

<sup>16</sup> Corin Morcom & Andreas Schloenhardt, ‘All about Sex?! The Evolution of Trafficking in Persons in International Law’ (2011) The University of Queensland Human Trafficking Working Group Research Paper, 13 <<https://law.uq.edu.au/files/4311/Evolution-of-Int-Law-relating-to-Trafficking-in-Persons.pdf>> accessed 24 July 2017.

<sup>17</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 58.

still had definitional limitations around gendered conceptions of trafficking victims:<sup>18</sup> it still defined trafficking as the transfer of women across nation-state borders for immoral purposes.<sup>19</sup> Trafficking was thus still first and foremost associated with the ‘immorality’ of prostitution.<sup>20</sup> Accordingly, neither the 1921 nor the 1933 treaty defined the many dimensions of trafficking/traffic, as they solely dealt with the coerced movement of women and girls abroad for the purpose of prostitution.<sup>21</sup> In addition, all the white slave traffic conventions applied only to recruitment and transportation process, and considered prostitution as a matter of internal jurisdiction, e.g., the 1904 Agreement and the 1910 Convention were gender and race biased, as they did not apply to males of any age or to non-Caucasian women and girls.<sup>22</sup>

Things began to change with the 1949 *International Convention for the Suppression of the Traffic of Persons and the Exploitation of the Prostitution of Others*.<sup>23</sup> The 1949 Convention took into account most of the previous major agreements relevant to the subject, which were thus consolidated into the new agreement. The 1949 Convention remained the major international covenant on trafficking for the next five decades, until the ratification of the Trafficking Protocol in 2000.<sup>24</sup> As such, the following section investigates the evolution of the regulation of trafficking from the beginning of the 1949 Convention until its current-day manifestation.

## 2.2.2 The Major Legal Architecture of Human Trafficking

### 2.2.2.1 Trafficking in International Human Rights Law

One of the additional protections offered by the 1949 Convention was its extended level of protection, which now included non-white women, since at

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See *International Convention for the Suppression of the Traffic in Women of Full Age (150 LNTS 431)* done 11 October 1933, entered into force 24 August 1934, amended by a Protocol approved by the General Assembly on 20 October 1947 (53 UNTS 13).

<sup>18</sup> Morcom & Schloenhardt (n 16) 14.

<sup>19</sup> *ibid* 14.

<sup>20</sup> *ibid* 11.

<sup>21</sup> *ibid* 14.

<sup>22</sup> *ibid* 13.

<sup>23</sup> See *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (96 UNTS 271) done 2 December 1949, entered into force 25 July 1951 (1949 Trafficking Convention).

<sup>24</sup> Anne T Gallagher, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations Publication, 2010), 19  
<[https://works.bepress.com/anne\\_gallagher/15/](https://works.bepress.com/anne_gallagher/15/)> accessed 24 August 2016.

that time in Europe, Asia and Africa, sexual exploitation began to be obvious. The Convention starts off by underlining the importance of valuing the human rights of trafficked victims by stating in its preamble that ‘prostitution and the accompanying evil of trafficking in persons for the purpose of prostitution [were] incompatible with the dignity and worth of the human person and endanger[ed] the welfare of the individual and the community’. Furthermore, the Convention posited ‘freedom’ as the birth right of every human being and extended the definition and conceptualisation of human trafficking while maintaining its focus on the sex industry.<sup>25</sup>

Nonetheless, the 1949 Convention came ‘under considerable and wide-ranging attack’, even though it survived as the only specialist treaty on human trafficking for more than half a century:<sup>26</sup>

Many human rights activists and States that operate systems of legalized, licensed, or otherwise regulated prostitution have criticized this instrument for not focusing sufficiently or solely on the more serious, coercive forms of sexual exploitation and for failing to distinguish between consensual and forced prostitution.

The 1949 convention ended up serving as the last official word on trafficking in international law until the adoption of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) in 1979.<sup>27</sup> The CEDAW prohibited all forms of trafficking of women, and obligated governments to do all that was in their power: ‘States Parties shall take all appropriate measures, including legislation, to suppress *all forms of traffic* in women and exploitation of prostitution of women’.<sup>28</sup> CEDAW put a new legal tool in women’s hands, empowering them to claim their right to equal treatment - including but not

<sup>25</sup> Morcom & Schloenhardt (n 16) 15.

<sup>26</sup> Gallagher *The International Law of Human Trafficking* (n 1) 61.

In 2000, the UN Special Rapporteur on Violence against Women stated following:  
The 1949 Convention has proved ineffective in protecting the rights of trafficked women and combating trafficking. The Convention does not take a human rights approach. 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”. As such, the 1949 Convention does very little to protect women from and provide remedies for the human rights violations committed in the course of trafficking, thereby increasing trafficked women’s marginalization and vulnerability to human rights violations. Gallagher, *The International Law of Human Trafficking* (n 1) 62.

<sup>27</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 64.

See *Convention on the Elimination of All Forms of Discrimination against Women* 18 December 1979 United Nations, Treaty Series, vol 1249, entered into force 3 September 1981 (CEDAW).

<sup>28</sup> CEDAW, art 6 (n 27) [emphasis added].

limited to being protected against sex trafficking - as internationally recognised and protected.<sup>29</sup> In terms of its scope when it comes to trafficking, CEDAW's reference to all forms of trafficking expanded the prohibitions offered by the 1949 Convention, thereby encompassing a broad range of purposes which went beyond sexual exploitation, including but not limited to forced labour, forced marriage and organ trafficking.<sup>30</sup> Note that Allain states that in time of armed conflict forced marriage 'transpires in situations where the 'spouse' and the 'bride' are unknown to each other but are brought together through an act of violence visited upon the community or the family.' Allain in his analysis continues as follows:

More so in times of armed conflict, where the legal regime has broken down; the ability of soldiers, as was the case in Sierra Leone, to kidnap and make of their victims 'rebel wives' was to control them as a thing owed. While they could have bought or sold their victims and in cases did transfer, exchange, or give these women as gifts, fundamentally they had the power to do so - but instead they simply used their violently acquired possession. Instead, having established control tantamount to possession, military men used these women to gain benefit from their service (sexual or otherwise) and labour - this under the mantle of a fraudulent marriage. Thus for me, the notion of 'forced marriage' in times of armed conflict is linked in fundamental terms to slavery; yet, like 'sexual slavery' the crime of 'forced marriage' has distinct characteristics: primarily, the perpetrator's non-consensual hosting of the mantle of spouse and/or marriage onto the victim.<sup>31</sup>

Since the ratification of CEDAW, trafficking has been addressed by a number of other international treaties. As such, the *Convention on the Rights of the Child and its Optional Protocol* (1989) was an important development for trafficking.<sup>32</sup> Even though the Convention did not deal with trafficking directly, the practice was mentioned in its preamble, which provided a definition for 'the sale of children'.<sup>33</sup> Further, the 'sale of children', child prostitution and child pornography were also expressly prohibited by the *UN Optional Protocol to the Convention on the Rights of the Children*.<sup>34</sup> The Protocol stressed the

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<sup>29</sup> Catharine A MacKinnon, *Are Women Human? And Other International Dialogues* (1<sup>st</sup> ed, Belknap Press - Harvard University Press, 2006), 64.

<sup>30</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 65.

<sup>31</sup> Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Nijhoff, 2015), 473.

<sup>32</sup> See *Convention on the Rights of the Child* (1577 UNTS 3) done 20 November 1989, entered into force 2 September 1990 (CRC).

<sup>33</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 67.

<sup>34</sup> See UNICEF Innocenti Centre, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (UNICEF, 2009) <[https://www.unicef-irc.org/publications/pdf/optional\\_protocol\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf)> accessed 22 March 2017.

significance and increasing international prevalence of child trafficking, and noted the continuing presence of sex tourism.<sup>35</sup> Additionally, the 1999 *ILO Worst Forms of Child Labour Convention* included not only the ‘worst forms of child labour’, but also the acts of procuring, offering or using children for the purposes of prostitution, which includes using children to produce pornographic materials or sexually exploitive performances.<sup>36</sup> The Convention classified trafficking among ‘forms of slavery or practices similar to slavery’,<sup>37</sup> and accepted its elimination as a matter of urgency, irrespective of countries’ levels of development.<sup>38</sup> Similarly, the *Guiding Principles on Internal Displacement* Article 11(2) particularly stated that internally displaced persons shall be protected against violence, forced prostitution, any form of indecent assault, slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation or forced labour of children.<sup>39</sup> Child prostitution, child pornography, and the sale and trafficking of boys and girls for sexual purposes were regulated as closely linked practical matters, such that in most cases they are seen as largely indistinguishable.<sup>40</sup> According to the UN commission, child sexual abuse is

Contacts or interactions between a child and an older or more knowledgeable child or adult (a stranger, sibling or person in a position of authority, such as a parent or caretaker) when the child is being used as an object of gratification for an older child’s or adult’s sexual needs. These contacts or interactions are carried out against the child using force, threats, bribes, threats or pressure.<sup>41</sup>

For example, UNICEF links child sexual abuse to commercial sexual exploitation as follows:

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See *Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography* GA Res 54,263, Annex 1, 54 UN GAOR Supp No. 49 7 UN Doc. A/54/49, Vol. III (2000), done 25 May 2000, entered into force 18 January 2002 (CRC Optional Protocol).

<sup>35</sup> John E James, ‘Human Trafficking ... a Global problem’ (2008) 60 *Mercer Law Review* 791, at 796.

<sup>36</sup> Virginia Mary Kendall & T Markus Funk, *Child Exploitation and Trafficking Examining the Global Challenges and U.S. Responses* (Rowman & Littlefield Publishers INC, 2012), 137.

<sup>37</sup> ILO *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* C182, 87<sup>th</sup> ILC session 17 Jun 1999, entered into force 19 November 2000 (Worst Forms of Child Labour Convention), art 3(a).

<sup>38</sup> Ulla Liukkunen & Yifeng Chen (eds), *Fundamental Labour Rights’ in China - Legal Implementation and Cultural Logic* (Springer, 2016), 149.

<sup>39</sup> UNHCR, *Guiding Principles on Internal Displacement* 22 July 1998 ADM 1.1, PRL 12.1, PR00/98/109 <<http://www.refworld.org/docid/3c3da07f7.html>> accessed 13 August 2017.

<sup>40</sup> Kendall & Funk (n 36) 125.

<sup>41</sup> Ibid 128.

(...) child sexual abuse becomes sexual exploitation when a second party benefits – through a profit or through a quid pro quo – through sexual activity involving a child. This may include prostitution, brothel and street-based sexual exploitation, trafficking for sexual purposes and child pornography.<sup>42</sup>

In addition to these regulations, international law has continued to address human trafficking in different ways by regulating it in the context of diverse treaties, which consider a number of international and regional instruments developed over the years.<sup>43</sup> An example of a relevant international human rights treaty is the *UN Declaration of Human Rights* (UDHR), in which many of the rights identified are important in combatting trafficking. Such rights include ‘the right of opportunity to gain a living through work freely chosen or accepted’, ‘the right to a fair trial, and the right to a remedy’.<sup>44</sup> Further, the Declaration accepts that human rights are for everyone, that rights have no borders and that all human beings to be covered by the basic protections of international human rights law. Accordingly, Article 1 of the UDHR declares that all human beings were born free and equal in dignity and rights. It is clear that the document seeks to recognise and underline the essential, inherent worth of all human beings, further stating that ‘disrespect for human rights had led to horrific acts that have outraged people across the world’. Other applicable articles within the UDHR include Articles 2, 3, 4, and 5. Article 2 of the Declaration states that the rights identified belong to everybody. Article 3 declares that ‘everyone has the right to life, liberty and security of person’. Articles 4 and 5 posit that ‘no one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms’; ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Another relevant international doctrine that supplements international trafficking law is Article 8 of the *International Covenant on Civil and Political Rights* (ICCPR, 1966) prohibits

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<sup>42</sup> UNICEF, ‘Commercial Sexual Exploitation and Sexual Abuse of Children in South Asia’ (2001) 2<sup>nd</sup> World Congress against Commercial Sexual Exploitation of Children, 10 <<http://www.unicef.org/rosa/commercial.pdf>> accessed 12 October 2016.

<sup>43</sup> Some of those regional documents can be exemplified as follows: Council of Europe *Convention on Action against Trafficking in Human Beings and its Explanatory Report* ETS 197 16 V 2005 done 16 May 2005, entered into force 1 February 2008 (European Convention); the *Council Framework Decision on Combating Trafficking in Human Beings of 2002* (2002/629/JHA) and the *2003 Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography* (2004/68/JHA) as well as *Council Directive 2004/81/EC* on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

<sup>44</sup> Gallagher, *Commentary Recommended Principles and Guidelines on Human Rights and Human Trafficking* (n 24) 21.

slavery and slave trade in all its forms, using similar language to the UDHR. The right to leave any country and freedom of movement that is regulated and protected in the Article 13 of UDHR are also violated in trafficking practices.<sup>45</sup>

Considering the violent nature of trafficking crimes in which victims are deceived and/or coerced for the purpose of exploitation, the above-mentioned regulations of international human rights law treaties are noteworthy. Nonetheless, at this point the question remains even though international human rights law has rules pertaining to trafficking, whether it necessarily means to prohibit trafficking in persons—as opposed to practices associated with trafficking.<sup>46</sup> Clearly, the dynamics of the practice of human trafficking constitute several human rights violations, e.g., in related cases ‘the inequality between trafficker and trafficked person’<sup>47</sup> is obvious. As an extension of the question above, the next question would be whether human trafficking can be described as a gross human rights violation from a legal perspective. There are two main ways to approach this question, as is explained in the following paragraphs in light of the arguments of Piotrowicz and Gallagher.

When it comes to the legal classification of trafficking, Ryszard Piotrowicz concludes that the classification of human trafficking as a human rights violation is incorrect.<sup>48</sup> He argues that ‘[i]t is incorrect to say that people trafficking is a breach of human rights for the same reason that it is incorrect to say that 2+2=5: because it is wrong and there is an inherent good in getting things right’.<sup>49</sup> In his view, without state involvement, human trafficking is nothing more than a crime, such as a murder or theft.<sup>50</sup> In other words, although it is true that the

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<sup>45</sup> Anne T Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage’ in Leila Nadya Sadat & Michael P Scarf (eds) *The Theory and Practices of International Criminal Law - Essays in Honour of M. Cherif Bassiouni* (Martinus Nijhoff Publishers, 2008). See *Universal Declaration of Human Rights* adopted by UNGA Res. 217 A (III), UN Doc. A/810 at 71, 10 December 1948 (UDHR).

<sup>46</sup> UNHRC, ‘Human Rights and Human Trafficking’ (2014) Fact Sheet No 36, 5 <[http://www.ohchr.org/Documents/Publications/FS36\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS36_en.pdf)> accessed 23 July 2017.

<sup>47</sup> Gregor Noll, ‘The Insecurity of Trafficking in International Law’ in Vincent Chetail & M Carlos-Tschopp (eds), *Globalization, Migration and Human Rights: International Law Under Review* (Vol II, Bruxelles, Bruylant, 2007), 344.

<sup>48</sup> Ryszard Piotrowicz, ‘THB in 2016 – Where are we, where have we been and where are we going?’ (Keynote Speech, TRACE workshop, 2016) <[http://trace-project.eu/wp-content/uploads/2016/03/TRACE-Stockholm\\_Piotrowicz.pdf](http://trace-project.eu/wp-content/uploads/2016/03/TRACE-Stockholm_Piotrowicz.pdf)> accessed 28 March 2017.

<sup>49</sup> Ryszard Piotrowicz, ‘The Legal Nature of Trafficking in Human Beings’ (2009) 4 *Intercultural Human Rights Law Review* 175, at 175.

<sup>50</sup> *ibid* 186.

State has failed to protect individuals when it comes to trafficking, the same is true with many other crimes, including theft and murder, for which the state is not held responsible.<sup>51</sup> Thus Piotrowicz believes in legal sense, human trafficking to be not a 'human rights violation', but a 'private criminal act or enterprise' in which one or more private citizens are involved in recruitment and transportation of victims, for the purpose of their exploitation.<sup>52</sup> On the other hand, this thesis asserts that perhaps human trafficking can be distinguished and classified as a breach of the state's human rights obligations, specifically because states are required to take 'all reasonable and necessary measures to prevent a given event from occurring'.<sup>53</sup> In consideration of this, Piotrowicz states that it is not that he is arguing that trafficking is not a serious crime or that the state does not have a responsibility to guard against it. When trafficking occurs the state has in fact failed to protect its citizens' human rights. Piotrowicz nonetheless maintains that this lack of state involvement still does not raise state culpability to the point of trafficking counting as a 'human rights violation' by the state. Thus, in his view, despite the state's failure to prevent it, trafficking remains a crime between two (or more) individuals, with no 'state involvement'.

Although this thesis considers the merits of Piotrowicz' argument, it leans more towards the argument of Anne T Gallagher. Before proceeding with Gallagher's argument however, it is important to note that Piotrowicz' idea could be even further supported by considering the fact that despite what is said by authors like Gallagher about trafficking qualifying as human rights abuse in legal sense, there is still no definitive global human rights convention concretely and exclusively condemning this practice. Thus, as it stands, trafficking are not dealt with at an international law level as would be called for by its classification as a 'gross human rights violation'. Of course, as stated previously, this does not mean that there are no several international treaties that in one way or another address the issue. The latter include Article 6 in CEDAW, and Article 35 in the CRC. Going back to Gallagher, however, it is important to note her observation

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<sup>51</sup> *ibid* 187.

<sup>52</sup> *ibid* 189; Gallagher, *The International Law of Human Trafficking* (n 1) 223.

<sup>53</sup> UN General Assembly Official Records (GAOR), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (Report of the International Law Commission on the Work of its fifty-third session 56<sup>th</sup> sess, supp no 10, 2001), 43  
<[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)> accessed 23 July 2017.

that despite these conventions' substantive reference to trafficking, it still remains that none of the relevant international human rights treaty bodies 'ha[ve] yet managed to tie trafficking directly to a violation of a specific right in a specific treaty'.<sup>54</sup> This thesis agrees with Gallagher that acknowledging this real gap in fully recognising trafficking as an international human rights issue 'stops us from being side-tracked by the slick arguments of those who would prefer it to be approached as a straightforward issue of migration, of public order or of organised crime'.<sup>55</sup> Unique, as it is tightly woven into the fabric of an inequitable, unjust and hypocritical world.<sup>56</sup> Yet no treaty addressing trafficking only from a human rights angle has been 'properly able to link itself to a parent instrument tackling detailed obligations as extensive a corruption, exchanging evidence across national borders, and seizing assets of offenders'.<sup>57</sup> In this sense, considering human trafficking as also a tort and a crime in addition to a human rights violation at the national level may be considered the optimal approach. Through such a lens, criminal or civil law may be invoked as required, including in cases of discrimination and torture.<sup>58</sup>

Alternatively, Gallagher offers an opposing view when she states that the above-mentioned 'conclusion does not negate a central place for international law, including international human rights law, in providing impetus, authority (including legal justification) and structure to an effective national response' to trafficking.<sup>59</sup> At the international level, it is important to acknowledge that human trafficking is a gross human rights violation, in which victims' fundamental rights are violated, and are done so within the jurisdiction of the State.<sup>60</sup> As Gallagher further concludes

In the present context, such rules affirm a range of obligations on States - not just to protect, support and provide remedies to victims, but also to investigate and prosecute trafficking cases with due diligence; to act

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<sup>54</sup> Gallagher, 'Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labour and Debt Bondage' (n 45) 3.

<sup>55</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 3.

<sup>56</sup> Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law* 789, at 792.

<sup>57</sup> *ibid* 793.

<sup>58</sup> Anne T Gallagher, 'A Response to Jean Allain and Ryszard Piotrowicz' (*Opinio Juris*, 8 June 2009) <<http://opiniojuris.org/2009/06/08/a-response-to-jean-allain-and-ryszard-piotrowicz/>> accessed 20 December 2016.

<sup>59</sup> *ibid*.

<sup>60</sup> Piotrowicz, 'The Legal Nature of Trafficking in Human Beings' (n 49) 188.

against public sector complicity in trafficking; to cooperate with other States; and to prevent future trafficking.<sup>61</sup>

It is also important to note that '[t]he United Nations General Assembly and the Human Rights Council have repeatedly affirmed that trafficking violates and impairs fundamental human rights, as have many of the international human rights mechanisms.'<sup>62</sup> In addition, it must be noted that trafficking 'was a matter for international human rights law long before it became an issue of migration or of transnational organized crime'.<sup>63</sup> Thus, considering its current place within the international legal system, it is reasonable to conclude that on its own trafficking has 'traditionally not been served well by the international human rights system.'<sup>64</sup>

As Piotrowicz states, 'when THB occurs it is evident that a victim may be the object of severe exploitation as well as serious criminal offences'.<sup>65</sup> This is because when a person is trafficked, many aspects of the law are infringed, and thus many legal fields are necessarily involved. These areas include criminal law, human rights law, migration law and employment law, as are encompassed by such acts as deprivation of freedom, forced labour, sexual exploitation, mental abuse and illegal entry into a state.<sup>66</sup> However, in terms of dealing with human trafficking in the field of human rights law, Piotrowicz concludes that

(...) traffickers, as private individuals, by definition cannot be held to account before any human rights tribunal; only States can. And States will only be held accountable if they have done something, or omitted to do something, that amounts to a failure to respect or ensure respect for the rights supposed to be guaranteed.<sup>67</sup>

Yet this thesis, in light of Gallagher's argument, posits that it remains crucial to acknowledge human trafficking as a human rights violation for which states are accountable. The latter is the only way to ensure that trafficking is prevented, that victims are protected, and that their needs are addressed on an international level.

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<sup>61</sup> Gallagher, 'A Response to Jean Allain and Ryszard Piotrowicz' (n 58).

<sup>62</sup> UNHRC, 'Human Rights and Human Trafficking' (n 46) 5.

<sup>63</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 477.

<sup>64</sup> *ibid* 477.

<sup>65</sup> Piotrowicz, 'The Legal Nature of Trafficking in Human Beings' (n 49) 176.

<sup>66</sup> *ibid* 177.

<sup>67</sup> *ibid* 197.

Ultimately, rather than agreeing on a universal instrument that would address all aspects of human trafficking, international human rights law has developed a series of rules that form the ‘international counter-trafficking law system’. Accordingly, the 1990s marked an important shift in relation to the framework of legal response(s) to human trafficking, as the issue finally began to be seen as a transnational criminal law concern.<sup>68</sup> This evolution resulted in the adoption of a new treaty, which served as ‘the principal legally binding global instrument to combat trafficking in persons’, namely the Trafficking Protocol.<sup>69</sup> As Goodey concludes, whereas until the beginning of the 20<sup>th</sup> century, human trafficking had been linked with prostitution and exploitation in the labour market, the Trafficking Protocol offered a shift in perspective, to situating trafficking within a transnational crime context.<sup>70</sup> As is explored in detail in the following section, the Trafficking Protocol was in many ways a turning point in the context of international human trafficking law regulations. The Protocol signified a shift in many ways, including by such acts as extending sexual exploitation as a form of exploitation of labour and including provisions to do with trafficking and organ removal.<sup>71</sup>

### **2.2.2.2 Trafficking in Transnational Criminal Law: The Organised Crime Convention and the Trafficking Protocol**

#### **2.2.2.2.1 The Drafting Process of the Trafficking Protocol**

This section looks at the creation of the *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime (Trafficking Protocol)* seeking to demonstrate the manner in which human trafficking found its place within this specific Protocol.

The Protocol is the most recent international treaty on human trafficking. It should be noted that before the ratification of the Protocol could take place,

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<sup>68</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 68.

<sup>69</sup> *ibid* 68.

<sup>70</sup> John Winterdyk & Benjamin Perrin & Philip Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (CRC Press, 2012), 7.

See also Jo Goodey, ‘Human Trafficking - Sketchy Data and Policy Responses, *Criminology and Criminal Justice*’ (2008) 8(4) *Criminology & Criminal Justice* 421.

<sup>71</sup> Annette Herz, ‘Human Trafficking and Police Investigations’ in Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (n 70), 133.

arriving at a universally accepted definition to regulate human trafficking proved to be a difficult task. This is because ‘human trafficking’ is best described as a ‘process’ and thus cannot be attached to a single act: any attempt to define the phenomenon by linking it to a specific act falls short of grasping it. As such, all the regulations pertaining to human trafficking that were to be taken into account in drafting the Protocol were neither in order nor regulated systematically. Thus, the Trafficking Protocol’s definition of the term ‘human trafficking’ can be regarded as substantive in such a way that this thesis appraises its ratification as a breakthrough, and adopts its definition of human trafficking as the most appropriate one.

This Chapter explores in what ways the Trafficking Protocol represents a breakthrough. For the present purposes, note that the Protocol contains for the first time, a definition of the term ‘trafficking in human beings’ which forms the ‘basis for the adoption of the appropriate penal provisions in the State Parties and makes the *international cooperation* in HT proceedings easier’.<sup>72</sup> Before this, trafficking had been an ‘obscure but jealously guarded’ and relatively inactive mandate of the UN human rights system,<sup>73</sup> and governments had struggled to address issues pertaining to this phenomenon. For many years, there was no internationally accepted definition, which led to misaligned, contradictory national responses, and rendered ineffective any kind of cross-border cooperation.<sup>74</sup> In this light, the following paragraphs outline how the Protocol came into international usage.

#### **2.2.2.2.2 Regulative Approach of Trafficking Protocol**

Before 2000, forced labour, child labour, debt bondage, forced marriage and commercial sexual exploitation of children and adults flourished in many parts of the world.<sup>75</sup> International anti-trafficking instruments at the time were dated

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<sup>72</sup> *ibid* 133.

<sup>73</sup> Janie A Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108(4) *The American Journal of International Law* 609, at 615.

<sup>74</sup> See Anne Gallagher & Paul Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking Lessons from the Front Line’ (2008) 18(3) *International Criminal Justice Review* 318.

<sup>75</sup> See Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 56).

and not comprehensive enough in their scope to combat human trafficking.<sup>76</sup> Even though many countries enacted their own specialist trafficking laws, 'trafficking problem' emerged as a political and practical issue.<sup>77</sup>

When it comes to the sexual exploitation of women, the issue was discussed at the 1993 Vienna International Conference on Human Rights<sup>78</sup> and the 1995 Beijing International Conference on Women.<sup>79</sup> Between these events, proposals on an international treaty of transnational organised crime were first tabled at the World Ministerial Conference on Organised Transnational Crime in Naples, Italy, in November 1994.<sup>80</sup> Nonetheless, as Gallagher explains, the origins of the Trafficking Protocol can actually be traced back to Argentina's interest in the issue of trafficking, specifically to do with minors.<sup>81</sup> Argentina was dissatisfied with the slow progress of negotiations for an additional protocol to the CRC, which would address child prostitution and child pornography.<sup>82</sup> The country was concerned with addressing such trafficking from a purely human rights perspective, as Argentina found it important to develop a broader international attack on transnational organised crime.<sup>83</sup> As such, Argentina's proposal was for a new convention against trafficking in minors, discussed at the 1997 Session of the UN Commission on Crime Prevention and Criminal Justice.<sup>84</sup>

In late 1997, the UN General Assembly established an intergovernmental group of experts to prepare a preliminary draft, after receipt of which it established an intergovernmental Ad Hoc Committee. Following these initial steps, in December 1998, the UN proposed the creation of a new international document addressing the issue of human trafficking. In other words, the aim was to identify the universal patterns in the organisation of human trafficking in 'an

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<sup>76</sup> See Anne T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975.

<sup>77</sup> Gallagher & Holmes (n 74) 319.

<sup>78</sup> OHCHR, 'World Conference on Human Rights 14-25 June 1993, Vienna Austria' <<http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx>> accessed 5 April 2016.

<sup>79</sup> UN Women, '1995 Beijing International Conference on Women' <<http://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women>> accessed 5 April 2016.

<sup>80</sup> Anne T Gallagher & Fiona David, *The International Law of Migrant Smuggling* (1<sup>st</sup> published, Cambridge University Press, 2014), 34.

<sup>81</sup> Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (n 76) 982.

<sup>82</sup> *ibid* 982.

<sup>83</sup> Gallagher & David (n 80) 67.

<sup>84</sup> Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (n 76) 982.

attempt to tame this heterogeneous reality so it could be comprehended as an entity appropriate for a certain set of interventions.’<sup>85</sup> The Vienna Process consisted of more than 120 states, NGOs and intergovernmental agencies, and lasted less than two years.<sup>86</sup> The Vienna Process ‘represented the first comprehensive attempt by the international community to invoke international law as a weapon against transnational organized crime’.<sup>87</sup> Ultimately, representatives from more than eighty countries met in Palermo, Italy, in 2000.

The Convention and the Protocols were negotiated at a series of eleven meetings of a special intergovernmental Ad-hoc Committee under the auspices of the UN Crime Commission, which were held in Vienna from January 1999 until October 2000 and more than 100 countries took part.<sup>88</sup>

The purpose of this meeting was to adopt a new international legal framework to combat transnational organised crime. Thus, the mobilization represented by the Trafficking Protocol took the form it did through two years of extensive meetings, and was highly influenced by human rights movements, including ones with feminist roots.<sup>89</sup> E.g., ‘feminists seeking the abolition of prostitution altogether have argued that, because prostitution is equivalent to violence against women, trafficking and prostitution are also equivalent terms’.<sup>90</sup>

This mobilisation resulted in the adoption of the Trafficking Protocol. The UN opened the Conventions and its Protocols<sup>91</sup> for signing to made official in

<sup>85</sup> Kay Warren, ‘The 2000 UN Human Trafficking Protocol: Rights, Enforcement, Vulnerabilities’ in Mark Goodale & Sally Engle Merry (eds), *The Practice of Human Rights - Tracking Law between the Global and the Local* (Cambridge University Press, 2007), 243.

<sup>86</sup> Venla Roth (ed), *Defining Human Trafficking and Identifying its Victims a Study on the Impact and Future Challenges of International, European and Finish Legal Responses to Prostitution Related-Trafficking in Human Beings* (Martinus Nijhoff Publishers, 2012), 151.

<sup>87</sup> Gallagher & David (n 80) 36.

<sup>88</sup> Kristina Touzenis, *Trafficking in Human Beings - Human Rights and Transnational Criminal Law, Developments in Law and Practices* (United Nations Educational, Scientific and Cultural Organization, 2010), 28.

<sup>89</sup> Warren (n 85) 264.

<sup>90</sup> Svati P Shah, ‘Sex Work & Women’s Movements’ (2011) CREA Working Paper, 11 <<http://www.nswp.org/sites/nswp.org/files/Sex%20work%20and%20Women's%20Movements.pdf>> accessed 1 November 2016.

<sup>91</sup> *United Nations Convention Against Transnational Organised Crime* (2225 UNTS 209) done 15 November 2000, entered into force 29 September 2003 (Organised Crime Convention) is supplemented by three additional treaties (Protocols) as follows: *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime* 15 November 2000, GA Res 55/25 Annex III, UN GAOR, 55<sup>th</sup> Sess, Supp No 49, at 62, UN Doc. A/45/49 (Vol I) (2001) entered into force 28 January 2004 (Migrant Smuggling Protocol);

Palermo, the heartland of the Sicilian mafia, and since then the Protocols, including the Trafficking Protocol, have been known as the ‘Palermo Protocol’.<sup>92</sup>

In December 2003, the Trafficking Protocol came into force as part of the UN Convention against Transnational Organised Crime. In order to become a party to the Protocol, states must also become a party to the Organised Crime Convention, as the Protocol and the Convention are to be ‘interpreted together’, whereby the ‘Protocols were not intended to become stand-alone treaties’.<sup>93</sup>

In this context, the way the Protocol regulates human trafficking is outlined in the following paragraphs:

The Protocol, in Articles 5-8, articulates a set of issues, reforms and remedies for receiving states. The articles oblige State Parties to implement legal reforms in order to criminalise trafficking and ensure victim protection. The final issue of coordination of state officials in law enforcement and immigration is dealt with in Articles 9-11, with the aim of identifying perpetrators and victims along international routes used by organised crime groups. The latter is done so that ‘the provisions on “other measures”, including border procedures and the security and control of documents, are more precise’.<sup>94</sup> Even though the Protocol obliges State Parties to criminalise conduct amounting to human trafficking in Article 5 on criminalisation, it does not deal with the criminal law sanctions. In order to tighten the net around traffickers, the Protocol states that State Parties shall pass new laws to criminalise human trafficking. In this context, State Parties are also expected to share information to boost links between law enforcement in countries of trafficking (origin, transit and destination).

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*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* A/RES/55/2515 entered into force 25 December 2003 (Trafficking Protocol); *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime* GA Res 255, 15 November 2000 UN Doc A/RES/55/255 (2001), done 31 May 2001, entered into force 3 July 2005 (Firearms Protocol).

<sup>92</sup> Jean Allain, *The Law and Slavery - Prohibiting Human Exploitation* (BRILL, 2015), 267.

<sup>93</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 73.

<sup>94</sup> Anna Jonsson (ed), *Human Trafficking and Human Security* (Routledge Taylor & Francis Group, 2009), 73.

When it comes to its use of language, in some provisions of the Protocol make it so that certain items are seen as either mandatory or at least worthy of consideration/positive effort.<sup>95</sup> Concurrently, terminology used at other times makes certain provisions seem weak or ‘optional’,<sup>96</sup> such as the provisions guiding ways to assist and protect victims of trafficking. The latter is due to the Protocol’s use of ‘hypothetical’ and noncommittal language such as ‘shall endeavour to’, ‘shall consider in appropriate cases’, and ‘to the extent possible’.<sup>97</sup> Victim protection needs to be unambiguous. Unlike many other crimes, threat to a victim does not end once she or he has escaped or been rescued from a criminal situation.<sup>98</sup> Protection needs to be defined broadly because of the many ways traffickers can manipulate victims, including through violence, deception, imprisonment, collusion, debt bondage, isolation, religion, culture and belief.<sup>99</sup> Although the Protocol has several protective provisions, including ‘victim assistance and support’, it does not say how such support should occur.<sup>100</sup> Instead it notes that ‘a State Party will not be breaching either the letter or the spirit of the Convention if it decides, after proper consideration, to provide no material, medical, or other assistance whatsoever to any victim of trafficking within its territory’.<sup>101</sup> Clearly, such a statement goes against any notion of ‘victim assistance and support’. Furthermore, it is also important to note that although the Protocol is a progressive document; its focus does repeatedly shift back to women and children, and the disproportionate impact of trafficking for sexual exploitation on this population, thus still taking a ‘gendered’ perspective on the issue.<sup>102</sup>

In light of its structure, it can be concluded that the Protocol grew out of efforts to develop a new international response to trafficking and to offer practical guidance to states, with drafting laws, which would help in creating

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<sup>95</sup> *ibid* 72.

<sup>96</sup> Kelly E Hynland, ‘The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children’ (2001) 8(2) *Human Rights Brief* 30, at 31.

<sup>97</sup> *ibid* 31.

<sup>98</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 301.

<sup>99</sup> UNODC – UN GIFT, ‘Anti-Human Trafficking Manual For Criminal Justice Practitioners - Module 4: Control Methods in Trafficking in Persons’ (New York, UN, 2009), 4 <[https://www.unodc.org/documents/human-trafficking/TIP\\_module4\\_Ebook.pdf](https://www.unodc.org/documents/human-trafficking/TIP_module4_Ebook.pdf)> accessed 19 April 2017.

<sup>100</sup> Julie Kaye & John Winterdyk, ‘Explaining Human Trafficking’ in Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (n 70), 60.

<sup>101</sup> Gallagher & Holmes (n 74) 72.

<sup>102</sup> Warren (n 85) 250.

comprehensive national anti-trafficking strategies, and assisting with resources to implement them.<sup>103</sup> Moreover, considering the nature of human trafficking as a multifaceted phenomenon with diverse perpetrators across state border,<sup>104</sup> the Protocol successfully establishes a definition and mechanism for trafficking meant to emphasise the transnational aspect of this phenomenon.<sup>105</sup> In this respect, the Protocol as a law enforcement instrument is unique in comparison to other treaties, in that it is created as a subset of the Organised Crime Convention, and links human trafficking to transnational organised criminal practices associated with drug and weapon trafficking.<sup>106</sup> Accordingly, human trafficking is defined within the Protocol as ‘one of the three ‘evils’ that haunts the globe’ alongside terrorism and drug trafficking.<sup>107</sup> Such terminology is effective in recognising the growing importance and urgency of curtailing human trafficking. Yet it is important to add that this does not necessarily mean that the Protocol requires State Parties to take action against trafficking only in cases with an international element or cases, which involve organised crime.<sup>108</sup> The inclusion of the transnational aspect in the Trafficking Protocol is meant to acknowledge not only the international dimension of this phenomenon, but also the fact that trafficking is not solely a border-crossing problem in every case.<sup>109</sup> At the state level, the Organised Crime Convention requires that the offence of trafficking be established in the domestic law of every state party, independently of its transnational nature or the involvement of an organised criminal group,<sup>110</sup> which is why many court cases involve domestic trafficking

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<sup>103</sup> See UNODC, ‘Model Law to Help States Fight Modern Slavery’ <<http://www.unodc.org/unodc/en/frontpage/2009/July/model-law-on-trafficking-in-persons-.html>> accessed 14 September 2016.

<sup>104</sup> John Picarelli, ‘Human Trafficking & Organised Crime in the US & Western Europe’ in Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector* (National Defence Academy and Austrian Ministry of Defence and Geneva Centre for the Democratic Control of Armed Forces, 2009), 128.

<sup>105</sup> Jean Allain, ‘No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol’ (2014) 7 *Albany Government Law Review* 111, at 112.

<sup>106</sup> Sanja Miliwojevic & Marie Segrave, ‘Evaluating Responses to Human Trafficking’ in Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (n 70), 236.

<sup>107</sup> Julie Kaye & John Winterdyk, ‘Explaining Human Trafficking’, in Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (n 70), 57.

<sup>108</sup> Gallagher & David (n 80) 68.

<sup>109</sup> Jessica Elliott, *The Role of Consent in Human Trafficking* (1<sup>st</sup> published, Routledge Taylor & Francis Group, 2015), 57.

<sup>110</sup> Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 56) 812; Jonathan Todres, ‘Widening Our Lenses: Incorporating Essential Perspectives in the Fights against Human Trafficking’ (2011) 33 *Michigan Journal International Law* 53, at 56.

settings.<sup>111</sup> Case in point, in Mexico, a man started the trafficking process by meeting and courting his 16-year-old victim, with the ‘couple’ eventually moving to a different city, upon arrival in which he forced her into prostitution, taking away all the proceeds.<sup>112</sup> As is seen from this example, it is possible for trafficking to be conducted by only one individual. Similarly, in a court case from Brazil, a European man was found guilty of recruiting a local woman through a feigned romantic relationship for the purpose of bringing her to Europe for sexual exploitation.<sup>113</sup>

According to the Protocol, human trafficking can also be organised by a group of individuals too.<sup>114</sup> Indeed, the Protocol primarily emphasises the ‘organised group crime’ aspect of human trafficking. As such, trafficking is said to be mostly maintained by the ‘nether world’ of criminal groups in which victims are trafficked for profit.<sup>115</sup> From the perspective of perpetrators of organized crime, human trafficking is a high-profit and low-risk venture that offers them sizeable monetary gains with a limited risk of being caught and prosecuted.<sup>116</sup> Criminal networks can relatively easily recruit victims in particular countries and move them across specific borders.<sup>117</sup> In these cases, traffickers belong to mafia-type transnational organised criminal groups or non-organised crime networks. For example, Albanian Luan Plakici was the head of a gang of traffickers, and used a false British passport to facilitate the illegal entry into the UK of between 50 and 60 young women. This particular perpetrator’s way of approaching young women from Romania was by offering them a job in the UK. Yet, after clearing immigration controls with fake passports, the women were forced to work as prostitutes.<sup>118</sup> If trafficking is committed as an organised crime, since the trafficking scheme is larger in this case, then one is more likely to find evidence

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<sup>111</sup> See UNODC, *Global Report On Trafficking in Persons - 2016* (United Nations Publication, 2016) <[http://www.unodc.org/documents/data-and-analysis/glotip/2016\\_Global\\_Report\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf)> accessed 24 July 2017.

<sup>112</sup> *ibid* 32.

<sup>113</sup> *ibid* 32.

<sup>114</sup> Atanas Rusev, *Human Trafficking, Border Security and Related Corruption in the EU* (DCAF a Centre for Security Development and the Rule of Law Paper Series, 2013), 2.

<sup>115</sup> Warren (n 85) 245.

<sup>116</sup> Transparency International - The Global Coalition against Corruption, ‘Corruption and Human Trafficking’ (2011) Working Paper 03/2011, 2 <[http://issuu.com/transparencyinternational/docs/ti-working\\_paper\\_human\\_trafficking\\_28\\_jun\\_2011?mode=window&backgroundcolor=%23222222](http://issuu.com/transparencyinternational/docs/ti-working_paper_human_trafficking_28_jun_2011?mode=window&backgroundcolor=%23222222)> accessed 22 August 2016.

<sup>117</sup> *ibid* 2.

<sup>118</sup> BBC News, ‘Prison for Sex Slave Gang Leader’ *BBC* (2003), <<http://news.bbc.co.uk/1/hi/uk/3340921.stm>> accessed 2 September 2016.

of associated crimes, such as document fraud, money laundering, cyber-crime and corruption involved.<sup>119</sup> As explained in Chapter I, in relation to the link between trafficking and corruption, criminal organisations seek ways to take advantage of immigration control, border protection and security systems that are weakened by corruption.<sup>120</sup>

The Protocol develops a method to deal with the transnational organised crime nature of trafficking, namely the ‘Three P’s’ approach: Prevention, Protection and Prosecution in its ‘Statement of Purpose’. Article 2 of the Trafficking Protocol expands on this approach, as follows:

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.

In connection with ‘Three P’s’ approach, Todres concludes that the point of failure of international law on human trafficking goes back to how it is designed.<sup>121</sup> As the emphasis of the Protocol is on intercepting, punishing and prosecuting traffickers, it is designed to facilitate cooperation between states to combat organised crime.<sup>122</sup> As a result of this focus on the logistics/practicalities of movement/borders, it may be argued that the document loses its focus on human rights.<sup>123</sup> The major concern of the Protocol is border controls and police cooperation. As such, the protection of victims’ human rights does not seem to be the direct aim of the document, which also limits the status quo of the Protocol.<sup>124</sup> By taking this approach, the Protocol encourages State Parties to criminalise trafficking and to adopt policies and programs to prevent and combat against such transnational organised crime. This means the emphasis of the

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<sup>119</sup> Louise Shelley, ‘Human Trafficking as a Form of Transnational Crime’ in Maggy Lee (ed), *Human Trafficking* (Portland, Willan, 2007), 116-37.

<sup>120</sup> UNODC, ‘Corruption and the Smuggling of Migrant’ (2013) Issue Paper, 11 <[http://www.unodc.org/documents/human-trafficking/2013/The\\_Role\\_Of\\_Corruption\\_in\\_the\\_Smuggling\\_of\\_Migrants\\_Issue\\_Paper\\_UNOD\\_C\\_2013.pdf](http://www.unodc.org/documents/human-trafficking/2013/The_Role_Of_Corruption_in_the_Smuggling_of_Migrants_Issue_Paper_UNOD_C_2013.pdf)> accessed 24 March 2017.

<sup>121</sup> See Jonathan Todres, ‘Widening Our Lens: Incorporating Essential Perspectives in the Fight against Human Trafficking’ (2011) 33 (1) *Michigan Journal of International Law* 53.

<sup>122</sup> Bridget Anderson & Rutvica Andrijasevic, ‘Sex, Slaves and Citizens: The Politics of Anti-Trafficking’ (2008) 40 *Soundings* 135, at 136.

<sup>123</sup> Warren (n 85) 265.

<sup>124</sup> Anderson & Andrijasevic (n 122) 136.

Protocol is on perpetrators of human trafficking rather than victims.<sup>125</sup>

Accordingly, the Protocol requires States Parties to take action against all forms of inappropriate dealing that lead to exploitation in order to end the subset of inappropriate transactions that are transnational in nature.<sup>126</sup> In this respect, it should be noted that one appealing advantage of the law enforcement approach is that it offers potential for prosecuting traffickers directly.<sup>127</sup> Presumably, the Protocol would also allow for the prosecution of individual officials involved too,<sup>128</sup> even though it does not address the role of the State or government officials in committing or tolerating trafficking. As discussed in Chapter I in regards to corrupt practices, in some cases government officials, such as police and border control officers, are themselves involved in human trafficking,<sup>129</sup> which in turn requires law enforcement agencies to be organised, empowered and funded in a manner that enables them to respond appropriately to such dynamics.<sup>130</sup>

Lastly, although there seems to be consensus on what constitutes trafficking in the context of the Protocol; this does not necessarily mean that the definition of trafficking within the Protocol marks the end of all such definitional debates.<sup>131</sup> While the Protocol stands as an ostensibly comprehensive attempt to stop trafficking, it nonetheless does not represent an international consensus on the definition of trafficking.<sup>132</sup> In large part, this is also ‘the result of the diverse views represented in UN institutions and of the loose and fragmented ways in which UN institutions function’.<sup>133</sup> Furthermore, the current international legal understanding of trafficking is also narrow<sup>134</sup> and complex. Resultantly, the following chapter helps address the question of what human trafficking is under

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<sup>125</sup> Allain, ‘No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol’ (n 105) 120.

<sup>126</sup> See James C Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ (2008) 49(1) *Virginia Journal of International Law* 1.

<sup>127</sup> Elizabeth M Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking’ (2004) 40 *Stanford Journal of International Law* 1, at 17.

<sup>128</sup> *ibid* 21.

<sup>129</sup> Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector* (National Defence Academy and Austrian Ministry of Defence and Sports & Geneva Centre for the Democratic Control of Armed Forces, 2009), 17-21.

<sup>130</sup> Gallagher & Holmes (n 74) 326.

<sup>131</sup> Gallagher, *The International Law of Human Trafficking* (n 1) 47.

<sup>132</sup> Phyllis Coontz & Catherine Griebel, ‘International Approaches to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law’ (2004) 4 *Women’s Health Journal* 47, at 48.

<sup>133</sup> *ibid* 48.

<sup>134</sup> *ibid* 47.

international law (primarily the Trafficking Protocol), and then looks at the meaning and context of the definitional quagmire surrounding this phenomenon.

## 2.3 Conclusion

This chapter has provided an analysis of the international legal rules pertaining to human trafficking. From a historical standpoint, human trafficking was initially understood as ‘white’ slavery in the first part of the 20th century, which is why five international instruments adopted during this period to combat against white slave trafficking. Further, the ‘period after the 1980s saw strong pressures for deregulation, led by the international financial institutions and the erosion of social protection systems for vulnerable people’,<sup>135</sup> which ‘led to the trafficking of women and also men, much of it through labour brokers and unscrupulous recruitment agencies operating in both sender and destination countries’.<sup>136</sup>

Considering such regulations, the meaning of trafficking as a term was complicated due to the use of ‘white slave traffic’ in the treaties of the 1904 Agreement and the 1910 Trafficking Convention, implying a crossover between the slave trade and the process of trafficking.<sup>137</sup> As such the 1910 Trafficking Convention used the terms slave, slavery, and slave trade without defining the context in which these terms were used.<sup>138</sup> By the 1930s, treaties regulating sexual exploitation adopted the word ‘traffic’ in English, while in French, Spanish and other languages the word ‘trade’ was used, creating confusion over terminology that continues to this day.<sup>139</sup> Despite how extensively this term is used, several regional and transnational treaties have regulated human trafficking later on. One of the main reasons for the increasing proliferation of treaties on the issue has been the increasing rate and visibility in human trafficking incidents in the past decade, leading to an increase in legal responses.<sup>140</sup> Eventually these legal developments led to the creation of a

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<sup>135</sup> Roger Plant, ‘Forced Labour, Slavery and Human Trafficking: When Do Definitions Matter?’ (2015) 5 *Anti-Trafficking Review* 153, at 153.

<sup>136</sup> *ibid* 153.

<sup>137</sup> Elliott (n 109) 50.

<sup>138</sup> *ibid* 50.

<sup>139</sup> Mike Dottridge, *Kids as Commodities? Child Trafficking and What to Do About It* (International Federation Terre des Hommes 2004), 18.

<sup>140</sup> Protection Policy and Legal Advice Section (PPLAS) & Division of International Protection Services (DIPS), ‘Refugee Protection and Human Trafficking - Selected Legal Reference

number of legal instruments designed to combat human trafficking at both the international and regional levels.<sup>141</sup> Indeed, these instruments have expanded the existing anti-trafficking legal regime, which has been in place since the late 19<sup>th</sup> century.<sup>142</sup> As a result, international criminal law, international human rights law, international labour law, regional international law and international refugee law now govern human trafficking.<sup>143</sup>

Long before the label ‘human trafficking’ was introduced to public international law, treaties had been adopted to regulate and abolish the phenomenon of slavery, as is explained in the next chapter. Treaties aiming to abolish slavery may in many ways be seen as predecessors to modern attempts to deal with human trafficking, albeit there are also significant differences between the terms slavery and trafficking. In order to understand the modern legal architecture applicable to human trafficking, this chapter has conducted an analysis of the evolution of trafficking under international law to assess how these past developments have influenced contemporary attempts to regulate this phenomenon.

Even though a nexus of international legal rules manages human trafficking, this section has shown that before the Trafficking Protocol, human trafficking was not the focus of any one specific treaty. In addition, this chapter illustrates that, with the adoption of the Trafficking Protocol in 2000, this phenomenon was defined and addressed explicitly. Due to the treaty’s importance, the analysis looks at how the Protocol emerged and how it regulates human trafficking. Even though trafficking looks different and is defined and understood differently in different parts of the world and in different places, a lot of time and effort has gone into coming up with a legal framework/structure that can be applied to the practice worldwide. This chapter has walked readers through this history and objective, showing them both the variety in definitions/understandings, and the efforts toward a unified view of trafficking, at least in a legal context. Yet, albeit the Trafficking Protocol is significant in defining human trafficking, there is ongoing debate over the meaning of trafficking in comparison to other

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Materials’ (1<sup>st</sup> ed, UNHCR, 2008), 11 <<http://www.refworld.org/docid/498705862.html>> accessed 22 December 2016.

<sup>141</sup> See *ibid.*

<sup>142</sup> *ibid.* 11.

<sup>143</sup> *ibid.* 11.

overlapping phenomena, namely slavery and migrant smuggling. This issue is explained in the following chapter as a definitional quagmire, and different examples are discussed as contemporary challenges to understanding what constitutes human trafficking, which in turn include discussion of how international law has responded to such challenges.



## 3 Definitional Quagmire of Human Trafficking

### 3.1 Abstract

This chapter deals with one major question: what is the meaning and scope of human trafficking under international law, considering the definitional quagmire surrounding this phenomenon?

In order to answer this question, this Chapter first closely examines the Trafficking Protocol's definition. Then, it conducts its analysis around the comparison of slavery and trafficking and the comparison of smuggling and trafficking under international law, which pertains to the issue of the definitional quagmire. The aim of this Chapter is to conclude whether existing definitions are unclear, and if so this is because these three terms/concepts (slavery, smuggling and trafficking) are various points on one continuum ('mere point[s] on a poorly defined continuum'<sup>1</sup>), or whether it happens because the actual laws that relate to each concept are different, and thus the differences are more 'real' than just various conceptual interpretations.

### 3.2 What is Human Trafficking?

#### 3.2.1 Human Trafficking Definition of the Trafficking Protocol

Until 2000, trafficking as a term was not defined by international law, even though it appeared in a number of international agreements.<sup>2</sup> Human trafficking is a complex and deeply troubling issue that is tied up with the nature of globalisation and the evolution of human rights discourse and practice.<sup>3</sup> In the process of struggling to define and identify human trafficking, the Trafficking Protocol emerged as a response to the diversity of trafficking practices

<sup>1</sup> Benjamin S Buckland, 'Human Trafficking & Smuggling: Crossover & Overlap' in Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector Human Trafficking & Organised Crime in the US & Western Europe* (National Defence Academy and Austrian Ministry of Defence and Sports & Geneva Centre for the Democratic Control of Armed Forces, 2009), 132.

<sup>2</sup> Anne T Gallagher, *The International Law of Human Trafficking* (1<sup>st</sup> published, Cambridge University Press, 2010), 12.

<sup>3</sup> Cherif Bassiouni et al, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st century' (2010) 81(3) *Revue Internationale de Droit Pénal* 417, at 417.

worldwide, which is why it remains a living document.<sup>4</sup> In terms of defining and regulating trafficking, the Protocol is a true breakthrough;<sup>5</sup> although its definition is not perfect, it is good enough, as it incorporates a common understanding of trafficking.<sup>6</sup>

For example, human trafficking is not restricted to sexual exploitation, and sex trafficking is accepted as a form of human trafficking. It is established that trafficking could have a range of end purposes, including but not limited to sexual exploitation, involving men and boys as well as women and girls at any age.<sup>7</sup> This sentence means trafficking in women had long been a topic of international concern, yet in this century the term trafficking is not reserved for women and girls forced into prostitution.<sup>8</sup> With the Protocol, the meaning of human trafficking moved from sexual exploitation to exploitation in a much more general sense.<sup>9</sup> For the first time, the definition linked trafficking with forced labour and slavery, bringing into play international conventions and agreements on forced labour:

[T]hrough the contribution of advocacy groups, civil society organisations definition of human trafficking was broadened to include other forms of exploitation such as slavery, forced labor, bonded labor, child labor, and so on, involving movements across international borders.<sup>10</sup>

The Protocol described various types of human exploitation, connected to international instruments, and brought them together for the first time.<sup>11</sup> E.g., organ trafficking, along with forced labour and sex trafficking, was addressed in the Protocol, and it is recognised that ‘even willing participants in underworld

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<sup>4</sup> *ibid* 447.

<sup>5</sup> Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975, at 1004.

<sup>6</sup> *ibid* 1004.

<sup>7</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 47.

<sup>8</sup> Kelly E Hyndlnad ‘The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children’ (2001) 8(2) *Human Rights Brief* 30, at 30.

<sup>9</sup> Johannes Koettl, ‘Human Trafficking, Modern Slavery, and Economic Exploitation - a Discussion on Definitions, Prevalence, Relevance for Development, and Roles for the World Bank in the Fight Against Human Trafficking’ (2009) SP Discussion Paper 0911, 6  
<<http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0911.pdf>> accessed 24 April 2017.

<sup>10</sup> *ibid* 5 -7.

<sup>11</sup> Jean Allain (ed), *The Legal Understanding of Slavery - From the Historical to the Contemporary* (1<sup>st</sup> ed, Oxford University Press, 2012), 215.

illicit kidney schemes can be counted as victims'.<sup>12</sup> Trafficking does not refer to a single act; rather, it covers a process that is organised in a variety of ways and involves a range of different actions and outcomes.<sup>13</sup>

The Trafficking Protocol offered the most comprehensive and universally accepted definition of trafficking, informing regional, sub-regional and national counter-trafficking legal frameworks.<sup>14</sup> This is outlined in Article III, as follows:<sup>15</sup>

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This definition describes human trafficking as a process that can be organised in a variety of ways; involving a range of different actions and outcomes, rather than as a single, unitary act leading to one specific outcome.<sup>16</sup> On the one hand, this definition from the Protocol is unclear/open, because it understands the practice of trafficking as one that unfolds overtime for purposes of exploitation and can be developed in variety of different ways.<sup>17</sup> On the other hand, the Protocol’s definition can be read as saying that trafficking is a non-consensual set of steps that together make a process, independently of where it takes place,<sup>18</sup> as a chain of acts, interrelated with ‘push and pull factors’.<sup>19</sup>

<sup>12</sup> Nancy Scheper-Hughes, ‘Human Traffic: Exposing The Brutal Organ Trade’ (*New Internationalist Magazine People, Ideas and Action for Global Justice*, 1 May 2014) <<https://newint.org/features/2014/05/01/organ-trafficking-keynote/>> accessed 10 March 2017.

<sup>13</sup> Bridget Anderson & Julia O’Connell Davidson, ‘Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study’ (2003) 15 *IOM Migration Research Series* 5, at 110.

<sup>14</sup> Joy N Ezeilo, ‘Achievements of the Trafficking Protocol: Perspectives from the former UN Special Rapporteur on Trafficking in Persons’ (2015) 4 *Anti-Trafficking Review* 144, at 146.

<sup>15</sup> See OHCHR, ‘Human Rights and Human Trafficking’ (2014) Fact Sheet No 36, 5 <[http://www.ohchr.org/Documents/Publications/FS36\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS36_en.pdf)> accessed 23 July 2017.

<sup>16</sup> Julia O’Connell Davidson, ‘Will the Real Sex Slave Please Stand Up?’ (2006) 83 *Feminist Review* 5, at 8.

<sup>17</sup> Anderson & Davidson, ‘Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study’ (n 13) 6.

<sup>18</sup> Koettl (n 9) 4.

<sup>19</sup> Kevin Bales, ‘What Predicts Human Trafficking’ (2007) 31(2) *International Journal of Comparative and Applied Criminal Justice* 269, at 271.

This definition of human trafficking can be analysed through three layers/elements:<sup>20</sup>

*Action* can describe a variety of activities including but not limited to<sup>21</sup> recruitment, transportation, transfer, harbouring or receipt of persons.

*Means* indicates securing that action through the abuse of power or of a position of vulnerability.<sup>22</sup> As Elliott discusses, ‘the terminology used in the trafficking definition makes it clear that it is possible to consent to exploitative activity, but that any instance of the “means” shall render the consent irrelevant’.<sup>23</sup> Of course, it is unnecessary to show that force, deception or any other means are used for trafficking children.<sup>24</sup> This sentence implies that the ‘means’ element of trafficking as operates to nullify consent, are not required to be established in relation to child trafficking.<sup>25</sup> In some cases, traffickers may offer misleading information by painting a picture of an ideal world and using manipulation tactics during the recruitment phase; various promises are made to victims with the aim of obtaining their consent. People are weakened by propaganda and this weakness makes them more vulnerable to traffickers. Indeed, the discussion of root causes of trafficking outlined social, environmental and political reasons that render human beings vulnerable, albeit such cases are also clear indicators of why victims cannot be trafficked voluntarily.<sup>26</sup> This idea suggests that these root causes mean that no one really ‘chooses’ to be trafficked, but rather they are pushed into it by these other root causes. In addition, the concept of abuse of a position of vulnerability is unique to the Trafficking Protocol, considering its definition, which refers ‘to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved’.<sup>27</sup> Thus in all cases of trafficking, victims have either never consented (due to coercion or

<sup>20</sup> OHCHR, ‘Human Rights and Human Trafficking’ (n 15); Anne T Gallagher & Fiona David, *The International Law of Migrant Smuggling* (1<sup>st</sup> published, Cambridge University Press, 2014), 69.

<sup>21</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 29.

<sup>22</sup> UNODC, ‘Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons’ (2013) Issue Paper <[http://www.unodc.org/documents/human-trafficking/2012/UNODC\\_2012\\_Issue\\_Paper\\_-\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability.pdf](http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf)> accessed 30 June 2016.

<sup>23</sup> Jessica Elliott, *The Role of Consent in Human Trafficking* (1<sup>st</sup> published, Routledge Taylor & Francis Group, 2015), 54.

<sup>24</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 31.

<sup>25</sup> *ibid* 47.

<sup>26</sup> Tom Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System’ (2005) 54(2) *International and Comparative Law Quarterly* 445, at 447.

<sup>27</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 32.

abduction) or even though they initially consented to whatever the agreement that is done with their traffickers, that consent has been rendered meaningless by the abusive action of traffickers, including false promises that are given during recruitment stage.<sup>28</sup>

*Purpose* refers to the intention/end goal of the action, which is exploitation, for which the means are used.<sup>29</sup> The definition gives examples of types of exploitation that are addressed, including sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or removal of organs.<sup>30</sup> The category of types of exploitation is left open-ended for each country to determine what type of exploitation they would seek to suppress.<sup>31</sup> The definition is an unstated invitation to legislators around the world to modify its provisions.<sup>32</sup> In this respect, it can be argued that the Protocol is ‘well equipped’ to capture new forms of exploitation and necessary elements of the offence, e.g., practices of *diya* (to be killed for blood money) taking place in the Northern part of Nigeria could be considered within the realm of human trafficking:

[T]he trafficker, often female, takes a child trafficked to Saudi Arabia to go shopping; when she spots an affluent Arab’s car, she pushes the child in the path of the car to get run over and possibly killed. There are two types of penalties for anyone who kills another human being in Saudi Arabia. The first is the death penalty; the second is offering compensation to the relatives of the dead victim, if the relatives accept (“*diya*”). The trafficker opts for the second option and obtains an equivalent of about Naira 3,500,000 (local currency, equivalent to some US \$27,000). The trafficker returns to Nigeria and informs the parents of the trafficked child that the child died of natural causes. The trafficker pays the parents about Naira 100,000 an equivalent (about US \$775) as the wages of the child while in Saudi Arabia. Parents do not typically probe the trafficker’s story, often accepting the death of the child as the will of Allah. Many simply accept the supposed wages. There is little research on this form of trafficking, but interviews suggest that those

<sup>28</sup> UNODC *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (E.05.V2, 2004) <[https://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf)> accessed 20 September 2017.

<sup>29</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 29.

<sup>30</sup> Jean Allain & Kevin Bales, ‘Slavery and Its Definition’ (2012) Global Dialogue Queen’s University Belfast Law Research Paper 12-06, 2 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2123155](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123155)> accessed 29 July 2017.

<sup>31</sup> Jean Allain, ‘No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol’ (2014) 7(1) *Albany Government Law Review* 111, at 117.

<sup>32</sup> *ibid* 117.

recruited are women and children from poor family backgrounds and rural communities.<sup>33</sup>

Gallagher states that 'it is difficult to identify a contemporary form of private exploitation that would not fall within the generous parameters of the definition'.<sup>34</sup> Indeed, the Protocol's definition does not just refer exploitation as an end purpose, but also includes a recruiter, broker or transporter, who could be a trafficker, individual or entity, which initiates or sustains the exploitation.<sup>35</sup> The Trafficking Protocol does not seek to suppress human exploitation per se.<sup>36</sup> The Protocol's definition seems sufficient to address different forms of trafficking practices, but there are still gaps, which will be discussed in the following section. Because it is important to define what in fact, and in law, exploitation actually is, yet no law defines it, although laws are written about prohibiting it.<sup>37</sup> The lack of clarity around terms related to human trafficking, especially exploitation, leaves main components of its definition open-ended, which also makes human trafficking a complex phenomenon. This fact, as this thesis posits, leads to a definitional quagmire due to the potential breadth of the components of its definition, as is explained in the following section.

Further, the Protocol's definition requires not only an act and an intended purpose; but also the action leading to exploitation must have been made possible through the use of special means, such as coercion, deception or the abuse of authority.<sup>38</sup> For instance, Gallagher states that exploitation should be about intention of conduct, in that a situation of trafficking does not necessarily arise just because exploitation takes place.<sup>39</sup> Taking into account of Gallagher's analysis, the following issues should also be considered: whether subsequent exploitation of people is a necessary element in trafficking cases;<sup>40</sup> and whether

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<sup>33</sup> Kristina Touzenis, *Trafficking in Human Beings - Human Rights and Transnational Criminal Law, Developments in Law and Practices* (United Nations Educational, Scientific and Cultural Organization, 2010), 38.

<sup>34</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 47.

<sup>35</sup> *ibid* 47.

<sup>36</sup> Jean Allain, 'The International Legal Regime of Slavery and Human Exploitation and Its Obfuscation by the Term of Art: 'Slavery Like Practice' in *The Law and Slavery Prohibiting Human Exploitation* (Brill Nijhoff, 2015), 159- 193.

<sup>37</sup> Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7(1) *Albany Government Law Review* 111, at 129.

<sup>38</sup> Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law* 789, at 814.

<sup>39</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 34.

<sup>40</sup> Tom Obakata, *Trafficking of Human Beings from a Human Rights Perspective Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006), 20.

trafficking is a process that may result in exploitation or it is a continuum of exploitation.<sup>41</sup>

Indeed, in cases of trafficking, it is important to establish a link between completed, actual or prospective exploitation and trafficking acts. As the UNODC has noted, the primary source of profit and purpose of human trafficking is exploitation.<sup>42</sup> Obokata explains that even though for an act to constitute trafficking, the element of subsequent exploitation must be present, not all trafficked people are exploited afterwards, 'as a result of early interception by the law enforcement authorities in States of destination, for example'.<sup>43</sup> A wide variety of human rights abuses as subsequent exploitation should be enough to regard such acts as trafficking.<sup>44</sup> As Obokata explains, 'the phrase "for the purpose of" can be interpreted merely to mean *mens rea* to facilitate exploitation'.<sup>45</sup> Thus, this makes the offence of trafficking intact even when people are not exploited afterwards, as the *mens rea* is established on the part of traffickers.<sup>46</sup> It is important to be aware that, legally, individuals do not have to be exploited in order to be trafficked. Under such circumstances, exploitation may be treated as a sufficient but not a necessary element of trafficking, which will keep the offence of trafficking actual even when people are not exploited afterwards.<sup>47</sup> When actual exploitation does not happen, it does not necessarily mean that trafficking is not exploitative; rather, it means the end purpose of trafficking has not yet occurred. This is because 'trafficking is a process [of] moving someone into a position of exploitation; because (...) maintaining a person in a situation of exploitation is trafficking'.<sup>48</sup> It can be thus concluded that albeit trafficking may not always result in actual exploitation of a person, it is still trafficking.

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<sup>41</sup> See ILO, 'Discussing The Legal Definitions of Human Trafficking, Forced Labour and Slavery' (A Panel Discussion by Jean Allain, Anne Gallagher, Babu Mathew & Thiago Gurjao Alves Ribeiro, 8 July 2014) <<https://www.youtube.com/watch?v=4p8zLIhea1Y>> accessed 19 October 2016.

<sup>42</sup> UNODC, 'A Short Introduction to Migrant Smuggling' (2010) Issue Paper, 30 <[https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_A\\_short\\_introduction\\_to\\_migrant\\_smuggling.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_A_short_introduction_to_migrant_smuggling.pdf)> accessed 29 July 2017.

<sup>43</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (n 40) 20.

<sup>44</sup> *ibid* 20.

<sup>45</sup> *ibid* 20.

<sup>46</sup> *ibid* 20.

<sup>47</sup> *ibid* 20.

<sup>48</sup> See the analysis of Anne T Gallagher at the Anti-Trafficking Week on 'Discussing the Legal Definitions of Human Trafficking, Forced Labour and Slavery' (n 41).

### 3.2.2 What are the Pitfalls of the Trafficking Protocol's Definition?

It has become evident that questions remain about certain aspects of the definition of the Trafficking Protocol:<sup>49</sup> 'questions have emerged regarding those aspects of the definition that are not elsewhere defined in international law or commonly known to the major legal systems'.<sup>50</sup>

Indeed, the main issue with the Protocol's definition is related to the scope of the terms used to define trafficking. The potential breadth of the trafficking definition creates intricacy because it extends along the poorly defined continuum of international law regulations pertaining to slavery and smuggling; this is explained in the following section. The issue is not the narrowness of definition's scope, but the potential breadth of the definition provided by the Protocol;<sup>51</sup> it would have been preferable if the Protocol had defined constituent elements of trafficking, namely exploitation, deception and coercion.<sup>52</sup> The reasons behind this argument can be explained through some examples.

The scope of 'the abuse of power or the position of vulnerability' is not clearly identified in the Protocol, and thus can be interpreted differently. In the cases of trafficking for forced labour, for instance, it is not clear if the 'means' element of the trafficking definition is applicable whenever an employer exploits the economic vulnerability of workers, which would constitute a non-consensual exploitation of labour power. The scope of forced labour is vague, as labour exploitation is a term used neither in the Trafficking Protocol nor in the regional documents building on this Protocol.<sup>53</sup> The main problem in regards to forced labour exploitation is that it is not clear to what extent labour could be truly a free labour and to what extent it would be possible to assert that a worker has the exclusive right of ownership over his body, in a system in which freedom is perceived as the ability to sell one's labour, to enter into a contract with a

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<sup>49</sup> See UNODC, 'Abuse of A Position of Vulnerability and Other "Means" Within the Definition of Trafficking in Persons' (n 22).

<sup>50</sup> *ibid* 1.

<sup>51</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 48.

Anderson & Davidson, 'Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study' (n 13) 6.

<sup>52</sup> Jane Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' (Columbia Law School Gender and Sexuality Online, 2011), 6 <SSRN:<http://ssrn.com/abstract=1779263>> accessed 10 April 2017.

<sup>53</sup> Kendra Strauss, 'Coerced, Forced and Unfree Labour: Geographies of Exploitation in Contemporary Labour Markets' (2012) 6 *Geography Compass* 137, at 139.

purchaser of labour, and to receive an agreed wage. Indeed, despite being a commonly used term, forced labour exploitation has never been defined by the specialised UN agency for labour standards in its entire history.<sup>54</sup> In cases of labour exploitation, it is not clear what are to be counted as trafficking instead of just abusive or exploitative labour practices, and where are the victims to be found?<sup>55</sup> For example, labourers employed on large-scale projects operated by two of the UK's largest construction companies in Qatar allegedly were exploited and mistreated.<sup>56</sup> Indeed, those migrants willingly signed a contract with an agent, even though they were tricked about the outcomes around the kind of work, the working conditions and the wages.<sup>57</sup> The alleged abuses included erratic or reduced payment of wages, passport confiscation, debt bondage, using fear and intimidation, and threats of arrest or deportation if workers stepped out of line.<sup>58</sup> This form of abuse constitutes human trafficking for forced labour, as trafficking can evolve as a form of forced labour, as explained above, although not all forms of forced labour can be considered human trafficking.<sup>59</sup> However, in this case still it remains unclear whether the concept of coercion also includes economic pressures.<sup>60</sup> Further, the question of where trafficking and poor working conditions end always is present. E.g., without understandable absence of a standard measure of what constitutes exploitation, it is not clear how unpleasant or exploitative does an employment situation have to be before to say that the victim was recruited/moved/harboured for purposes of exploitation.<sup>61</sup>

This kind of analysis can also be applied to cases in which the line between slavery and trafficking is blurred: it is hard to find the line between slavery and

<sup>54</sup> Conny Rijken (ed), *Combating Trafficking in Human Beings for Labour Exploitation* (Wolf Legal Publishers, 2011), 471.

<sup>55</sup> Sheldon X Zhang & Li Cai, 'Counting Labour Trafficking Activities: An Empirical Attempt at Standardised Measurement', in Kristiina Kangaspunta (guest ed), *Researching Hidden Populations: Approaches to and Methodologies for Generating Data on Trafficking in Persons* (vol 8, UNODC Forum on Crime and Society, 2015), 40.

<sup>56</sup> Pete Pattison, 'Balfour Beatty and Interserve Accused of Migrant Worker Labour Abuses in Qatar' *The Guardian* (Doha, 13 April 2016) <[http://www.theguardian.com/global-development/2016/apr/13/balfour-beatty-interserve-accused-migrant-worker-labour-abuses-qatar?CMP=tw\\_t\\_a-global-development\\_b-gdndevelopment](http://www.theguardian.com/global-development/2016/apr/13/balfour-beatty-interserve-accused-migrant-worker-labour-abuses-qatar?CMP=tw_t_a-global-development_b-gdndevelopment)> accessed 13 April 2016.

<sup>57</sup> UNODC, 'Abuse of a Position of Vulnerability and Other "Means" Within the Definition of Trafficking in Persons' (n 22) 17.

<sup>58</sup> Pattison (n 56).

<sup>59</sup> UNODC, 'Abuse of a Position of Vulnerability and Other "Means" Within the Definition of Trafficking in Persons' (n 22) 12.

<sup>60</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 49.

<sup>61</sup> *ibid* 49.

trafficking, and between slavery and exploitative work practices; or when considering exploitative conditions at what point does the situation become slavery.

In sum, as is explained in the following section, unclear boundaries of the terms used to define trafficking not only make its definition in the Protocol vague, but also place it in a poorly defined continuum formed by international regulations pertaining to trafficking, slavery and migrant smuggling. This leads to the definitional quagmire of trafficking.

### **3.3 What Forms the Definitional Quagmire of Human Trafficking?**

This thesis identifies that the intricacy of international legal rules make trafficking, slavery and smuggling ‘mere points on a poorly defined continuum’.<sup>62</sup> As explained above, although the Trafficking Protocol is a true breakthrough, components of its human trafficking definition have a potential breadth that can leave room for different interpretations. Just like the definition of trafficking is too broad, so too are the definitions of smuggling and slavery, as the details are explained in the following sections.

Indeed, there is confusion/overlap in international law between smuggling and trafficking. Thus, primarily the media, scholars and legal voices see an overlap between slavery-trafficking and smuggling-trafficking. That is why they have interpreted such intricacy of international law regulations in a way that e.g., trafficking has been referred as modern-day slavery or migrant smugglers have been identified as traffickers. This thesis sees these varied interpretations as the reason for the definitional quagmire. In fact, there is not enough evidence to clearly imply that international law indeed uses the term trafficking interchangeably with either slavery or smuggling. Reasons for this are explained briefly as follows.

Definitional quagmire of slavery/trafficking definition: In the Trafficking Protocol’s definition, slavery is introduced as just one of the possible outcomes of what is termed trafficking; as ‘(...) include, at a minimum, the exploitation of

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<sup>62</sup> Buckland (n 1) 132; Gallagher, *The International Law of Human Trafficking* (n 2) 53.

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'.<sup>63</sup> The definition links the act, the means and the purpose; accordingly, connections among the actors become a condition of identifying a trafficking case.<sup>64</sup> Under the Trafficking Protocol's definition, human beings do not necessarily have to be held in slavery, but have to be transported for purposes of exploitation. However, including slavery in the definition of human trafficking is interpreted as strong evidence of a substantive link between the two concepts, e.g., in one way or another; slavery would include human trafficking practices.<sup>65</sup> Similar to the definition in the Trafficking Protocol, the 1999 *ILO Convention on the Worst Forms of Child Labour* calls for 'immediate and effective measures to secure prohibition and elimination of the worst forms of child labour as a matter of urgency,' including 'all forms of slavery or practices similar to slavery such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour'.<sup>66</sup> In some cases, slavery and human trafficking intersect; e.g., the UN Deputy Secretary General Jan Eliasson, on the issue of Isis's trafficking of Yazidis, stated that those atrocities constituted human trafficking as 'slavery in the modern age'.<sup>67</sup> This kind of overlap can be seen in, e.g., the exploitation of construction workers in the Persian Gulf, children in India working in brick kilns and garment workers in Bangladesh.<sup>68</sup> Taking account of related incidents, traditional religious practices also seem as a form of slavery and if concrete actions are not taken by states concerned to put an end to these practices, in some cases this may lead to trafficking related form of exploitation for instance.<sup>69</sup> Scarpa in this regard gives *Devadasi* (female servant of god)

<sup>63</sup> Julia O'Connell Davidson, *Modern Slavery the Margins of Freedom* (1<sup>st</sup> published, Palgrave Macmillan, 2015), 4; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime A/RES/55/2515* entered into force 25 December 2003 (Trafficking Protocol). (Trafficking Protocol), art 3(a) [emphasis added].

<sup>64</sup> Danièle Bélanger, 'Labor Migration and Trafficking among Vietnamese Migrants in Asia' (2014) 653(1) *ANNALS of the American Academy of Political and Social Science* 87, at 89.

<sup>65</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 189.

<sup>66</sup> *ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour C182*, 87<sup>th</sup> ILC session 17 Jun 1999, entered into force 19 November 2000 (Worst Forms of Child Labour Convention), art 1 [emphasis added].

<sup>67</sup> UN Meetings & Coverage & Press Release, 'Human Trafficking 'Slavery in the Modern Age', Says Deputy Secretary-General in Briefing to Security Council' (16 December 2015) <<https://www.un.org/press/en/2015/dsgsm926.doc.htm>> accessed 22 March 2017.

<sup>68</sup> The Editorial Board, 'Modern Slavery Grows' *The New York Times - The Opinion Pages* (2 December 2014) <<http://www.nytimes.com/2014/12/03/opinion/modern-slavery-grows.html>> accessed 9 August 2016.

<sup>69</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (1<sup>st</sup> published, Oxford University Press, 2008), 15.

practice as an example. As Scarpa explains this practice is found mainly in Southern India, and ‘girls usually belonging to the Dalit community (the lower caste) are dedicated to a God before puberty and are subsequently unable to marry because they are obliged to become temple prostitutes’.<sup>70</sup> This practice is the result of their birth status, as ‘children of Devadasi are also vulnerable to sexual exploitation and trafficking’.<sup>71</sup>

This thesis argues that although there is overlap between slavery and trafficking philosophically and factually, it is not correct to interpret the intricacy of international legal regulations pertaining to these phenomena as suggesting that trafficking is modern-day slavery. It is indeed difficult to use the Protocol’s broad definition of trafficking clearly and with certainty in empirical research.<sup>72</sup> There are also some aspects of the definition of slavery under the 1926 Slavery Convention that have caused different interpretations, e.g., due to the ambiguous concept of ownership as an element of slavery. However, despite the poorly defined continuum generated by international law regulations pertaining to slavery and trafficking, human trafficking cannot legally be referred to as a new form of slavery, as ‘that would require the snake to swallow its own tail’.<sup>73</sup> Taking into account the Trafficking Protocol’s definition of human trafficking, it cannot be concluded that trafficking is in fact regulated as a form of modern-day slavery in a legal sense. According to the Protocol, in order to qualify as a human trafficking victim, a person does not have to be held in slavery but must be transported for the purpose of exploitation. Indeed, the definitions of human trafficking and slavery provided by the 1926 Convention may seem confusing due to some of the terms used, including legal ownership and exploitation. In any case, the Trafficking Protocol’s definition should be the primary source in order to avoid ‘guessing games’ about what human trafficking ‘actually’ is.

Definitional quagmire of migrant smuggling/human trafficking: It was reported that ‘human traffickers “netted up to four billion pounds last year”’.<sup>74</sup> Yet the

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<sup>70</sup> *ibid* 15.

<sup>71</sup> *ibid* 15.

<sup>72</sup> Bélanger (n 64) 89.

<sup>73</sup> Jean Allain, ‘Book review, Scarpa, Silvia; Trafficking in Human Beings: Modern Slavery’ (2009) 20(2) *European Journal of International Law* 453, at 454.

<sup>74</sup> Charlotte McDonald Gibson, ‘Refugee Crisis: Human Traffickers ‘Netted Up to £4 bn Last Year’ *Independent* (16 January 2016) <<http://www.independent.co.uk/news/world/europe/refugee-crisis-human-traffickers-netted-up-to-4bn-last-year-a6816861.html>> accessed 16 January 2016.

same report stated that ‘human smugglers’ made a record profit last year of around 4 billion pounds by exploiting the misery of refugees.<sup>75</sup> Looking at this language, one could assume that traffickers smuggle refugees, even though these terms have different legal meanings.<sup>76</sup> Indeed, Gallagher points that ‘trafficking and migrant smuggling are processes that are often interrelated and almost always involve shift, flows, overlaps, and transitions. [E.g.], [a]n individual can be smuggled one day and trafficked the next’.<sup>77</sup> Buckland argues that ‘smuggled and trafficked people fall along a continuum of abuse - quite clearly distinguishable at the extremes but increasingly hard to tell apart at the centre’.<sup>78</sup> It is difficult to identify victims of human trafficking when the victim is or was involved in illegal activity; in such cases e.g., a smuggled person becomes a trafficked person.<sup>79</sup> As is explained in the related section pertaining to the smuggling/trafficking analysis, these phenomena have different legal meanings, even though regulations for them under international law have caused the definitional quagmire leading to different interpretations.

In summary, ‘the evolution of consensus on what constitutes trafficking does not necessarily mark the end of definitional controversies’, which forms the definitional quagmire.<sup>80</sup> On one hand, indeed such attempts are well-intentioned to widen the scope of human trafficking in order to address this phenomenon as modern-day slavery or migrant smuggling.<sup>81</sup> In this regard, this thesis posits that the Trafficking Protocol defines trafficking as a unique crime, different from slavery and smuggling. However, the main problem is the broad scope of the formulation of not only the human trafficking definition in the Protocol, but also the 1926 Slavery Convention’s definition of slavery and the Migrant Smuggling Protocol’s smuggling definition. Unclear boundaries between these phenomena under international law have led to different interpretations of these concepts.

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<sup>75</sup> *ibid.*

<sup>76</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 55.

<sup>77</sup> *ibid.* 52.

<sup>78</sup> Buckland (n 1) 63.

<sup>79</sup> Cindy J Smith & Kristiina Kangaspunta, ‘Defining Human Trafficking and Its Nuances in a Cultural Context’ in John Winterdyk & Benjamin Perrin & Philip Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (CRC Press, 2012), 27.

<sup>80</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 47.

<sup>81</sup> *ibid.* 51.

### 3.3.1 Definitional Quagmire of Trafficking in relation to Slavery and Smuggling

#### 3.3.1.1 Trafficking and Slavery

##### 3.3.1.1.1 Characterisation of Trafficking in relation to Slavery

The international movement to abolish white slavery provided a framework for international human trafficking law regulations. In this process, 'trafficking' relating to human beings 'came into international use in the early 20th century in connection with white slavery: a term that was initially used to refer to forcible or fraudulent recruitment to prostitution'.<sup>82</sup> Before that, the focus was exclusively on slavery, such that human trafficking as a term was not regulated in the context of international law under a specific treaty until the Trafficking Protocol. Yet, as is explained in this section, even after the adoption of the Trafficking Protocol, although the term trafficking was seen as different from slavery, trafficking has been referred to or characterised as 'modern-day slavery' by the international community.

The legal meaning of human trafficking is important, because calling trafficking a modern form of slavery sends a message that slavery is not a thing of past, but rather surreptitiously resurfaces in new guises, such as trafficking.<sup>83</sup> Yet without defining human trafficking, it would not be possible to identify trafficking victims, as explained in Chapter IV.

Indeed, human trafficking, considering its violent nature, is reminiscent of slavery. The fact that trafficking is like slavery is one of the reasons why the two seem to overlap.<sup>84</sup> Yet irrespective of real-world examples, legally, no form of human trafficking constitutes slavery, and, in the same vein, not all slavery is human trafficking.<sup>85</sup> Although human trafficking as a phenomenon is similar to slavery, it does not necessarily mean that legally these two phenomena should be interpreted as sharing a close relationship. International law has not included

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<sup>82</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 13.

<sup>83</sup> Harmen van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 *Chinese Journal of International Law* 297, at 298.

<sup>84</sup> Achille Mbembe, 'Necropolitics' (2003) 15(1) *Public Culture* 11, at 21.

<sup>85</sup> Wilt (n 83) 334; Jessica Valenti, 'Inside Human Trafficking: Don't Call It 'Modern Day Slavery' – Fix It Already' *The Guardian* (25 April 2014) <<http://www.theguardian.com/commentisfree/2014/apr/25/human-trafficking-modern-day-slavery-prostitution-in-new-york-city>> accessed 6 April 2016.

trafficking as a form of slavery, yet the language used to define trafficking and slavery has motivated the international community to capture the legal meaning of these two phenomena precisely. As can be seen in the following section, the overlap between slavery and trafficking has also been a major reason why some scholars and international judgements justify their view of trafficking as a form of modern-day slavery.

For this reason, this thesis conducts its analysis in the following paragraphs in order to untangle the definitional knot by considering the following questions on the basis of first real-world incidents and second international legal regulations:

To what extent and in what cases do trafficking practices overlap with slavery in human history and in modern times?

Whether human trafficking is regulated as a form of modern-day slavery under international law?

### **3.3.1.1.2 The Overlapping Aspects of Trafficking and Slavery**

#### **3.3.1.1.2.1 The Connection between Human Trafficking and Slavery Practices in Human History**

Various forms of slavery, including coerced human labour, existed in Western and African societies before the 16<sup>th</sup> century, when transatlantic chattel slavery started.<sup>86</sup> A range of texts, including the Greek classics, the Hebrew Bible, the New Testament and the Qur'an, all describe slavery,<sup>87</sup> although they only sought its regulation and humanisation rather than its abolition.<sup>88</sup> In the classic form of slavery, individuals were traded for the purpose of exploiting their labour for profit; this was mainly practiced in Africa, Asia, the Americas and the Ottoman

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<sup>86</sup> Hakim Adi, 'Africa and the Transatlantic Slave Trade' *BBC History* (10 May 2012) <[http://www.bbc.co.uk/history/british/abolition/africa\\_article\\_01.shtml](http://www.bbc.co.uk/history/british/abolition/africa_article_01.shtml)> accessed 7 March 2015.

<sup>87</sup> Michael J Palmiotto, *Combating Human Trafficking: A Multidisciplinary Approach* (CRC Press Taylor & Francis Group, 2015), xvii; John Blake, 'How Religion Has Been Used to Promote Slavery' *CNN* (29 March 2012) <<http://religion.blogs.cnn.com/2012/03/29/how-religion-has-been-used-to-promote-slavery/>> accessed 7 March 2016.

<sup>88</sup> Anne T Gallagher, 'Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage' in Leila Nadya Sadat & Michael P Scarf (eds) *The Theory and Practices of International Criminal Law - Essays in Honour of M. Cherif Bassiouni* (Martinus Nijhoff Publishers, 2008), 401.

Empire.<sup>89</sup> In West Africa, slavery was a feature of society in the Dahomey Kingdom,<sup>90</sup> as its economy was based on the slave trade. The Kingdom went to war with neighbouring societies to capture slaves and trade them with Europeans for guns, in order to use the guns to go to war.<sup>91</sup> Slavery formed the social structure of the Dahomey Kingdom, similar to that of the ancient Greeks, who considered it morally acceptable.<sup>92</sup> Not only during the Roman Empire (150 BCE-350 CE) but also in the Americas (1492-1865), actual 'slave societies' were established, such that, until the early 19<sup>th</sup> century, indentured servitude was both morally acceptable and legal.<sup>93</sup>

The tactics used in early slavery and human trafficking overlap in many aspects. For instance, Thomas Thistlewood wrote in his diary about sexually using his slaves over a period of 37 years, during which he engaged in 3,852 sexual acts with 138 slave women, most of whom he developed close physical relations to, in exactly the way a pimp operates today.<sup>94</sup> During the 19<sup>th</sup> century, many slaves were 'trafficked', such that the phenomenon of slavery inherently entailed a trafficking element. The tactics of contemporary slaveholders and traffickers remain the same as those of transatlantic slave traders. Considering these examples, the transatlantic slave trade is relevant to human trafficking practices,<sup>95</sup> which involved the large-scale enslavement of African populations, lasting from 1514 to 1866.<sup>96</sup> Admiral John Hawkins, an English navigator (1532-1595), initiated the transatlantic slave trade, and it was embraced shortly after by the Spaniards as they colonised the New World:<sup>97</sup> 'The Portuguese and Spanish introduced African slaves to replace the indigenous inhabitants of the Americas, who had quickly fallen prey to the colonisers' depredations, diseases

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<sup>89</sup> Bernard Lewis, *Race and Slavery in the Middle East - An Historical Enquiry* (1<sup>st</sup> published, Oxford University Press, 1992), 11.

<sup>90</sup> Joshua S Goldstein, *War and Gender How Gender Shapes the War System and Vice Versa* (Cambridge University Press, 2001), 21.

<sup>91</sup> *ibid* 22.

<sup>92</sup> Peter Simpson, 'Aristotle's Defensible Defence of Slavery' (2006) 23(1) *Polis: The Journal for Ancient Greek Political Thought* 95, at 95.

<sup>93</sup> Roger L Ransom & Richard Sutch, *One Kind of Freedom - The Economic Consequences of Emancipation* (2<sup>nd</sup> ed, Cambridge University Press, 2001), 1.

<sup>94</sup> Orlando Patterson, 'Trafficking, Gender and Slavery: Past and Present' in Jean Allain (ed), *The Legal Understanding of Slavery - From the Historical to the Contemporary* (1<sup>st</sup> ed, Oxford University Press, 2012), 327.

<sup>95</sup> See Karen E Bravo, 'Exploring the Analogy Between Modern Trafficking in Humans and the Trans- Atlantic Slave Trade' (2007) 25(207) *Boston University International Law Journal* 207.

<sup>96</sup> Allain, *The Law and Slavery: Prohibiting Human Exploitation* (n 36) 6.

<sup>97</sup> Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 79) 6.

and labour demands.’<sup>98</sup> This form of slavery was carried out by flagged ships of Brazil, Denmark, France, Germany, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom and the United States of America. <sup>99</sup> European countries used international law to justify the ownership of human beings.<sup>100</sup>

Similarly, ‘the Romans and Greeks used trafficked slaves to build their economies and expand the Roman Empire’.<sup>101</sup> Slaves in the Roman Empire were brought to Italy against their will to serve the Romans.<sup>102</sup> Although an estimated 609,000 slaves arrived in the New World in the beginning of the 19<sup>th</sup> century, within a relatively short time, things began to change.<sup>103</sup>

Such analysis, which aims to link trafficking and slavery by considering the transatlantic slave trade, can be beneficial e.g., what follows are the outcomes of this analysis:<sup>104</sup> ‘stimulation to the audience to action’; ‘the diminution of the horror of transatlantic slavery’; ‘the assumption of the mantle of righteousness’; ‘distancing of our time from theirs or “how far we’ve come”’; and “mythic slaying of the dragon”’.<sup>105</sup> In this respect, connections between the transatlantic slave trade and modern-day slavery could generate a moral response to human trafficking.<sup>106</sup> This comparison is not only an effective way of illustrating the horrors of human trafficking in the modern world, it also romanticises collective action against perpetrators by depicting filmic scenes; e.g. men prey upon vulnerable women; rich countries exploit; poor people are commodities, and on and on.<sup>107</sup> In this respect, the truth is, as Bravo explains, that the transatlantic slave trade is generally used as an emotional touchstone, aiming to trigger

<sup>98</sup> Karen E Bravo, ‘The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse’ (2011) 9(2) *Seattle Journal for Social Justice* 555, at 561.

<sup>99</sup> Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 79) 6.

<sup>100</sup> Jenny S Martinez, ‘The Slave Trade and the Origins of International Human Rights Law’ (*Stanford Lawyer*, 28 October 2011) <<https://law.stanford.edu/stanford-lawyer/articles/the-slave-trade-and-the-origins-of-international-human-rights-law-2/>> accessed 8 August 2017.

<sup>101</sup> Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 79) 6.

<sup>102</sup> *ibid* 6.

<sup>103</sup> Martinez (n 100).

<sup>104</sup> Bravo, ‘Exploring the Analogy Between Modern Trafficking in Humans and the Trans- Atlantic Slave Trade’ (n 95) 251.

<sup>105</sup> Bravo, ‘The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse’ (n 98) 562.

<sup>106</sup> Julie Kaye & John Winterdyk, ‘Explaining Human Trafficking’ in Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 79), 69.

<sup>107</sup> *ibid* 70.

action and to stress the fact that people are treated as ‘completely disposable tools for making money’.<sup>108</sup> As such that it is also because the similarity between slavery and trafficking shows the deeper structures of the world economic systems and factors at play which eventually caused and fostered rise of both concepts.<sup>109</sup>

The anti-slavery movement was created to oppose the classic ideas of chattel slavery, which turned human beings into property to be owned and used for various ends.<sup>110</sup> Those who were freed from this New World slavery became de jure free in societies where social rights, liberties and protections were unequally distributed along the lines of race, class and gender.<sup>111</sup> In America, at the end of the civil war, with emancipation from slavery and involuntary servitude, black people reclaimed the power they lost to shape their destinies; they discovered their own voice and gained political and economic freedom for the first time in their lives.<sup>112</sup>

Similarly, over a century ago, amid increased globalisation and the rise of imperialism, the emergence of traffic in women and girls for prostitution alarmed countries throughout the world. Indeed, white slavery is comparatively neither less nor more important than the transnational slave trade, as explained above. Both terms were established to stress the tragedy of demoralised, abused and exploited human beings.<sup>113</sup> Underpaid labour drove women and girls into prostitution, for instance.<sup>114</sup> The white slavery campaign at the time was an

<sup>108</sup> Kevin Bales, *Disposable People - New Slavery in the Global Economy* (University of California Press, 2012), 21.

<sup>109</sup> Bravo, ‘Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade’ (n 95) 212.

<sup>110</sup> See Hilary McDonald Beckles, *Slave Voyages the Transatlantic Trade in Enslaved African* (UNESCO, 2002).

<sup>111</sup> Julia O’Connell Davidson, ‘Happy Endings? Slavery, Emancipation and Freedom’ *Open Democracy* (7 October 2014) <<https://www.opendemocracy.net/beyondslavery/julia-o'connell-davidson/happy-endings-slavery-emancipation-and-freedom>> accessed 12 October 2016.

<sup>112</sup> Ransom & Sutch (n 93) 1.

‘Slavery in the United States did not emerge until 1619 when a Dutch trader sold 20 slaves in Jamestown, Virginia. The practice grew and spread rapidly after that.’ Winterdyk & Perrin & Reichel (eds) *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 79) 6.

<sup>113</sup> See Svati P Shah, ‘Trafficking and the Conflation with Sex Work: Implications for HIV Control and Prevention’ (2011) Global Commission on HIV and the Law Working Paper for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law <<https://hivlawcommission.org/wp-content/uploads/2017/06/Sex-Work-Trafficking-and-HIV.pdf>> accessed 13 September 2016.

<sup>114</sup> See Amy Foerster, ‘Contested Bodies – Sex trafficking NGOs and Transnational Politics’ (2009) 11(2) *International Feminist Journal of Politics* 151.

early example of ‘moral panic’.<sup>115</sup> The concept of white slavery was originally developed by activists intend on abolishing systems of regulated prostitution in Europe to distinguish female sexual slavery from the enslavement of Africans.<sup>116</sup> Trafficking was the first women’s issue taken up in international accords, well before other issues advocated during the same period, including suffrage, education and married women’s citizenship.<sup>117</sup> It was a rising concern back then that European women and girls were abducted, transported abroad and forced into prostitution.<sup>118</sup> Thus the international law, due to anti-slavery activities, responded to the trafficking by linking it to the issue of slavery, since calling human trafficking as modern-day slavery has guaranteed that more people will pay attention to the issue. In regards to addressing trafficking as modern-day slavery, one commenter concluded following:<sup>119</sup>

‘Old’ and ‘modern’, for example, are in quotes because they are relative terms: north Atlantic slavery is ‘modern’ compared to that of Antiquity and the Mediterranean world; and the ‘modern’ and ‘new’ slaveries that anti-slavery organisations target are new in relation to the slave systems of the 18th and 19th centuries that abolition wiped out. Yet not all agree on this naming (...) We should all spend more time exploring people’s evolving ideas of freedom than we do quarrelling over whether this or that contemporary experience can be defined as ‘modern’ or ‘new’ slavery.

Randall Robinson, in *The Debt: What America Owes to Blacks*, stated that, ‘[s]lavery itself did not end in 1865, as is commonly believed, but rather extended into the twentieth century’.<sup>120</sup> Human history has been built upon slavery: ‘almost all peoples have been both slaves and slaveholders’.<sup>121</sup> The moral understanding of human trafficking is rooted in slavery, as for centuries across the globe people have been sold and compelled to work for somebody

<sup>115</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 56.

<sup>116</sup> *ibid* 55.

<sup>117</sup> Stephanie A Limoncelli, *The Politics of Trafficking the First International Movement to Combat the Sexual Exploitation of Women* (Stanford University Press, 2010), 2.

<sup>118</sup> Corin Morcom & Andreas Schloenhardt, ‘All about Sex?! The Evolution of Trafficking in Persons in International Law’ (2011) The University of Queensland Human Trafficking Working Group Research Paper, 11 <<https://law.uq.edu.au/files/4311/Evolution-of-Int-Law-relating-to-Trafficking-in-Persons.pdf>> accessed 24 July 2017.

<sup>119</sup> Alice Bellagamba, ‘Living in The Shadows of Slavery’ *Open Democracy* (18 July 2016) <<https://opendemocracy.net/beyondslavery/alice-bellagamba/living-in-shadows-of-slavery>> accessed 7 February 2017.

<sup>120</sup> Randall Robinson, *The Debt - What America Owes to Blacks* (Penguin Group, 2000), 225.

<sup>121</sup> David Eltis, *The Rise of African Slavery in the Americas* (1<sup>st</sup> published, Cambridge University Press, 2000), xiii.

else for little or no reward.<sup>122</sup> The term trafficking was also used in writings from the early 17<sup>th</sup> century referring to '[t]hose which made it a trafficke to buy and sell slaves'.<sup>123</sup>

It can be interpreted that since incidents of slavery and trafficking contain elements of extreme physical and psychological coercion to control another's life, human trafficking is akin to slavery or a form of modern-day slavery.<sup>124</sup> As discussed in the introduction, human trafficking victims are subjected to subjugation, and face physical and mental suffering. Further, slavery and related practices constitute physical violence as well as emotional abuse. For the present purposes, it should also be noted that even without the existence of actual physical violence, economic forces might lead people to consent to severe economic exploitation. For example, debt-bonded brothel prostitution in Southeast Asia is not a case of violence, but due to the absence of payment, economic exploitation occurs.<sup>125</sup> Similarly, in the slave societies of the Caribbean, America and Brazil, some slaves were able to take part in trade, to work for wages and to engage in a range of different types of resistance.<sup>126</sup> Indeed, in some trafficking cases there exists either 'the total control of one person by another for the purpose of economic exploitation',<sup>127</sup> or complete coercive control of victims by taking advantage of the economic value of these individuals without accepting responsibility for their survival.<sup>128</sup> For this reason, it could be asserted that any such disposal of people would likely fall within the parameters of slavery where control and possession are present.<sup>129</sup>

In recent years, due to some important international cases pertaining to slavery and human trafficking as well as some scholarly approaches, it has become

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<sup>122</sup> Ryszard Piotrowicz, 'Irregular Migration Networks: The Challenge Posed by People Traffickers to States and Human Rights' in Barbara Bogusz et al (eds), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* (Leiden/Boston, Martinus Nijhoff Publishers, 2004), 138.

Note that 'trafficking, and the slave trade, are both processes, but the elements of these processes differ at points. Slavery may be a 'purpose' element of either process- that is to say, it can occur as an end result of each.' Elliott (n 23) 49.

<sup>123</sup> Elliott (n 23) 51.

<sup>124</sup> Maggy Lee, *Trafficking and Global Crime Control* (1<sup>st</sup> published, Sage Publications, 2011), 21.

<sup>125</sup> Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of "Freedom"' (2010) 10(2) *Global Networks a Journal of Transnational Affairs* 244, at 250.

<sup>126</sup> *ibid* 246.

<sup>127</sup> Bales, *Disposable People - New Slavery in the Global Economy* (n 108) 6.

<sup>128</sup> *ibid* 25.

<sup>129</sup> Jean Allain & Robin Hickey, 'Property and the Definition of Slavery' (2012) 61(4) *International and Comparative Law Quarterly* 915, at 935.

popular to view these two phenomena as equivalent, or to see slavery as an umbrella term. On the basis of the idea that ‘the past is never dead, it is not even past’,<sup>130</sup> it can also be suggested that human trafficking perpetuates ancient atrocities of slavery in a modern-day context, although today it is not possible to have legal ownership rights over another human being.<sup>131</sup> The crime of enslavement in cases of sexual slavery have been considered an international crime to include trafficking for exploitative conducts in which an individual could stand trial before the International Criminal Court, for instance.<sup>132</sup> Thus, slavery has been applied in a manner where its reach was meant to extend to situations associated with trafficking, as is detailed further in regards to the ICTY *Kunarac et als case* on enslavement and trafficking.<sup>133</sup>

Based on the historical evolution of slavery practices and human trafficking presented in this chapter, the following section looks at contemporary challenges pertaining to human trafficking and/or slavery. This is done to set forth reasons why human trafficking can be interpreted as slavery, considering the overlapping aspects of these practices.

### 3.3.1.1.2.2 Contemporary Challenges pertaining to Slavery and/or Trafficking

This section looks at various occurrences of slavery and/or trafficking. Trafficking is present in each of these given cases, in a way that they also demonstrate different examples of ‘culturally ingrained, endemic slavery’.<sup>134</sup> Indeed, due to a poorly defined continuum, in some cases it is also not easy to draw a clear line between slavery and human trafficking. This thesis posits that ‘the ‘term “slave” is sometimes used in a metaphorical sense to describe victims of such conditions.’<sup>135</sup> This indeed gives slavery a meaning that ‘extends beyond the limits set by the text, context, and purpose of the 1926 Slavery

<sup>130</sup> William Faulkner, *Requiem for a Nun* (Vintage Classics - Penguin, 1996).

<sup>131</sup> Angela A Jones, ‘Post-Traumatic Stress Disorder and Victims of Human Sex Trafficking: A Perpetuation of Chronic Indignity’ (2009) 4 *Intercultural Human Rights Law Review* 317, at 318.

<sup>132</sup> Jean Allain, ‘The Definition of Slavery in International Law’ (2009) 52 *Howard Law Journal* 239, at 240.

<sup>133</sup> *ibid* 243.

<sup>134</sup> Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 38) 815.

<sup>135</sup> Jean Allain, ‘The Legal Definition of Slavery into the Twenty-First Century’ in Jean Allain (ed) *The Legal Understanding of Slavery - From the Historical to the Contemporary* (1<sup>st</sup> ed, Oxford University Press, 2012), 216.

Convention'.<sup>136</sup> Thus due to overlapping elements between slavery and human trafficking include things like control, domination and exploitation, the analysis here is about to introduce some of those real-world examples as slavery and some are examples of trafficking.

One of the main contemporary challenges of humankind is gendered violence, e.g., the abduction, rape and forced marriage of girls in Northern Tanzania, encapsulated in the single word *kupura*, are common practices.<sup>137</sup> This violence provides the impetus for women to migrate and enables the trafficking of women.<sup>138</sup> Pew Research, relying on data from the UN and US State Department, reported that '[l]aws in 117 countries around the world permit[ed] children under the age of 18 to marry',<sup>139</sup> which could give rise to forced marriages. Allain, in his book *Slavery in International Law of Human Exploitation and Trafficking*, discusses forced marriage as slavery. Allain describes the condition of women who are forced to marry as follows:

Women taken in cases of forced marriage had no free will, no autonomy, least of all sexual autonomy. Once enslaved, women were required to maintain "their" soldier under pain of death or physical violence (...) They were, in a word: possessed.<sup>140</sup>

Many women lose their livelihoods and find themselves in exploitative working environments not only due to forced marriage or other means of sexual

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<sup>136</sup> *ibid* 217.

<sup>137</sup> Marc Ellison, 'Tales of a Child Bride: 'My Father Sold Me for 12 Cows'' *Al Jazeera* (12 July 2016) <<http://www.aljazeera.com/indepth/features/2016/07/tales-child-bride-father-sold-12-cows-160711100933281.html>> accessed 12 September 2016.

<sup>138</sup> Susie Jolly & Hazel Reeves, *Gender and Migration - Overview Report* (Bridge Development-Gender, Institute of Development Studies, 2005), 1.

<sup>139</sup> Witw Staf, 'Child Marriage Permitted in 117 Countries, Report Finds' *New York Times-Women in the World* (16 September 2016) <<http://nytlive.nytimes.com/womenintheworld/2016/09/19/child-marriage-permitted-in-117-countries-report-finds/>> accessed 11 May 2017.

<sup>140</sup> Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2013), 315.

Note that whilst the *Brima* case of the *Special Court for Sierra Leone* for the first time determined forced marriage as crime against humanity, forced marriage was in fact accepted as gender based discrimination under *CEDAW* in art 16 (1): 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.' *Convention on the Elimination of All Forms of Discrimination Against Women* 18 December 1979 United Nations, Treaty Series, vol 1249, entered into force 3 September 1981 (*CEDAW*).

exploitation, but also because of globalisation; for some women, sleep is the only time they have a break.<sup>141</sup>

A report by UNICEF found that many sexually exploited girls aged 9-17 in major cities of the United Republic of Tanzania had been trafficked from the country's interior.<sup>142</sup> Some had been recruited as domestic workers and were abused within their employers' homes. Many others were trafficked directly into prostitution or recruited into it by peers. The same report concluded that, similarly, in the major Indian cities of Mumbai, Delhi and Kolkata, and in Bangladeshi cities, large numbers of girls and boys were exploited in street sex markets and brothels; in Eastern Europe, children aged 13-18 were particularly at risk of being trafficked. Children in the Middle East and Africa are also unable to leave or reject a marriage; their freedom of choice in personal matters is denied, and they become subject to rape and violence without recourse to law or society for protection.<sup>143</sup>

The sexual objectification of women remains as an issue in modern times, e.g., Isis jihadists sexually exploited Yazidi women and young girls, as they are part of a small Iraqi minority who believe in a single god who created the Earth and left it in the care of a peacock angel.<sup>144</sup> Yazidis were 'forcibly converted to Islam, kept in sexual slavery, bought and sold in slave markets, and passed among as many as four Isis members'.<sup>145</sup> It was reported that when one Isis 'fighter was

<sup>141</sup> Violence against women is defined in the 1993 *United Nations Declaration on the Elimination of Violence against Women. Declaration on the Elimination of Violence against Women* (A/RES/48/104) 20 December 1993, art 1.

<sup>142</sup> The Editorial & Research Team, *The State of the World's Children in an Urban World* (UNICEF, 2012), 31 <[http://www.unicef.org/sowc/files/SOWC\\_2012-Main\\_Report\\_EN\\_21Dec2011.pdf](http://www.unicef.org/sowc/files/SOWC_2012-Main_Report_EN_21Dec2011.pdf)> accessed 12 October 2016.

<sup>143</sup> Aidan McQuade, 'Combating Child Marriage to Save Girls from Slavery' *Thomson Reuters Foundation New* (21 May 2015) <<http://www.trust.org/item/20150521143909-fxl8s/?source=leadCarousel>> accessed 17 October 2016; Hillary Margolis, 'Kyrgyzstan Ups Fight Against Child Marriage' *Human Rights Watch* (21 November 2016) <<https://www.hrw.org/news/2016/11/21/kyrgyzstan-ups-fight-against-child-marriage>> accessed 13 December 2016.

<sup>144</sup> Atika Shubert & Bharati Naik, 'ISIS 'Forced Pregnant Yazidi Women to Have Abortions' *CNN* (6 October 2015) <<http://edition.cnn.com/2015/10/06/middleeast/pregnant-yazidis-forced-abortions-isis/>> accessed 9 March 2017; Charlotte Alter, 'A Yazidi Woman Who Escaped ISIS Slavery Tells Her Story' *Time* (20 December 2015) <<http://time.com/4152127/isis-yezidi-woman-slavery-united-nations/>> accessed 6 December 2016; Atika Shubert & Bharati Naik, 'Hundreds of Yazidi Women Killing Themselves in ISIS Captivity' *CNN* (6 October 2015) <<http://edition.cnn.com/2015/10/05/middleeast/yazidi-women-suicide-in-isis-captivity/index.html?sr=cnnifb>> accessed 13 July 2016.

<sup>145</sup> Human Rights Watch, 'Iraq: Women Suffer Under ISIS for Sunnis, Lives Curtailed; for Yezidis, New Accounts of Brutal Rapes' (5 April 2016) <<https://www.hrw.org/news/2016/04/05/iraq-women-suffer-under-isis>> accessed 13 July 2016.

asked whether she was his wife, he announced, “[t]his is not my wife, she is my *sabia*, she is my *slave*”.<sup>146</sup> In other incidents, teenage Syrian refugees who fled to neighbouring countries were forced into pleasure marriages for the purpose of prostitution or sexual exploitation by men from Jordan, Saudi Arabia and other Gulf countries.<sup>147</sup> Young Syrian women in Jordan were not only at risk of trafficking but also struggled to survive in a country where they were not allowed to work.<sup>148</sup> Considering the religious background of Middle Eastern and Arab countries, it was also argued that because of the ‘low status’ of women within Islam, this religion condoned exploitative acts against women, including forms of slavery and sex trafficking, even though these practices are related to the way Islam is interpreted by those groups and organisations.<sup>149</sup> Isis justified its enslavement of Yazidi women by using the ‘theology of rape’;<sup>150</sup> e.g., if a ‘preteen girl practiced a religion other than Islam, the Quran not only gave him the right to rape her – it condoned and encouraged it’, as Isis fighters insisted. Ironically, despite being a peaceful religion, Islam has allegedly motivated atrocities conducted by Isis jihadists, such as manslaughter, sexual exploitation of women and girls, and using children as child soldiers. However, in reference to the S/RES/2331, ‘trafficking in persons in the context of armed conflict, especially women and girls, cannot and should not be associated with any religion, nationality, or civilization.’<sup>151</sup> At this point, it is important to note that the conduct of Isis is a way of expressing its power through rape and sexual assault, and those jihadists used degrading acts as an instrument of territorial control and domination. Indeed, this mentality and attitude existed long before Isis began these practices. Around the 1990s, organised sexual assault began to

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<sup>146</sup> *ibid* [emphasis added].

<sup>147</sup> See United States Department of State Diplomacy in Action, ‘2014 Trafficking in Persons Report – Syria’ (2014) <<https://www.state.gov/j/tip/rls/tiprpt/countries/2014/226828.htm>> accessed 27 March 2017.

<sup>148</sup> Lee Harper, ‘Syrian Women in Jordan at Risk of Sexual Exploitation at Refugee Camps’ *The Guardian* (Amman, 24 January 2014) <<http://www.theguardian.com/global-development/2014/jan/24/syrian-women-refugees-risk-sexual-exploitation>> accessed 28 July 2017; Samantha T Godec, ‘Between Rhetoric and Reality: Exploring The Impact of Military Humanitarian Intervention Upon Sexual Violence - Post-Conflict Sex Trafficking in Kosovo’ (2010) 92(877) *International Review of the Red Cross* 235, at 247.

<sup>149</sup> See Saneya Saleh, ‘Women in Islam: Their Status in Religious and Traditional Culture’ (1972) 2(1) *International Journal of Sociology of the Family* 35.

<sup>150</sup> Bernard K Freamon, ‘ISIS, Boko Haram and the Human Rights to Freedom from Slavery Under Islamic Law’ (2016) 39 *Fordham International Law Journal* 245, at 255.

<sup>151</sup> UN Meetings Coverage & Press Releases, ‘Security Council Condemns Human Trafficking in Strongest Terms, Unanimously Adopting Resolution 2331 (2016)’ (20 December 2016) <<http://www.un.org/press/en/2016/sc12647.doc.htm>> accessed 24 April 2017.

be used 'as a tactic in terrorising and humiliating a civilian population'.<sup>152</sup> On this topic, the S/RES/2331 also states that acts of trafficking during armed conflict

as well as sexual and gender-based violence could be part of the strategic objectives and ideologies of certain terrorist groups by, among other things, incentivizing recruitment, supporting financing through the sale of women, girls and boys, and use of religious justifications to codify and institutionalize sexual slavery.<sup>153</sup>

A further example is Boko Haram, an Islamic extremist group based in Northeast Nigeria, similar to Isis militants, who kidnap girls and young women and condone exploitative acts against them, including forms of slavery and sex trafficking,<sup>154</sup> under the guise of religion.<sup>155</sup> Yet these acts do not serve any religion but only aim to break the spirit of the invaded community; such as it is seen in the words of a West Pakistani soldier during the intervention of India's army on behalf of East Pakistan to force the West Pakistan: '*Hum ja rathe hain. Lekin been chore kar ja rathe hain*- We are going. But we are leaving our seed behind'.<sup>156</sup> The rapes committed by Isis are similar to the serial incidents that happened during the Liberian civil war:

Women were kidnapped and forced into sexual slavery only to be passed around as 'wives' of roaming combatants (...) Women suffered the indignity of having the children that they bore after being raped and held as sex slaves summarily taken away from them by combatants at the end of armed conflict.<sup>157</sup>

In some cases, women and young girls were sexually exploited by UN peacekeepers, such as in Bosnia after the Bosnian war.<sup>158</sup> Back then, sex trafficking that was conducted by UN peacekeepers appeared as startling claims,

<sup>152</sup> Goldstein (n 90) 363.

<sup>153</sup> UN Meetings Coverage & Press Releases, 'Security Council Condemns Human Trafficking in Strongest Terms, Unanimously Adopting Resolution 2331 (2016)' (n 151) [emphasis added].

<sup>154</sup> Rachel Aspden, 'The Girl who Beat ISIS: My Story by Farida Khalaf and Andrea C Hoffman review' *The Guardian* (1 July 2016) <<https://www.theguardian.com/books/2016/jul/01/the-girl-who-beat-isis-my-story-farida-khalaf-andrea-c-hoffman>> accessed 1 July 2016.

<sup>155</sup> Robert J Steinfeld, *Coercion, Contract and Free Labour in the Nineteenth Century* (1<sup>st</sup> published, Cambridge University Press, 2001), 15; Goldstein (n 90) 333.

<sup>156</sup> Najib Ghabdian, 'Political Islam Inclusion or Violence?' in Kenton Worcester et al (eds), *Violence Politics: Globalisation's Paradox* (Routledge – Taylor & Francis Group, 2002), 110.

<sup>157</sup> Annie Bunting, 'Forced Marriage' in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes' (2012) 1(1) *Canadian Journal of Human Rights* 165, at 173.

<sup>158</sup> See Colum Lynch, 'Six UN Officers in Bosnia Resign After Unauthorised Raid' *Washington Post* (30 November 2000) <[https://www.washingtonpost.com/archive/politics/2000/11/30/six-un-officers-in-bosnia-resign-after-unauthorized-raid/9f608f52-36ba-4b95-a3c8-d1765fab7d42/?utm\\_term=.4acd1a7acd42](https://www.washingtonpost.com/archive/politics/2000/11/30/six-un-officers-in-bosnia-resign-after-unauthorized-raid/9f608f52-36ba-4b95-a3c8-d1765fab7d42/?utm_term=.4acd1a7acd42)> accessed 15 May 2017.

considering that, as an organisation, the UN was formed from the ashes of Auschwitz. Yet it became apparent that its name was in danger of being remembered for raping the very people it was meant to protect.<sup>159</sup> The incidents were discovered by Kathryn Bolkovac, who had been recruited to serve as a UN peacekeeper in Bosnia and Herzegovina in 1999. During her employment by the UN High Commissioner for Human Rights to run a pilot project designed to prevent violence against women, she discovered that instead of protecting the young women they were supposed to safeguard, both the UN peacekeepers and the local police were themselves making use of the sexual services offered. It soon became apparent that the UN peacekeepers had become involved in human trafficking. If Bolkovac had lacked the courage to speak out, the UN's role in this unspeakable violation might never have become a matter of public knowledge. Bolkovac did, however, speak out, and her bravery helped the world to learn about the awful things that had happened.<sup>160</sup> A further example comes from the DPKO (Department for Peace Keeping Operations) Policy Paper, 2004, and states the involvement of the UN peacekeepers in human trafficking chains, as follows:

For peacekeeping (UN and other) there is a crisis of perception in relation to trafficking and the linked issue of sexual exploitation and abuse, which sees peacekeepers branded as more part of the problem than the solution, along with criticisms that the issue is not taken seriously by peacekeeping institutions.<sup>161</sup>

Another contemporary challenge that causes slavery and/or trafficking practices is linked to movements of human beings across the globe. People fleeing conflict and persecution are at their most vulnerable, and thus especially sensitive to hostility and discrimination they face in the places they seek refuge.<sup>162</sup> It should be noted that many are resilient and courageous women and men, who are

<sup>159</sup> Originated in the film of the *Whistleblower*, (2010):

Blakely: Madeleine, I have to protect this organization, and so should you. The U.N. is too fragile, too important. And that's what immunity is for.

Madeleine Rees: Immunity, not impunity. The United Nations was formed from the ashes of Auschwitz. The United States led the way, and it's a point of honor with me that the U.N. is not remembered for raping the very people we must protect.

Blakely: Those girls are whores of war. It happens. I will not dictate for morality.

Madeleine Rees: So what are we dictating for?

<sup>160</sup> Antony Barnett, 'British Firm Accused in UN 'Sex Scandal'' *The Guardian* (29 July 2001) <<https://www.theguardian.com/world/2001/jul/29/unitednations>> accessed 12 July 2016.

<sup>161</sup> UN, 'Human Trafficking and United Nations Peacekeeping' (2004) DPKO Policy Paper <<http://www.un.org/womenwatch/news/documents/DPKOHumanTraffickingPolicy03-2004.pdf>> accessed 12 July 2016.

<sup>162</sup> Al Jazeera, 'Life in Displacement: Making Ends Meet, Far from Home' (17 July 2016) <<http://www.aljazeera.com/indepth/inpictures/2016/07/life-displacement-making-ends-meet-home-160707100711231.html>> accessed 12 October 2016.

aware of the possible risks of exploitation.<sup>163</sup> Yet still they may find themselves exploited as domestic workers, sex workers or forced labourers in a foreign country.<sup>164</sup>

An illegal immigrant would likely endure mistreatment in working conditions for fear of deportation. For the present purposes, it should be noted that not all migrant workers have been trafficked, whereas many trafficked persons are migrant workers who have left their homes in search of having a gainful job in another country. Hence, those vulnerable workers living in permanent fear of the law become very valuable for employers.<sup>165</sup> Oman's immigrant labour law was tying many foreign employees to a specific family's sponsorship; thus, many foreign employees faced exploitation and abuse at the hands of their Omani employers.<sup>166</sup> In some cases, people simply cannot walk away, and cannot make any choices about anything in their lives.<sup>167</sup> E.g., construction workers in the Persian Gulf, children in India working in brick kilns and garment workers in Bangladesh.<sup>168</sup> This is also present in prostitution rings and even in private homes that employ domestic workers in the US and Europe: these workers are held under complete control backed by violence.<sup>169</sup> Similarly, migrants work in Thailand's offshore fisheries in extreme working conditions to produce seafood consumed in Europe; they are not free, poorly paid and abused.<sup>170</sup> In the South Asian countries of India, Nepal and Pakistan, poor people take loans from their employers to cover emergencies; 'they subsequently find it impossible to repay for a combination of reasons, including high interest rates, low pay, and over-inflated prices for agricultural or other essential production inputs provided by the landlord or employer'.<sup>171</sup> In Brazil, individuals are recruited, transported and

<sup>163</sup> Laura Smith-Spark, 'Report: 600,000 Forced Labor Victims in Middle East' *CNN* (9 April 2013) <<http://edition.cnn.com/2013/04/09/world/meast/mideast-migrant-workers/>> accessed 24 May 2017.

<sup>164</sup> *Ibid*; Gallagher, *The International Law of Human Trafficking* (n 2) 171.

<sup>165</sup> Smith-Spark (n 163).

<sup>166</sup> Joshua Fatzick, 'HRW: Foreign Workers in Oman Face Slavery-Like Conditions' *Voa News* (13 July 2016) <<http://www.voanews.com/a/hrw-foreign-workers-in-oman-face-slavery-like-conditions/3416230.html>> accessed 9 October 2016.

<sup>167</sup> Kevin Bales & Rebecca Cornell, *Slavery Today* (Groundwork Guides, 2008), 8.

<sup>168</sup> The Editorial Board, 'Modern Slavery Grows' *NY Times* (2 December 2014) <<https://www.nytimes.com/2014/12/03/opinion/modern-slavery-grows.html>> accessed 30 July 2017.

<sup>169</sup> *Ibid*.

<sup>170</sup> Melissa Marschke & Peter Vandergeest, 'Slavery Scandals: Unpacking Labour Challenges and Policy Responses Within the Off-Shore Fisheries Sector' (2016) 68 *Marine Policy* 39, at 39.

<sup>171</sup> ILO, 'Global Report on Forced Labour in Asia: Debt Bondage, Trafficking and State-Imposed Forced Labour' (18 May 2005) <<http://www.ilo.org/global/about-the->

received through deception, force and coercion in order to exploit their labour in the charcoal industry.<sup>172</sup> The ILO conducted a study in 2013, titled 'Tricked and Trapped: Human Trafficking in the Middle East', based on more than 650 interviews done over a two-year period in Jordan, Lebanon, Kuwait and the United Arab Emirates.<sup>173</sup> As the study reports, 'of the workers interviewed, 266 were assessed to be in a situation of trafficking and forced labour, on the basis of specific indicators, namely recruitment by deception, work and life under duress, and inability to leave the employer'.<sup>174</sup>

In cases of forced labour, mostly statelessness is one of the main reasons why people are trafficked. An estimated 12 million stateless individuals worldwide<sup>175</sup> have no land to build a house, life or identity; they are mostly found in Burma (the Rohingya), Nepal (Dalit), Bangladesh (the Bihari), Sri Lanka (Hill Tamils), Malaysia, Kenya, Ivory Coast, Kuwait and Ukraine. As Hanna Arendt described, 'to be stripped of citizenship is to be stripped of worldliness; it is like returning to a wilderness as cavemen or savages (...) they could live and die without leaving any trace.'<sup>176</sup> In contemporary times, the most striking example of statelessness in relation to trafficking and/or slavery can be found in the Rohingya in Myanmar. The Rohingya are a Muslim minority who were rendered stateless half a century ago due to British colonial rule and the arbitrary border between Burma and Bangladesh.<sup>177</sup> Since Myanmar's governments believed they were not a genuine ethnic group and they were actually Bengali migrants, they introduced policies to repress the Rohingyas since the 1970s.<sup>178</sup> The Rohingya people, due to discrimination and pressure sustained by the community and the

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ilo/newsroom/news/WCMS\_075504/lang--en/index.htm> accessed 12 September 2016; Junius P Rodriguez, *Slavery in the Modern World - A History of Political, Social, and Economic Oppression* (vol I: A-N, ABC - CLIO, 2011), 225.

<sup>172</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 816.

<sup>173</sup> See Hé lène Harroff & Alix Nasri Tavel, *Tricked and Trapped Human Trafficking in the Middle East* (International Organisation for Migration, 2013) <[http://www.ilo.org/wcmsp5/groups/public/-arabstates/---ro-beirut/documents/publication/wcms\\_211214.pdf](http://www.ilo.org/wcmsp5/groups/public/-arabstates/---ro-beirut/documents/publication/wcms_211214.pdf)> accessed 12 October 2016.

<sup>174</sup> *ibid* 14.

<sup>175</sup> Lucy Gregg & Chris Nash & Nick Oakeshott, *Mapping Statelessness in the United Kingdom* (UNHCR, 2011), 22 <<http://www.refworld.org/docid/4ecb6a192.html>> accessed 30 July 2017. See also *Convention Relating to the Status of Stateless Persons* (360 UNTS 117) done 28 September 1954, entered into force 6 June 1960.

<sup>176</sup> Bridget Cotter, 'Hanna Arendt and "The Right to Have Rights"' in Jr Anthony F Lang & John Williams (eds), *Hanna Arendt and International Relations – Readings Across the Lines* (1<sup>st</sup> published, Palgrave Macmillan, 2005), 87.

See also Hannah Arendt, *The Origins of Totalitarianism* (1<sup>st</sup> published, Schocken Books, 1951).

<sup>177</sup> Bill Berkeley, 'Stateless People, Violent Stateless' (2009) 26(1) *World Policy Journal* 3, at 8.

<sup>178</sup> BBC, 'Why Are So Many Rohingya Migrants Stranded at Sea?' (18 May 2015) <<http://www.bbc.co.uk/news/world-asia-32740637>> accessed 12 September 2016.

government, fled Myanmar in the hope of escaping ill treatment. ‘Rohingyas have often been called the most persecuted minority in the world’, unable to claim citizenship either in Myanmar or in any other country.<sup>179</sup> Yet on the way, they were transported like cattle from western Burma and Bangladesh to vile jungle camps in Thailand and Malaysia, and ‘most have been systematically tortured, packed like sardines into small quarters, and given an ultimatum: raise \$2,000 or die’.<sup>180</sup> Captives who could not raise money to ‘buy’ their ‘freedom’ were sold to bonded-labour bosses, fishing boat captains and other purveyors of exploitation.<sup>181</sup> Rohingyas have been living in border camps, and every year they pay smugglers to reach Thailand or Malaysia, hoping to find a job. In Thailand, in the process of seafood production, Rohingyas are forced to work for no pay for long hours and under threats of extreme violence.<sup>182</sup> For the purpose of producing seafood sold across the world, hundreds of Rohingya men were sold through a network of trafficking camps to work on Thai fishing boats.<sup>183</sup> The National Human Rights Commission in Thailand denounced the labour exploitation of 100 fishermen who were kept in captivity for three years, working without pay in Indonesian waters.<sup>184</sup>

In addition to this, poverty and environmental abuse hasten the process of exploitation. An ecologist at the University of California, Berkeley, underlined a human tragedy that frequently went unnoticed: ‘[a]s fish and fauna are wiped out, more children around the world are forced to work, and more people are forced into indentured servitude.’<sup>185</sup> However, when governments ratify international treaties and pass national legislation, they only address half of the

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<sup>179</sup> The Economist, ‘The Rohingyas - The Most Persecuted People on Earth?’ (Kuala Lumpur, 13 June 2015) <<http://www.economist.com/news/asia/21654124-myanmars-muslim-minority-have-been-attacked-impunity-stripped-vote-and-driven>> accessed 12 October 2016.

<sup>180</sup> Matthew Smith, ‘The ‘Boat People’ Crisis Won’t End Until Burma Stops Persecuting the Rohingya’ *The Guardian* (20 July 2015) <<http://www.theguardian.com/global-development-professionals-network/2015/jul/20/rohingya-crisis-burma-thailand>> accessed 7 July 2016.

<sup>181</sup> *ibid.*

<sup>182</sup> Kate Hodal & Chris Kelly & Felicity Lawrence, ‘Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US’ *The Guardian* (10 June 2014) <<https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>> accessed 7 July 2016.

<sup>183</sup> *ibid.*

<sup>184</sup> Maria Beatriz Alvarez & Edward J Alessi, ‘Human Trafficking is More than Sex Trafficking and Prostitution: Implications for Social Work’ (2012) 27(2) *Journal of Women and Social Work* 142, at 142.

<sup>185</sup> Sarah Yang, ‘Global Wildlife Decline Driving Slave Labor, Organized Crime’ *Berkeley News* (24 July 2014) <<http://newscenter.berkeley.edu/2014/07/24/wildlife-decline-drives-social-conflict/>> accessed 28 September 2016.

problem.<sup>186</sup> As Gary Haugen mentions in his book *Good News About Injustice*, ‘injustice occurs when power is misused to take from others (...) namely, their life, dignity, liberty or the fruits of their (...) labour’.<sup>187</sup> For instance, as a *Guardian* investigation uncovered, Rohingya migrants were trafficked through deadly jungle camps and sold to Thai fishing vessels ‘with the knowledge and complicity of some Thai state officials’.<sup>188</sup> Rohingya ‘slaves’, as the investigation called them, were forced to work at sea. George Soros, who escaped Nazi-occupied Hungary, concluded, there were alarming parallels between the plight of the Rohingya people and the Nazi genocide:<sup>189</sup> Since Rohingyas are denied basic freedoms of movement, marriage and childbirth because they are stateless, the violence to which they are subjected could be interpreted as a crime against humanity. Amnesty International stated that ‘the deplorable actions of the military could be part of a widespread and systematic attack on a civilian population and may amount to crimes against humanity’.<sup>190</sup> What happened in Thailand was not substandard labour, it was an instance of abusive work without consent in which Myanmar men were recruited by labour brokers, using deceptive practices.<sup>191</sup>

In light of the aforementioned examples, it is important to question how modern international law regulates human trafficking, and whether trafficking can be considered as equivalent to slavery or whether slavery as a term comprises human trafficking, in a legal sense, to help determine ways to distinguish these phenomena and to understand adequacy of international law in terms of defining human trafficking - this is considered below.

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<sup>186</sup> Anthony Freeman, ‘Child Labor & Exploitation’ (2000) 14(3) *Journal of Civil Rights and Economic Development* 383, at 385.

<sup>187</sup> Gary A Haugen, *Good News about Injustice: A Witness of Courage in a Hurting World* (Inter-Varsity Press, 1998), 72.

<sup>188</sup> Hodal & Kelly & Lawrence (n 182).

<sup>189</sup> Associated Press in Yangon, ‘Burma Rejects ‘Unbalanced’ Rohingya Remarks by Nobel Prize Winners’ *The Guardian* (31 May 2015) <<http://www.theguardian.com/world/2015/may/31/burma-rejects-unbalanced-rohingya-remarks-by-nobel-prize-winners>> accessed 7 July 2016.

<sup>190</sup> Al Jazeera & News Agencies, ‘Rohingya Abuse May Be Crimes Against Humanity: Amnesty’ (19 December 2016) <<http://www.aljazeera.com/news/2016/12/rohingya-crimes-humanity-amnesty-161219045655733.html>> accessed 19 December 2016.

<sup>191</sup> Joanna G Sylwester, ‘Fishers of Men: The Neglected Effects of Environmental Depletion on Labor Trafficking in The Thai Fishing Industry’ (2014) 23 *Pacific Rim Law & Policy Journal* 423, at 426.

### 3.3.1.1.2.3 The Legal Understanding of Slavery and its Comparison to Trafficking under International

This section initially addresses the question, in light of Jean Allain's analysis in the *The Legal Understanding of Slavery: From the Historical to the Contemporary*: '[w]hat is slavery?'<sup>192</sup> It first examines the 1926 definition of slavery, which has modern relevance considering several international judgments.<sup>193</sup> It then identifies in what ways slavery and human trafficking phenomena overlap in some scholarly writing and major court decisions. The rest of this section concludes whether the slavery/trafficking definitional controversy is the result of a poorly defined continuum generated by related international legal regulations pertaining to these terms.<sup>194</sup> If we do not know what slavery is, then we cannot validly determine what is slavery, what is human trafficking and whether they indeed overlap.<sup>195</sup>

#### 3.3.1.1.2.3.1 What is Slavery?

##### 3.3.1.1.2.3.1.1 Abolishment of Slavery

Information about slaves can be learnt through different sources, such as the Code of Hammurabi, from Babylon in the 18th century BC, and the Cyrus Cylinder in the 539 BC. E.g., the Cyrus Cylinder was a product of Cyrus's sovereignty placed at the base of a building in ancient Babylon, proclaimed that 'those people who had been captured and enslaved by his predecessors should be allowed to go back to their homes and the status of their different gods returned to their original shrines to be freely worshipped'.<sup>196</sup> Even though slavery was not completely abolished until the 20<sup>th</sup> century, in the 1800s the earliest international human rights court such as in Sierra Leone, Cuba, Brazil heard cases related to slave trade.<sup>197</sup>

The first international condemnation of slave trade was declared under the Universal Abolition of the Slave Trade annexed to the Act. It was adopted during

<sup>192</sup> Jean Allain (ed), *The Legal Understanding of Slavery - From the Historical to the Contemporary* (1<sup>st</sup> ed, Oxford University Press, 2012), 1.

<sup>193</sup> *ibid* 1.

<sup>194</sup> Buckland (n 1) 132.

<sup>195</sup> Allain, *The Legal Understanding of Slavery - From the Historical to the Contemporary* (n 192) 1.

<sup>196</sup> The Economist, 'Diplomatic Whirl: The Cyrus Cylinder' (Washington DC, 23 March 2013) <<https://www.economist.com/news/books-and-arts/21573955-show-tests-limits-cultural-politics-diplomatic-whirl>> accessed 30 July 2017.

<sup>197</sup> Martinez (n 100).

the Congress of Vienna of 1815, and signed by eight powers, including Austria, France, Portugal, Prussia, Russia, Spain, Sweden and the United Kingdom.<sup>198</sup> Under the Declaration, it was stated that the slave trade was ‘repugnant to the principles of humanity and universal morality’.<sup>199</sup> It has gradually evolved from a moral offence to an international crime.<sup>200</sup>

Slavery as a term was recognised under international law as applicable to treaty-based and customary international law-based prohibition.<sup>201</sup> It was established as a rule of customary international law and was regularly identified as a legal obligation erga omnes and as part of jus cogens.<sup>202</sup>

Throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries, several international treaties were established to combat slavery.<sup>203</sup> Indeed, prohibition of slavery was a central feature of more than 75 multilateral and bilateral conventions from the beginning of the 19<sup>th</sup> century.<sup>204</sup> Yet it was with the 1926 Slavery Convention that the definition of slavery was articulated.<sup>205</sup> Initially, slavery was accepted to be a violation of the rights of man in 1926.<sup>206</sup> Through further attempts after the 1926 Convention, under *the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*,<sup>207</sup> four servile statuses were abolished: debt bondage, serfdom, specific types of servile marriage and child exploitation.<sup>208</sup>

In brief, on the international treaty level the term slavery was defined in 1926, confirmed in 1956, and replicated in substance as the definition of enslavement

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<sup>198</sup> Scarpa (n 69) 42.

<sup>199</sup> Randall Lesaffer, ‘Vienna and the Abolition of the Slave Trade’ (*Oxford Public International Law*) <<http://opil.ouplaw.com/page/vienna-slave-trade-abolition>> accessed 7 April 2016.

<sup>200</sup> M Cherif Bassiouni (ed), *International Criminal Law: Sources, Subjects and Contents* (3<sup>rd</sup> ed, vol I, Martinus Nijhoff Publishers, 2008), 539.

<sup>201</sup> Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 38) 798.

<sup>202</sup> *ibid* 798.

<sup>203</sup> Trafficking in Persons Working Group, ‘Trafficking in Persons in International Law’ (*The University of Queensland Australia– TC Beirne School of Law*, 2013) <[www.law.uq.edu.au/ht-international](http://www.law.uq.edu.au/ht-international)> accessed 28 March 2017.

<sup>204</sup> Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 38) 799.

<sup>205</sup> *ibid* 800.

<sup>206</sup> Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (Alta Mira Press, 2003), 14–15.

<sup>207</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (226 UNTS 3) done 1 April 1957, entered into force 30 April 1957 (Supplementary Slavery Convention).

<sup>208</sup> *ibid* art 1.

included in the 1998 Statute of the International Criminal Court.<sup>209</sup> These are the major slavery treaties that continue to be important, because they define key concepts used in later instruments, such as the Trafficking Protocol.<sup>210</sup> Thus, it is essential to know what slavery is.

### 3.3.1.1.2.3.1.2 The Definition of Slavery

The 1926 Slavery Convention defined slavery under Article 1 as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.<sup>211</sup> Article 1 also defined ‘slave trade’ as including:

[A]ll 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.

Even though ‘the definition of the slave trade has remained uncontested, the definition of “slavery” has been interpreted in at least three ways’: The Judgment of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the 2002 *Kunarac et als case*; The UN Sub-Commission on the Promotion and Protection of Human Rights; The High Court of Australia in the 2008 the *Queen v Tang case*.<sup>212</sup>

The abolition of slavery can be considered in three eras: ‘i) 1890-1966 - the slave trade, slavery, and servitude in general international law<sup>213</sup>; ii) 1966-1998 - ‘slavery-like practices’ and human rights law; and iii) 1998-present - enslavement and international criminal law’.<sup>214</sup>

The definition of slavery is problematic in that e.g., powers attaching to the right of ownership and the forms of slavery that were to be progressively abolished were not specifically defined in the 1926 Convention. Given that the 1926 definition mentions ‘powers attaching to the right of ownership are

<sup>209</sup> Allain & Bales, ‘Slavery and Its Definition’ (n 30) 3.

<sup>210</sup> Anne T Gallagher, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations Publication, 2010), 20  
<[https://works.bepress.com/anne\\_gallagher/15/](https://works.bepress.com/anne_gallagher/15/)> accessed 24 August 2016.

<sup>211</sup> League of Nations, *Convention to Suppress the Slave Trade and Slavery* (60 LNTS 253) done 25 September 1926, entered into force 9 March 1927 (1926 Slavery Convention), art 1(1).

<sup>212</sup> Allain, *The Law and Slavery: Prohibiting Human Exploitation* (n 36) 164.

<sup>213</sup> Allain explains that ‘[s]ervitude should be understood as human exploitation falling short of slavery.’ Jean Allain, ‘On the Curious Disappearance of Human Servitude from General International Law’ (2009) 11 *Journal of the History of International Law* 303, at 304.

<sup>214</sup> Allain, *The Law and Slavery: Prohibiting Human Exploitation* (n 36) 159.

exercised’, this might appear to suggest that a person needs to own another for slavery to be said to exist.<sup>215</sup> However, this is not the case according to the Australian equivalent of the United States Supreme Court.<sup>216</sup> The Court made it clear in its 2008 *Tang* case that ‘the definition has contemporary relevance in situations where a person does not legally own another, as they did in days of old’.<sup>217</sup> A person could be in a condition of slavery without legal ownership, whereupon they were treated like a slave in fact, if not in law.<sup>218</sup>

In the traditional sense, in early history slavery was referred to as chattel slavery on the grounds that the owners of such slaves were able to treat them as if they were possessions.<sup>219</sup> In the modern context, the identification of an enslaved person depends on the degree of individual’s inherent freedom of movement, the degree of control over the individual’s personal belongings, and the existence of informed consent.<sup>220</sup> Due to the intrinsic inalienability of personal freedom, consent is irrelevant in cases of slavery.<sup>221</sup> Thus, it is also essential to understand what ownership means when defining slavery.

‘Possession allows for the exercise of the other powers attaching to the right of ownership’, as is underlined in the Bellagio-Harvard Guidelines:<sup>222</sup>

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.

<sup>215</sup> Allain & Bales, ‘Slavery and Its Definition’ (n 30) 3.

<sup>216</sup> *ibid* 3.

<sup>217</sup> *ibid* 3.

The facts of *Tang* concerned five women of Thai nationality who had voluntarily come to Australia to work in the sex industry. On arrival, they discovered that they had been ‘bought’ and consequently were required to work off the debt, which consisted of more than double their ‘purchase’ price. Their passports were withheld, and their movement was restricted until their debt was paid off, at which point the restrictions were lifted, travel documents were returned, and they were given freedom of choice with respect to their hours of work. Elliott (n 23) 89.

<sup>218</sup> Allain & Bales, ‘Slavery and Its Definition’ (n 30) 3.

<sup>219</sup> David Weissbrodt & Anti-Slavery International, ‘Abolishing Slavery and its Contemporary Forms’ (OHCHR - HR/PUB/02/4, 2002), 7

<<http://www.ohchr.org/Documents/Publications/slaveryen.pdf>> accessed 5 July 2016.

<sup>220</sup> Allain & Bales, ‘Slavery and Its Definition’ (n 30) 7.

<sup>221</sup> Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor and Debt Bondage’ (n 88) 8.

<sup>222</sup> Allain, *The Law and Slavery Prohibiting Human Exploitation* (n 36) 29-30.

Allain argues that when a professional athlete is traded from one club to another, such a deal is hard to call slavery, although the selling and buying of this athlete is what occurs. In this kind of situation, 'the exercise of control tantamount to possession, such buying, selling or transferring will not meet the threshold of slavery.'<sup>223</sup>

Further definition of the 1926 Convention also does not completely differentiate master-slave relationships from other social relationships.<sup>224</sup> 'Slavery in all its forms' was not intended to expand the definition beyond practices involving powers attached to the right of ownership.<sup>225</sup> Yet such institutions and practices e.g., debt bondage and sale of children, would be considered slavery within the terms of the 1926 Convention only if they involved the exercise of 'any or all of the powers attaching to the right of ownership'.<sup>226</sup> The High Court of Australia in the *Tang case* took a certain approach to consider characteristics of slavery. The Court concluded that the 'degree of *control* exercised over the victims went beyond any level of exploitation which is tentatively deemed acceptable, and in fact, went so far as to constitute slavery'.<sup>227</sup>

Indeed, as the Australian court indicated, the 1926 Slavery Convention has a definition that has not become obsolete, and is applicable to contemporary cases. Examples including the *Brima case* before the Special Court for Sierra Leone in 2008, the *Kunarac et als case* before the International Criminal Tribunal in the former Yugoslavia, the *Siliadin v France case* before the European Court of Human Rights in 2005 and the European Court of Human Rights in *Rantsev case* in 2010 show a trend towards accepting the contemporary relevance of the 1926 slavery definition.<sup>228</sup>

What remains consistent in the definitions of the 1926 Convention, 1956 Supplementary Convention and the Rome Statute is the phrase 'the powers

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<sup>223</sup> *ibid* 30.

<sup>224</sup> Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of 'Freedom' (n 125) 246.

<sup>225</sup> Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and The 1956 United Nations Convention 2008* (Martinus Nijhoff Publishers, 2008), 50-79.

<sup>226</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 801.

<sup>227</sup> Elliott (n 23) 89.

<sup>228</sup> Allain & Hickey, 'Property and the Definition of Slavery' (n 129) 923.

attaching to the right of ownership'.<sup>229</sup> Unfortunately, the powers attaching to the right of ownership and the forms of slavery were not specified in the 1926 Convention, making slavery's definition one point in a poorly defined continuum.<sup>230</sup> Correspondingly, these ambiguous provisions have been used by activists and scholars to justify an expanded definition of slavery beyond the boundaries of Article 1 of the 1926 Convention, which has caused a definitional quagmire.<sup>231</sup> Thus, it is essential to fully capture the concept of slavery and distinguish it from trafficking practices.

In order to understand the description of right of ownership, initially we may turn to the Roman law applicable to slaves during the Roman era.<sup>232</sup> In Roman law, an individual could be a *res* - a thing or an object -, which could be owned and thus was chattel.<sup>233</sup> In the context of slavery, ownership means 'the ability to possess and use a slave, to compel and gain from the slave's labour, but also to buy, sell (...) a slave'.<sup>234</sup> In comparison, as Allain concludes, power attaching to the right of ownership means the 'powers attached to such rights but for the fact that ownership is illegal'.<sup>235</sup> As he explains, 'to exercise the right of ownership over an individual is fundamentally different than *exercising powers attached to the right of ownership*'.<sup>236</sup> Allain demonstrates his approach through the example of illegal drugs, over which legal rights do not exist.<sup>237</sup> In this

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<sup>229</sup> Allain, 'The definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute' in *The Law and Slavery: Prohibiting Human Exploitation* (n 36) 3. Art 7(a) of the *Supplementary Slavery Convention* defines slavery as: "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status' (n 207). Art 7(1)(c) of the *Rome Statute* defines enslavement as: '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.' *Rome Statute of the International Criminal Court* (last amended 2010) (2187 UNTS 90) adopted 17 July 1998, entered into force 1 July 2002.

<sup>230</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 800.

<sup>231</sup> *ibid* 800.

<sup>232</sup> Allain, 'The definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute' in *The Law and Slavery: Prohibiting Human Exploitation* (n 36)10.

<sup>233</sup> *ibid* 10.

<sup>234</sup> *ibid* 11.

<sup>235</sup> *ibid* 11.

<sup>236</sup> *ibid* 21.

<sup>237</sup> *ibid* 21.

The Secretary General's 1953 Memorandum sets forth the characteristics of the various powers attaching to the right of ownership, as follows:

The individual of servile status may be made the object of a purchase;

The master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;

context, it could be concluded that such institutions and practices, e.g., debt bondage and sale of children, would be considered slavery if they involved the exercise of ‘any or all of the powers attaching to the right of ownership’:<sup>238</sup>

[O]ne should realise quite clearly that [debt slavery] – whatever form it may take in different countries—is not ‘slavery’ within the definition set forth in Article 1 of the 1926 Convention, unless any or all the powers attaching to the right of ownership are exercised by the master.

This means ‘the degree of restriction and control exerted is central to determining what practices constitute slavery’,<sup>239</sup> e.g., if a person is treated in a fashion which would be acceptable if that person was legally an owned object.<sup>240</sup>

Considering the content and meaning of slavery under international law, the following section conducts an analysis to understand whether human trafficking is the new slavery.

### **3.3.1.1.2.3.2 Human Trafficking: The New Slavery?**

#### **3.3.1.1.2.3.2.1 Scholarly Discussion**

The key question relating to the definition and substantive content of the international legal rules around human trafficking remains whether trafficking can be referred to as ‘the new slavery’.

It was concluded that the international legal definition of trafficking incorporated into the Trafficking Protocol ‘amount[ed] to a significant retreat from already agreed upon prohibition of slavery’, and was ‘highly circumscribed

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The products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;  
The ownership of the individual of servile status can be transferred to another person;  
The servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;  
The servile status is transmitted ipso facto to descendants of the individual having such status. Allain, ‘The definition of ‘Slavery’ in General International Law and the Crime of Enslavement within the Rome Statute’ in *The Law and Slavery: Prohibiting Human Exploitation* (n 36) 13.

<sup>238</sup> Jean Allain, *The Slavery Conventions - The Travaux Préparatoires of The 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers, 2008), 7-9 & 59-60.

<sup>239</sup> Elliott (n 23) 88.

<sup>240</sup> *ibid* 87.

relative to the legally binding definitions of slavery already adopted'.<sup>241</sup> It is asserted that 'any form of dealing with human beings leading to forced exploitation of their labour', including 'the exercise of any or all of the powers attaching to the right of ownership over a person', constitutes slavery.<sup>242</sup> Piotrowicz states that 'while not all slavery involves THB [trafficking of human beings], THB will almost always involve slavery or slavery-like practices and it is therefore appropriate to consider the legal regime with regard to slavery'.<sup>243</sup> Similarly, Bassiouni and the High Commissioner for Human Rights indicate that trafficking for forced labour and forced prostitution constitute a modern form of slavery, and as early as 1974, the UN working group recognised trafficking as a form of slavery. Further, there are reports and surveys that categorise human trafficking under the heading of slavery, e.g., the 2014 Global Slavery Report, which is a flagship report produced by the Walk Free Foundation, considered human trafficking in the context of modern slavery, along with other forms of human exploitation.<sup>244</sup> In the same vein, by challenging the value of the Trafficking Protocol's definition on human trafficking, Kara advocates adoption of a notion of 'modern' slavery as 'the process of coercing labour from a captive individual, through any means, including exploitation of bodies or other body parts'.<sup>245</sup> From a similar perspective, Anna Jonsson, in her book *Human Trafficking and Human Security*, notes the following:

Many human rights analysts have failed to recognise the present trafficking situation as a new form of slavery (...) Likewise, until recently, the human rights movement has not approached trafficking as a resurgence of the problem of slavery. This new form of slavery is different from that which existed in many regions of the world.<sup>246</sup>

This thesis argues that there is no consensus on the meaning of right of ownership, and the international legal rules pertaining to trafficking and slavery do not use clear language to help differentiate these phenomena; this is why

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<sup>241</sup> James C Hathaway, 'The Human Rights Quagmire of 'Human Trafficking'' (2008) 49(1) *Virginia Journal of International Law* 1, at 10.

<sup>242</sup> *ibid* 9.

<sup>243</sup> Ryszard Piotrowicz, 'The Legal Nature of Trafficking in Human Beings' (2009) 4 *Intercultural Human Rights Law Review* 175, at 179 [emphasis added].

<sup>244</sup> Walk Free Foundation, 'The Global Slavery Index 2014' (2014), 8  
<[http://reporterbrasil.org.br/wp-content/uploads/2014/11/GlobalSlavery\\_2014\\_LR-FINAL.pdf](http://reporterbrasil.org.br/wp-content/uploads/2014/11/GlobalSlavery_2014_LR-FINAL.pdf)>  
accessed 31 July 2017.

<sup>245</sup> Siddharth Kara, *Sex Trafficking - Inside the Business of Modern Slavery* (New York, Columbia University Press, 2009), 5.

<sup>246</sup> Anna Jonsson (ed), *Human Trafficking and Human Security* (Routledge Taylor & Francis Group, 2009), 13.

human trafficking has been referred to as modern-day slavery by the international community - a broad group of peoples and governments of the world.<sup>247</sup> As is detailed further below, despite condemnations of the evil of slavery and prohibition of enslavement by international criminal law, no provision suggests that human trafficking equates to slavery in the rulings of law.<sup>248</sup> Yet before concluding this, the following section first looks at major international judgements in order to understand the practice, i.e., how trafficking is interpreted in association with slavery.

### 3.3.1.1.2.3.2.2 The European Court of Human Rights on Human Trafficking

In *Rantsev v. Cyprus v. Russia*, the European Court of Human Rights (ECHR) addressed human trafficking as ‘the exercise of powers attaching to the right of ownership’<sup>249</sup> by assessing human trafficking as reminiscent of slavery and practices similar to slavery, as follows:

Trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements were often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions.<sup>250</sup>

‘The January 7, 2010, judgment established for the first time that human trafficking is a violation of Article 4 of the ECHR’.<sup>251</sup> Thus, in the view of the Court, human trafficking violated the prohibition of slavery, servitude and forced labour of the European Convention on Human Rights.<sup>252</sup> Article 4 contains three concepts - slavery, servitude and forced labour - and does not specifically mention trafficking. The Court concluded that the Convention was a living instrument, and thus must be interpreted in light of present-day conditions.<sup>253</sup> Thus, by implying general rules of treaty interpretation of Article 31 of the 1969

<sup>247</sup> Allain & Hickey, ‘Property and the definition of slavery’ (n 129) 915; Jonsson (n 246).

<sup>248</sup> Morcom & Schloenhardt (n 118) 8.

<sup>249</sup> *Rantsev v Cyprus v Russia* Application no 25965/04 (ECHR, 7 January 2010), para 281.

<sup>250</sup> *ibid* para 281.

<sup>251</sup> Siddharth Kara, ‘Designing More Effective Laws against Human Trafficking’ (2011) 9(2) *Northwestern Journal of Human Rights* 123, at 124; *Convention for the Protection of Human Rights and Fundamental Freedoms* (213 UNTS 222) done 4 November 1950, entered into force 3 September 1953 (European Convention on Human Rights), art 4.

<sup>252</sup> *Rantsev v Cyprus v Russia* (n 249) para 281.

<sup>253</sup> *ibid* para 281.

Vienna Convention on the Law of Treaties, the Court concluded that trafficking fell within the purview of Article 4.<sup>254</sup> This means ‘the Court has added human trafficking, ‘as defined in the [Trafficking] Protocol and the CoE Trafficking Convention, to the conceptual apparatus of Article 4’.<sup>255</sup>

Similarly, the Strasbourg Judgement in the *Siliadin v. France case*, in which the Court looked into the situation of a girl from Africa held in servitude as a housemaid in France, referred to the hierarchy of denial of personal autonomy,<sup>256</sup> and defined slavery in terms of treating the victim as owned property.<sup>257</sup> The Court in *Siliadin v. France case* ‘highlighted the importance of a “genuine right of legal ownership” to establish enslavement under Article 4 by relying primarily upon the definition of “slavery” in the Slavery Convention 1926’.<sup>258</sup> The Court considered sex trafficking under Article 4 and held that trafficking of a child domestic worker fell within the scope of this Article.<sup>259</sup> This judgement was criticised for its narrow construal of the definition of slavery under Article 4,<sup>260</sup> as the case law under Article 4 is also very limited. Yet recently, the ECHR delivered a decision in *Chowdury v. Others v. Greece*, where the Court found a violation of Article 4(2) of the ECHR (the right not to be subjected to forced labour), due to exploitation of irregular migrant labour amounting to forced labour.<sup>261</sup> ‘The European Court of Human Rights has issued a landmark judgment vindicating a group of migrant strawberry pickers who were shot at by employers for asking for their wages after months of unpaid labour’.<sup>262</sup> As was explained above in *Rantsev v. Cyprus v. Russia case*, the Court defined human trafficking through the definition of slavery in international law. This interpretation of the Court has caused further confusion. In that in the

<sup>254</sup> See Jean Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10(3) *Human Rights Law Review* 5.

<sup>255</sup> Vladislava Stoyanova, ‘Irregular Migrants and the Prohibition of Slavery, Servitude, Forced Labour & Human Trafficking under Article 4 of the ECHR’ (*EJIL: Talk!*, 2017) <<https://www.ejiltalk.org/irregular-migrants-and-the-prohibition-of-slavery-servitude-forced-labour-human-trafficking-under-article-4-of-the-echr/>> accessed 27 April 2017.

<sup>256</sup> *Siliadin v France* Application no 73316/01(ECHR, 26 July 2005), 122.

<sup>257</sup> *ibid* 103.

<sup>258</sup> Kara, ‘Designing More Effective Laws against Human Trafficking’ (n 251) 125.

<sup>259</sup> *Siliadin v France* (n 256).

See also Malta Ruth Farrugia, ‘State Responsibility for Human Trafficking - Perspectives from Malta’ (2012) 15(2) *Journal of Money Laundering Control* 142.

<sup>260</sup> Kara, ‘Designing More Effective Laws against Human Trafficking’ (n 251) 128.

<sup>261</sup> Stoyanova (n 255).

<sup>262</sup> Helena Smith, ‘Bangladeshi Fruit Pickers Shot at by Greek Farmers Win Human Rights Case’ *The Guardian* (30 March 2017) <<https://www.theguardian.com/world/2017/mar/30/bangladeshi-strawberry-pickers-shot-at-by-greek-farmers-win-european-rights-case>> accessed 27 April 2017.

reasoning of the *Chowdury*, the Court talked only about human trafficking without mentioning forced labour (apart from a reference to exploitation).<sup>263</sup> As concluded in the final chapter of this thesis, exploitation is not defined under international law, and in the context of human trafficking, exploitation is a broader concept than forced labour. Yet the Court offered no explanation as to how it defined exploitation and how it might relate to forced labour and servitude in the context of Article 4.<sup>264</sup> This leaves the minimum threshold of severity under Article 4 uncertain.<sup>265</sup> Such uncertainty also suggests that the ECHR is still struggling with the conceptual apparatus under Article 4 pertaining to developing a link between slavery, forced labour and human trafficking.<sup>266</sup>

### 3.3.1.1.2.3.2.3 Kunarac et als Case of the ICTY on Trafficking and Enslavement

The Rome Statute, which is the only treaty addressing crimes against humanity, refers to ‘trafficking’ in Article 7 as a crime against humanity under the category of crime of enslavement, reads as follows:<sup>267</sup>

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>263</sup> Stoyanova (n 255).

<sup>264</sup> *ibid.*

<sup>265</sup> *ibid.*

<sup>266</sup> *ibid.*

<sup>267</sup> Charles Chernor Jalloh, ‘What Makes a Crime against Humanity’ (2013) 28(2) *American University International Law Review* 381, at 382.

The Rome Statute provides for the creation of the ICC in the aim of punishing the most serious violations of human rights in cases when national justice systems fail at the task. William A Schabas, *An Introduction to the ICC* (1<sup>st</sup> published, Cambridge University Press, 2001), ix.

This reference, takes place in the Article 7(c) of the Rome Statute, has also deepened the definitional quagmire of human trafficking. Explicit inclusion of trafficking in Article 7 was interpreted by the ICTY in the *Kunarac et als case* as expanding the Statute's definition of enslavement beyond the 1926 Slavery Convention to include human trafficking.<sup>268</sup>

Discussions around slavery, trafficking and enslavement in the context of the Rome Statute raise the following concerns: Whether enslavement can be understood as an umbrella term including trafficking;<sup>269</sup> whether trafficking can be judged as slavery, considering the definition of enslavement in Article 7(c) of the Rome Statute and in the Elements of Crimes of the Convention on the Abolition of Slavery as the 'right of ownership over a person'.

These concerns can be explained as follows:

In the first case scenario, the above-mentioned explicit inclusion of trafficking in Article 7 established a perception that the Statute's definition of enslavement expanded beyond the slavery definition of the 1926 Slavery Convention to include human trafficking.<sup>270</sup> Bassiouni concluded that including trafficking as a form of enslavement under Article 7 is of 'essential significance' because it 'precludes a perpetrator from claiming that he has not "enslaved" because he has not literally "put the person to work"'.<sup>271</sup> According to Kim, 'the inclusion of trafficking under the Statute's enslavement provision expands longstanding and traditional formulations of the crime of enslavement', and 'while the phrase "modern day slavery" is colloquially accepted, some jurists challenge the expansive legal use of the term "slavery" rendering it "virtually meaningless" when it covers a wide range of practices'.<sup>272</sup> The ICTY in the *Kunarac et als case* accepted the Protocol's means element, which is the abuse of power or of a position of vulnerability,<sup>273</sup> as customary international law, in order to fulfil the

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<sup>268</sup> Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' (n 52) 8.

<sup>269</sup> Wilt (n 83) 298.

<sup>270</sup> Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' (n 52) 8.

<sup>271</sup> *ibid* 8; M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2<sup>nd</sup> ed, Kluwer Law International, 1999), 311.

<sup>272</sup> Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' (n 52) 6.

<sup>273</sup> UNODC 'Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons' (n 22).

Rome Statute's intent to target trafficking as a form of enslavement.<sup>274</sup> Further, the ICTY also reiterated the classic definition of the Slavery Convention,<sup>275</sup> and characterised enslavement as an umbrella term for slavery, servitude and forced labour: 'enslavement as a crime against humanity' may be 'broader than the distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in the other areas of international law'.<sup>276</sup> The Tribunal, with the aim of including trafficking in the realm of enslavement, also stated the following: '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.'<sup>277</sup> The Tribunal evidently interpreted enslavement in a broad context as an umbrella term including slavery and trafficking.<sup>278</sup>

In the second scenario, this 'identification' supports the idea that human trafficking may grow into slavery in consideration of the Trial Chamber's identification. The Chamber set a number of factors as an important indication of enslavement:<sup>279</sup>

Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of individual's autonomy, freedom of choice and freedom of movement; and 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

<sup>274</sup> Note that neither allegations of human trafficking have been brought to the ICC, nor they have appeared before the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' (n 52) 3.

<sup>275</sup> Wilt (n 83) 304.

<sup>276</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, (*Kunarac et als*), 193.

See also David Keane & Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar Publishing, 2012), 227.

Note that 'On appeal, the appellants claimed that the Trial Chamber adopted too broad a definition of the crime of enslavement, emphasizing in particular the requirements of lack of consent and duration as constituent elements of the crime. The Appeals Chamber did not agree and corroborated the Trial Chamber's findings.' Wilt (n 83) 304.

<sup>277</sup> *Kunarac et als* (n 276) 193.

<sup>278</sup> Allain, *The Law and Slavery Prohibiting Human Exploitation* (n 36) 189.

<sup>279</sup> *ibid* 447-48.

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.

The Chamber also determined a duration requirement which defines ‘the duration of the suspected exercise of powers attaching to the right of ownership’ as another factor in order to conclude whether someone was enslaved.<sup>280</sup> Based on this approach, Obakata developed an argument stating that human trafficking

(...) may be treated as slavery when the traffickers themselves continue[d] to exploit their victims. If the continuous exercise of ownership on the part of traffickers [was] terminated (i.e. people being exploited by those other than traffickers) when they reach[ed] their destination, trafficking [could not] then be regarded as slavery.<sup>281</sup>

In its explanation, the Tribunal also stated that subsequent exploitation can effectively amount to slavery, because the right of ownership was fully exercised and retained when people were exploited in sex and other industries in states of destination.<sup>282</sup> Another way of looking at this is once the right of ownership is fully exercised and retained when people are exploited, these acts can be regarded as slavery.<sup>283</sup>

Indeed, a review of recent developments in international law shows that the concept of slavery remains highly contested in relation to international criminal justice.<sup>284</sup> In this respect, Allain, in regards to discussions around slavery/enslavement/trafficking in the context of the Rome Statute, observed that failure to define substantive content of the prohibition of enslavement would have an effect on the international community’s ability to bring to justice individuals who are criminally responsible for violating the prohibition.<sup>285</sup> It should be noted that apart from having an established definition of slavery in

<sup>280</sup> Obakata, ‘Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System’ (n 26) 449.

<sup>281</sup> *ibid* 449.

<sup>282</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective Towards a Holistic Approach* (n 40) 18.

<sup>283</sup> Obakata, ‘Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System’ (n 26) 449

<sup>284</sup> Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 38) 798.

<sup>285</sup> Jean 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, 1 <[https://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain\\_en.pdf](https://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf)> accessed 28 March 2017.

international and domestic law, very little action has been taken to prosecute individuals for enslaving others in this 'neo-abolition' era.<sup>286</sup> Chapter V reaches a conclusion about interpreting trafficking as a crime against humanity. However, because this section looks at the ICTY decision, it takes into consideration other interpretations, which might feature in that decision. Thus, the discussion is not really over/concluded.

After all, the question becomes whether international legal rules include trafficking in slavery, such that referring this phenomenon as the new slavery is legally correct, which is explained further below.

### **3.3.1.233 Is Trafficking Regulated as Modern-Day Slavery in the Context of International Law?**

The analyses above suggest that there is a strong evidence that legal understanding of what constitutes slavery has evolved to include contemporary forms of exploitation, e.g., debt bondage and trafficking,<sup>287</sup> while the core element of the 1926 definition remains intact.<sup>288</sup> Irrespective of some scholars' approaches and interpretations of international judgements to trafficking/slavery, this thesis concludes the following:

Under international law, human trafficking is not considered to be a form of slavery. Thus, slavery should not be used as a blanket term; this is also stated by legal commentators on decisions of the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia.<sup>289</sup>

While traffickers may view trafficked victims as possessions/commodities, this does not necessarily mean that it constitutes ownership in legal sense, as is implied in slavery cases.<sup>290</sup> A situation of trafficking, debt bondage, bonded labour, or forced labour may be identifiable as slavery only if trafficking has involved, as required by the 1926 Convention, 'the exercise of any or all of the powers attached to the right of ownership'.<sup>291</sup> This means that if the right of

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<sup>286</sup> Allain & Bales, 'Slavery and its Definition' (n 30) 1.

<sup>287</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 190.

<sup>288</sup> *ibid* 190.

<sup>289</sup> Lee (n 124) 22.

<sup>290</sup> Elliott (n 23) 53.

<sup>291</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 810.

ownership is fully exercised and retained when people are exploited, then human trafficking can be regarded as slavery.<sup>292</sup> Thus, an ‘addition of ‘any form of dealing with human beings leading to the forced exploitation of their labor’ remains unsupported in international law.<sup>293</sup> In this respect, where the definition of human trafficking overlaps with the definition of slavery, then the act of trafficking breaches a jus cogens norm; not because it is an act of human trafficking, but because it is slavery.<sup>294</sup> The European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia stated that whether a phenomenon constituted a form of enslavement would depend on ‘a range of factors, including the level of control displayed, the measures taken to prevent escape, the use of force or coercion, any evidence of abuse’.<sup>295</sup> In this sense, if the continuous exercise of ownership on the part of traffickers is terminated once they reach their destination, trafficking cannot then be regarded as slavery.<sup>296</sup>

It should be noted that although a duty to eradicate slavery is clearly identified by the International Court of Justice as a supreme rule of customary international law, a legal obligation erga omnes, and part of jus cogens a fundamental norm of international law,<sup>297</sup> there is no clear indication in regards to human trafficking.<sup>298</sup>

In the Trafficking Protocol, trafficking is not understood as slavery, but more like a process by which slavery can be achieved.<sup>299</sup> The Protocol broadens the definition to include all forms of forced labour and slavery into which people of any gender can be trafficked, whether within or across borders.<sup>300</sup> Having considered the definition of the Trafficking Protocol, which created an

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<sup>292</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective Towards a Holistic Approach* (n 40) 20.

<sup>293</sup> Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 38) 810.

<sup>294</sup> Jean Allain, ‘Book review, Scarpa, Silvia; Trafficking in Human Beings: Modern Slavery’ (2009) 20(2) *European Journal of International Law* 453, at 456.

<sup>295</sup> Lee (n124) 22.

<sup>296</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System’ (n 26) 449.

<sup>297</sup> M Cherif Bassiouni, ‘Enslavement as an International Crime’ (1991) 23 *New York University Journal of International Law & Politics* 445, at 455.

<sup>298</sup> Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ (n 241) 8.

<sup>299</sup> Allain & Bales, ‘Slavery and Its Definition’ (n 30) 2.

<sup>300</sup> See Marjan Wijers ‘Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol’ (2015) 4 *Anti-Trafficking Review* 56.

international consensus of what constitutes human trafficking,<sup>301</sup> slavery is mentioned as a form of exploitation and as a result of human trafficking under the definition of Article 3(a): ‘Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, *slavery or practices similar to slavery*, servitude’. Gallagher notes that after the adoption of the Trafficking Protocol, trafficking ‘became an umbrella term for a wide range of forced and exploitative labor practices that had traditionally only been dealt with at the edges of international law and policy’.<sup>302</sup> It is difficult to argue that a treaty-based concept of slavery includes trafficking and related exploitation without any conditions,<sup>303</sup> e.g., in the case of Sinai trafficking mentioned in the Chapter I, the purpose of trafficking is slavery and extortion through severe torture.<sup>304</sup> In light of Allain’s approach, relying on the fundamentals of property law to evaluate slavery, in the Sinai case, the trafficked persons were treated as property and not as human beings in the aim of their exploitation.<sup>305</sup>

Another key difference between slavery and human trafficking is its purpose.<sup>306</sup> As was explained, exploitation is a key element of trafficking; yet exploitation per se does not constitute slavery.<sup>307</sup> As a legal matter, it is unlikely that ‘the international legal prohibition of slavery would apply to many of the individuals caught up in the contemporary form of exploitation’.<sup>308</sup> Thus, the prohibition on slavery contained in the above-mentioned treaties cannot be interpreted as including trafficking.<sup>309</sup>

As Gallagher concludes, ‘if the international legal definition of slavery adopted in 1926 indeed had included related institutions and practices, there would have

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<sup>301</sup> Mohamed Y Mattar, ‘Human Security or State Security? The Overriding Threat in Trafficking in Persons’ (2006) 1 *Intercultural Human Rights Law Review* 249, at 258.

<sup>302</sup> Anne T Gallagher, ‘Understanding Exploitation’ (2011) *Harvard International Review* 4, at 4.

<sup>303</sup> Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labour and Debt Bondage’ (n 88) 12.

<sup>304</sup> Mirjam van Reisen & Conny Rijken, ‘Sinai Trafficking: Origin and Definition of a New Form of Human Trafficking’ (2015) 3(1) *Social Inclusion* 113, at 120.

<sup>305</sup> *ibid* 119.

<sup>306</sup> Wilt (n 83) 7.

<sup>307</sup> Elliott (n 23) 88

<sup>308</sup> Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (n 38) 810.

<sup>309</sup> Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Human Trafficking: The Prohibitions on Slavery, Servitude Forced Labor and Debt Bondage’ (n 88) 12.

been no need to develop a new instrument', such as the Trafficking Protocol.<sup>310</sup> Indeed, both slavery and trafficking feature 'examples of non-consensual movement of persons coupled with human exploitation and control'.<sup>311</sup> Yet 'exploitation' in the context of trafficking does not always amount to slavery, even though it may in certain circumstances, as is outlined within the definition of the Trafficking Protocol.<sup>312</sup> In a philosophical sense, trafficking may be perceived as a modern form of slavery, yet legally it is not synonymous with the slave trade; it could be said to be based upon slavery if the only purpose constitutes slavery.<sup>313</sup>

In this context, even though human trafficking is positioned as modern-day slavery as a result of the poorly defined continuum provided by international legal rules, such interpretation has found support mainly for the purpose of hijacking attention from the global structural inequalities in 'the distribution of wealth and access to education, health care and social security, and gender-based or religious violence, and ethnic conflicts'.<sup>314</sup> The phrase modern-day slavery and the expansive legal use of this term is rendered virtually meaningless when it covers a wide range of practices.<sup>315</sup> In this respect, as a legal matter, it is unlikely that, at the present time, the international legal prohibition of slavery would apply to many of the individuals caught up in contemporary forms of exploitation.<sup>316</sup> Human trafficking inherently includes an element of slavery, yet referring to human trafficking, as slavery would depoliticise it, albeit slavery as a term creates a popular appeal.<sup>317</sup> As a consequence of this approach, in some cases states could encourage coercive exploitation of workers, particularly migrants.<sup>318</sup> It would enable states to avoid responsibility for vulnerabilities created by restrictive migration policies.<sup>319</sup> Thus, referring to human trafficking

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<sup>310</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 802.

<sup>311</sup> Elliott (n 23) 88.

<sup>312</sup> *ibid* 52.

<sup>313</sup> *ibid* 52.

<sup>314</sup> Neil Howard & Mumtaz Lalani, 'Editorial Introduction: The Politics of Human Trafficking' (2008) 4(1) *St Antony's International Review* 5, at 10.

<sup>315</sup> *ibid* 6.

<sup>316</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 810.

<sup>317</sup> Janie A Chuang, 'The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"' (2015) 5 *Anti-Trafficking Review* 146, at 149.

<sup>318</sup> *ibid* 147.

<sup>319</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *The American Journal of International Law* 609, at 613ff.

as modern-day slavery would not only cause an understanding that slavery is a blanket term in a legal sense, but such referral could also possibly cause a perception that all human trafficking victims are in slavery status, which would affect the scope of victim protection in human trafficking cases. This is one of the reasons why the next chapter discusses the importance of victim identification, which is directly related to definitional analysis of human trafficking.

This section concludes that slavery/human trafficking are perceived as equivalent, because they are ‘mere points on a poorly defined continuum’. The Trafficking Protocol left the scope of the main components of human trafficking vague, which brings more questions to the table, such as what is exploitation, and what constitutes coercion. In terms of defining the phrase ‘powers attaching to the rights of ownership’ in cases of slavery, the phrase’s scope has been discussed by the international community from different aspects, which has led to a definitional quagmire. In this context, irrespective of the poorly defined continuum, equating trafficking and slavery as legal terms would be incorrect, as they are processes whose elements differ at points.<sup>320</sup>

Indeed, definitional discussion is not limited to determining how trafficking differs from slavery. Due to its transnational nature and global cross-border movements, human trafficking is also misidentified as migrant smuggling in some cases, which is why the following section addresses what migrant smuggling is in comparison to human trafficking.

### **3.3.1.2 Trafficking and Smuggling**

This section aims to compare migrant smuggling and human trafficking, which is another aspect of the definitional quagmire. Indeed, ‘borders between smuggling and trafficking are sometimes blurred’ in related cases.<sup>321</sup> These two phenomena have some overlap, yet this thesis posits that irrespective of the unclear boundaries around human trafficking particularly generated by the Trafficking Protocol, trafficking and smuggling are legally distinct concepts, explained in the following paragraphs.

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<sup>320</sup> Elliott (n 23) 49.

<sup>321</sup> Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 79) 4.

### 3.3.1.2.1 Historical Background of Migrant Smuggling

The initial signs of contemporary political interest in migrant smuggling can be traced back to the US' concern about facilitated irregular migration in the mid-1960s, with the expiration, in 1964, of a guest worker program between Mexico and the US.<sup>322</sup> Later, e.g., in 1980, about 15,000 Haitians came unlawfully to the US by boat.<sup>323</sup> Salt states that 'temporary labor migration became the norm, followed by family reunion; in the 1980s we have become more conscious of refugee flows and the transient migrations of the highly skilled'.<sup>324</sup> The issue of migrant smuggling attracted international attention as a serious concern in 1993, when a Chinese vessel was deliberately run aground off the coast of New York, known as the Golden Venture:<sup>325</sup>

[T]he tramp freighter dumped its starving and frightened cargo of nearly 300 Chinese immigrants into frigid waters off one of New York City's most popular public beaches. Six passengers died from drowning or exposure, several had to be hospitalised and the remainder was sent to detention centres to await Federal hearings.<sup>326</sup>

After this incident, it became apparent that deficiencies in international law were detrimental:

(...) as summarized by advocates of a new treaty on the subject, there was no agreed definition of smuggling, no domestic obligation to criminalize smuggling, and no obligation to extradite or prosecute perpetrators, resulting in a 'legal lacuna under international law [that] is increasingly perceived as an obstacle to the efforts of the international community to cope in an efficient manner with the phenomenon of smuggling of illegal migrants for criminal purposes'.<sup>327</sup>

Proposals for an international treaty on transnational organised crime - including human trafficking - first raised as an issue at the World Ministerial Conference on

<sup>322</sup> Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 25.

<sup>323</sup> Arthur C Helton, 'The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects' (1992) 10 *New York Law School Journal of Human Rights* 325, at 325; Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 26.

<sup>324</sup> John Salt, 'A Comparative Overview of International Trends and Types, 1950-80' (1989) 23(3) *International Migration Review* 431, at 431.

<sup>325</sup> Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 27.

<sup>326</sup> Opinion, 'The Golden Venture, Plus 100,000' *The New York Times* (9 June 1993) <<http://www.nytimes.com/1993/06/09/opinion/the-golden-venture-plus-100000.html>> accessed 4 October 2016.

Note that 'ten' died due to drowning or hypothermia, most of the survivors were deported back to China. Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 27.

<sup>327</sup> Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 28.

Organised Transnational Crime in Italy in 1994. Considering growing concerns about trafficking and migrant smuggling, the idea of separate protocols was initially opened for discussion in 1998 at an intergovernmental group of experts' meeting, 'established by the General Assembly to crime'.<sup>328</sup> The initial proposal on a legal instrument for migrant smuggling was presented to the Commission on Crime Prevention and Criminal Justice by the government of Austria.<sup>329</sup> The Organised Crime Convention and its supplemented Protocol on migrant smuggling were adopted by the General Assembly in 2000, and opened for signature in Italy in the same year. As mentioned previously, the Vienna Process invoked international law as a weapon against transnational organised crime.<sup>330</sup> Yet eventually states decided to separate migrant smuggling and human trafficking issues.<sup>331</sup> As explained further below, although smuggling and trafficking have different legal definitions under separate protocols, the differences are not clear. The following sections conduct a comparative analysis on migrant smuggling and human trafficking to understand how these concepts are identified by international law and in what ways there is a definitional quagmire surrounding them.

### 3.3.1.2.2 Formalisation of Smuggling

#### 3.3.1.2.2.1 The Definition of Smuggling

In 1994, the International Organisation for Migration defined human trafficking as 'including an illegal crossing of an international border, voluntary movement, and financial gain for the trafficker which was nearly the modern definition of migrant smuggling'.<sup>332</sup> Today, the Anti-Smuggling Protocol defines migrant smuggling as<sup>333</sup> '(...) the procurement, in order to obtain, directly or

<sup>328</sup> Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (n 5) 982.

<sup>329</sup> *ibid* 983.

<sup>330</sup> Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 36.

<sup>331</sup> *ibid* 66.

<sup>332</sup> Sarah Pierce, 'The Vital Difference between Human Trafficking and Migrant Smuggling' *Open Democracy* (12 November 2014) <<https://www.opendemocracy.net/beyondslavery/sarah-pierce/vital-difference-between-human-trafficking-and-migrant-smuggling>> accessed 25 April 2017; Gallagher, *The International Law of Human Trafficking* (n 2) 19; Godfrey Gunatilleke, 'International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights: Eleventh IOM Seminar on Migration 26–28 October 1994, Geneva' 32(4) *International Migration* 593.

<sup>333</sup> UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime* done 15 November 2000, GA Res 55/25 Annex III, UN GAOR, 55<sup>th</sup> Sess, Supp No 49, at 62, UN Doc.

indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’.

The Smuggling Protocol is important, since ‘there is no universal instrument that addresses all aspects of smuggling of migrants and other related issues’.<sup>334</sup>

Migrant smuggling can be simply understood as ‘facilitating the breach of migration laws for profit’.<sup>335</sup> In other words, as Zhang concludes, ‘migrant smuggling is the act of assisting or facilitating, often for a fee, the un-authorised entry of a foreign national into another country’.<sup>336</sup>

A smuggler could be described as someone ‘who assists another to cross a border without official permission’; thus, a smuggler could play ‘a critical role in assisting refugees to reach safety’.<sup>337</sup> In some cases, in contrast to human trafficking, migrant smuggling may be perceived as a victimless crime, depending on how it is executed.<sup>338</sup> Smugglers may view their business as ‘God’s work’, giving people who escape from war-torn lands a lifeline.<sup>339</sup> Thus, the question could be raised of whether a smuggler is in fact a saviour or a murderer.<sup>340</sup>

Migrants are certainly at the mercy of smugglers during the journey, yet smuggling is a business, and like any other business it requires a certain level of trust: ‘[y]ou pay for a service and you get what you pay for’.<sup>341</sup> Smugglers are

A/45/49 (Vol I) (2001) entered into force 28 January 2004 (Migrant Smuggling Protocol), art 3(a).

In 1994 the International Organisation for Migration defined human trafficking as ‘including an illegal crossing of an international border, voluntary movement, and financial gain for the trafficker, which is close to the modern definition of migrant smuggling’. Gallagher, *The International Law of Human Trafficking* (n 2) 19.

<sup>334</sup> Venla Roth, *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), 93.

<sup>335</sup> Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 1.

<sup>336</sup> Sheldon X Zhang, *Smuggling and Trafficking in Human Beings: All Roads Lead to America* (Praeger Publishers, Westport, Connecticut, 2007), 1.

<sup>337</sup> James C Hathaway, ‘Why Human Smuggling is Vital’ *National Post (Canada)* (13 September 2010) <<http://news.nationalpost.com/full-comment/james-c-hathaway-why-human-smuggling-is-vital>> accessed 29 September 2016.

<sup>338</sup> Pierce (n 332).

<sup>339</sup> Louisa Loveluck, ‘I’m Doing God’s Work’, Says 21-Year-Old People Smuggler in Turkey’ *The Telegraph* (14 February 2016) <<http://www.telegraph.co.uk/news/worldnews/europe/turkey/12156946/Im-doing-Gods-work-says-21-year-old-people-smuggler-in-Turkey.html>> accessed 12 October 2016.

<sup>340</sup> Luigi Achilli, ‘The Smuggler: Hero or Felon?’ (2015) 10 *European University Institute Migration Policy Centre* 1, at 6-7.

<sup>341</sup> *ibid.*

not the cause of migration or refugees' problems;<sup>342</sup> they simply respond to demand for geographic mobility created by increasing inequality among countries,<sup>343</sup> e.g., many Eritrean refugees in Khartoum view smugglers as facilitators rather than exploiters.<sup>344</sup> History witnessed heroes who saved people from oppression and death, e.g., helping Jews out of Nazi-occupied territory.<sup>345</sup> Yet some smugglers engage in terrible acts and take advantage of those who rely on them, through rape, torture, kidnapping and other types of abuse.<sup>346</sup> Indeed, smuggling is usually 'no modern-day, Schindler-like humanitarian enterprise'; rather, it is a business driven by money, placing the lives and wellbeing of human beings at serious risk.<sup>347</sup>

It is argued that current definitions fail to recognise whether human trafficking and migrant smuggling are equivalent.<sup>348</sup> Considering such analyses, this thesis posits that human trafficking and migrant smuggling have major legal differences, detailed as follows.

### 3.3.1.2.2 The Distinction between Trafficking and Smuggling

The similarities between the Migrant Smuggling and Trafficking Protocols are considerable and it is 'evident throughout both instruments: from purpose, to definition, to the structure, and substantive content of the mandated response'.<sup>349</sup> It was during the drafting process that states decided to formally separate these two phenomena.<sup>350</sup> Considering the definitions of trafficking and

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<sup>342</sup> Milena Belloni & James Jeffrey, 'Human Smugglers: Exploiters or Pioneers of New Underground Railroad?' *Al Jazeera* (30 November 2014) <<http://america.aljazeera.com/articles/2014/11/30/human-smugglers-exploiters.html>> accessed 6 July 2016.

<sup>343</sup> *ibid.*

<sup>344</sup> *ibid.*

<sup>345</sup> Antje Missbach, 'Human Smugglers Roundtable: Are Smugglers Parasites or Service Providers?' *Open Democracy* (26 March 2016) <<https://www.opendemocracy.net/beyondslavery/hsr/human-smugglers-roundtable-are-smugglers-parasites-or-service-providers-0>> accessed 6 July 2016.

<sup>346</sup> *ibid.*

<sup>347</sup> Anne Gallagher, 'Migrant Smugglers: Monsters or Saviours?' *Open Democracy* (13 April 2015) <<https://www.opendemocracy.net/beyondslavery/anne-gallagher/migrant-smugglers-monsters-or-saviours>> accessed 29 September 2016.

<sup>348</sup> See Ernesto U Savona & Sonia Stefanizzi (eds), *Measuring Human Trafficking: Complexities and Pitfalls* (New York, Springer, 2007); Anna Triandafyllidou & Thanos Maroukis, *Migrant Smuggling: Irregular migration from Asia and Africa to Europe* (1<sup>st</sup> published, Palgrave Macmillan, 2012).

<sup>349</sup> Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 66.

<sup>350</sup> *ibid.* 66.

smuggling, they in fact in many ways are different crimes, as summarised in the following paragraphs.<sup>351</sup>

The act in smuggling is always transnational, whereas it may not be so in trafficking; trafficking may be committed by crossing borders or remaining within the same State.<sup>352</sup> Migrant smuggling constitutes movement that takes place outside the regulatory norms of sending, transit and receiving countries.<sup>353</sup>

Human trafficking victims can be of any nationality, whereas smuggled migrants are always foreign nationals.

The purpose in human trafficking is all about exploitation, whereas in migrant smuggling it is to obtain a financial or other material benefit from procuring the illegal entry itself.

Migrant smuggling is not understood to be a 'crime against humanity', as the term crime against humanity requires fundamentally inhumane conduct that is part of a widespread or systematic attack that intentionally causes great suffering or serious injury to body or to mental or physical health. Since theoretically human trafficking requires the acquisition of people by improper means such as force, fraud or deception with the aim of exploiting them, it is interpreted that trafficking crimes might rise to the level of a crime against humanity if necessary conditions are met, envisaged in the context of the Rome Statute. When everything goes well between smuggler and smuggled individual, it is a crime against the State. In this case, it is important to note that smuggled migrants should nevertheless not be perceived as being 'complicit in their own misfortune and thereby not "victims" deserving of protection and support'.<sup>354</sup>

Migrant smuggling is exercised by the illegal migrants' consent, e.g., once the border is crossed, the transaction between smuggler and migrant ends. In cases of human trafficking, consent is negated and cannot be used to absolve a person

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<sup>351</sup> Note that in the Smuggling Protocol 'the clear intention was to ensure that any offence provisions developed to give effect to the Protocol aim to target migrant *smugglers*, and not persons being smuggled.' Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 359.

<sup>352</sup> UNODC, 'Trafficking in Persons and Migrant Smuggling' <<https://www.unodc.org/lpo-brazil/en/trafico-de-pessoas/index.html>> accessed 28 March 2017.

<sup>353</sup> IOM, 'Key Migration Terms' <<https://www.iom.int/key-migration-terms>> accessed 25 April 2017.

<sup>354</sup> Gallagher, 'Migrant Smugglers: Monsters or Saviours?' (n 347).

of criminal responsibility.<sup>355</sup> Individuals are smuggled willingly. The primary issue with human trafficking is the negation of consent, as once deception or fraud is present, a person's initial consent is rendered irrelevant,<sup>356</sup> e.g., even if the victim consents, the existence of deception and coercion always makes the consent void. Under the definition of the Trafficking Protocol, consent is addressed in Article 3's definition of trafficking. In the Protocol, the definition of human trafficking emphasises the fact that consent to intended exploitation is irrelevant, and trafficking necessarily involves some 'consent-nullifying' behaviour.

Trafficking and migrant smuggling are two completely different crimes.<sup>357</sup> Trafficking cases include a range of different phenomena, such as debt bondage, sale of children into prostitution, and various forms of labour exploitation. Related examples include the construction sector in Russia, fishing boats in Thailand, cocoa farms in Cote d'Ivoire, and domestic helpers working in Western countries.<sup>358</sup> Trafficking is a serious crime where victims' rights are violated.<sup>359</sup> Somewhat sarcastically, it could be concluded that in human trafficking 'people are a good commodity as they do not easily perish, but they can be transported over long distances and can be re-used and re-sold.'<sup>360</sup> Salt suggests that 'trafficking and more voluntary forms of undocumented migrations are best thought of as a continuum', as where the elements of deception and/or coercion begin is not easy to establish.<sup>361</sup> In this sense, the definitional quagmire around smuggling and trafficking is caused by the potential breadth of the terms used to define trafficking in the first place. However, it is clear that the knowledge of what awaits them in the destination country varies from one victim to another

<sup>355</sup> UNODC, *Toolkit to Combat Trafficking in Persons - Global Programme against Trafficking in Human Beings* (New York, United Nations, 2008), 5.

<sup>356</sup> Klara Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (Joseph Rowntree Foundation, 2010), 7. <<http://www.gla.gov.uk/media/1585/jrf-between-decent-work-and-forced-labour.pdf>> accessed 1 December 2016.

<sup>357</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 792.

<sup>358</sup> See Paolo Campana & Federico Varese, 'Exploitation in Human Trafficking and Smuggling' (2016) 22 *European Journal on Criminal Policy and Research* 89; Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 816.

<sup>359</sup> Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (n 38) 817.

<sup>360</sup> Raimo Väyrynen, 'Illegal Immigration, Human Trafficking, and Organized Crime' (2003) WIDER Working Paper 72/2003, 3 <<https://www.wider.unu.edu/sites/default/files/dp2003-072.pdf>> accessed 31 July 2017.

<sup>361</sup> John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 38(3) *International Migration* 31, at 33.

and in any case, human trafficking is ‘inherently exploitative’, whereas migrant smuggling is ‘only incidentally exploitative’.<sup>362</sup> Human trafficking has a distinctive relationship with exploitation in comparison to migrant smuggling.

In some incidents, human trafficking and smuggling may intertwine, considering the cross-border nature of human trafficking crimes, and human rights violations conducted on the way, in the process of either migrant smuggling or trafficking. The following analysis looks at these occurrences to set forth similarities and overlapping aspects of migrant smuggling and human trafficking.

### **3.3.1.2.2.3 The Overlapping Aspects between Smuggling and Trafficking**

#### **3.3.1.2.2.3.1 The Major Reasons Why Smuggling and Trafficking Intersect**

The above analysis has identified in what ways, legally, migrant smuggling and human trafficking diverge. On the other hand, by looking at the definition of migrant smuggling, which is ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’, it can be seen that ‘smuggling and trafficking happen at the same time when a person’s experience meets both definitions, i.e., they are taken over an international border in an irregular and forced or deceptive way for profit and exploited’.<sup>363</sup> This also brings the discussion back to the purpose element of trafficking, which is exploitation. Considering the in-depth meaning and unclear boundaries of the exploitation element in the context of human trafficking, it seems confusing whether in some cases human trafficking can be solely understood as migrant smuggling or vice versa. E.g., trafficking can be committed by means of illegal entry, similar to smuggling. Lee states that ‘it is often unclear whether a person is tracked or smuggled at the beginning of his or her journey, as deception, exploitation and human rights abuses may not be apparent until later stages’.<sup>364</sup>

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<sup>362</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 52.

<sup>363</sup> Rebecca Napier-Moore, ‘FAQ 2: Smuggling and Trafficking Intersections’ (2011) Global Alliance against Traffic in Women (GAATW) Working Paper, 9  
<[http://www.gaatw.org/publications/Working\\_Papers\\_Smuggling/FAQ2\\_TraffickingandSmugglingIntersections.pdf](http://www.gaatw.org/publications/Working_Papers_Smuggling/FAQ2_TraffickingandSmugglingIntersections.pdf)> accessed 31 July 2017.

<sup>364</sup> Maggy Lee (ed), ‘Understanding Human Trafficking’ in *Human Trafficking* (Routledge, 2012), 11.

In this respect, it seems acceptable in one way that despite the existence of a legal difference between these terms, human trafficking and smuggling are used interchangeably, especially by politicians leaping to blame smugglers, who 'traffic in misery'.<sup>365</sup> However, this thesis posits that despite the overlapping aspects, the underlying purpose of those (especially politicians) who use trafficking and smuggling interchangeably to describe cross-border movements in relation to political matters do so to de-politicise trafficking/smuggling and to hide complicity in border deaths that shame our age.<sup>366</sup>

Indeed, migrant smuggling and human trafficking are in some cases interrelated, involving shifts, flows, overlaps and transitions.<sup>367</sup> Having a clear understanding of trafficking in relation to migrant smuggling is important, as it focuses on the issue of consent.<sup>368</sup> Piotrowicz and Redpath-Cross conclude that '[t]here is no real consent from the trafficked person', and '(...) smuggling involves the consent of the individual'.<sup>369</sup> In cases of forced labour exploitation, the question becomes whether those workers are smuggled, because they surely consent, or are trafficked, because the exploitative offer is actually a threat.<sup>370</sup> It can be argued that such incidents should be discussed by considering circumstances, e.g., 'if the migrant would starve (...) unless he or she took up the offer, then the offer would be coercive'.<sup>371</sup> Kleemans argues that smuggled people could be seen as customers, and trafficked people as victims.<sup>372</sup> Similarly, Obokata discusses that the definition of migrant smuggling is about willing participants who violate national immigration laws and regulations, whilst human trafficking, due to the presence of coercion or deception by traffickers and subsequent exploitation is treated as a human rights issue, reinforcing the case for

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<sup>365</sup> Julia O'Connell Davidson & Neil Howard 'On Freedom and (Im)Mobility: How States Create Vulnerability by Controlling Human Movement' *Open Democracy* (18 May 2015) <<https://www.opendemocracy.net/beyondslavery/julia-o'connell-davidson-neil-howard/on-freedom-and-immobility-how-states-create-vulne>> accessed 31 July 2017.

<sup>366</sup> *ibid.*

<sup>367</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 52.

<sup>368</sup> Elliott (n 23) 21.

<sup>369</sup> Ryszard Piotrowicz & Jillyanne Redpath-Cross, 'Human Trafficking and Smuggling' in Brian Opeskin & Richard Perruchoud & Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (1<sup>st</sup> published, Cambridge University Press, 2012), 234.

<sup>370</sup> Touzenis (n 33) 28.

<sup>371</sup> *ibid.* 28.

<sup>372</sup> See Maria Ioannou & Miriam S D Oastinga, 'Empirical Framework of Control Methods of Human Trafficking for Sexual Exploitation' (2015) 16(1) *Global Crime* 34.

protection of victims.<sup>373</sup> Migrant smuggling may turn into trafficking, due to underlying intent or motive;<sup>374</sup> or smuggled individuals might find themselves trafficked during or after crossing a border. Individuals who seek to leave their countries through the assistance of a third person may lose their control over their fate.<sup>375</sup> Women in particular may rely on the services of a human smuggler and fall victim to the traffickers' exploitative practices.<sup>376</sup> A form of deception involves women who are unaware before their departure that they will be working as prostitutes, and who do not know the extent to which they will be exploited, controlled, intimidated and indebted.<sup>377</sup>

Due to external subjective factors, including the ones identified in Chapter I, if a place does not provide enough resources for people to live and sustain a minimally decent life, then they will move to places where such resources are available, regardless of national boundaries.<sup>378</sup> Noll also indicates this, as follows:

The choice between different forms of misery raises the question what conditions make persons accept the offers of smugglers and traffickers. Those conditions could be described as violations of human rights, particularly in the economic and social domain. In such situations, individuals would be faced with the choice between two set-ups of human rights deprivations: that are caused directly and indirectly by trafficking, and that are caused by remaining in the country of origin.<sup>379</sup>

In such cases, individuals are unable to enter countries along conventional paths, e.g., they may be incapable of securing an official identity or travel document; they also might not qualify for refugee status. For this reason, in the absence of humanitarian visas, smugglers are the most common 'lifeline' for refugees. Individuals who must rely on smuggling to migrate can become vulnerable to

<sup>373</sup> Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non- State and State Actors under International Human Rights Law' (2005) 17 *International Journal of Refugee Law* 394, at 397.

<sup>374</sup> Winterdyk & Perrin & Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns and Complexities* (n 79) 5.

<sup>375</sup> Dennis Broeders, 'The New Digital Borders of Europe: EU Databases and The Surveillance of Irregular Migrants' (2007) 22(1) *International Sociology* 71, at 74.

<sup>376</sup> Kaye & Winterdyk, 'Explaining Human Trafficking' in *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (n 79) 59.

<sup>377</sup> Alexis A Aronowitz, *Human Trafficking, Human Misery - The Global Trade in Human Beings* (1<sup>st</sup> published, Preager Publishers, 2009), 3.

<sup>378</sup> See David Miller, *National Responsibility and Global Justice* (Oxford Scholarship Online, 2007).

<sup>379</sup> Gregor Noll, 'The Insecurity of Trafficking in International Law' in Vincent Chetail & M Carlos-Tschopp (eds), *Globalization, Migration and Human Rights: International Law Under Review* (Vol II, Bruylant, 2007), 353.

trafficking. In other cases, some people might start their journey by agreeing to be smuggled into a country illegally, but find themselves in an exploitative situation, such as being trafficked, later in the process.<sup>380</sup> In these kinds of incidents, those smuggled could be unwilling participants who violate national immigration laws and regulations too.<sup>381</sup> These cases -in which trafficking and smuggling intersect - are analysed by considering the journey itself in the context of exploitative conditions that victims are subjected to during and after their journey, in the following paragraphs.

### 3.3.1.2.3.2 Cross-Border Movements in relation to Trafficking and Smuggling

Migrant smuggling constitutes a human rights issue in modern times, reinforcing the case for protection of victims.<sup>382</sup> Smuggled individuals may experience acts amounting to torture, inhuman or degrading treatment, sexual and physical violence, exhaustion and malnutrition, and may even lose their lives during the course of their journey.<sup>383</sup> Those victims might be hidden among cargo shipments, resulting in injury or death by drowning, freezing or suffocating. The UN refugee agency said that in May 2016 more than 700 hundred people might have drowned in 3 Mediterranean Sea shipwrecks south of Italy.<sup>384</sup> Additionally, overcrowding and environmental extremes, and shortages of food and water, aggravate the situation.<sup>385</sup> When they reach their destination, many experience other human rights abuses, including racism/xenophobia, restriction on freedom of movement, and strict law enforcement measures.<sup>386</sup> 'I fled my country looking for safety. I still haven't found it,' said a Hazara man after he and 2 fellow refugees were beaten with an iron bar by locals on Manus Island.<sup>387</sup> During this

<sup>380</sup> Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24(2) *International Journal of Refugee Law* 181, at 182.

<sup>381</sup> Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (n 373) 397.

<sup>382</sup> *ibid* 394-97.

<sup>383</sup> Touzenis (n 33) 10.

<sup>384</sup> Patrick Kingsley, 'More Than 700 Migrants Feared Dead in Three Mediterranean Sinkings' *The Guardian* (29 May 2016) <<http://www.theguardian.com/world/2016/may/29/700-migrants-feared-dead-mediterranean-says-un-refugees>> accessed 25 April 2017.

<sup>385</sup> Jonathan Todres, 'Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking' (2011) 89(2) *North Carolina Law Review* 447, at 466.

<sup>386</sup> Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (n 373) 397.

<sup>387</sup> Ben Doherty, 'Manus Refugee Says He Thought He Would Die after Being Attacked by Locals' *The Guardian* (15 August 2016) <<https://www.theguardian.com/australia->

journey, trafficking could be made possible by and sustained through high levels of violence and intimidation.<sup>388</sup> Eventually, those victims may experience physical, sexual and emotional violence at the hands of human traffickers under various workplace, health and environmental hazards.<sup>389</sup> In these hypothetical cases, smuggling and trafficking rings are closely related, and both smuggled and trafficked individuals are labelled as illegal.<sup>390</sup> Smuggled migrants become trafficking victims once they are subjected to force/coercion and exploitation upon their arrival in the destination countries.<sup>391</sup> Because ‘traffickers thrive just underneath the thoroughfares of legitimate human migration’, they prey on desperate, unemployed individuals, so on hopes.<sup>392</sup> In some cases, it may not be easy to distinguish between forced labourers and those who have been smuggled.<sup>393</sup> Illegal immigrants cannot pay human smugglers, and thus end up as victims of human trafficking.<sup>394</sup> In cases where people cannot pay and they are trafficked, the fine line between human trafficking and migrant smuggling seems to be blurred. However, the definition of trafficking requires coercion and exploitation of humans, yet ‘the definition of smuggling is met already when a smuggled migrant has crossed the international border illegally and the smuggler has received financial or other material benefit for that service’.<sup>395</sup>

After crossing the border if the victim is subjected to any form of abuse, including trafficking, it makes little difference to the exploited individual whether trafficking or smuggling has occurred:<sup>396</sup>

(...) [t]he point for her is that she cannot quit or escape, is denied basic freedoms, is not getting paid, is forced to live and work in bad

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news/2016/aug/15/manus-refugee-says-he-thought-he-would-die-after-being-attacked-by-locals> accessed 11 October 2016.

<sup>388</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 301.

<sup>389</sup> Todres, ‘Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking’ (n 385) 463.

<sup>390</sup> Susan York Kneebone & Bernadette M McSerry, ‘Trafficking in Women and Forced Migration: Moving Victims across the Border of Crime into the Domain of Human Rights’ (2009) Monash University Faculty of Law Legal Studies Research Paper No 2009/35, 68 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1599406](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599406)> accessed 27 July 2017.

<sup>391</sup> Joan Fitzpatrick, ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking’ (2003) 24 *Michigan Journal of International Law* 1143, at 1151.

<sup>392</sup> Joseph L Dunne, ‘Hijacked: How Efforts to Redefine the International Definition of Human Trafficking Threaten Its Purpose’ (2012) 48(3) *Willamette Law Review* 403, at 404.

<sup>393</sup> Roth (n 334) 99.

<sup>394</sup> *ibid* 99.

<sup>395</sup> *ibid* 103.

<sup>396</sup> *ibid* 99.

conditions, has no control over her work place, hours of work or job content, and/or is subjected to physical violence or its threat.<sup>397</sup>

In cases of demand for illegal work force and the exploitation of undocumented migrants, illegal immigrants may be left desperate if they are unable to pay for smuggling services; thus, they often turn out to be victims of human trafficking.<sup>398</sup> In this case, the threat to a victim does not end once she or he has escaped or been rescued from a criminal situation.<sup>399</sup> Possibly the victim is placed in a situation of debt bondage and is exploited,<sup>400</sup> e.g., Nigerian women in Norway are not intentionally recruited to prostitution but they resort to selling sex in order to reduce their debts stemming from their travel expenses.<sup>401</sup> Victims are promised decent work, which they chose to undertake, and later they discover the horrific nature of circumstances upon arriving at their destination.<sup>402</sup> They then have no reasonable alternative but to obey the commands of human traffickers,<sup>403</sup> since traffickers provoke feelings of fear, disconnection, dependency and helplessness in victims.<sup>404</sup>

As is seen, although trafficking and smuggling are different offences, in some cases the difference between them is not so clear, when it is actually happening sometimes it is not easy to tell which one it is. Thus determining whether a crime fulfils the definition of trafficking or migrant smuggling requires careful consideration.<sup>405</sup> It is also because e.g., when contemplating referring a person to a shelter, the police must be convinced that there is preliminary evidence suggesting that the person is a victim of human trafficking.<sup>406</sup> Thus, it is important to define the problem at hand, and whether that exploitative practice

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<sup>397</sup> *ibid* 100.

See also Julia O'Connell Davidson & Bridget Anderson, 'The Trouble with "Trafficking"' in Christien L van den Anker & Jeroen Doomernik (eds), *Trafficking and Women's Rights* (Palgrave MacMillan, 2006), 20.

<sup>398</sup> Roth (n 334) 99.

<sup>399</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 301.

<sup>400</sup> Aronowitz (n 377) 167.

<sup>401</sup> Roth (n 334) 100.

<sup>402</sup> *ibid* 407.

<sup>403</sup> See Samuel Vincent Jones, 'Human Trafficking Victim Identification: Should Consent Matter?' (2012) 45(483) *Indiana Law Review* 483.

<sup>404</sup> Elizabeth Hopper & Jose Hidalgo, 'Invisible Chains: Psychological Coercion of Human Trafficking Victims' (2006) 1 *Intercultural Human Rights Law Review* 185, at 193.

<sup>405</sup> Roth (n 334) 98.

<sup>406</sup> Daphna Hacekr & Orna Cohen, 'The Shelters in Israel for Survivors of Human Trafficking' (2012) Report by the Hotline for Refugees and Migrants <<https://www.scribd.com/document/202508941/The-Shelters-in-Israel-for-Survivors-of-Human-Trafficking>> accessed 6 July 2016.

constitutes trafficking, as definitional issue is also directly related to the state's responsibility and obligation to protect.

### 3.4 Conclusion

Human trafficking is not a singular issue, as it extends to immigration, migrant smuggling, organised crime, migrant labour, slavery, social cohesion and structural inequalities,<sup>407</sup> although trafficking does not always involve illegal migration. An IOM study found that many migrant women trafficked for sexual exploitation entered destination countries legally.<sup>408</sup>

However, human trafficking can be regarded as a phenomenon linked to migration outflow and subsequent exploitation of migrants by those involved in the trafficking process:<sup>409</sup> 'potential migrants may see traffickers as "migration brokers", or facilitators - agents who aid them in their quest to migrate'.<sup>410</sup> Human trafficking victims may enter into the destination state legally, yet they may become subject to exploitation, whereas in migrant smuggling, illegal means of entry are commonly used.<sup>411</sup>

Human trafficking differs from migrant smuggling in the process; as explained above, trafficking is always exploitative (the purpose is always exploitation), whereas this is not the case in migrant smuggling. Smuggled individuals may be subject to torture, rape or any other means of ill treatment on the road; however, this does not mean that the end purpose in migrant smuggling is exploitation of those individuals, even though e.g., they find themselves trafficked. This also seems problematic, since these kinds of incidents are defined by 'what happens *after* migrants reach their eventual destination'.<sup>412</sup> Thus, a statement such as 'the definition of trafficking fails to distinguish

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<sup>407</sup> Joel Quirk, *The Anti-Slavery Project from the Slave Trade to Human Trafficking* (University of Pennsylvania Press, 2011), 216.

<sup>408</sup> John Salt & Jeremy Stein, 'Migration as a Business: The Case of Trafficking' (1997) 35(4) *International Migration* 467, at 470.

<sup>409</sup> Elliott (n 23) 13.

<sup>410</sup> *ibid* 14.

<sup>411</sup> Roth (n 334) 96.

<sup>412</sup> Quirk (n 407) 217.

between trafficking and voluntary consensual migration' would also imply that trafficked persons receive the same treatment as illegal migrants.<sup>413</sup>

This thesis has resolved that in a legal sense, human trafficking and migrant smuggling are distinct phenomena in many ways, albeit victims of smuggling and trafficking often share a background of disadvantage and face similar human rights abuses.<sup>414</sup> Common causes of smuggling are also rooted mostly in poverty, humanitarian crises and discrimination on account of race, gender and other distinctions, which are all pertinent human rights issues.<sup>415</sup> In such cases, smuggling does not cause migration; it responds to an underlying demand.<sup>416</sup> Nonetheless, in the process of migrant smuggling, smuggled people might endure extreme hardship and become victimised. Many people who make their way from Central America across Mexico are abducted, killed and raped.<sup>417</sup> Some people who are fleeing from conflict face the risk of being drowned: 'more than 3,700 migrants died in the Mediterranean' in 2015.<sup>418</sup> Since smuggled migrants are at high risk of being trafficked, it is important to highlight the following: 'the obligation to identify those who have been trafficked; non-criminalisation of victims; provision of immediate protection and support; and provision of legal assistance',<sup>419</sup> which is addressed as the victim identification problem in the following chapter. Having a clear understanding of trafficking is important, because this influences the treatment of trafficked 'victims' by states that the treatment reinforces this belief that there are deserving victims and 'undeserving' individuals to whom no victim status should be attributed.<sup>420</sup> Possessing a mobile phone or some money may create the idea that they have

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<sup>413</sup> Touzenis (n 33) 23.

<sup>414</sup> Aronowitz (n 377) 167.

<sup>415</sup> Touzenis (n 33) 8.

<sup>416</sup> Alexander Betts, 'To Deal with the Refugee Crisis You Need to Understand the Cause' (*University of Oxford Refugee Studies Centre*, 24 April 2015) <<http://www.rsc.ox.ac.uk/news/to-deal-with-the-refugee-crisis-you-need-to-understand-the-cause-alexander-betts-in-the-conversation>> accessed 5 July 2016.

<sup>417</sup> The Economist, 'No Safe Passage' (9 September 2010) <<http://www.economist.com/node/16994348>> accessed 29 September 2016; Insight Crime - Investigation and Analysis of Organised Crime, 'Migrant Kidnappings by Criminal Organizations 'Systematic' in Mexico' (11 May 2012) <<http://www.insightcrime.org/news-analysis/migrant-kidnappings-by-criminal-organizations-systematic-in-mexico>> accessed 29 September 2016.

<sup>418</sup> Jim Yardley & Gaia Pianigiani, 'Three Days, 700 Deaths on Mediterranean as Migrant Crisis Flares' *The New York Times* (29 May 2016) <[http://www.nytimes.com/2016/05/30/world/europe/migrants-deaths-mediterranean-libya-italy.html?\\_r=0](http://www.nytimes.com/2016/05/30/world/europe/migrants-deaths-mediterranean-libya-italy.html?_r=0)> accessed 29 September 2016.

<sup>419</sup> Gallagher & David, *The International Law of Migrant Smuggling* (n 20) 12.

<sup>420</sup> Elliott (n 23) 24.

not been trafficked, as they do not fit the expectation of a ‘perfect victim’.<sup>421</sup> In many countries, trafficked persons are either never identified or are misidentified as illegal or smuggled migrants:

‘[I]t is worth noting that while the additional elements, such as force, deception, coercion, and so on, that distinguish trafficking from illegal migration and migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation.’<sup>422</sup>

In the current Mediterranean crisis, even though some individuals are trafficked overseas, they are characterised as illegal migrants or victims of migrant smuggling, as these characterisations are the easiest for national law enforcement authorities to make.<sup>423</sup>

Activities, which can be deemed as human trafficking, fall along a spectrum of exploitation, which could also cross into the realms of *de facto* slavery.<sup>424</sup> Indeed, as an exceptional evil, slavery, like human trafficking, ‘forcibly separate[s] people from family and friends to face long and uncertain journeys followed by purchase of total strangers in a highly degrading fashion’.<sup>425</sup> Thus, in a philosophical sense, the link between slavery and human trafficking is apparent. Yet in regards to such relationship in contemporary legal terms, international agreements on slavery dating from the latter part of the 19<sup>th</sup> century and the first decades of the 20<sup>th</sup> century do not purport to cover the practices that are associated with trafficking.<sup>426</sup> Both slavery and human trafficking are exploitative, yet the core difference between them can be discussed through the meaning of legal ownership and control, which has been addressed in this Chapter. In concluding the reasoning behind the trafficking/slavery analysis, it is important to identify whether practices are slavery or trafficking, because diluting the slavery norm risks undermining its *ius cogens* status, which in turn could compromise the international community’s ability to prosecute alleged perpetrators of slavery.<sup>427</sup>

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<sup>421</sup> *ibid* 24.

<sup>422</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 278.

<sup>423</sup> *ibid* 278.

<sup>424</sup> Elliott (n 23) 92.

<sup>425</sup> Quirk (n 407) 217.

<sup>426</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 55.

<sup>427</sup> Chuang, ‘The Challenges and Perils of Reframing Trafficking as “Modern-Day Slavery”’ (n 317) 146.

As is seen, the definitional quagmire is the product of different interpretations of law.

Viewed from that perspective, the requirements of an international legal framework are clear: an unambiguous definition of the problem; an equally sharp identification of core State obligations; and effective means of monitoring and encouraging compliance.<sup>428</sup>

Certainly, despite the existence of a poorly defined continuum, the Trafficking Protocol has provided justification for cautious optimism, which is why its adoption was identified as a breakthrough. As Gallagher states,

the appropriate task of the international legal practitioner is a relatively modest one: (...) to analyze and to explain the law, including its weaknesses, to those who (...) are engaged in actually using it (...) at the end of the day, it is the law that properly directs the legal scholarship, and not the other way around.<sup>429</sup>

Indeed albeit trafficking has been used/interpreted interchangeably with migrant smuggling, slavery and forced labour, this has real consequences.<sup>430</sup> This thesis has argued that in a legal sense, definitions do matter in many contexts.<sup>431</sup> As is explained in the following chapter, definitions not only help law enforcement officials recognise victims, but also help legal systems.<sup>432</sup> Legal definitions matter, as they provide a 'common basis for governments worldwide to collect and share data, to facilitate extradition of criminal suspects, and to pursue policy coordination with other governments'.<sup>433</sup>

Another aspect of the definitional and identification problem is linked to the criminalisation of prostituted minors, for instance. These individuals are victims of commercial sexual exploitation and who are subject to society's ambivalence as being perceived to be transgressors of its rules.<sup>434</sup> In such cases, 'there should

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<sup>428</sup> Anne T Gallagher, 'A Response to Jean Allain and Ryszard Piotrowicz' (*Opinio Juris*, 8 June 2009) <<http://opiniojuris.org/2009/06/08/a-response-to-jean-allain-and-ryszard-piotrowicz/>> accessed 20 December 2016.

<sup>429</sup> *ibid.*

<sup>430</sup> Nicola Pieper & Marie Segrave & Rebecca Napier Moore, 'What's in a Name? Distinguishing Forced Labour, Trafficking and Slavery' (2015) 5 *Anti-Trafficking Review* 1, at 1.

<sup>431</sup> Fiona David, 'When it Comes to Modern Slavery, do Definitions Matter?' (2015) 5 *Anti-Trafficking Review* 150, at 152.

<sup>432</sup> *ibid.* 152.

<sup>433</sup> Chuang, 'The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"' (n 317) 146.

<sup>434</sup> Karen E Bravo, 'On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking' (2011) 31 *Northern Illinois University Law Review* 467, at 483.

be no public disclosure of the identity of trafficking victims and their privacy should be respected to the extent possible while taking into account the right of an accused person to a fair trial'.<sup>435</sup> The Trafficking Protocol is criticised for its focus on the transnational crime aspect of human trafficking, while saying very little about the victim.<sup>436</sup> Thus, it is mainly important to determine who trafficked persons/minors are, and then provide them with protection. The Trafficking Protocol does not contain a definition for victims, even though the European Trafficking Convention in Article 4(e) addresses this point by defining a victim as 'any natural person who is subjected to trafficking in human beings as defined', for instance.<sup>437</sup> Yet the issue is not that quite simple, as the process of identifying trafficking victims is a complicated one, as Gallagher concludes: '[d]eciding that a particular situation constitutes trafficking - or that a particular individual is a victim (or indeed a perpetrator) of trafficking - is notoriously complex and time-consuming'.<sup>438</sup> The possibility of individuals being wrongly identified was not contemplated during the drafting of the Trafficking Protocol.<sup>439</sup> Such concerns are addressed in the next chapter when considering the obligation to protect.

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<sup>435</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (E/2002/68/Add.1, OHCHR, 2002), guideline 6.6 <<http://www.refworld.org/docid/3f1fc60f4.html>> accessed 1 September 2017.

<sup>436</sup> Touzenis (n 33) 23.

<sup>437</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 280.

<sup>438</sup> *ibid* 277.

<sup>439</sup> Anne T Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and Treaties' (2002) 12 *Forced Migration Review* 25, at 27.

## 4 Obligations of Protection

### 4.1 Abstract

This chapter is about states' obligations of identification and non-criminalisation of victims of human trafficking, in light of the international legal protection accorded to them.

### 4.2 The Scope of Obligations of Protection

#### 4.2.1 The Objective of this Chapter

This chapter explains the importance and problematic aspects of identification and non-criminalisation of victims of human trafficking, in the realm of obligations of protection. As a side note, no one who is subjected to any form of exploitation or ill-treatment would like to be labelled a 'victim'. Thus, describing individuals who are subject to human trafficking as survivors or thrivers, rather than victims, would emphasise the positive, as a triumph of hope over despair: 'survivor celebrates the individual, but victim recognises the enormity of the system we are up against, and its brutalising potential'.<sup>1</sup> Yet despite the best intentions of respecting the experiences of trafficked persons, in which case the preferred term would be 'survivors', this thesis uses the term 'victim', as this is the word used in legal contexts. These two subject areas have been chosen for the following reasons.

Human trafficking victims are often 'captured' in situations mostly due to 'consequential offences' such as prostitution, begging, theft or 'status offences', including not carrying travel or identity documents required to enter, remain in, or depart from a country.<sup>2</sup> This sentence emphasises 'captured' in its analysis, because trafficked victims are usually afraid of going to the police either due to threats made by their traffickers or because they do not trust

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<sup>1</sup> Rahila Gupta, 'Victim' vs 'Survivor': Feminism and Language' *Open Democracy* 50.50 *Inclusive Democracy* (16 June 2014) <<https://www.opendemocracy.net/5050/rahila-gupta/victim-vs-survivor-feminism-and-language>> accessed 6 July 2016.

<sup>2</sup> Andreas Schloenhardt & Rebekkah Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons — Principles, Promises, and Perspectives' (2016) 4(1) *Groningen Journal of International Law* 10, at 13.

officials.<sup>3</sup> Trafficked persons also often illegally reside in a country or consider themselves guilty of crimes, which can result in their removal from that country if they are exposed to authorities.<sup>4</sup> Therefore, in most cases they encounter public officials because of the crimes they have committed/been forced to commit related to their status,<sup>5</sup> e.g., victims may be treated as criminals due to their involvement in prostitution or their status as illegal immigrants. In this case, ‘without identification and recognition as victims of crime, they can unjustly suffer prosecution’.<sup>6</sup> Realistically, systematic identification would only work well if there was no threat of prosecution for status crimes. Note that this possibility is very unrealistic, if states have a desire to be tougher on such crimes. It is also important to add that people who are trafficked internally are also at great risk of suffering from the consequences of misidentification or non-identification of their status. Thus, the analysis in this chapter refers not only to individuals trafficked transnationally but also those trafficked internally.

Since human trafficking is mostly a hidden crime with a complex nature, identification and non-criminalisation of human trafficking victims are not easy tasks to determine in practice and in law. That is why this chapter explains what makes these issues challenging, e.g., ‘the whore/Madonna division within prostitution and the idea that the non-innocent sex worker gets what she deserves’,<sup>7</sup> and that ‘whores’ sacrifice their rights to social protection through their degraded behaviour.<sup>8</sup> Such misconception and misidentification may likely cause the criminalisation of trafficked victims.

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<sup>3</sup> UNODC, ‘Protecting Victims of Human Trafficking’ <<https://www.unodc.org/unodc/en/human-trafficking/protection.html>> accessed 6 January 2017.

<sup>4</sup> Venla 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* (Leiden/Boston, Martinus Nijhoff Publishers, 2012), 289.

<sup>5</sup> Ryszard Piotrowicz, ‘European Initiatives in the Protection of Victims of Trafficking Who Give Evidence against their Traffickers’ (2002) 14 *International Journal of Refugee Law* 263, at 263; Jessica Elliott, *The Role of Consent in Human Trafficking* (1<sup>st</sup> published, Routledge Taylor & Francis Group, 2015), 162; Kristina Touzenis, *Trafficking in Human Beings - Human Rights and Transnational Criminal Law, Developments in Law and Practices* (United Nations Educational, Scientific and Cultural Organization, 2010), 60.

<sup>6</sup> UNODC, ‘Protecting Victims of Human Trafficking’ (n 3).

<sup>7</sup> Bernadette M McSherry & Susan York Kneebone, ‘Trafficking in Women and Forced Migration: Moving Victims across the Border of Crime into the Domain of Human Rights’ (2009) Monash University Faculty of Law Legal Studies Research Paper No 2009/35, 73 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1599406](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599406)> accessed 27 July 2017.

<sup>8</sup> Pardis Mahdavi, *Gridlock: Labor, Migration and Human Trafficking in Dubai* (Stanford University Press, 2011), 29.

This chapter aims to help address these concerns in the context of obligations of protection by considering the following topics:

Why victim identification is an important but problematic issue;

The factual obstacles to identifying human trafficking victims;

How international law has regulated victim identification and defined trafficked victim status;

The relationship between victim identification and the non-criminalisation principle which suggests that ‘offences committed by victims of trafficking are not illegal and do not require prosecution and punishment’;<sup>9</sup>

The scope of the issue of non-criminalisation of trafficked victims;

Alongside all of these inquiries, the major international law regulations pertaining to non-criminalisation in trafficking.

The following two sections briefly look at the meaning and content of obligations of protection in light of the related international legal regulations.

## **4.2.2 Obligations of Protection in Trafficking Related Crimes**

### **4.2.2.1 Why do States have Obligations to Protect Victims?**

States have an obligation to refrain from violating human rights and to ensure that others do not violate human rights.<sup>10</sup> Since human trafficking has ‘an adverse impact on the rights and freedoms of trafficked persons and others’,<sup>11</sup> it constitutes a human rights violation; such as

(...) detention of trafficked persons in immigration or shelter facilities; prosecution of trafficked persons for status related offences including

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<sup>9</sup> Schloenhardt & Markey-Towler, (n 2) 32.

<sup>10</sup> Viviana Waisman, ‘Human Trafficking: State Obligations to Protect Victims’ Rights, the Current Framework and a New Due Diligence Standard’ (2010) 33 *Hastings International & Comparative Law Review* 385, at 387.

<sup>11</sup> UNHCR, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (E/2002/68/Add.1, OHCHR, 2002) <<http://www.refworld.org/docid/3f1fc60f4.html>> accessed 1 September 2017, guideline 1.1.

illegal entry, illegal stay and illegal work; denial of exit or entry visas or permits; violations of the rights of persons suspected of or convicted for involvement in trafficking and related offences, including unfair trials and inappropriate sentencing.<sup>12</sup>

For this reason, once trafficking crimes become an issue, states' obligations of protection should be triggered by prioritising the protection and support of individuals who have been trafficked.<sup>13</sup> Human trafficking 'emphasises the inequality between trafficker and trafficked person,<sup>14</sup> giving states good reason 'to side with the latter – and weaker party – in that relationship'.<sup>15</sup> In other words, states have an international legal responsibility to act with due diligence, irrespective of their place in the trafficking cycle, because they have obligations to prevent human rights violations from happening and they have to protect victims and 'provide a domestic legal [protection] to victims of human rights violations (...) committed in their territory'.<sup>16</sup> Thus, a state will be held legally responsible for violations of international law, 'if it was actually involved in the commission of the violation or if it did not follow the required standard of care in preventing or responding to the violation'.<sup>17</sup> In this context, the role and responsibility of states (as 'states are also obliged to exercise due diligence in identifying traffickers, including those who are involved in controlling and exploiting trafficked persons') in cases of human trafficking can be articulated as follows:<sup>18</sup>

States are responsible for not violating rights of victims or neglecting their duty to prevent these violations from happening;

<sup>12</sup> Anne T Gallagher, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations Publication, 2010), 85-7.

<sup>13</sup> *ibid* 127.

<sup>14</sup> Gregor Noll, 'The Insecurity of Trafficking in International Law' in Vincent Chetail (ed), *Globalization, Migration and Human Rights: International Law Under Review* (Bruxelles, Bruylant, Vol II, 2007), 344.

<sup>15</sup> *ibid* 344.

<sup>16</sup> Anne T Gallagher, 'The Right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy' (Paper submitted for the expert consultation convened by the UN Special Rapporteur on Trafficking in Persons, especially women and children, Ms. Joy Ngozi Ezeilo on: "The right to an effective remedy trafficked persons", 2010) <[http://www.ohchr.org/Documents/Issues/Trafficking/Bratislava\\_Background\\_paper1.pdf](http://www.ohchr.org/Documents/Issues/Trafficking/Bratislava_Background_paper1.pdf)> accessed 25 April 2017.

<sup>17</sup> Gallagher, 'The Right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy' and Policy' (n 16) 4. UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' states that developing national plans of action to end trafficking 'should be used to build links and partnerships between governmental institutions involved in combating trafficking and/or assisting trafficked persons and relevant sectors of civil society.' (n 11) guideline 1/ principle 3.

<sup>18</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 11), guideline 2.

States are obliged to protect and support victims;

States have obligations to legal remedy for human trafficking victims.

Since a full investigation on the legal obligations and responsibilities of states in trafficking cases is beyond the scope of this present chapter, the following section looks at the international law regulations pertaining to states' obligations of protection alone to describe its content.

#### **4.2.2.2 Obligations of Protection Considering Related International Legal Regulations**

This section maps international legal protections accorded to victims of human trafficking. Although 'the precise contours and limits of that protection are not yet firmly established',<sup>19</sup> the scope of that protection can nevertheless be addressed in different ways, such as the right to shelter, access to health care and counselling, legal assistance and visas to remain in the destination country, access to reintegration programmes and compensation for their victimisation.<sup>20</sup> In Article 6, the Trafficking Protocol offers clear indication of what might constitute that protection, along with Articles 7 and 8, on status of victims of trafficking in persons in receiving states, and repatriation of victims.

Further, international human rights law imposes obligations on states beyond the simple obligation 'not to traffic', e.g., states in trafficking cases have to ensure that 'the victim is protected from further exploitation and harm—from those who have already exploited that person as well as from anyone else', in light of the following rules:<sup>21</sup>

In the *Universal Declaration of Human Rights*, Article 2 states that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration (...)'. The *International Covenant on Civil and Political Rights*, Article 6(1), underlines that '[e]very human being has the inherent right to life. This right shall be protected

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<sup>19</sup> Anne T Gallagher & Elaine Pearson, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking' (2010) 32(1) *Human Rights Quarterly* 73, at 76.

<sup>20</sup> See Marika McAdam, 'Who's Who at the Border? A Rights-Based Approach to Identifying Human Trafficking at International Borders' (2013) 2 *Anti Trafficking Review* 33.

<sup>21</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 11) 13; Gallagher, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* (n 12) 77.

by law'. The *Trafficking Protocol*, in Article 6.5, requires each state party to 'endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory', e.g., *Organised Crime Convention* Articles 24 and 25 under the provisions of 'protection of witnesses' and 'assistance to and protection of victims' say something similar. The *Optional Protocol on the Sale of Children* in Articles 8(1)(f) and 8(5) also regulates specific provisions on protection from further harm. Similarly, the *Trafficking Protocol's* Article 6 'assistance to and protection of victims of trafficking in persons' requires state parties to consider implementing measures to provide for the physical, psychological and social recovery of victims.

For the present purposes, note that obligations of protection are not simply about protection, but also encouragement to denounce victims' exploiters through offering victims real incentives, e.g., access to a job or a permanent residence permit in the host country.<sup>22</sup> Indeed, the possibility of obtaining a job is crucial, considering the importance of victims' economic independence, as dependence on others is one of the external objective root causes of trafficking.<sup>23</sup>

As was initially explained, obligations of protection can be effective if victims of human trafficking are identified; only then can non-prosecution and non-detention of trafficked victims, protection from further harm, providing physical and psychological care, support and legal assistance, and providing residence permits and the right to remain be considered.<sup>24</sup> Thus, this thesis deals with the identification and non-criminalisation of trafficked victims as the core aspects of obligations of protection when trafficking related violations occur. Because '[a] failure to identify a trafficked person correctly is likely to result in a further

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<sup>22</sup> Federico Lenzerini, 'International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled?' (2009) 4 *Intercultural Human Rights Law Review* 205, at 231.

<sup>23</sup> *ibid* 231.

<sup>24</sup> See Anne T Gallagher, *The International Law of Human Trafficking* (1<sup>st</sup> published, Cambridge University Press, 2010), Chapter V; Jayashri Srikantiah, 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87(1) *Boston University Law Review* 157, 157ff.

denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place'.<sup>25</sup>

### 4.3 Identification of Victims of Human Trafficking

#### 4.3.1 Why it is Important?

Identification of human trafficking victims is important, because if they are misidentified or not identified, they cannot be 'referred to the system of victim assistance and issued with a reflection period or residence permit'.<sup>26</sup>

Misidentification of a trafficked victim can result in their subsequent deportation, and any rights granted to these victims would be rendered 'purely theoretical and illusory'.<sup>27</sup> Further illustration can be seen when victims break free from their traffickers; they may be physically injured and/or emotionally traumatised, in which case they also may be afraid of retaliation.<sup>28</sup> 'If a trafficked person is not identified at all, or is incorrectly identified as a criminal or as an irregular or smuggled migrant, then this will directly affect the ability of that person to access the rights to which she or he is entitled',<sup>29</sup> or the victim will be treated as a 'normal' offender.<sup>30</sup> This will also cause further infringement of their human rights, which are now violated. Victims of human trafficking already suffer from e.g., gender discrimination, 'infringements of the right to live free of violence, the right to physical integrity, right to liberty, the right to freedom of movement, the right to family life, the right to health', and other related human rights violations.<sup>31</sup> Women who are coerced into the sex

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<sup>25</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 11) guideline 2.

<sup>26</sup> Roth (n 4) 289.

<sup>27</sup> *ibid* 279.

<sup>28</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 11) 12.

<sup>29</sup> Gallagher, 'Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 12) 73.

<sup>30</sup> Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (OSCE), *Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking - In Consultation with the Alliance Against Trafficking in Persons Expert Co-Ordination Team* (OSCE, 2013), 16.

<sup>31</sup> Waisman (n 10) 385.

industry in their home countries and trafficked internationally<sup>32</sup> might be already in poverty and in danger due to armed conflict, honour killings or discrimination.

In other cases, not identifying an individual as a trafficking victim, and instead identifying them as a criminal may prove dangerous. E.g., if a trafficked woman is randomly picked up off the streets by a police officer, she may be held responsible for 'selling sex', even though she is forced to do so. This is also because trafficked persons are usually treated as clandestine workers or foreign prostitutes.<sup>33</sup> Similarly, a man who has abandoned his job after months of working without pay, once the police officer realises that he has overstayed his visa,<sup>34</sup> may be regarded as an 'undesirable and criminal alien'.<sup>35</sup> However, in an ideal world this assessment has to be considered null and void, possibly leading to a legal title giving him a permit to stay, under protection for trafficked victims.

Identification of human trafficking victims is important, as it assists victims with identifying what happened to them as human trafficking. The earlier a person is identified as a victim of trafficking; the sooner steps can be taken to advance administrative measures for any alleged offences and/or to ensure protection and support for the victim.<sup>36</sup> Since identifying victims has an obvious practical purpose, this thesis aims to identify the legal purpose of identifying them in the context of this thesis. However, victim identification faces some major real-world challenges and gaps in the context of international law regulations, which make the issue problematic. These problematic aspects are explained in the following sections.

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<sup>32</sup> Andrea Parrot & Nina Cummings, *Forsaken Females: The Global Brutalization of Women* (Rowman & Littlefield Publishers INC, United States of America, 2006), 27.

<sup>33</sup> *ibid* 287.

<sup>34</sup> Mahdavi, *Gridlock Labor, Migration and Human Trafficking in Dubai* (n 8) 7.

<sup>35</sup> *ibid* 500.

<sup>36</sup> OSCE (n 30) 16.

### 4.3.2 Why it is Problematic?

Victim identification is problematic for three main reasons:

Factual reasons which are linked to several complex pragmatic questions, including how, where and by whom victim identification should be performed.<sup>37</sup> In most cases trafficked persons do not identify themselves; thus, 'specialist expertise is required to ask the right questions and draw the right conclusions from the evidence available, in which case the identification of a trafficked person often requires the assessment of something that might not have happened yet', such as exploitation.<sup>38</sup> Identification of trafficked persons becomes even more complex when it is difficult to judge whether someone has been transported across borders for the purposes of exploitation, especially if there is no evidence of past exploitation.<sup>39</sup> Prejudice, assumptions and justifications also complicate the issue of victim identification in the search for 'traffickable' victims. Because this term is loosely used in everyday speech or in the media, it is harder to legally handle.<sup>40</sup>

There is a legal gap in the context of international law rules in terms of defining victim status and identification processes. Major international legal instruments, including the Trafficking Protocol, are silent on these matters. They impose on state parties an 'unambiguous obligation to take positive measures to identify individuals who have been trafficked', and they do not provide a concrete definition of victim status for trafficked people.<sup>41</sup> However, the trafficking protection system needs to be firmly established because e.g., trafficked persons may only be properly 'identified if there is a national trafficking protection system, geared to the complexities of this task'.<sup>42</sup> Thus, it is highly

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<sup>37</sup> McAdam (n 20).

<sup>38</sup> Jacqueline Bhabha & Christina Alfiev, 'Legal and Protection Policy Research Series the Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs' (2009) Legal And Protection Policy Research Series PPLAS/2009/03, 31 <<http://www.refworld.org/pdfid/4ad317bc2.pdf> > accessed 28 July 2017.

<sup>39</sup> *ibid* 10.

<sup>40</sup> Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, Oxford and Portland, Oregon, 2008), 21.

<sup>41</sup> Bhabha & Alfiev (n 38) 31.

<sup>42</sup> *ibid* 31.

important to have explicit regulations on the international level, especially considering the necessity of states' activity and engagement.<sup>43</sup>

The definitional understanding pertaining to human trafficking is one of the main reasons why identification of human trafficking victims is problematic.<sup>44</sup> The difficulty of victim identification derives from other forms of migration in which trafficked victims are treated as illegal migrants, illegal migrant workers or smuggled individuals. For the present purposes, it is important to note that people who are trafficked internally are also at great risk of suffering from the consequences of misidentification or non-identification of their status. Thus, the analysis in this chapter not only refers to individuals who are trafficked transnationally but also to those trafficked internally.

There is a difference between identifying someone as a trafficked person rather than an illegal worker or smuggled migrant. Gallagher notes that '[i]n many countries, victims of trafficking are never identified and, as a result, are simply invisible'.<sup>45</sup> In these cases victims can also be treated as criminals: 'in countries of transit and destination, trafficked persons are often arrested, detained, charged and even prosecuted for unlawful activities such as entering illegally, working illegally or engaging in prostitution'.<sup>46</sup> However, the fact is that it is not the victims but the traffickers, who regularly breach immigration and border control laws, employ bribery and corruption techniques, forge documentation, and unlawfully confine their victims.<sup>47</sup> In Liberia, most traffickers are relatives of their victims, who promise their desperate, poor relatives a better life for their children, for instance.<sup>48</sup> Yet at the destination point, victims' identification documents are taken away from them and they are presented with a large debt for repayment.<sup>49</sup> This debt is normally repaid through labour or sexual exploitation, and victims are forced to honour their debt through intimidation or

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<sup>43</sup> Gallagher, *The International Law of Human Trafficking* (n 24) 281.

<sup>44</sup> Roth (n 4) 286.

<sup>45</sup> Gallagher, *The International Law of Human Trafficking* (n 24) 278

<sup>46</sup> Gallagher, 'Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 12) 129.

<sup>47</sup> Tamara Makarenko, 'Organized Crime or Crime Organized Isolating and Identifying Actors in the Human Trafficking Chain' in Anna Johnson (ed), *Human Trafficking and Human Security* (Routledge Taylor & Francis Group, 2009), 28.

<sup>48</sup> Women's Rights Law Reporter, 'Justice Ruth Bader Ginsburg Symposium on International Women's Rights: Promoting Global Equality for Women Through the Law Ginsburg Symposium on International Women's Rights' (2013) 34 *Women's Rights Law Reporter* 105, at 188.

<sup>49</sup> Makarenko (n 47) 28.

violence.<sup>50</sup> Further, criminalisation often results in ‘the deportation of foreign victims - thereby denying them right of access to an effective remedy’.<sup>51</sup> In these cases, detention of trafficked victims also violates their rights to freedom of movement and liberty, and the prohibition on arbitrary detention.<sup>52</sup>

For the present purposes, it should be noted that since previous chapter focused on understanding/uncovering the definition of trafficking, this chapter only addresses problematic real-world aspects/issues around defining and identifying victims.

#### 4.3.2.1 The Major Factual Challenges of Identification of Human Trafficking Victims

The factual complexity of identification of human trafficking victims can be formalised based on the following main challenges.

Prevalent discourse, which depicts a victim profile: in some cases, once trafficked victims are rescued, they are categorised in terms of their race, gender, class, or sexuality, according to who is ‘traffickable’.<sup>53</sup> Human trafficking victims are assumed to be primarily young women who are duped and forced into sex.<sup>54</sup> Prevalent discourse is mainly based on stories manufactured by dominant anti-trafficking rhetoric, disseminated by the mass media.<sup>55</sup> Edward Snajdr underlined in his article that the ‘master narrative of anti-trafficking’ contained the main assumptions put forward by US officials, the media and many NGOs. What he called the master narrative was ‘reproduced and disseminated’

<sup>50</sup> Kevin Bales, *Understanding Global Slavery: A Reader* (University of California Press, 2005), 158.

<sup>51</sup> Gallagher, ‘Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (n 12) 129.

<sup>52</sup> *ibid* 138; Schloenhardt & Markey-Towler (n 2) 13

See UNHCR, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (n 11) guideline 1.5; *International Covenant on Civil and Political Rights* Resolution 2200A (XXI) of 16 December 1966 (999 UNTS 171) entered into force 23 March 1976 (ICCPR), art 9(1); the *Universal Declaration of Human Rights* GA Res 217 A (III), UN GAOR, 3<sup>rd</sup> Sess, 183<sup>rd</sup> plen mtg, UN Doc. A/810, 10 December 1948 (UDHR), art 3.

Note that even though detention of human trafficking victims is related to a range of international standards and protection of rights of human beings, such as right to freedom of movement and the prohibition on unlawful deprivation of liberty, the Trafficking Protocol does not directly address this issue. Detention in the context of human trafficking cases refers the situation of ‘any person deprived of personal liberty except as a result of conviction for an offence.’ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (A/RES/40/173), 9 December 1988.

<sup>53</sup> Mcsherry & Kneebone (n 7) 71.

<sup>54</sup> Mahdavi (n 8) 13.

<sup>55</sup> Edward Snajdr, ‘Beneath the Master Narrative: Human Trafficking, Myths of Sexual Slavery and Ethnographic Realities’ (2013) 37 *Dialect Anthropol* 229, at 231.

using horror stories of individual traumatised victims. Snajdr noted that narratives are typically written in third person and lack information about the conditions under which the tales were told; victims are depicted as disembodied individuals, defined by their bodies as prostituted, violated, beaten and dead.<sup>56</sup> These stereotypes evoke figures of women and children being snatched from their homelands and forcibly transported elsewhere.<sup>57</sup> Victims are described as if they are fictitious characters, mostly migrant women or girls forced into prostitution. Non-western women are reflected as typical human trafficking victims within hegemonic anti-trafficking discourses: they are presented as in need of rescue, because they are poor, uneducated, tradition-bound and victimised.<sup>58</sup> This kind of produced perception means that in police units, victims may be considered as an 'undesirable other'.<sup>59</sup> For this reason, in some cases trafficked women may be prioritised as victims by criminal justice agencies just to fulfil stereotypes of 'innocent' victims.<sup>60</sup> These stereotypes generate an understanding that trafficked women suffer due to dire poverty in some developing countries, and they must always be entrapped by dark-skinned men, often with the Middle Eastern accents, who happen to be bad guys.<sup>61</sup> The 'iconic victim' in this scenario is a 'victim of sex trafficking who passively waits for rescue by law enforcement, and upon rescue presents herself as a good witness who cooperates with all law enforcement requests'.<sup>62</sup> This is not to say that stereotypes are always based on fictitious stories or exaggerations, as in some cases a 'stereotypical victim' is a real/actual target; e.g., in cases of honour killings with links to sex trafficking. Nevertheless, this thesis posits that people who can be considered as victims are not only passive and helpless females, suffering coercion and deception at the hands of their exploiters, and that they

<sup>56</sup> Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (1<sup>st</sup> ed, Oxford University Press, 2013), 141.

<sup>57</sup> Bridget Anderson & Julia O'Connell Davidson, 'Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study' (2003) 15 *IOM Migration Research Series* 5, at 8.

<sup>58</sup> Lucrecia Rubio Grundell, 'Silencing The Challenging Voices of the Global 'Subaltern' in Anti-Trafficking Discourse' *Open Democracy* (22 May 2015) <<https://www.opendemocracy.net/beyondslavery/lucrecia-rubio-grundell/silencing-challenging-voices-of-global-%E2%80%98subalterns%E2%80%99-in-antitra>> accessed 1 August 2017.

<sup>59</sup> Jo Goodey, 'Sex Trafficking in Women from Central and East European Countries: Promoting a 'Victim-Centred' and 'Woman-Centred' Approach to Criminal Justice Intervention' (2004) 76 *Feminist Review* 26, at 33.

<sup>60</sup> *ibid* 33.

<sup>61</sup> Pardis Mahdavi, 'Commentary Migrating in The Era of Human Trafficking' (2015) 11(2) *Asian Population Studies* 111, at 112.

<sup>62</sup> Srikantiah (n 24) 187.

should behave as such,<sup>63</sup> but that they are not only victims of sex trafficking. As was explained, sex trafficking is only one of the outcomes of human trafficking.

Disposition and assumptions surrounding the history of trafficked victims: for instance, victims bring their misfortune upon themselves or have already given initial consent for work, or any other deal with their traffickers, which would not make them victims of a crime, although in trafficking ‘consent is rendered immaterial’.<sup>64</sup> Especially in the cases of ‘trafficked’ migrant workers, the bias is mainly about their perceived ‘consent’. E.g., people who queue outside recruitment offices in the hope of an opportunity to work abroad may gladly accompany recruitment brokers on journeys.<sup>65</sup> Thus, since these people are not specifically snatched and transported as objects,<sup>66</sup> they may not be perceived as victims. Yet once they are trafficked, they are moved as subjects, albeit subjects whose choices are framed by limited alternative options.<sup>67</sup> Indeed, ignorance may be a factor in making decisions such as applying for a job, moving abroad or to another city in the territory of their country of origin, and so on. Yet victims mostly make these choices ‘based on a series of individual and macro forces structuring their circumstances’.<sup>68</sup> Advocates and social scientists studying the phenomena of human trafficking and indentured servitude have clearly indicated that human trafficking begins in large part with an individual who exercises some agency to improve her circumstances but then has that desire exploited.<sup>69</sup>

Indeed, in some cases, victims do not consider themselves as such, e.g., people who have been trafficked for forced labour may identify as migrant workers rather than trafficked victims.<sup>70</sup> Brunovskis and Surtees conducted interviews with institutional representatives in Southeast Europe and victims of

<sup>63</sup> Klara Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (Joseph Rowntree Foundation, 2010) <<http://www.gla.gov.uk/media/1585/jrf-between-decent-work-and-forced-labour.pdf>> accessed 1 December 2016.

<sup>64</sup> Noll (n 14) 346.

<sup>65</sup> Julia O’Connell Davidson, *The Margins of Freedom -Modern Slavery the Margins of Freedom* (1<sup>st</sup> published, Palgrave Macmillan, 2015), 110.

<sup>66</sup> *ibid* 110.

<sup>67</sup> *ibid* 110.

<sup>68</sup> Mahdavi, *Gridlock: Labor, Migration, and Human Trafficking in Dubai* (n 8) 31.

<sup>69</sup> Dina Francesca Haynes, ‘Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers’ (2009) 23(1) *Notre Dame Journal of Law, Ethics & Public Policy Symposium on Migration* 1.

<sup>70</sup> Tanja Bastia, ‘Stolen Lives or Lack of Rights? Gender, Migration and Trafficking’ (2006) 39(2) *Labour, Capital & Society* 20, at 28.

trafficking.<sup>71</sup> They conclude that there is a tendency to ‘pathologize women’s choices to migrate and to enter into prostitution as a means of explaining this “deviant” behaviour’.<sup>72</sup> In one of these interviews, they spoke to a woman who was deceived and exploited by a man whom she considered her boyfriend. The ‘boyfriend’ exploited her for prostitution, used her as a drug mule and had her videotaped when working in prostitution. The authors narrated her statement as follows: ‘I will not denounce him to the police; because I left of my own free will (...) I don’t want him to be arrested because he is not guilty in this case’.<sup>73</sup>

Identification of human trafficking victims cannot be all about ticking the boxes or judging abused victims’ stories as true or false.<sup>74</sup> It should be primarily about recognising that victims are people with inalienable rights. There should be no intention of putting them into certain categories.

Apart from these factual challenges, there is also one challenge of a legal nature in relation to victim identification, which derives from the existing gap in international law on victim identification and definition of victim status, as is detailed below.

#### **4.3.2.2 The Problematic Aspect of Victim Identification in the Dimension of Related International Legal Rules**

One of the problematic aspects of identification of human trafficking victims is linked to a gap in the context of international legal rules pertaining to the definition of trafficked victim status. The Trafficking Protocol neither defines trafficked persons’ status nor generates indicators for victim identification, nor do other major international law human trafficking treaties. Thus, this section aims to look at definitions of victim status provided by international law rules in order to help address the issue of victim identification. Initially, victim status definition is considered in a general sense under international law to derive a consolidated formula, which can be applicable to trafficked victims; then other

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<sup>71</sup> See Anette Brunovskis & Rebecca Surtees, ‘Agency or Illness—The Conceptualization of Trafficking Victims’ Choices and Behaviors in the Assistance System’ (2008) 12(1) *Gender, Technology and Development* 53.

<sup>72</sup> *ibid* 60ff.

<sup>73</sup> *ibid* 58.

<sup>74</sup> Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (n 56) 145.

international law regulations, which comprise indicators for victims who might be trafficked, are set forth in subsequent paragraphs.

The notion of a victim is recognised in the A/RES/40/34 Declaration of 1985 (*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*); the victim is acknowledged in the context of protection of human rights, as follows:<sup>75</sup>

“Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

In addition to this, the 1985 Declaration, in para.2, noted the importance of identifying a person as a victim of crime ‘regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim’. The Declaration added that ‘[t]he term “victim” also includes (...) the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’.

It is important to consider trafficked persons as victims of human rights violations, as Principle 8 of the *2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* defines victims. In this context, a victim is depicted in a rather broad sense, which can presumably include natural and legal persons, individuals and collective groups, families and dependents of injured parties:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where

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<sup>75</sup> UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (A/RES/40/34) 29 November 1985  
<<http://www.refworld.org/docid/3b00f2275b.html>> accessed 19 August 2017, para 1; Antonietta Confalonieri, ‘The Role of the Victim in Administrative and Judicial Proceedings’ (2010) 81(3) *Revue Internationale de Droit Pénal* 529, at 529; Doak (n 40) 23.

appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.<sup>76</sup>

Since no particular definition exists of a trafficked victim’s status in the context of contemporary major international law treaties, namely the Trafficking Protocol and Organised Crime Convention,<sup>77</sup> in light of the definitions above, trafficking victims can be understood as someone who is ‘in recognition of his or her complaint that he or she has suffered harm as the result of the criminal action of another’.<sup>78</sup> In this context, a trafficked person is a part of a process ‘as one upon whom an act defined as criminal is perpetrated’.<sup>79</sup>

Several international organisations have also developed ‘indicators’ of trafficking. The ILO and the European Commission formalised these indicators as ‘relevant to deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative conditions of work, coercion at destination and abuse of vulnerability at destination’.<sup>80</sup> Further, the UNODC’s Anti-Human Trafficking Training Manual for Criminal Justice Practitioners provides indicators of trafficking; similarly, the UNODC and the UN.GIFT.HUB offer specific and general trafficking indicators for situations of domestic servitude, begging and petty crime, in addition to sexual and labour exploitation.<sup>81</sup> In

<sup>76</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (A/Res/60/147) 16 December 2005 (Principles and Guidelines on the Right to a Remedy and Reparation).

<sup>77</sup> Note that on the regional level, e.g., the European Trafficking Convention defines victim as ‘any natural person who is subjected to trafficking in human beings as defines.’ Council of Europe *Convention on Action against Trafficking in Human Beings and its Explanatory Report* ETS 197 16 V 2005, done 16 May 2005, entered into force 1 February 2008 (European Convention), art 4(e).

<sup>78</sup> Doak (n 40) 24.

<sup>79</sup> Carol Bohmer, ‘Victims Who Fight Back: Claiming in Cases of Professional Sexual Exploitation’ (1992) 16 *Justice System Journal* 73, at 76.

<sup>80</sup> McAdam (n 20).

<sup>81</sup> UNODC, ‘Human Trafficking Indicators’ <[https://www.unodc.org/documents/human-trafficking/HT\\_indicators\\_E\\_LOWRES.pdf](https://www.unodc.org/documents/human-trafficking/HT_indicators_E_LOWRES.pdf)> accessed 1 August 2017.

Indicators, that can be used by border authorities, are listed by the IOM, read as follows:  
 Lack of credibility of situations observed and information provided by travellers;  
 Purpose of travel compared with other apparent signs, e.g. luggage, money, physical condition of travellers, profession declared, etc.; Luggage, e.g. quantity and type compared with statements of travellers; items carried in luggage; different citizenship of people in groups travelling together; Driver answering questions for all travellers; Same vehicles or means of transport used several times transporting different people; Same passport used several times by different people; Observing common features of travellers, e.g. physical appearance, age etc.; individuals travelling together do not know each other; Behaviour and body language that indicates tension, unease. IOM

specific cases, such as gender-based violence, including sex trafficking and sexual exploitation in the form of forced prostitution, the UNHCR Guidelines for Preventing and Responding to Sexual and Gender-based Violence (2003) can also be a guide for victim identification,<sup>82</sup> along with the ILO Forced Labour and Human Trafficking Handbook for Labour Inspectors,<sup>83</sup> and the UNODC Online Toolkit to Combat Trafficking in Persons.<sup>84</sup> Yet it is important to add that these efforts to address the problem of identification of trafficking victims ‘have included presumptions of victim status and the introduction of lower-threshold definitions that provide the trigger for certain entitlements’.<sup>85</sup> For example, the UNODC Model Law on Trafficking states that ‘a person should be considered and treated as a victim of trafficking in persons, irrespective of whether or not there is already a *strong suspicion* against an alleged trafficker or an official granting/recognition of the status of victim’.<sup>86</sup>

Considering these rules, indicators and regulations, even though identification of human trafficking victims is crucial to ensure their protection and support, it can be concluded that a legal definition and mode of identification of human trafficking victim status has not been regulated systematically. Further, the above mentioned indicators ‘emphasise the exploitation phase of trafficking

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*Policy Development, Anti-Trafficking Training for Frontline Law Enforcement Officers Training Guide* (ICMPD, Vienna, 2006), 46.

<sup>82</sup> Michele R Decker et al, ‘Forced Prostitution and Trafficking for Sexual Exploitation among Women and Girls in Situations of Migration and Conflict: Review and Recommendations for Reproductive Health Care Personnel’ in Susan Forbes Martin & John Tirman (eds), *Women, Migration, and Conflict - Breaking a Deadly Cycle* (Springer, 2009), 77.

<sup>83</sup> ‘Indicators of possible forced labour situations’ should

Guide labour inspectors, other law enforcement agencies and victim assistance organisations to identify possible situations of forced labour; Be country-specific by taking into account forced labour situations that are most likely to occur in specific sectors and regions; Be based on national law and regulations; Help to distinguish poor working conditions from forced labour. (...)

Each of these generic indicators should be linked to a sub-set of questions that are more specific (...) Physical violence, including sexual violence: Does the worker have any sign of maltreatment, such as bruises? Does the worker show signs of anxiety? Is there any other sign of mental confusion or traces of violence? –Do supervisors/employers demonstrate violent behaviour? Restriction of freedom of movement: Is the worker locked up at the workplace? Is the worker forced to sleep at the workplace? Are there visible signs which indicate that the worker is not free to leave the workplace due for example to barbed wire or the presence of armed guards or other such constraints? Is the worker constrained to leave the workplace? Beate Andrees, *Forced Labour and Human Trafficking Handbook for Labour Inspectors - Handbook for Labour Inspector* (International Labour Organisation, 2008), 18-23.

<sup>84</sup> UNODC, ‘Online Toolkit to Combat Trafficking in Persons’ Chapter 6 - Victim Identification’ <<https://www.unodc.org/unodc/en/human-trafficking/2008/electronic-toolkit/electronic-toolkit-chapter-6-victim-identification.html>> accessed 13 February 2017.

<sup>85</sup> Gallagher, *The International Law of Human Trafficking* (n 24) 277.

<sup>86</sup> UNODC, *Model Law on Trafficking in Persons* UN Sales No E 09 V 11 (2009) (UNODC Model Law), art 18 [emphasis added].

(and, to a lesser extent, the recruitment stage), and as such offer little support to border officials who must identify trafficked victims before any exploitation has taken place'.<sup>87</sup> Since 'a failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights',<sup>88</sup> this chapter, in order to set forth the importance of victim identification in the context of obligations of protection, extends its scope to states' obligations of non-criminalisation of trafficked victims as an interrelated issue to victim identification. This is detailed in the following paragraphs.

## 4.4 Non-criminalisation of Trafficked Victims

### 4.4.1 How Are Victims Criminalised?

Criminalisation of trafficked victims can be explained through two types of offences:

*Consequential offences* 'committed by victims often constitute the work or services for which the victims have been recruited, with the trafficker intending to obtain a financial or other material benefit from such work'.<sup>89</sup> Victims of trafficking are forced to commit crimes such as pickpocketing, theft, credit card and cheque fraud, or transport of drugs, possibly leaving them vulnerable to blackmail to ensure their compliance.

On the other hand, *status offences* committed by victims of trafficking are mostly a result of their status in the place to or through which they have been trafficked.<sup>90</sup> Victims or persons acting on their behalf can

(...) make false representations or provide fraudulent documents such as birth certificates, documents relating to enrolments or qualifications, false marriage certificates, used to apply for visas, passports, or to deceive immigration and border control officials.<sup>91</sup>

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<sup>87</sup> McAdam (n 20).

<sup>88</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 11) 4.

<sup>89</sup> Schloenhardt & Markey-Towler (n 2) 14.

<sup>90</sup> *ibid* 13.

<sup>91</sup> *ibid* 14.

E.g., ‘victims do not carry travel or identity documents required to enter, remain in, or depart from a country’, or using ‘visas and passports that were once valid and have since expired’.<sup>92</sup>

As discussed in regards to smuggling cases in the previous chapter, trafficking and people smuggling are interrelated in many ways, as individuals whose lives are threatened by war seek ways to flee from conflict, and for most of them smuggling is the only way to escape. Yet they may be trapped by traffickers and, once they are smuggled into another country, they may be forced to work as prostitutes, along with soliciting or begging as consequential offences. Due to illegal border crossing movements, these people may be also identified as illegal migrants, who breach migration rules, or as ‘deportable aliens’.<sup>93</sup> Thus, many individuals who are unwilling participants in an illegal act as trafficked victims are detained in police lock-ups, immigration detention centres and prisons, and are re-victimised by smugglers, traffickers and destination countries.<sup>94</sup>

#### **4.4.2 The Importance of Non-Criminalisation of Victims in light of Major Occurrences**

This section aims to explain the importance of non-criminalisation of victims of human trafficking through examples where that principle should have come into play in light of the non-criminalisation principle. The non-criminalisation principle of victims of human trafficking ‘advocates that victims should not be criminalised for offences they commit during the course of their trafficking experience or for offences that are connected in some way to their status as victims of trafficking’.<sup>95</sup>

B.W., a thirteen-year-old girl with a history of sexual and physical abuse, had been living with a 32-year-old man, and she was convicted of prostitution after offering to perform a sex act for an undercover officer in return for 20 dollars. The child was charged and convicted, despite the fact that, under Texas law, she was incapable of consenting to sex because she was under the age of 14. The

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<sup>92</sup> *ibid* 13.

<sup>93</sup> Sverre Molland, ‘Human Rights at The Border’ (2013) (2) *Anti-Trafficking Law Review* 3 <<http://www.antitraffickingreview.org/index.php/atrjournal/article/view/76/88>> accessed 1 August 2017.

<sup>94</sup> Gallagher & Pearson (n 19) 76.

<sup>95</sup> Schloenhardt & Markey-Towler (n 2) 11.

Texas Supreme Court later reversed the conviction, stating that ‘children were the victims, not the perpetrators, of child prostitution’.<sup>96</sup> Consider this example; the non-criminalisation principle aims to affirm that victims are treated as victims of a crime: ‘trafficked persons should neither be criminalised for possible illegal activities committed as a result of their condition nor re-victimised or re-traumatised’.<sup>97</sup> Otherwise, any form of punishment will make victims guilty of the crimes of their traffickers, even though these crimes are committed by them due to their status as trafficked persons. In these cases it is important to understand that the ‘possibility of being criminalised represents a huge disincentive for victims to cooperate with the authorities in order to bring the traffickers and exploiters to justice’.<sup>98</sup> However, there are still obstacles, which prevent victims from revealing the truth; in some cases, traffickers make the exploitation possible through high levels of violence and intimidation, and so victims may be terrified of exposing their traffickers. Unlike many other crimes, threat to a victim does not end once she or he has escaped or been rescued from a criminal situation.<sup>99</sup>

Indeed, in either consequential or status offences the acts are involuntary, and therefore excusable, as they are performed either under duress or owing to ignorance.<sup>100</sup> For instance, victims who are forced into prostitution may already violate the state’s laws on prostitution.<sup>101</sup> Similarly, victims may be provided with false identity documents,<sup>102</sup> even though this breaches the state’s immigration law.

In other cases, different types of crimes may be present and combined, e.g., illicit production of drugs is one of the main reasons why victims are treated as criminals. E.g., a 15-year-old Hai (not his real name) was selling plastic bottles

<sup>96</sup> Morgan Smith, ‘Texas Supreme Court Rules on Child Prostitutes’ (*The Texas Tribune*, 2010) <<https://www.texastribune.org/2010/06/18/texas-supreme-court-rules-on-child-prostitutes/>> accessed 6 December 2016.

See also Tessa L Dysart, ‘Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children’ (2014) 21 *Duke Journal of Gender Law & Policy* 255.

<sup>97</sup> Lenzerini (n 22) 230.

<sup>98</sup> *ibid* 230.

<sup>99</sup> Gallagher, *The International Law of Human Trafficking* (n 24) 301.

<sup>100</sup> Robert Hadley Hall, ‘The Voluntary and the Involuntary in Aristotle’s Nicomachean Ethics’ (1977) 5(1) *Auslegung: A Journal of Philosophy* 5, at 18.

<sup>101</sup> OSCE, *Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking - In Consultation with the Alliance Against Trafficking in Persons Expert Co-Ordination Team* (n 30) 23.

<sup>102</sup> *ibid* 23.

on the street in the capital Hanoi and a man approached him and offered to help him reach Europe where he could work. The *Guardian* reports the rest of this incidence as follows:

Hai's mother took out a loan against their house to pay an agent to take him. After 14 months of travelling he was told by his traffickers that he owed them even more money and would have to water cannabis plants to pay off the debt. His trafficker left him alone in the house and locked the doors from the outside, returning every few days with food and water. When police raided the house three months later Hai was arrested. He was too scared to tell anyone what had happened to him and his solicitor advised him to plead guilty. He was sentenced to 24 months in an adult prison.<sup>103</sup>

'Trafficking victims forced into crime are let down by police, report reveals' drug cartels, especially in Mexico, prey on vulnerable immigrants.<sup>104</sup> They view them as a potential source of ransom money, sex or forced labour.<sup>105</sup> Traffickers who are involved in organised crime may see no difference between abusing a woman's body by either forcing her to swallow bags of drugs or to have sex with hundreds of men.<sup>106</sup> As a side note, research has shown that husbands and boyfriends of women recruit traffic and pimp their female partners into prostitution,<sup>107</sup> and use them to convey drugs. For instance, a friend or family member who organises drugs transportation can take advantage of the vulnerabilities of a single mother, and she may be lent some money to pay off her bills. Then, sometime later, people who lent the money demand it back, knowing that she does not have it, and they tell her that she has to carry drugs for them.<sup>108</sup>

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<sup>103</sup> Harriet Grant, 'Trafficking Victims Forced into Crime Are Let Down by Police, Report Reveals' *The Guardian* (20 December 2013) <<https://www.theguardian.com/global-development/2013/dec/20/trafficking-victims-forced-crime-let-down-police>> accessed 20 December 2016.

<sup>104</sup> Callin Kerr, 'Mexico's Drug War: Is it Really a War' (2012) 54(1) *South Texas Law Review* 193, at 195; Sylvia Longmire, 'How Mexican Cartels Are Changing Face of Immigration' (2014) 38(2) *Fletcher Forum of World Affairs* 109, at 110.

<sup>105</sup> Longmire (n 104) 110.

<sup>106</sup> UNODC, 'Transnational Organized Crime in Central America and The Caribbean - A Threat Assessment' (2012) <[https://www.unodc.org/documents/data-and-analysis/Studies/TOC\\_Central\\_America\\_and\\_the\\_Caribbean\\_english.pdf](https://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf)> accessed 13 February 2017.

<sup>107</sup> Janice G Raymond, 'The New UN Trafficking Protocol' (2002), 25(5) *Women's Studies International Forum* 491, at 492.

<sup>108</sup> See Olga Heaven, 'Straddling the Border: Drug Mules and Human Trafficking' (Issue 5, Global Eye on Human Trafficking - A Bulletin of News, Information and Analysis on Trafficking in Persons, IOM, 2009)

Two criminals Mack and Onysko<sup>109</sup> conspired together to provide heroin or cocaine to four females, and then, after the victims incurred drug debts, used force, threats of force, fraud and coercion to compel them to engage in commercial sex acts.<sup>110</sup> In many cases, drug traffickers use women for different purposes depending on their age and physical appearance. They put them to work as prostitutes, drugs suppliers or house cleaners. However, if the victims are caught, they are not seen as trafficked victims; instead, it is accepted by the authorities that these women committed the offence of importing drugs.

Considering these examples, when trafficked victims' potential involvement in criminal activities becomes an issue, such as carrying drugs, selling sex, working without a permit as an agriculture worker, committing theft, street begging and so on, reasonable suspicion must first be established to understand whether someone has been trafficked.<sup>111</sup> Then a careful assessment of the circumstances of his/her case must be made. If the crime is related to human trafficking, then it is important to determine whether those who are 'accused' of committing that crime in fact are victims of a crime or of human rights violations.<sup>112</sup> For the present purposes, it is important to note that the non-criminalisation principle should be triggered only in cases of status-related crimes. This principle should not be interpreted as intending to confer blanket immunity on trafficked victims in cases where non-status-related crimes are committed with the requisite level of criminal intent, such as robbery, unlawful violence or even trafficking, namely non-immigration offences.<sup>113</sup> In cases where 'graduating' victims collaborate with their traffickers as partners in crime, such as participants, managers and brothel madams, this participation of former victims is not directly related to previous trafficking crimes, and thus they are not deserving of the non-criminalisation principle.<sup>114</sup> Yet it is also important to be mindful that

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<[https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/projects/showcase\\_pdf/global\\_eye\\_fifth\\_issue.pdf](https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/projects/showcase_pdf/global_eye_fifth_issue.pdf)> accessed 28 August 2017.

<sup>109</sup> US Attorney's Office, 'Lorain County Man and Woman Charged with Human Trafficking Offences' (The FBI - Federal Bureau of Investigation, 2013)  
<<http://www.fbi.gov/cleveland/press-releases/2013/lorain-county-man-and-woman-charged-with-human-trafficking-offenses>> accessed 20 December 2016.

<sup>110</sup> *ibid.*

<sup>111</sup> OSCE, *Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking - In Consultation with the Alliance Against Trafficking in Persons Expert Co-Ordination Team* (n 30) 16.

<sup>112</sup> Gallagher, *The International Law of Human Trafficking* (n 24) 278.

<sup>113</sup> Gallagher, 'Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 12) 133.

<sup>114</sup> Schloenhardt & Markey-Towler (n 2) 15.

‘the non-criminalisation of victims of trafficking for offences they commit during their trafficking situation is a contentious issue (...) and requires further consideration and development’.<sup>115</sup> Because ‘there is, at present, no clear, uniform and universal articulation of this concept and it is premature to speak of an established principle, ready for implementation into domestic laws worldwide’.<sup>116</sup> Thus, the following regulations may guide states on the issue of non-criminalisation of trafficked victims.

#### 4.4.3 Counter International Legal Rules pertaining to Non-criminalisation of Trafficked Victims

This section considers prominent international legal rules regulating the non-criminalisation of human trafficking victims. The most recent and comprehensive international law treaties on trafficking, which are the Organised Crime Convention and the Trafficking Protocol, do not include any explicit obligations for state parties to refrain from criminalising victims of trafficking.<sup>117</sup> Article 2(b) of the Trafficking Protocol states that one of the purposes of this document is to ‘protect and assist the victims of such trafficking, with full respect for their human rights’. Article 9 of the Protocol indicates the ‘explicit’ duty of state parties ‘to protect victims of trafficking in persons, especially women and children, from re-victimisation’ by undertaking several different measures

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<sup>115</sup> *ibid* 37.

<sup>116</sup> *ibid* 37.

<sup>117</sup> There are number of different non-binding guidelines that have developed rules for states in order to prevent trafficked persons from being prosecuted for their illegal entry or residence; such as the UNHCR, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (n 11); the OSCE Action Plan (n 30); the General Assembly resolutions 55/67 & S-23/3; Council of Europe *Convention on Action against Trafficking in Human Beings and its Explanatory Report* ETS 197 16 V 2005, done 16 May 2005, entered into force 1 February 2008 (European Convention), art 26; *Resolution on Traffic in women and girls (A/RES/55/67)* 31 January 2001, para 6; *Resolution Global Plan of Action to Combat Trafficking in Persons (A/RES/64/293)* 12 August 2010.

The Working Group on Trafficking in Persons which was designed to ‘advise and assist the Conference [of the Parties to UNCTOC] in the implementation of its mandate with regard to the Trafficking in Persons Protocol’, recommended in 2009:

With regard to ensuring the non-punishment and non-prosecution of trafficked persons, States parties should: (a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support; (b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts. UN, ‘Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009’ (2009) Working Report CTOC/COP/WG.4/2009/2 <<https://www.unodc.org/unodc/en/treaties/CTOC/working-group-on-trafficking-apr-2009.html>> accessed 12 January 2017.

detailed in the article.<sup>118</sup> As is seen, the non-criminalisation of victims is not specifically addressed by the Trafficking Protocol, but only implied, such as in Article 2(b).<sup>119</sup> This is in fact surprising, because another protocol developed by the same committee at the same time, the UN Smuggling of Migrants Protocol, explicitly regulates the non-criminalisation principle applicable to persons who are victims of migrant smuggling in its Article 5.<sup>120</sup> This might be because the focus of the Trafficking Protocol is to criminalise the agent, not an individual; e.g., the Organised Crime Convention and the Trafficking Protocol consistently refer to punishment of traffickers and protection of victims.

The new *Protocol to the Forced Labour Convention (2014)*<sup>121</sup> gives more clarity by stating in Article 4(2) that:

Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

Gallagher concludes that ‘outside of treaty law, the principle of non-criminalisation for status-related offences finds support in a number of the UN resolutions and reports of the Secretary-General as well as regional soft-law instruments and other policy documents’.<sup>122</sup> Indeed, in the context of different regulations and recommendations, namely guiding tools, the non-criminalisation of human trafficking victims has been regulated and stressed to provide a rule for state parties to not prosecute or penalise victims of trafficking. The Inter-Parliamentary Union (IPU) and the UNODC, through UN.GIFT.HUB in 2009 published *Combating Trafficking in Persons - A Handbook for Parliamentarians*,

<sup>118</sup> Kristina Touzenis, *Trafficking in Human Beings - Human Rights and Transnational Criminal Law, Developments in Law and Practices* (United Nations Educational, Scientific and Cultural Organization, 2010), 3.

<sup>119</sup> Srikantiah (n 24) 739.

‘States parties should (...) [c]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts.’ UN, ‘Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009’ (n 117) para. 12.

<sup>120</sup> Schloenhardt & Markey-Towler (n 2) 25.

<sup>121</sup> *Protocol of 2014 to the Forced Labour Convention* 103<sup>rd</sup> ILabC Session done 11 June 2014, entered into force 9 November 2016. See also *Convention Concerning Forced and Compulsory Labour* (39 UNTS 55) ILO No 29, done 28 June 1930, entered into force 1 May 1932 (Forced Labour Convention).

<sup>122</sup> Gallagher, *The International Law of Human Trafficking* (n 24) 285.

in which Section 4.2 addresses the issue of non-criminalisation. The UNODC *Toolkit to Combat Trafficking in Persons - Global Programme against Trafficking in Human Beings*, 2008, Tool 6.1 also regulates the issue of non-criminalisation of trafficked victims.

Further illustration appears in the 2009 report of the Working Group on Trafficking in Persons, which notes that:

With regard to ensuring the non-punishment and non-prosecution of trafficked persons, States Parties should: (a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support; (b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.<sup>123</sup>

The Recommended Principles and Guidelines on Human Rights and Human Trafficking, which is included as an addendum to the High Commissioner for Human Rights' report to the Economic and Social Council (E/2002/68/Add.1), provided the following words on the non-criminalisation of trafficked persons in Guideline 7 'Protection and Assistance':<sup>124</sup>

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

The same text in Guideline 8 also sets forth measures for the protection and support of child victims of trafficking: 'children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons'. Further, Guideline 2.5 calls on states to ensure that 'trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons'. In the same vein, Guideline 4.5, in reference to the issue of prosecution for status-related offences, regulates that 'legislation

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<sup>123</sup> UN, 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009' (n 117) para 12.

<sup>124</sup> UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 11) 1.

prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons’.

A similar regulation appears in the UNODC Model Law, Article 10:<sup>125</sup>

(a) A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons; (b) A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.

It is also important to note that several General Assembly resolutions recommend that member states ‘[c]onsider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, taking into account that they are victims of exploitation’.<sup>126</sup> In 2014 the Assembly in its resolution urged

governments, in accordance with their respective legal systems, to take all appropriate measures, including through policies and legislation, to ensure that victims of trafficking are protected from prosecution or punishment for acts those victims have been compelled to commit as a direct consequence of having been trafficked and that the victims do not suffer from re-victimisation as a result of actions taken by Government authorities, and encourages Governments to prevent, within their legal framework and in accordance with national policies, victims of trafficking in persons from being prosecuted or punished as a direct consequence of their illegal entry or residence.

Finally, the Working Group on Trafficking in Persons committee, which was established by the Conference of States Parties to the Transnational Organised Crime Convention, confirms the danger of criminalisation of human trafficking victims thus:

Criminalisation limits the trafficking victims’ access to justice and protection and decreases the likelihood that they will report their victimisation to the authorities. Given the victims’ existing fears for

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<sup>125</sup> UNODC, *Model Law against Trafficking in Persons* (n 86).

<sup>126</sup> Kathryn Gordon & Barbara Christiani & Federico Magherini (eds), *Year Book of the United Nations*, 2000 (vol 54, Sales no E 02.I.1, United Nations Publications, 2002), 1097.

their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.<sup>127</sup>

In the context of international law regulations, it was made clear that victims were not intended targets for criminalisation.<sup>128</sup> Yet although mentioned regulations repeatedly underlined the importance of non-criminalisation of human trafficking victims by urging governments to take necessary actions to prevent it, these rules do not formalise why and on what grounds victims should not be criminalised.

## 4.5 Conclusion

This chapter has investigated obligations of protection in two aspects: identification and non-criminalisation of victims of human trafficking. This analysis has given sufficient reasons to conclude that obligations of protection cannot be triggered and implemented without identifying victims of trafficking and preventing their criminalisation due to status-related offences. States have obligations to identify trafficked victims and not to prosecute or punish them 'for trafficking-related offences such as holding false passports or working without authorization, even if they agreed to hold false documents or to work without authorization'.<sup>129</sup> Otherwise, such treatment may result in denial of their rights, such as the right to be treated with humanity and dignity,<sup>130</sup> and prosecuting/punishing them would deny their right to claim their own rights the access to justice which they are entitled under international law.<sup>131</sup>

<sup>127</sup> UN, 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009' (n 117) paras 5–6.

<sup>128</sup> Srikantiah (n 24) 739.

<sup>129</sup> UNODC, 'Tool 6.1 Non-criminalization of trafficking victims' <[https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296\\_tool\\_6-1.pdf](https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_6-1.pdf)> accessed 13 February 2017.

States have adopted two approaches to deal with the principle of non-liability:

The duress model is grounded on the belief that despite a person committing an offence the individual should not be held responsible because he or she was compelled to commit the offence.

According to the "causation" based model, trafficked persons are not to be held liable for offences that are directly connected or related to the trafficking. UN, 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April' (n 117) 4.

<sup>130</sup> Anne T Gallagher & Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking Lessons from the Front Line' (2008) 18(3) *International Criminal Justice Review* 318, at 329.

<sup>131</sup> Gallagher, *The International Law of Human Trafficking* (n 24) 283.

While identification and non-criminalisation of victims of human trafficking are fundamentally important, international law has not formulated a specific set of rules to capture on what grounds and how victims should be identified and not criminalised. For this reason, this chapter has chosen to follow a step-by-step analysis of the reasons why victim identification is crucial yet problematic factually and legally, in what ways it is linked to the non-criminalisation principle and why victims of human trafficking should not be criminalised in light of the related international legal regulations.

As explained in the previous chapter, defining human trafficking, distinguishing it from similar phenomena and addressing contemporary challenges pertaining to trafficking can inform a discussion on why it is important to have a purpose for identification and protection of trafficking victims. Thus, this thesis has investigated the importance of identifying and offering legal protection to victims. Considering the messy intersections of human trafficking with statelessness, citizenship and migration in migrant departure and destination countries,<sup>132</sup> human trafficking is considered a challenging contemporary topic in this thesis. That is why this thesis has looked at this aspect of trafficking crimes through main issues, namely the definitional quagmire around trafficking, and identification and non-criminalisation of victims. Since the major issues have been investigated by considering relevant incidents and international legal regulations, the following chapter, as the conclusion of this thesis, completes its research question of whether international human trafficking law regulations are sufficient for facing major contemporary challenges. Thus, the final chapter summarises the findings of the analysis; it concludes where current approaches are/are not in conformity with international law and what could/should be done to improve the situation.

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<sup>132</sup> Mahdavi, 'Commentary Migrating in The Era of Human Trafficking' (n 61) 112.

## 5 Conclusion

This thesis has conducted a critical assessment of human trafficking discourse to investigate one overarching question: whether the international legal framework applicable to human trafficking is appropriate to deal with this modern-day phenomenon in its multi-faceted manifestations. In pursuance of this question, this thesis firstly identified breakdown of human trafficking to examine its character as a modern-day phenomenon, including its scale, root causes, and the main reasons for its complexity. Then it mapped the international legal framework of human trafficking. This thesis sought definitions of human trafficking in international law that do justice to the phenomenon's complexity due to its overlapping features with slavery and migrant smuggling. Later it considered states' obligations of protection in the context of identification and non-criminalisation of trafficking victims.

Based on the analysis it can be concluded that trafficking 'is not [just] an ordinary crime with transnational dimensions', and that the rules of international counter-trafficking law are not adequate despite the developments that have been made, due to diffuse concepts, circular arguments and a human rights bias pertaining to the issue of trafficking.<sup>1</sup> In this Chapter, it is concluded that trafficking is one of the most endemic human rights violations globally, and that due to its specific nature it cannot be seen/understood as equivalent to modern-day slavery or migrant smuggling. Besides, since the Rome Statute does not make the meaning of trafficking crimes clear enough, it thus cannot be concluded that human trafficking should be understood just as a crime against humanity.

Human trafficking represents a form of human exploitation that has become a growing social phenomenon and it is regulated through international law as a transnational crime. Nonetheless, in some respects as is outlined in the following paragraphs, the international legal rules pertaining to human trafficking are not appropriate to deal with the major challenges surrounding this phenomenon,

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<sup>1</sup> Protection Policy and Legal Advice Section (PPLAS) & Division of International Protection Services (DIPS), 'Refugee Protection and Human Trafficking - Selected Legal Reference Materials' (1<sup>st</sup> ed, UNHCR, 2008), 11 <<http://www.refworld.org/docid/498705862.html>> accessed 22 December 2016.

although international law has provided a conduit for combatting the issue. In fact, there are international human rights standards that address states' rights and obligations.<sup>2</sup> However

[r]arely is there consensus among academics, politicians or activists regarding what 'trafficking' is or what to do about it. Despite these differences, contemporary anti-trafficking discourses agree on one crucial idea: there is such a thing as 'trafficking' that can be discovered, analysed, and told<sup>3</sup> [under international law].

In this light, this thesis posits that the definition of human trafficking used in international law through the Trafficking Protocol is not adequate. However, this does not necessarily mean that the Protocol's definition is not comprehensive. The Protocol provides a comprehensive definition of trafficking, yet it contains many terms, including exploitation, abuse, coercion and consent, that can be interpreted differently in national legislation, and so in fact 'efforts by States to create their own definitions have also been problematic'.<sup>4</sup> These different interpretations about the scope of human trafficking, generated by states, the media, international legislation and scholars, have led to a definitional quagmire explicitly in relation to slavery and migrant smuggling. This is indeed concerning, considering the importance of victim identification, which is explained in detail in Chapter IV. As is stressed over the course of this thesis, without a concrete understanding of what human trafficking is, it is not easy/possible to identify victims; actual victims of trafficking will therefore not receive access to vital services and justice. 'The identification of victims of human trafficking is usually based on attempts to link victims' characteristics with constituent parts of the definition of human trafficking'.<sup>5</sup> However, as is set forth in Chapter IV in regards to obligations of protection, victim identification and the non-criminalisation principle have not been regulated in detail by major counter-trafficking international legal rules (Trafficking Protocol

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<sup>2</sup> Anne T Gallagher, *The International Law of Human Trafficking* (1<sup>st</sup> published, Cambridge University Press, 2010), 478.

<sup>3</sup> Lucrecia Rubio Grundell, 'Silencing The Challenging Voices of the Global 'Subaltern' in Anti-Trafficking Discourse' *Open Democracy* (22 May 2015) <<https://www.opendemocracy.net/beyondslavery/lucrecia-rubio-grundell/silencing-challenging-voices-of-global-%E2%80%98subalterns%E2%80%99-in-antitra>> accessed 1 August 2017.

<sup>4</sup> Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (OSCE), *Trafficking in Human Beings: Identification of Potential and Presumed Victims - A Community Policing Approach* (vol 10, SPMU Publication Series, 2011), 24-25 <<http://www.osce.org/secretariat/78849?download=true>> accessed 16 September 2017.

<sup>5</sup> *ibid* 24.

and Organised Crime Convention). Of course, that is not to say that international law has not regulated either victim identification or the non-criminalisation of human trafficking victims. In addition to the examples given in Chapter IV, Delphi Methodology, constituted by the European Commission and the ILO, developed harmonized definitions and associated indicators for trafficking in human beings.<sup>6</sup> However, this thesis indicates the importance of regulating such major issues primarily under a specific treaty or protocol, which has not yet been achieved in international law to make states adopt concrete, systematic and accurate regulations on defining trafficking and identifying human trafficking victims. Considering the initial explanations in this section, the following paragraphs summarise how human trafficking is indeed regulated under international law, and how the ambiguities mentioned throughout this thesis and in the sentences above can be overcome.

## **5.1 Description of Human Trafficking**

### **5.1.1 Human Trafficking is an Alarming Part of Transnational Crime Which Faces Unique Contemporary Challenges**

This thesis has introduced many of the major contemporary challenges, which are exemplified in the following sentences including armed conflict, corruption, economic and social factors associated with the practice of trafficking. These challenges are further complicated by the many contemporary crises the world is currently facing including climate change and terrorist infiltration in the Middle East, especially within Syria, Iraq and Somalia. All such crisis contributes to instability, which in turn leads to a range of negative consequences, including criminal activity that includes human trafficking.<sup>7</sup> As such, contemporary crises can exacerbate the effect of pre-existing societal root causes, such as armed conflict, economic and social circumstances, gender and ethnic discrimination, honour killings, poverty, and violations of economic, social and cultural rights.

There are many relevant contemporary representation of the connection between root socio-economic causes and the proliferation of trafficking. In

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<sup>6</sup> *ibid* 25.

<sup>7</sup> Anthony Banbury, 'I Love the UN, But It Is Failing' *NY Times Sunday Review Opinion* (New York, 18 March 2016) <[https://www.nytimes.com/2016/03/20/opinion/sunday/i-love-the-un-but-it-is-failing.html?\\_r=0](https://www.nytimes.com/2016/03/20/opinion/sunday/i-love-the-un-but-it-is-failing.html?_r=0)> accessed 10 April 2017.

Jordan, young Syrian women are at risk of sex trafficking, as they struggle to survive in a country where they are not allowed to work.<sup>8</sup> Many children whose families have fled the Syrian war to Lebanon are forced to work for little or no pay in dangerous conditions.<sup>9</sup> The UN Global Initiative to Fight Human Trafficking notes that children continue to be exploited and trafficked in different industries worldwide, including as sex workers, child soldiers, camel jockeys, beggars or as workers on construction sites and plantations.<sup>10</sup> In Cambodia, Thailand and Vietnam, '[c]hildren as young as 10 are working as sea slaves on fishing boats to fill our cat food tins, making toys for our children, supplying sex for paedophiles, and being purchased as brides'.<sup>11</sup>

Having considered these contemporary cases, we can see that human trafficking continues to get shaped by the instabilities and crises created by our modern world, despite John Ashe claiming that 'human trafficking has no place in the modern world'.<sup>12</sup> Human trafficking persists, and it is thus essential to draw political attention to it as a human rights violation. Identifying trafficking in such terms includes facing such challenges as the fact that the numbers of identified victims have not been consistent and that the vast majority of trafficking victims are unidentified. Because of its irregular and clandestine nature, the numbers on human trafficking remain as estimates.<sup>13</sup> Since no fully representative statistics depicting exact numbers of incidents exist, it is not clear exactly how big of an 'evil' is to be fought against.<sup>14</sup> Regardless of this challenge, the international community to introduce anti-trafficking measures at

<sup>8</sup> Lee Harper, 'Syrian Women in Jordan at Risk of Sexual Exploitation at Refugee Camps' *The Guardian* (Amman, 24 January 2014) <<https://www.theguardian.com/global-development/2014/jan/24/syrian-women-refugees-risk-sexual-exploitation>> accessed 28 July 2017.

<sup>9</sup> Alex Whiting, 'Syrian Refugees in Lebanon at Growing Risk of Forced Labour - Anti-Slavery Activists' *Thomson Reuters Foundation* (12 April 2016) <<http://news.trust.org/item/20160412000354-xxo0i>> accessed 28 July 2018.

<sup>10</sup> UN GIFT HUB, 'Trafficking of Children' <<http://www.ungift.org/knowledgehub/en/about/trafficking-of-children.html>> accessed 27 February 2017.

<sup>11</sup> Cathy Zimmerman, 'Migrant Children Who Don't Make the Front Page' (*The Chariot Views from the London School of Hygiene and Tropical Medicine*, 2015) <<http://blogs.lshtm.ac.uk/news/2015/09/15/migrant-children-who-dont-make-the-front-page/>> accessed 19 December 2016.

<sup>12</sup> UN News Centre, 'Human Trafficking Has No Place in Modern World, General Assembly President Says' (14 July 2014) <<http://www.un.org/apps/news/story.asp?NewsID=48271#.WXstQ617FmA>> accessed 28 July 2017.

<sup>13</sup> Protection Policy and Legal Advice Section (PPLAS) & Division of International Protection Services (DIPS), 'Refugee Protection and Human Trafficking - Selected Legal Reference Materials' (1<sup>st</sup> ed, UNHCR, 2008) <<http://www.refworld.org/docid/498705862.html>> accessed 22 December 2016.

<sup>14</sup> *ibid* 11.

both international and regional levels has matched the rise in incidents of trafficking with an increase in activity.<sup>15</sup>

As explained in Chapter II, in 2000 trafficking was defined and addressed under a specific treaty, namely the Trafficking Protocol: ‘human trafficking has been recognized as an international legal issue for well over a century, (...) the international legal landscape as it applies to trafficking [has] changed forever.’<sup>16</sup>

The Trafficking Protocol is the most comprehensive treaty on trafficking, having been cited by governments, NGOs, activists and scholars as a prime source. Nonetheless, such international organisations, states and NGOs also offer their own definitions on trafficking.<sup>17</sup> This means, as Chuang concludes, that although ‘new legal definitions of “trafficking” were codified in international (...) law in 2000, (...) what conduct qualifies as “trafficking” remains hotly contested’.<sup>18</sup> Indeed, the Trafficking Protocol also acknowledges in its Preamble that there is ‘no universal instrument that addresses all aspects of trafficking in persons’.<sup>19</sup>

In consideration of this, definitional issues pertaining to human trafficking referred to as a ‘definitional quagmire’ were discussed in Chapter III. As previously explained, defining complex phenomena such as human trafficking accurately is important, because definitions affect everything from data gathering to states’ ability to identify victims. Furthermore, as was concluded in Chapter IV, in order to identify victims and ensure their protection, it is crucial for the definition attributed to trafficking to be expansive enough in meaning and scope to cover the problem of human trafficking in its many manifestations.

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<sup>15</sup> *ibid* 11.

<sup>16</sup> Anne Gallagher, ‘Human Rights and Human Trafficking in Thailand: A Shadow TIP Report’ in Karen Beeks & Delila Amir (eds), *Trafficking and Global Sex Industry* (Lexington Books, 2006), 142.

<sup>17</sup> Kara Abramson, ‘Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol’ (2003) 22 *Harvard International Law Journal* 473, at 480.

<sup>18</sup> Janie A Chuang, ‘Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy’ (2010) 158 *University of Pennsylvania Law Review* 1655, at 1656.

<sup>19</sup> Ryszard Piotrowicz, ‘Victims of People Trafficking and Entitlement to International Protection’ (2005) 24 *Australian Year Book International Law* 159, at 161.

### 5.1.2 Human Trafficking is not regulated as Slavery under International Law

The term ‘modern-day slavery’ is often wrongly used synonymously with ‘human trafficking’, to the point that the word ‘slavery’ itself has become a popular term in discussions of trafficking. Thus, this thesis investigated three main reasons why human trafficking has been referred to as ‘modern-day slavery’ in order to understand to what extent such reference is accurate under international law as following:

The factual resemblance between slavery and trafficking;

The intricacy of international legal regulations pertaining to slavery and trafficking;

Interpretations by the media, scholars and international judgements - based on factual resemblance and international law regulations - of these phenomena, which has led to the definitional quagmire.

Factual resemblance: Slavery has always been something to fight against, as buying and selling human beings has existed in every stage of human history. The difficulty of defining slavery along with reasons that go beyond definition problems (such as finding perpetrators and proving their crimes, for example) makes it hard to seek justice for victims. Human traffickers, like slave traders, commodify human beings into mere merchandise that is transported across borders, traded for currency and recycled through domestic economies. Indeed, trafficking and slavery have been interwoven in such a way that they both have similar patterns. Historically, sexual slavery was practiced in the Ottoman Empire with slaves having been war captives or coming from organised enslavement expeditions in Africa and Circassia in the Caucasus. Africans were trafficked across the Atlantic Ocean to the New World from the 15<sup>th</sup> through the 19<sup>th</sup> centuries: ‘first generation African slaves were taken by force and transported across the ocean to work throughout the new world’.<sup>20</sup>

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<sup>20</sup> See Candice Goucher & Charles LeGuin & Linda Walton, ‘Commerce and Change: The Creation of a Global Economy and the Expansion of Europe’ in *In the Balance: Themes in Global History* (Vol 2, McGraw-Hill, 1998), 491–508.

Intricacy of the international legal regulations pertaining to human trafficking and slavery: Related international law rules have ‘either such a semantic congruence’ or appear as ‘an attempt to assert ownership of the term slavery’,<sup>21</sup> such that the definition of trafficking in the Protocol does not apply to slavery.<sup>22</sup> The legal definition of slavery has been contested due to the vagueness of the concept of ‘ownership’. On these grounds, international law, including the Trafficking Protocol, does not make clear whether trafficking would be a distinct crime from slavery, and if so why and in what ways. Long before the label of ‘human trafficking’ was introduced into public international law, treaties had been adopted to regulate and abolish slavery, which is why in many ways, slavery is seen as a predecessor to modern attempts to deal with human trafficking.

For the above-mentioned reasons, many important entities including the UN, the media, certain scholars and organisations dealing with trafficking have referred to or interpreted trafficking as a modern form of slavery, which has also contributed to the definitional quagmire. Accordingly, Yury Fedotov, Executive Director of the UNODC has said that ‘existing frameworks must be strengthened to act against “modern-day slave traders”’.<sup>23</sup> In the same vein, Ban Ki-Moon has stated that ‘Yazidi girls captured in Iraq were *trafficked* into Syria and sold in open *slave markets*’ in 2016.<sup>24</sup> Further illustration is found from the Security Council in December 2015, in the testimony of Nadia Murad Basee Taha, a Yazidi survivor of sexual exploitation:<sup>25</sup> ‘when the floor opened for debate, members praised Ms. Basee Taha’s courage in sharing her experiences while they roundly condemned *human trafficking as slavery in the twenty-first century*’.<sup>26</sup> Indeed, sexually exploited Yazidi women have been described as ‘trafficked and

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<sup>21</sup> Karen E Bravo, ‘Exploring the Analogy between Modern Trafficking in Humans and the Transatlantic Slave Trade’ (2007) 25 *Boston University International Law Journal* 207, at 212.

<sup>22</sup> David Nelken, ‘Human Trafficking and Legal Culture’ (2010) 43 *Israel Law Review* 479, at 495.

<sup>23</sup> UN Meetings Coverage & Press Releases, ‘Security Council Condemns Human Trafficking in Strongest Terms, Unanimously Adopting Resolution 2331 (2016)’ (20 December 2016) <<http://www.un.org/press/en/2016/sc12647.doc.htm>> accessed 24 April 2017.

<sup>24</sup> *Ibid* [emphasis added].

<sup>25</sup> United Nations University, ‘UN Report Proposes Action by Security Council, Private Sector on Human Trafficking in Conflict’ (New York, 8 September 2016) <<https://unu.edu/media-relations/releases/un-report-proposes-action-by-security-council-private-sector-on-human-trafficking-in-conflict.html#info>> accessed 28 July 2017.

<sup>26</sup> United Nations Meetings Coverage & Press Releases ‘Security Council Presidential Statement Says Human Trafficking Might Constitute War Crimes, as Members Consider Issue for First Time’ (16 December 2015) <<https://www.un.org/press/en/2015/sc12165.doc.htm>> accessed 23 July 2017 [emphasis added].

enslaved on a regular basis, exploited and sold in the market to be sexual slaves, which amounts to a crime against humanity'.<sup>27</sup> The Report of the Working Group on Contemporary Forms of Slavery has stated that 'trans-border trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights'.<sup>28</sup> As can be seen, an increasing tendency among academics, researchers, journalists, the UN, governments, civil society organisations and other policy makers is to label trafficking as a form of modern-day slavery.<sup>29</sup> Thus, this thesis has considered relevant legal regulations, particularly the 1926 Slavery Convention and the Trafficking Protocol in Chapter III, in order to understand whether the definitional quagmire between slavery and trafficking has indeed been caused by international legal regulations, and if so why.

Despite the poorly defined continuum between slavery and trafficking, considering the current international legal rules, there is not enough evidence to conclude that human trafficking has been regulated as a form - or equivalent - of slavery. It cannot be said that all forms of human trafficking constitute slavery and/or all slavery is human trafficking in legal terms.<sup>30</sup>

Trafficking in person cannot be a new form of slavery, as slavery is but one example of eight component parts (examples of exploitation) of one of three elements (the means, the method and the purpose) of the definition of trafficking.<sup>31</sup>

In some cases, modern forms of exploitation can also be described as human trafficking, e.g.:

Commercial sexual exploitation (of minors and adults of all genders); indentured servitude; agricultural construction and factory labor coerced through debt bondage or other forms of coercion; exploitative guest worker arrangements; child labor recruitment and deployment of child

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<sup>27</sup> *ibid.*

<sup>28</sup> Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 (2) *International Journal Refugee Law* 181, at 183.

<sup>29</sup> Ramona Vijayarasa & José Miguel Bello Y Villarino, 'Modern-Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev' (2012) 8 *Journal of International Law and International Relations* 38, at 39.

<sup>30</sup> See Harmen van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 *Chinese Journal of International Law* 297.

<sup>31</sup> Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Nijhoff, 2015), 204.

soldiers; and other scenarios where individuals are held in positions of total control and exploitation.<sup>32</sup>

As Suzan Miers concludes, use of the term 'slavery' may be said to cover such a wide range of practices that this risks making it virtually meaningless.<sup>33</sup> It is not only slavery but also other forms of human exploitation that have been instrumental in building the world as we know it, and continue to this day to drive global economic growth, whether it be through cheap labour, cheap sex or cheap goods.<sup>34</sup> Indeed, the adjective 'modern' in the phrase 'modern-day slavery' 'acknowledges that it is an anachronism to compare a contemporary phenomenon with an arcane institute of the past'.<sup>35</sup> Yet this also causes an assumption that the phenomenon of 'modern-day' slavery encompasses all forms of exploitative practices, including trafficking. Thus, the expression 'modern-day slavery' may be seen as the only way to address all exploitative acts, yet modern trafficking is so much more expansive than could have been imagined hundreds or thousands of years ago. Trafficking not only covers the exploitative acts of a lover who exploits the physical attractions of his so-called girlfriend, but also the ulterior motives of huge organisations which 'reap millions of dollars from their ignoble trade'.<sup>36</sup> As such trafficking is too expansive for it to be only explainable through reference to a dated concept like slavery. Trafficking is a crime to do with moving people for the express purpose of their exploitation. Trafficking can also include varying degrees of violence, including trafficking in armed conflict and related acts, which have been described as crimes against humanity. As such, the UN's reference to the enslavement provision of the Rome Statute includes human trafficking in its regulation. Despite the in-depth analysis of the borders between 'slavery-enslavement-trafficking' in Chapter III, it is important to conclude that despite such referrals, there is still no firm ground to address trafficking under the terms of the Rome Statute.

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<sup>32</sup> Karen E Bravo, 'Interrogating the State's Role in Human Trafficking' (2015) 25(1) *Indiana International & Comparative Law Review* 9, at 13.

<sup>33</sup> Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (Rowman Altamira, 2003), 453.

<sup>34</sup> Anne T Gallagher, 'Understanding Exploitation' (2011) *Harvard International Review* 4, at 5.

<sup>35</sup> Wilt (n 30) 314.

<sup>36</sup> *ibid* 314.

### 5.1.3 Human Trafficking Should not be Understood (just) as a Crime Against Humanity

As was explained in the analysis around the enslavement provision of the Rome Statute in Chapter III, inclusion of trafficking as a term in the context of such a regulation has opened up room for new interpretations, due to the fact that the Statute does not make the meaning of ‘trafficking crimes’ clear enough. Further, the ICTY, in the *Kunarac et als case*, in which Kunarac and Kovač were charged with the ‘enslavement and rape of Muslim women whom they had detained during six months and abused for their own sexual gratification’, analysed the definition(s) of enslavement/slavery/trafficking.<sup>37</sup> Accordingly, the Trial Chamber reiterated the classic definition of the Slavery Convention,<sup>38</sup> and characterised enslavement as an umbrella term for slavery, servitude and forced labour: ‘enslavement as a crime against humanity’ may be ‘broader than the distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in the other areas of international law’.<sup>39</sup> Based on this judgment, Chapter III addressed whether trafficking is a form of enslavement and whether enslavement is a catchall term.

In this light, this section aims to conclude whether human trafficking crimes can be interpreted as amounting to crimes against humanity under the provision of enslavement in the Rome Statute. This concern is addressed in the following paragraphs.

Considering the violent nature of traffickers’ conduct, it is easy to label trafficking-related acts as crimes against humanity. Thus, it is important to understand whether regulations (such as the Rome Statute), in fact apply to these situations. In the preamble of the Rome Statute of the ICC, it was stressed that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’. Such crimes were noted as including

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<sup>37</sup> *ibid* 304.

<sup>38</sup> *ibid* 304.

<sup>39</sup> Allain, *The Law and Slavery: Prohibiting Human Exploitation* (n 31) 189.

On appeal, the appellants claimed that the Trial Chamber adopted too broad a definition of the crime of enslavement, emphasizing in particular the requirements of lack of consent and duration as constituent elements of the crime. The Appeals Chamber did not agree and corroborated the Trial Chamber's findings. Wilt (n 30) 304.

international crime(s) of enslavement and war crime(s) such as sexual slavery.<sup>40</sup> Further, the UN Security Council Presidential Statement,<sup>41</sup> and Resolution 2331, adopted in 2016,<sup>42</sup> refer to human trafficking crimes committed in war as crimes against humanity. During the meeting of the Security Council in December 2015, '[s]ome speakers emphasised that ISIL's use of people as human shields, sexual slaves and forced labourers constituted war crimes and crimes against humanity, and thus punishable by the International Criminal Court'.<sup>43</sup> Furthermore, the S/RES/2331 stresses that 'human trafficking has contributed to other forms of transnational organized crime, which could exacerbate conflict and foster increased global insecurity and instability'.<sup>44</sup> Secretary-General Ban Ki-Moon has stressed that 'all perpetrators [of trafficking] must be brought to justice', and only an 'international response could succeed in resolving an international problem like human trafficking'.<sup>45</sup> The latter indicates the transnational criminal law aspect of trafficking crimes. It should also be noted that 'crimes against humanity can [also] be perpetrated when there is *no* armed conflict taking place. It is misleading - in fact wildly inaccurate - to think of [trafficking] occurring only during armed conflict'.<sup>46</sup> Without any doubt, when trafficking is deployed during armed conflict, the damage is more brutal and horrific.<sup>47</sup> This is why it is important to conclude whether trafficking can be regarded as one of the 'most serious crimes of concern to the international community as a whole or *delicta juris gentium*'.<sup>48</sup>

As explained in Chapter III, using enslavement as an umbrella-term for trafficking is not legally correct. As well, the slavery analogy is not an accurate way of categorising human trafficking crimes as an international crime. After all, even if human trafficking, by taking into account the opinion of the ICTY, can be

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<sup>40</sup> *Rome Statute of the International Criminal Court (last amended 2010)* (2187 UNTS 90) adopted 17 July 1998, entered into force 1 July 2002.

<sup>41</sup> United Nations Meetings Coverage & Press Releases, 'Security Council Presidential Statement Says Human Trafficking Might Constitute War Crimes, as Members Consider Issue for First Time' (n 26).

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (n 28) 184 [emphasis added].

<sup>47</sup> United Nations Meetings Coverage and Press Releases 'Security Council Presidential Statement Says Human Trafficking Might Constitute War Crimes, as Members Consider Issue for First Time' (n 26).

<sup>48</sup> Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006), 139.

assimilated into the provision of enslavement or another category in the Rome Statute's Article 7, it would mean that trafficking qualifies as a crime against humanity, and is eligible for prosecution and trial by the ICC and international criminal tribunals.<sup>49</sup> Yet, in such a situation, several other key elements must also be met before an act can be elevated to a crime against humanity.<sup>50</sup>

The Rome Statute's article 7(1)(a)-(k) establishes the perpetration of the acts enumerated in the context of crime against humanity, which reads as follows:

The acts must constitute an attack directed against any civilian population; the acts must be widespread or systematic in nature; the attack must be pursuant to, or in furtherance of, a State or organisational policy to commit such attacks; the acts must be committed as part of the attack; the perpetrator(s) must have known that the conduct was part of or intended the conduct to be a part of such an attack.

This regulation can be completed on the point of:

Crimes against humanity are typically committed against fellow nationals as well as foreigners; [c]rimes against humanity are international crimes; [c]rimes against humanity are committed by politically organized groups acting under color of policy; [c]rimes against humanity consist of the most severe and abominable acts of violence and persecution; [c]rimes against humanity are inflicted on victims based on their membership in a population rather than their individual characteristics.<sup>51</sup>

Above-mentioned key elements include following:

Whether it is accepted that human trafficking is widespread and there is no country on earth immune from human trafficking. E.g., considering human trafficking as a transnational organized crime, its presence is felt in all the countries across the world, therefore there would be a need to have an

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<sup>49</sup> Wilt (n 30) 299.

<sup>50</sup> Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54(2) *International & Cooperative Law Quarterly* 445, at 451.

<sup>51</sup> David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal International Law* 85, at 93ff.

international body or statute which could address the human trafficking cases and deliver effective and efficient prosecution;<sup>52</sup>

If acts of trafficking can be considered as attacks directed against any civilian population.<sup>53</sup> Indeed

such attacks on civilian populations are done through human trafficking based on some policies of using the children as shields in armed conflicts, using women for sexual exploitation, exploiting women and children through forced labour and finally exploiting many cultural and ethnic groups or population;<sup>54</sup>

If it is perceived that human trafficking is a profitable business of organised criminal groups and is committed systematically;

If human trafficking can be committed purely for personal motives or if it is proven that ‘the perpetrator was aware of the attack but may not have the knowledge of all the characteristics and precise details of the attack and the policy of the State or the organization’;<sup>55</sup>

If it is acknowledged that either there is an organisation, ‘in the absence of a State policy there must be an organization, but only a “State-like” organization having some type of policy would qualify’;<sup>56</sup>

If there is ‘any entity with the capacity to carry out crimes against humanity’.<sup>57</sup> In addition, accepting the latter approach involves accepting the understanding that non-state actors, such as traffickers or organisations backed by governmental policies can also commit trafficking.

Creating distinctions between crimes and labelling some as ‘against humanity’ dictates an understanding that in fact some crimes are inhuman.<sup>58</sup> This requires

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<sup>52</sup> Joshua N Aston & Vinay N Paranjape, ‘Human Trafficking and Its Prosecution: Challenges of the ICC’ (2012), 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2203711](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203711) > accessed 29 March 2017.

<sup>53</sup> Wilt (n 30) 315.

<sup>54</sup> Aston & Paranjape (n 52) 8.

<sup>55</sup> *ibid* 9.

<sup>56</sup> Jalloh Charles Chernor, ‘What Makes a Crime against Humanity’ (2013) 28(2) *American University International Law Review* 381, at 384.

<sup>57</sup> *ibid* 385.

<sup>58</sup> Raimond Gaita, ‘Refocusing Genocide: A Philosophical Responsibility’ in John K Roth (ed), *Genocide & Human Rights - A Philosophical Guide* (Palgrave Macmillan, 2005), 153-163.

an assessment of whether human trafficking crimes indeed have an impact on humanity in the first place. Humanity in this context refers to both humankind and the spirit of human nature. Bassiouni considers crimes against humanity as grievous enough to 'shock the conscience of mankind'.<sup>59</sup> Crimes against humanity such as genocide or slavery shock humankind's conscience, even though specific instances of such actions may not threaten peace and security.<sup>60</sup> Viewed along these lines, 'crimes against humanity' as a term 'signifies that all humanity is the interested party and that humanity's interest may differ from the interests of the victims'.<sup>61</sup> The question becomes whether such deep understanding can be established and implemented for trafficking crimes, as 'violating humanness and offending against humankind are not equivalent' - sadistic rape or murder degrades the humanity of its victim without impacting the interests of the entire human race.<sup>62</sup>

In light of this section's analysis, it can be concluded that if the requirements are indeed met to accept human trafficking as a crime against humanity, states will be more reluctant to combat corruption, intimidation and bribery perpetrated by traffickers due to direct control of the offence of trafficking that would become possible at the international level.<sup>63</sup> Obligations of protection would be implemented in a more effective way, especially considering the importance of identification and non-criminalisation of trafficked victims. This would also encourage states to take global action against human trafficking crimes.<sup>64</sup> However, it is also important to note that the ICC is only the last resort to prosecute such cases and to have jurisdiction over the crimes conducted in the state party's territory, which would only happen if the states fail to 'exercise criminal jurisdiction or are not able to investigate and prosecute the cases or are unwilling to investigate and prosecute cases'.<sup>65</sup> If states 'start prosecuting and resolving cases of trafficking and crimes against humanity in an

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<sup>59</sup> M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59(4) *Law and Contemporary Problems* 63, at 69.

<sup>60</sup> David Luban, 'A Theory of Crimes against Humanity' (2004) 29 *Yale Journal International Law* 85, at 88.

<sup>61</sup> *ibid* 88.

<sup>62</sup> *ibid* 90.

<sup>63</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (n 50) 453.

<sup>64</sup> *ibid* 454.

<sup>65</sup> Aston & Paranjape (n 52) 12.

effective manner at the national level, then the ICC will have no cases to prosecute'.<sup>66</sup>

The Rome Statute also fails to define the substantive content of the prohibition of enslavement, which directly affects the ability of the international community to bring to justice those individuals who are criminally responsible for violating the prohibition.<sup>67</sup> 'Enslavement' as interpreted by the ICTY is not a catchall term that all trafficking crimes can be put under: 'although the link between trafficking and slavery has been clearly acknowledged by the European Court of Human Rights, that court has shied away from stating explicitly that trafficking amounts to enslavement'.<sup>68</sup> The court stressed the clear links between the two practices:

(...) trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment (...) It involves the use of violence and threats against victims, who live and work under poor conditions.

It should also be noted that the duty to eradicate slavery as a human rights violation is clearly identified by the International Court of Justice as a supreme rule of customary international law, a legal obligation erga omnes, and part of jus cogens, a fundamental norm of international law;<sup>69</sup> whereas there is no clear indication and regulation for human trafficking crimes.<sup>70</sup> This also confirms that 'a criminal justice response alone, represented by the Trafficking Protocol and international criminal law, is not sufficient'<sup>71</sup> to tackle trafficking as a matter of international crime, particularly a crime against humanity. E.g., it might be also considered whether human trafficking can be determined under the category of 'other human acts' of the Article 7(1)(k) as crime against humanity, yet again 'other human acts' is not defined and specified by the Rome Statute that would

<sup>66</sup> *ibid* 12.

<sup>67</sup> Allain, *The Law and Slavery Prohibiting Human Exploitation* (n 31) 799.

<sup>68</sup> Piotrowicz, "States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations" (n 28) 196, 201.

<sup>69</sup> See M Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23 *New York University Journal of International Law & Politics* 445.

<sup>70</sup> A Yasmine 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 International Law* 311, at 322.

<sup>71</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (n 50) 457.

help address trafficking crimes as one of the crimes against humanity. Thus, a clear understanding of trafficking in connection to crimes against humanity would be preferable to a broad and arguably vague definition under international law, if the aim was to elevate human trafficking to a crime against humanity.

#### **5.1.4 Human Trafficking is not regulated as Migrant Smuggling under International Law**

This thesis has looked at human trafficking under international law as a modern-day phenomenon facing contemporary challenges, including in reference to incidents of trafficking in conflict, trafficking in reference to the growing contemporary refugee crisis, and in reference to absent state policies creating safe havens for traffickers. Criminal gangs have taken advantage of Europe's migration crisis by forcing people into sex work or other types of exploitation, according to an EU report on human trafficking, for instance.<sup>72</sup> One such example is that of Syrian young women who were told that they would get well-paid jobs in Lebanon, yet instead were locked up in two hotels North of Beirut and forced into prostitution.<sup>73</sup> Considering the increasing need to combat migrant smugglers, the mainstream media has drawn attention to such cases by using the terms trafficking and smuggling interchangeably. This means that even though trafficking and migrant smuggling are legally regulated as two completely different crimes under separate protocols;<sup>74</sup> they are often not treated as such. Thus, addressing the fine line between smuggling and trafficking is crucial. For example, people who cross the sea illegally are mostly smuggled individuals - not trafficked victims - and are thus simply seeking protection.

As explained previously, migrant smuggling and trafficking are defined and regulated under separate Protocols as distinctive phenomena. However, it is difficult to identify victims of human trafficking when they are or were involved

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<sup>72</sup> Jennifer Rankin, 'Human Traffickers 'Using Migration Crisis' to Force More People into Slavery' *The Guardian* (19 May 2016) <<http://www.theguardian.com/world/2016/may/19/human-traffickers-using-migration-crisis-to-force-more-people-into-slavery>> accessed 6 March 2017.

<sup>73</sup> Bassem Mroue, 'Lebanon Shocked Over Sex trafficking of Young Syrian Women' *AP the Big Story* (13 April 2016) <<http://bigstory.ap.org/article/72253307caef4863858d659ce6686808/lebanon-shocked-over-sex-trafficking-young-syrian-women>> accessed 6 March 2017.

<sup>74</sup> Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law* 789, at 792.

in illegal activity - in such cases a smuggled person may become a trafficked person. For this reason, this thesis explains that even though legally the distinction between trafficking and smuggling is clear, interchangeable usage is the result of a poorly defined continuum generated by convoluted international legal rules. As was argued, 'trafficking and more voluntary forms of undocumented migrations are best thought of as a continuum' as it is not easy to establish where the elements of deception and/or coercion begin.<sup>75</sup> The scope and the meaning of the components of human trafficking are not clear, making it difficult to draw a line between smuggling and trafficking in cases where e.g., smuggled individuals are deceived about the conditions of their awaiting journey, or when they are tricked about the working conditions in their destination state after a dangerous journey through illegal channels. In light of the definitions generated by the Trafficking and Smuggling Protocols,

(...) we now know that smuggling is, simply, the unlawful movement of people across national borders for profit. Trafficking, on the other hand, is the much more sinister buying, selling and movement of persons within or between, countries through (in the case of adults) a range of means such as coercion and deception, for the express purpose of exploiting them.<sup>76</sup>

This means that '[e]ven though knowledge of what awaits them in the destination country varies from one victim to the other, the core difference is that human trafficking is 'inherently exploitative', whereas migrant smuggling is 'only incidentally exploitative''.<sup>77</sup>

Human trafficking has a more distinctive relationship with exploitation than migrant smuggling does.

Irrespective of the vague scope of the main components of trafficking, the different purposes of these two phenomena, both of which are regulated by international law, help in addressing them as different crimes. The difference(s) between trafficking and slavery is important to discuss because, in order to set forth the concern around victim protection, it is crucial to capture the scope and

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<sup>75</sup> John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 38(3) *International Migration* 31, at 33.

<sup>76</sup> Anne T Gallagher & Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking Lessons from the Front Line' (2008) 18(3) *International Criminal Justice Review* 318, at 319.

<sup>77</sup> Gallagher, *The International Law of Human Trafficking* (n 2) 52.

meaning of human trafficking crimes. As explained, ‘if a trafficked person is not identified at all, or is incorrectly identified as [a] criminal or as an irregular or smuggled migrant, then this will directly affect the ability of that person to access the rights to which she or he is entitled’,<sup>78</sup> or the victim will be treated as a ‘normal’ offender.<sup>79</sup> In most countries trafficked persons are treated as illegal aliens or criminals, and recycled into another form of trafficking or criminality:<sup>80</sup> they find themselves arrested and/or deported rather than protected.<sup>81</sup> Thus, this thesis has looked at the ‘definitional quagmire’ of pinning down what encompasses trafficking, because ‘obligations that we now take for granted, for example to criminalise trafficking and to protect victims, would be meaningless without the anchor of an agreed definition’.<sup>82</sup>

## 5.2 International Law of Human Trafficking: Gaps and Prospects

### 5.2.1 Towards a Clear Understanding of the Gaps in the International Legal Framework of Human Trafficking Generating a Complex Phenomenon

Despite several developments within the realm of international counter-human-trafficking law, trafficking remains a complicated and complex modern-day issue, for which scholars and the international community have continued to suggest inconsistent definitions.<sup>83</sup> The major reasons for this complexity and related gaps in the international legal framework of human trafficking can be brought together in light of this thesis’ analysis as follows:

<sup>78</sup> Anne T Gallagher, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations Publication, 2010)

<[https://works.bepress.com/anne\\_gallagher/15/](https://works.bepress.com/anne_gallagher/15/)> accessed 24 August 2016.

<sup>79</sup> Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (OSCE), *Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking - In Consultation with the Alliance Against Trafficking in Persons Expert Co-Ordination Team* (OSCE, 2013), 16.

<sup>80</sup> Paul Peachey, ‘Slavery Victims are Being Jailed for Crimes They were Forced to Commit, Warns Anti-Slavery Tsar’ *Independent* (18 October 2015)

<<http://www.independent.co.uk/news/uk/crime/slavery-victims-are-being-jailed-for-crimes-they-were-forced-to-commit-warns-anti-slavery-tsar-a6698996.html>> accessed 22 August 2016.

<sup>81</sup> Martina Vandenberg, ‘Complicity, Corruption, and Human Rights: Trafficking in Human Beings’ (2002) 34(3) *Case Western Reserve Journal of International Law* 323, at 329.

<sup>82</sup> Anne T Gallagher, ‘Two Cheers for the Trafficking Protocol’ (2015) 4 *Anti-Trafficking Review* 14, at 15.

<sup>83</sup> Erin O’Brien & Sharon Hayes & Belinda Carpenter, *The Politics of Sex Trafficking* (1<sup>st</sup> published Palgrave Macmillan, 2013), 103.

The major issue is not the scope of the definition of trafficking, but rather of its potential breadth, such that the Protocol does not define elements of human trafficking, particularly exploitation, deception and coercion. This is why the Protocol's broad definition leaves room for different interpretations, leading to the definitional quagmire of the term.<sup>84</sup> The definition fails to describe the coercive psychological process used by traffickers to recruit and control human trafficking victims.<sup>85</sup> Thus, for example, 'some States have adopted a broad understanding of the term "abuse of a position of vulnerability" that enables courts to characterise the prostitution or economic exploitation of poor migrants as "trafficking"'.<sup>86</sup>

The failure of the Protocol to precisely delimit 'exploitation' (the 'purpose' of trafficking) has enabled states to extend the definition to include practices as diverse as illegal, unethical adoptions; commercial surrogacy; begging; prostitution/pornography; involvement in criminal activities; use in armed conflict or religious rituals; and kidnapping for the purposes of extortion or political terrorism. Ambiguities in the definition have also supported the careless and increasingly frequent equation of trafficking with slavery and 'modern slavery' (the latter term unknown to international law).<sup>87</sup>

The lack of clear lines delimiting 'trafficking' (as explained above) are why Chapter I looked at the root causes and different forms of trafficking occurrences in a broad brush, to include child recruitment during armed conflict and certain other economic and social reasons leading to exploitation of human beings. Such an expansive approach to trafficking crimes has at times been criticised as an 'expansionist creep'. This thesis exemplified trafficking occurrences along such a wide spectrum so to build a foundation for the analysis conducted in Chapter III. As explained in that chapter, the Trafficking Protocol's definition can be applied in many different cases. However, this kind of

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<sup>84</sup> Job Elom Ngwe & Oko Elechi, 'Human Trafficking: The Modern Day Slavery of the 21st Century' (2012) 6(1/2) *African Journal of Criminology & Justice Studies* 103, at 105; UNODC, 'The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (2015) Issue Paper, 21 <[https://www.unodc.org/documents/human-trafficking/2015/UNODC\\_IP\\_Exploitation\\_2015.pdf](https://www.unodc.org/documents/human-trafficking/2015/UNODC_IP_Exploitation_2015.pdf)> accessed 6 March 2017.

<sup>85</sup> Jodie G Beeson, 'Psychology of Human Trafficking' in Michael J Palmiotto (ed), *Combating Human Trafficking: A Multidisciplinary Approach* (CRC Press -Taylor & Francis Group, 2015), 48.

<sup>86</sup> Gallagher, 'Two Cheers for the Trafficking Protocol' (n 82) 22.

<sup>87</sup> *ibid* 30.

expansionist interpretation of the Protocol's definition could lead to different understandings. As such, in the aim of expanding the usage of exploitation in the context of trafficking, every kind of exploitative practice can be perceived as a form of human trafficking, as was observed -and criticized accordingly- for situations of slavery. One of the major gaps of international counter-trafficking law pertains to the meaning of 'exploitation'. As a concept, exploitation is not only painfully unclear in how it is often defined, but also 'there is no adequate analytical basis for the understanding of exploitation under international law'.<sup>88</sup> Of course, this is not for lack of a range of disciplines having occupied themselves with seeking to establish a meaning for 'exploitation' as a term.<sup>89</sup> It is because of this ambiguity that continuing definitional ambiguity that the conditions governing the application of the concept of exploitation in trafficking cases are not apparent - nor does the Trafficking Protocol offer the final word.<sup>90</sup> The latter ambiguity could be due to a number of reasons, including the 'immense diversity between and within trafficking systems'.<sup>91</sup> Indeed, the Trafficking Protocol regulates exploitation as the end purpose of trafficking and acknowledges the many different types of exploitation: 'the inclusion of the phrase 'at a minimum' means that 'exploitation' goes further than those types of exploitation enumerated in the trafficking conventions.'<sup>92</sup> Yet since it does not provide any explicit explanation for exploitation,<sup>93</sup> it can be interpreted that the Protocol broadens the definition of trafficking to include all forms of forced labour, including that of victims of slavery of any gender who can be trafficked within or across borders.<sup>94</sup>

Different forms of exploitation which are regularised by the Trafficking Protocol, also defined under different international treaties, including commercial sexual exploitation and other forms of sexual exploitation transferring women and girls illegally from their home to a country in which they are forced into prostitution, the escort branch, sex

<sup>88</sup> Gregor Noll, 'The Insecurity of Trafficking in International Law' in Vincent Chetail & M Carlos-Tschopp (eds), *Globalization, Migration and Human Rights: International Law Under Review* (Vol II, Bruylant, 2007), 347.

<sup>89</sup> UNODC, 'The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (n 84) 21.

<sup>90</sup> See John Lawrence Hill, 'Exploitation' (1994) 79 *Cornell Law Review* 635.

<sup>91</sup> Sonal Pandey et al, 'Human Trafficking: Popular Models of Interception and Intervention' in Gyan P Agarwal & Sunil K Choudhary & Reenu Gupta (eds), *Human rights in Changing Times* (Cambridge Scholars Publishing, 2013), 45.

<sup>92</sup> Allain, *The Law and Slavery Prohibiting Human Exploitation* (n 31) 348.

<sup>93</sup> Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor' (2007) 36(1) *Journal of International Law & Policy* 9, at 14.

<sup>94</sup> Marjan Wijers, 'Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 56, at 7.

entertainment, web cam sex, or pornography; forced labour or services; slavery, servitude and other practices similar to slavery; removal of organs for the purpose of illegal transplants; illegal adoption; forced begging and forced to commit criminal acts; the worst forms of child labour as set out by the ILO Convention on the Worst Forms of Child Labour.<sup>95</sup>

For that reason alone, trafficking can be construed as an umbrella-term covering a range of actions and outcomes.

Related to the afore-mentioned criticism, the Trafficking Protocol also addresses non-forced or even overtly consensual activities that are seen to fall into the realm of sexual exploitation.<sup>96</sup> Yet the terms 'exploitation of the prostitution of others' and 'sexual exploitation' were intentionally left undefined in the Protocol by leaving the question of how to address prostitution to the discretion of individual states and their domestic laws.<sup>97</sup> For this reason, it is also not clear whether prostitution and other commercial sexual practices are always to be regarded as exploitative. Similarly, a false distinction between prostitution and trafficking has caused an assumption that demands prostitution to have been created through trafficking, even though there is no reason why prostitution would demand trafficked participants.<sup>98</sup> This kind of narrow approach may also be because states' power to legislate has the power to redefine reality and normalise the exploitation of individuals and groups.<sup>99</sup>

E.g., past campaigns have placed a strong emphasis on the trafficking of women for the purpose of sexual exploitation, that is:

(...) of the twenty-eight international campaigns that were sampled in research conducted by The University of Queensland Human Trafficking Working Group in 2010, 29% were focused exclusively on the issue of trafficking for sexual exploitation. This percentage was even higher in

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<sup>95</sup> Jill E B Coster van Voorhout, 'Human Trafficking for Labour Exploitation: Interpreting The Crime' (2007) 3 *Utrecht Law Review* 44, at 44.

<sup>96</sup> *ibid* 46.

<sup>97</sup> Ronald Weitzer, 'Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation' 101(4) *Journal of Criminal Law and Criminology* 1337, at 1344.

<sup>98</sup> *ibid* 1344.

<sup>99</sup> Karen E Bravo, 'Interrogating The State's Role in Human Trafficking' (2015) 25 *Indiana International & Comparative Law Review* 9, at 9.

the Australian context with 50% of sampled campaigns directed solely at trafficking for sexual exploitation.<sup>100</sup>

Indeed, in many ways, although the Protocol does not make it explicitly clear, prostitution, trafficking, and other forms of sexual exploitation including pornography may be seen as overlapping in many ways. For current purposes, it should be noted that pornography is easily accessible in some cultures/societies. In turn, the production of pornography can and does often lead to exploitation through trafficking for females. Furthermore, pornography may be seen as suggesting that women always consent to sex, even under duress/force, which also encourages exploitation.<sup>101</sup> For instance,

‘One camp would insist that no women would ever willingly engage in prostitution whatever her age, making all “pimps” and “johns” traffickers. The other camp insists that while prostitution may not be an ideal first choice, women over the age of 18 have agency and have the right to use their bodies as they wish.’<sup>102</sup>

These interpretations also pertain to obligations of protection, considering how the unclear definition of trafficking affects the process of victim identification. Gallagher and Paul stressed that ‘the obligation to actively identify victims of

<sup>100</sup> Andreas Schloenhardt & Paris Astill-Torchia & Jarrod M Jolly, ‘Be Careful What You Pay For: Awareness Raising on Trafficking in Persons’ (2012) 11(2) *Washington University Global Studies Law Review* 415, at 423.

<sup>101</sup> Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (1<sup>st</sup> ed, Belknap Press - Harvard University Press, 2006), 88.

Mackinnon argued following:

Pornography is clearly covered as sex trafficking [sic] under this [Trafficking Protocol] definition. For pornography, women and children are recruited, transported, provided and obtained for sex acts on account of which, typically, money is given to pornography pimps and received by lesser pimps. Then, each time the pornography is exchanged, the trafficking continues as the women and children in it are transported and provided for sex, sold and bought again. Doing all these things for the purpose of exploiting the prostitution of others- which prostitution intrinsically does- make it trafficking in persons’. Catherine A. MacKinnon, ‘Pornography as Trafficking’ (2004) 26 *Michigan Journal of International Law* 933, at 1004.

Yet on the other hand, Gallagher concludes that

in the case of adults, however, the additional requirement of means operates to restrict application of the definition to only those situations in which the recruitment, transport, receipt etc. was made possible through deception, force, coercion, abuse of authority etc. The argument that sale and resale of images amounts to trafficking is equally difficult to sustain. Equating pornography with prostitution does not strengthen Mackinnon’s argument, as the drafters of the Trafficking Protocol were explicit on the point that the definition did *not* operate to regulate or even pronounce on prostitution: Travaux Préparatoires for the Organised Crime Convention and Protocols, 347; Gallagher, *The International Law of Human Trafficking* (n 2) 51.

<sup>102</sup> Claude D’Estree, ‘Voices from Victims and Survivors of Human Trafficking’ in John Winterdyk & Benjamin Perrin & Philip Reichel (eds), *Human Trafficking Exploring the International Nature, Concerns, and Complexities* (CRC Press, 2012), 83; Heather Monasky, ‘Note: On Comprehensive Prostitution Reform: Criminalising the Trafficker and the Trick, but not the Victim — Sweden’s Sexköpslagen in America’ (2011) 37(4) *William Mitchell Law Review* 1989.

trafficking is the foundation upon which all other obligations with respect to victims rests', and it is also essential to prosecute traffickers, because of the reliance on victim cooperation and testimony.<sup>103</sup> Yet for several reasons, including internal subjective factors, victim identification is not an easy task. The latter is very problematic in the context of international legal rules.<sup>104</sup> E.g., victims are fallen prey mostly due to their vulnerabilities, which are shaped by circumstances affecting their freedom of choice and/or consent:

If you were just some African, the deal would be simple. You give me your kidney; I give you a new identity. I sell the kidney for 10 grand so I am happy. The person who needs the kidney gets cured, so he is happy. The person who sold his kidney gets to stay in this beautiful country, so he is happy. My whole business is based on happiness.<sup>105</sup>

International law has provided no particular answer to questions pertaining to the status of trafficked victims and their identification: accordingly, such obligation of identification is not contained within the Trafficking Protocol but is reflected in both the European Convention and the UN Principles and Guidelines.<sup>106</sup>

Considering the above analysis of major gaps in international counter human trafficking law, this thesis concludes the following:

Trafficking can be defined as a form of domination and degradation of human beings by other human beings;<sup>107</sup> it is all about 'the action of transporting people by means of force or deception in order to control and exploit them'.<sup>108</sup>

It can be concluded that the Trafficking Protocol has defined human trafficking through the questions of 'what is done', 'how it is done' and 'why it is done', explained in Chapter III in terms of 'actions - means - purpose'. It also regulates trafficking as a process, entailing several phases including recruitment,

<sup>103</sup> Gallagher & Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking Lessons from the Front Line' (n 76) 332.

<sup>104</sup> Clark Wolf, 'Commodification, Exploitation, and the Market for Transplant Organs Discussion of Dirty Pretty Things - A Discussion of Dirty Pretty Things' in Sandra Shapshay (ed), *Bioethics at the Movies* (The Johns Hopkins University Press, 2009), 171.

<sup>105</sup> *ibid* 171.

<sup>106</sup> See Gallagher, 'Two Cheers for the Trafficking Protocol' (n 82).

<sup>107</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel Pub, 1993), 148.

<sup>108</sup> Kevin Bales, 'Understanding the Demand Behind Human Trafficking' in *Understanding Global Slavery: A Reader* (University of California Press, 2005), 155.

transportation and control at the destination.<sup>109</sup> Note that traffickers and consumers are not the same persons in every setting of trafficking cases. Even though, in some incidents one trafficker may conduct the whole process, in the other scenarios such as food production, sexual exploitation, child labour in the chocolate industry, wholesalers, recruiters, traffickers who harvest and move people in to the trafficking are on the scene.<sup>110</sup> Thus, this thesis posits that human trafficking, forced labour, sexual exploitation and slavery all refer to forms of human exploitation. At the same time, some nuances help differentiate these phenomena (whether they are large or small), despite overwhelming similarity in certain situations. E.g., whether exploiters are private agents or state law enforcement; purpose of exploitation, movement of persons.<sup>111</sup> These nuances are also implied in the questions of who the exploiters are, what they gain, what the movement of persons involves and to what degree the exploitation is consensual.<sup>112</sup>

This thesis identifies exploitation in its abstract form as having an economic benefit (i.e., to make money) and/or involve the abuse of an individual.<sup>113</sup> Even though the broad scope of the formulation of exploitation leads to possible overlaps between prostitution, sexual exploitation, forced labour, servitude, slavery and organ trafficking, these are different forms of human exploitation. In cases of trafficking, since all of the mentioned forms of human exploitation are regulated as the end purposes of trafficking under the Trafficking Protocol, in order to conclude that a person has been trafficked, this person does not have to be held in slavery; rather, s/he has to be transported for purposes of this kind of exploitation, namely slavery. The intent to exploit is enough to qualify something as trafficking. Even if actual exploitation is not perpetrated, this only means that the end purpose of trafficking has not yet been completed. It is the exploitation, prospective or actual, that determines trafficking; this

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<sup>109</sup> Pierre-Arnaud Chouvy (ed), *An Atlas of Trafficking in Southeast Asia: The Illegal Trade in Arms, Drugs, People, Counterfeit Goods and Natural Resources in Mainland Southeast Asia* (I.B. Tauris Publishers, 2013), 58.

<sup>110</sup> Bales, 'Understanding the Demand Behind Human Trafficking' (n 108) 158.

<sup>111</sup> Johannes Koettl, 'Human Trafficking, Modern Slavery, and Economic Exploitation - a Discussion on Definitions, Prevalence, Relevance for Development, and Roles for the World Bank in the Fight Against Human Trafficking' (2009) 0911 SP Discussion Paper <<http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0911.pdf>> accessed 24 April 2017.

<sup>112</sup> *ibid* 46.

<sup>113</sup> Vijayarasa & Villarino (n 29) 65.

phenomenon is always about exploitation, and the acts of traffickers are always exploitative.

It can be concluded that there is substantial room for improvement in the Protocol both due to the definitional quagmire - including the vague concept of exploitation as a component of trafficking, which has led to different interpretations and state legislation - and considering the constraints on victim identification and the non-criminalisation principle.

### **5.2.2 Overcoming Protective Gaps and Ambiguities in the Law**

Despite the major issues surrounding the meaning of human trafficking having been addressed, human trafficking might also have different meanings at the national level, depending on the country.<sup>114</sup> Thus, state legislators may not simply transpose the Trafficking Protocol definition verbatim into their legislation.<sup>115</sup> Instead, countries often incorporate the definition of trafficking into their domestic legislative practices, whereby the term is crafted according to their own understanding of what constitutes 'trafficking':<sup>116</sup> 'the potential breadth and narrowness of the definition raises several issues about which States have taken quite different positions'.<sup>117</sup> This is well within their rights, as the UN has made clear that the general provisions and definitions are not mandated by the Protocol per se.<sup>118</sup> Thus, it may be asserted that establishing a definition in domestic law of what constitutes trafficking may be the most effective approach.<sup>119</sup> That way, legislators around the world can determine for themselves what constitutes such concepts as 'unfair advantage'.<sup>120</sup> The Protocol was not designed to be a comprehensive international law against human trafficking; rather, it was created such that countries could set their own legislation to properly deal with regional issues.<sup>121</sup>

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<sup>114</sup> Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7(1) *Albany Government Law Review* 112, at 142.

<sup>115</sup> *ibid* 122.

<sup>116</sup> *ibid* 122.

<sup>117</sup> UNODC, 'The Concept of 'Exploitation' In The Trafficking in Persons Protocol' (n 84) 5.

<sup>118</sup> Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7(1) *Albany Government Law Review* 111, at 122.

<sup>119</sup> *ibid* 130.

<sup>120</sup> *ibid* 130.

<sup>121</sup> Connor J Baer, 'A Firm Foundation a Defence of the UN Trafficking Protocol' (2012) 3 *Grove City College Journal of Law & Public Policy* 103, at 122.

On the other hand, trafficking cannot be solved by independent domestic responses: anti-trafficking policies must ‘combine and integrate various obligations of the involved countries into a single non-fragmented framework’ considering the transnational nature of trafficking.<sup>122</sup> As demonstrated above, the jurisdictions of states across the globe are not truly compatible with each other, as when they speak of trafficking they may be speaking about different things in different contexts.<sup>123</sup> Yet in accordance to the principle *nullem crimen, nulla poena, sine lege*, ‘there is no crime, there is no punishment, without law’ - states are obliged to ensure that human trafficking is introduced into the criminal code by ratification of the Trafficking Protocol. Irrespective of the complex understanding of historical, legal, social and economic differences, a ‘one size fits all’ solution may in fact exist to guide states in defining and combating human trafficking.<sup>124</sup> Strategies do not have to be shaped by the cultural and social differences of different regions and legal cultures,<sup>125</sup> as in most cases, best practice know no cultural boundaries.<sup>126</sup> After all, the general rule of law within the context of (local) socio-economics, in any given system, will often be exploited by those who find a way to do so.<sup>127</sup> Further, laws and regulations neither reduce the demand for cheap labour nor provide incentives for people to stay in their home countries.<sup>128</sup> For this reason, even though each state has its own responsibility to understand the dominant problems to do with trafficking in that region in order to find relevant solutions, human trafficking should simultaneously be regulated clearly by international law to the extent possible. Seeing that trafficking is a global activity, it is crucial for international/global law to be wholly involved in its abolishment.<sup>129</sup> That is why

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<sup>122</sup> Anna Gekht, ‘Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings’ (2009) 37(1) *Denver Journal International Law & Policy* 29, at 30.

<sup>123</sup> Allain, ‘No Effective Trafficking Definition Exits: Domestic Implementation of the Palermo Protocol’ (n 118) 111.

<sup>124</sup> Ann Jordan, ‘Slavery, Forced Labour, Debt Bondage, and Human Trafficking: From Conceptual Confusion to Targeted Solutions’, (2011) Issue Paper, Program on Human Trafficking and Forced Labour, Center for Human Rights and Humanitarian Law, at 10 <<http://traffickingroundtable.org/wp-content/uploads/2012/07/Issue-Paper-2-Slavery-Forced-Labor-Debt-Bondage-and-Human-Trafficking.pdf>> accessed 30 June 2016.

<sup>125</sup> Nelken, ‘Human Trafficking and Legal Culture’ (n 22) 513.

<sup>126</sup> See Gallagher & Holmes, ‘Developing an Effective Criminal Justice Response to Trafficking in Persons: Lessons from the Front Line’ (n 76).

<sup>127</sup> W Brian Arthur, ‘All Systems will be Gamed: Exploitive Behaviour in Economic and Social Systems’ in *Complexity and the Economy* (1<sup>st</sup> ed, Oxford University Press, 2014), 1.

<sup>128</sup> Pardis Mahdavi, *Gridlock: Labor, Migration, and Human Trafficking in Dubai* (Stanford University Press, 2011), 32.

<sup>129</sup> Virginia M Funk & T Markus Kendall, *Child Exploitation and Trafficking Examining the Global Challenges and U.S. Responses* (Rowman & Littlefield Publishers INC, 2012), 124.

cooperative effort among states is key for combating trafficking internationally. It is essential to develop an international common view on certain key concepts, thus leaving no unnecessary gaps that would likely cause different regional interpretations regarding such human trafficking concerns as clear definitions and proper victim status.

As addressed in Chapter III, the Trafficking Protocol's definition of human trafficking has been interpreted differently in different contemporary instances. For instance, '[t]he increasingly common claims that 'all trafficking is slavery' and 'all forced labour is trafficking' (and thereby slavery) are just two manifestations of what one commentator has aptly termed 'exploitation creep'.<sup>130</sup> 'The exploitation element of the definition of trafficking is often not well or uniformly understood, which in turn obstructs relevant investigations and prosecutions'.<sup>131</sup> Thus, 'the absence of clear definitions in the law (both of exploitation and of stipulated forms of exploitation) is seen as part of the problem, providing individuals with a measure of interpretative discretion that can lead to inconsistency'.<sup>132</sup>

Indeed, the 'means' element and the 'purpose' (exploitation) contained in the Protocol have not been understood clearly enough to allow the international community to capture the scope of human trafficking. These terms, particularly exploitation, are not defined definitively under international law, although a range of disciplines, including law, philosophy, economics and politics, have been occupied with examining the meaning and definition of exploitation. It should be noted that oftentimes, instead of offering a definition of exploitation per se, certain practices commonly identified as exploitative are instead defined.<sup>133</sup>

It has been controversial among scholars how narrowly or broadly trafficking should be viewed in terms of different perspective. One of the reasons is that the Trafficking Protocol does not define exploitation; it only provides an open-ended list of examples 'at a minimum', which also confirms that 'forms of exploitation not explicitly mentioned in the definition could also be captured

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<sup>130</sup> UNODC, 'The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (n 84) 19.

<sup>131</sup> Funk & Kendall (n 129) 114.

<sup>132</sup> UNODC, 'The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (n 84) 11.

<sup>133</sup> *ibid* 23.

within the Protocol's definition of trafficking in persons'.<sup>134</sup> A review of the *Travaux Préparatoires for the Organized Crime Convention and Protocols*, and the *2009 UNODC Model Law*, confirm that

The forms of exploitation listed in the Trafficking in Persons Protocol are an integral part of its substantive content. Indeed, it is the substance and scope of these forms that, taken together, provide the minimum parameters of the third element of the definition set out in the Protocol. Critically the stipulated forms constitute a minimum list of exploitative purposes. States Parties are required to at least include these forms of exploitation but may also target other forms of exploitation.<sup>135</sup>

Indeed, as long as they fit the definition (verbatim) of the Trafficking Protocol, a range of different exploitative practices can be understood as human trafficking.

In general, human trafficking is a complex crime and thus difficult to properly portray in a global context.<sup>136</sup> It is a growing human trade that has been regulated in the context of international legal rules and is facing many contemporary challenges. This thesis underlines the fact that human trafficking continues to flourish all over the world, making it crucial to investigate its root causes in order to protect vulnerable individuals.<sup>137</sup>

Friesendorf has concluded that 'over recent years, the link between human trafficking and organised crime, fears over illegal migration, and the violent nature of trafficking has caused significant concern among policymakers and members of the public'. He thus indicates that a criminal law approach should be at the centre of tackling trafficking.<sup>138</sup> On the other hand, the emphasis of a human rights based approach in any human trafficking case must be central in order to hold states accountable for how they treat both their nationals and other individuals under their control. Human rights based approach also offers legal and political space for disenfranchised individuals to claim these needs as rights, and thereby raises the issue of state responsibility.<sup>139</sup> Additionally, this

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<sup>134</sup> *ibid* 24.

<sup>135</sup> UNODC, 'The Concept of 'Exploitation' In The Trafficking in Persons Protocol' (n 84) 27.

<sup>136</sup> Sharen Hayes & Belinda Carpenter, *The Politics of Sex Trafficking - A Moral Geography* (1<sup>st</sup> published, Palgrave Macmillan, 2013), 103.

<sup>137</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (1<sup>st</sup> published, Oxford University Press, 2008), 4.

<sup>138</sup> Cornelius Friesendorf, 'Pathologies of Security Governance: Efforts against Human Trafficking in Europe' (2007) 38(3) *SAGE Journals* 379, at 379.

<sup>139</sup> Janie Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13(1) *Indiana Journal of Global Legal Studies* 137, at 151.

approach requires member states to ensure coordination amongst various governmental agencies involved in anti-trafficking activities by acknowledging trafficking as a violation of human rights. All those involved in anti-trafficking efforts should integrate human rights into their analysis of the problem and their responses. Human rights based approach considers every stage that impacts the law, policy, and practice, as well as individuals who have been trafficked or are vulnerable to being trafficked and whose rights and freedom are compromised. For this reason, human trafficking cannot be dealt with by focusing on dimensions of it having to do with enforcement or criminal law at the jeopardy of the human rights perspective on the issue, as is arguably done by the Trafficking Protocol. E.g., definition of ‘consent’ or ‘coercion’ is more an imperative moral, political and practical negotiation; such that when a poor woman faces the choice between starvation and bonded labour, her ‘choice’ to opt for bonded labour cannot be simply explained as ‘labour rights are human rights’- it is more about the socio-economic rights and the kinds of human rights that they can expect to enjoy.<sup>140</sup> However, this thesis also acknowledges that ‘the alternative—a human rights treaty on trafficking—was never a serious possibility in the first place because it would not have received the necessary level of political support’.<sup>141</sup> On the positive side, considering the Trafficking Protocol’s vague language in many aspects, including in its definition of trafficking, victim support and the criminal justice response, international law has provided a conduit in order to overcome the gaps of the Protocol: ‘the UN Trafficking Principles and Guidelines provided a way forward that has supported the evolution of a cohesive “international law of human trafficking” which weaves together human rights and transnational criminal law’.<sup>142</sup> This instrument, along with regional ones such as the 2005 Council of Europe Convention, have led to widespread acceptance of the idea that victims hold special rights due to their status, such that ‘no State could (or indeed does) convincingly argue that its human rights obligations in this area are limited to those set out in the Trafficking Protocol’.<sup>143</sup>

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<sup>140</sup> Klara Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (Joseph Rowntree Foundation, 2010) <<http://www.gla.gov.uk/media/1585/jrf-between-decent-work-and-forced-labour.pdf>> accessed 1 December 2016.

<sup>141</sup> Gallagher, ‘Two Cheers for the Trafficking Protocol’ (n 82) 17.

<sup>142</sup> *ibid* 17.

<sup>143</sup> *ibid* 18.

Therefore, this thesis' ultimate recommendation is that human trafficking be engaged with as a growing global concern; trafficking should thus be confronted as yet another component of a response to severe global inequalities on the spectrum of human exploitation.<sup>144</sup>



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<sup>144</sup> Mahdavi, *Gridlock: Labor, Migration, and Human Trafficking in Dubai* (n 128) 31.

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