When is Human Trafficking Slavery or Enslavement?

Human Trafficking at the Intersection of Human Rights Law and Criminal Law

Kerttuli Lingenfelter

Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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European University Institute
Department of Law

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Researcher declaration to accompany the submission of written work
Department of Law – LL.M. Programme

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Thesis summary

This thesis explores the international definitions of slavery, enslavement and human trafficking to determine if and when human trafficking is slavery. Using predominantly the legal method, the thesis argues that there is an overlap between the definitions, yet they are not synonymous. Furthermore, the principles of human rights law and criminal law are compared in the context of slavery and human trafficking. Although the systems can and do engage with each other, it is posited that in a criminal setting courts should be wary of relying on human rights jurisprudence to determine the substance of the criminal definition. This is because human rights are interpreted in an evolutive, teleological way, whereas criminal courts should be bound by the principle of legality. Human rights courts, on the other hand, could and should engage more with the contours of the definitions of human trafficking and slavery – not to determine criminal liability, but instead to produce a deeper, more nuanced understanding of the structures that render persons vulnerable to exploitation. In this way, the thesis asserts, a human rights approach could move beyond the current model, which is excessively oriented toward criminal investigation and punishment. Due to current challenges posed by conflict and post-conflict situations, the thesis ends by reflecting on the potential of human trafficking being prosecuted by the International Criminal Court as a crime against humanity. Although the possibility has found some support within academia, this thesis proposes that if and when human trafficking does amount to slavery and meets the other elements of crimes against humanity, it has and can be prosecuted. Some forms of human trafficking, as of all other acts constituting crimes against humanity, will, however, fall outside the scope of international criminal law.

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Introduction

At times it seems as though the law on slavery has become riddled with confusion, and some academics fear this will water down the law's original meaning and purpose.[1] In the 21st century attention around human trafficking brought slavery back to the forefront of many debates. Brought together under the umbrella of so-called "contemporary slavery", public figures, NGOs, academics and even courts have come to use the two concepts almost interchangeably. The term 'contemporary slavery', despite its common use, "enjoys no utility under international law".[2] The law still draws distinctions between the two, forcing courts and tribunals to grapple with these concepts. Out of this body of jurisprudence a precarious balance between slavery and human trafficking has emerged.

This thesis explores the human rights law and criminal law dimensions of human trafficking and slavery. By drawing upon the differences in the criminal definitions of human trafficking and slavery, I elaborate upon the ways in which criminal law still differentiates between the two concepts. However, it is interesting that, while human trafficking itself is "rarely linked to the violation of a specific provision of a specific treaty",[3] the human rights dimensions of human trafficking have been addressed under the specific provisions prohibiting slavery, servitude and forced labor. This is why the implied slavery – human trafficking dichotomy is the starting point for this thesis.

The argument made herein is that criminal law provides only a partial account of human trafficking because, in short, a criminal proceeding can only examine cases of slavery from the perspective of whether or not a specific, individual perpetrator can be held responsible. Human rights law, on the other hand, can and should engage more readily with the underlying causes and vulnerabilities. Currently, there is too much confusion between human rights law and international criminal law without a clear respect toward the differences underlying their aims and methods of interpretation,[4] which causes a conflation of the concepts of human trafficking and slavery. To clarify common misunderstandings, Chapter 1 provides a detailed account of

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[1] Jean Allain, 'The Definition of Slavery in International Law' (2008) 52 Howard Law Journal 239, 241. Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (AltaMira Press 2003) 453.

[2] Nicole Siller, '"Modern Slavery": Does International Law Distinguish between Slavery, Enslavement and Trafficking?' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2878231 405 <https://papers.ssrn.com/abstract=2878231> accessed 13 February 2018.

[3] Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' [2009] Virginia Journal of International Law, Vol. 49, No. 4, 2009 793.

[4] Vladislava Stoyanova, 'United Nations against Slavery: Unravelling Concepts, Institutions and Obligations' (2017) 38 Michigan Journal of International Law; Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?' (2017) 17 Human Rights Law Review 701.

the definition of human trafficking. Chapter 2 defines slavery, and Chapter 3 ties together Chapters 1 and 2 by comparing and contrasting human trafficking and slavery in light of the interpretative differences of human rights courts *vis-à-vis* criminal courts. The last two chapters aim to take the discussion further, first by exploring the untapped potential of human rights law (Chapter 4) and demonstrating why, contrary to some recent claims, there is no need to add human trafficking to the list of crimes against humanity (Chapter 5).

I predominantly use a doctrinal methodology throughout this thesis. However, it would be misleading to imply that this were a purely doctrinal work. Instead, at times I also employ some critical and law in context approaches. The cases used are both domestic and international. This is mostly because human trafficking remains a part of transnational criminal law, thus even the international provisions are implemented primarily by domestic courts. The international cases are both from criminal courts as well as human rights courts.

1. Human trafficking

Human trafficking, unlike slavery, is not always mentioned explicitly in human rights instruments.[5] Instead, many of the international instruments concerning human trafficking are of a transnational criminal nature and have as their purposes the criminalization of human trafficking and the enhancement of transnational cooperation in criminal proceedings. As a starting point for this thesis, the first chapter introduces the conduct of human trafficking as it is defined in law. Moving from the evolution of the definition to an analysis of how the current definitions are applied, the aim of this chapter is to facilitate an understanding of the ways in which human trafficking and slavery may overlap – the topic of the following chapters.

1.1 History

The first international agreement to mention the term traffic in the context of humans was the International Agreement for the Suppression of the "White Slave Traffic".[6] The term traffic was used instead of trade, and the concept of "white slaves" at this time referred only to women being procured into prostitution. The agreement obliges "[e]ach of the Governments … to have a watch kept … for persons in charge of women and girls destined for an immoral life [i.e. prostitution]." As is immediately clear, the focus was on the criminalization of the persons who were bosses, recruiters or slave-owners[7] of women and girls working in the sex industry. Soon after, in 1910, the International Convention for the Suppression of the "White Slave Traffic" was agreed upon. Following in the footsteps of its predecessor, the 1910 Convention also related purely to the procurement of women and girls into prostitution. It required each of the contracting parties to legislate adequate punishments for "[w]hoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes" and for whomever who, "in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl … for immoral purposes", noteworthily "notwithstanding that the various acts constituting the offence may have been committed in different countries."[8] Although the title of the 1910 Convention

[5] Human rights law explicitly prohibiting human trafficking includes the American Convention on Human Rights 1969 Article 6(1); Convention on the Rights of the Child 1989 Article 35; Convention on the Elimination of All Forms of Discrimination Against Women 1981 Article 6; European Union Charter of Fundamental Rights 2012 OJ C 326 Article 5.

[6] International Agreement for the Suppression of the 'White Slave Traffic' 1904 (35 Stat 1979, 1 LNTS 83).

[7] Although, at this point, women enslaved into prostitution were not always recognized as slaves.

[8] International Convention for the Suppression of the 'White Slave Traffic' 1910 (211 Consol TS 45, 1912 GR Brit TS No 20) Articles 1-3.

indicates it is a convention suppressing slavery, the described conduct strongly resembles what, today, we often call human trafficking.

Once the League of Nations came into being it began to take action and in 1921 the Convention for the Suppression of the Traffic in Women and Children was signed. The term "white slave traffic" was changed to "traffic in women and children". This illustrates the recognition of trafficking being a crime which extends beyond race, age and even sex, though at this point only the traffic in under-aged males (instead of all males) was noted.[9] It is at this point when the distinction between the terms slavery and human trafficking gets confusing. The switching of the term "white slave traffic" to "traffic in women and children" depicts a shift in conscience – it is the same traffic being described, yet the victims of that traffic are no longer necessarily considered victims of slavery.

Where human trafficking was once a concept used to describe the transport of the innocent white woman into an "immoral life"[10] the modern legal definition has expanded so as to include all placement of humans into any type of exploitation.[11]

1.2 Definition today

When UNODC set about to draft a new international suppression agreement, the purposes were to harmonize the definition of the crime of human trafficking as well as to coordinate the transnational criminal enforcement of the provision. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children[12] ('the Protocol'), adopted in 2000, set forth the first and most widely recognized international legal definition for human trafficking. Article 3(a) of the Protocol defines human trafficking as

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced

[9] D Gorman, 'Empire, Internationalism, and the Campaign against the Traffic in Women and Children in the 1920s' (2008) 19 Twentieth Century British History 186–216.

[10] Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (1999) 18 Gender Issues 23.

[11] Jean Allain, 'Genealogies of Human Trafficking and Slavery' in Ryszard Piotrowicz, Conny Rijken and Baerbel Heide Uhl, *Routledge Handbook of Human Trafficking* (Routledge 2018).

[12] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The elements of this definition can be deduced into the act, the means and the purpose. The *actus reus* of human trafficking is thus the recruitment, transportation, transfer, harbouring or receipt of persons. The act must be achieved through means of 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. The *mens rea* of human trafficking is the purpose of exploitation, which is not defined but of which a non-exhaustive list of examples is given: 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 has been copied into a number of other regional agreements on human trafficking, such as the Council of Europe Convention on Action against Trafficking in Human Beings[13] and the EU Directive on preventing and combating trafficking in human beings and protecting its victims.[14] A comparative study of cases and literature shows, however, that this seemingly straightforward definition is interpreted in various differing ways.

1.2.1 Exploitation: mens rea or actus reus?

The purpose element of human trafficking is, to date, the element which has caused the widest range of confusion and with the biggest implications.[15] There are two general approaches to the element. According to one line of thinking, human trafficking consists of the act of moving a person for the purpose of exploitation, whether or not the exploitation ensues. The second approach is that exploitation must occur for the elements of trafficking to be fulfilled. This raises two central questions related to how human trafficking is to be perceived. Firstly, if human trafficking requires exploitation, does exploitation become a second *actus reus* rather than the *mens rea*? Secondly, who is the trafficker? If human trafficking is in and of itself exploitation rather than a course of action potentially leading the victim into exploitation, the criminal responsibility may differ. In the first scenario, the trafficker must be the exploiter, whilst in the second scenario the trafficker and the exploiter may be different persons. There are some indicia that both possibilities were foreseen. For example, the UN High Commissioner

[13] The Council of Europe Convention on Action against Trafficking in Human Beings 2005 (CETS No 197).
[14] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims 2011.
[15] Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 The American Journal of International Law 609.

for Human Rights notes, that "States are also obliged to exercise due diligence in identifying traffickers, *including those who are involved in controlling and exploiting trafficked persons*"[16] (emphasis added). In other words, states are obliged to exercise due diligence in identifying both traffickers who are not involved in controlling and exploiting victims and traffickers who are.

In the criminal case of *Urizar*, the Appeal Court of Quebec concluded that as long as a clear intent to exploit or facilitate exploitation can be shown,[17] "regardless of whether or not exploitation actually ensues,"[18] a trafficker can be found to be responsible. In *Regina v. C, E, I and F*, I and F were both found to be victims of trafficking. Although they were arrested on their journey, before the exploitation took place, the elements of human trafficking were found to have been fulfilled on the basis of the perpetrator having brought I and F to the UK in a situation of debt bondage, through deception, and for the purpose of placing them into prostitution.[19] However, whilst some courts recognize that trafficking may involve both exploitation by traffickers themselves or the mere facilitation of exploitation, i.e. making the victim available for another perpetrator to exploit, not all cases demonstrate such a view.

In a case heard before a Finnish Court of Appeals, the charge for human trafficking rested on whether the exploitation of forced labour had occurred.[20] In this case, foreigners were lured to Finland with false promises of work and pay, following which they were indebted, had to work long hours and were paid very little. However, because the elements of the crime of forced labour were not met, the Court did not find the defendants guilty of human trafficking.

This brings us to a third central conundrum. What is meant by "exploitation" in the first place? Courts and academics alike may be perplexed in part because of the different ordinary meanings of the term exploitation. In *D'Souza*, this question formed a central component of the case. While the prosecutor argued that "human trafficking is not generally a complex subject. It is, essentially … pimping together with an element of exploitation"[21], the defence took the position that the definition of exploitation is vague and against the principle of legal certainty.[22] Due to the fact that the Canadian provisions offered a definition for exploitation, the judgement was in

[16] 'Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Addendum, Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) E/2002/68/Add.1 4.
[17] *R v Urizar* [2013] 2013 QCCA 46, 2013 CarswellQue 14799 C.A. Qué. Montréal 500-10-004763-106 [71,76].
[18] ibid 68.
[19] *Regina v C, E, I, F* [2014] Court of Appeal Criminal Division EWCA Crim 1483 2014 WL 3387862 No: 201305649/C4 201304989/C5 201303783/B1 201303784/B1 [32].
[20] *Turun HO 3092013 1700 R 12/1529* (Turun hovioikeus).
[21] *R v D'Souza* [2016] 2016 CarswellOnt 15051, 2016 ONSC 2749 CR-15-169-0000 [39].
[22] ibid 32, 41, 54, 57.

favour of the prosecutor. It is, nevertheless, an intriguing argument which I have rarely come across – often, a particular understanding of the notion of exploitation can merely be read between the lines rather than from an explicit explanation.

Most individual cases seem to abide by the conception that the trafficker is the exploiter or, at the very least, the would-be exploiter in cases where the exploitation has yet to take place. This could be in part because an intent to exploit another person in the form of prostitution, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs is probably most easily proven in a criminal court if that particular exploitation has actually ensued. However, when more widespread cases of human trafficking are described, or when the conduct of trafficking by organized criminal groups is enumerated, another type of "exploitation" emerges. For example, in early June 2018 the UN blacklisted six individuals for human trafficking in Libya. It was the case that one of these six individuals had trafficked persons into sexual slavery,[23] whereas most often the people were blacklisted for carrying out "illicit operations related to the trafficking and smuggling of migrants".[24] While these operations resulted in exploitation, or violence, detention or abuse, the focus seems to be on the transportation of people across territories. For example, Fitwi Abdelrazak leads a "transnational network responsible for trafficking and smuggling tens of thousands of migrants, mainly from the Horn of Africa to the coast of Libya and onwards to destination countries in Europe and the United States."[25]

Trafficking and smuggling are two very different courses of action and it is useful, at this point, to disaggregate them. Human trafficking, as set out above, has a victim. Smuggling, on the other hand, is the transportation of one person by another across an international border. It is done not to exploit the person being transported, but for the purpose of the smuggler's financial gain.[26] However, when the person being smuggled is deceived or forcibly exploited, the

[23] The Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya, 'Narrative Summary of Reasons for Listing Mohammed Kachlaf' (2018) LYi.025 <https://www.un.org/sc/suborg/en/sanctions/1970/materials/summaries/individual/mohammed-kachlaf> accessed 29 July 2018.

[24] The Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya, 'Narrative Summary of Reasons for Listing Al Rahman Al-Milad' (2018) LYi.026ABD <https://www.un.org/sc/suborg/en/sanctions/1970/materials/summaries/individual/abd-al-rahman-al-milad> accessed 29 July 2018.

[25] The Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya, 'Narrative Summary of Reasons for Listing Fitiwi Abdelrazak' (2018) LYi.022 <https://www.un.org/sc/suborg/en/sanctions/1970/materials/summaries/individual/fitiwi-abdelrazak> accessed 29 July 2018.

[26] UNODC, 'Global Study on Smuggling of Migrants 2018' (United Nations Office on Drugs and Crime 2018) Sales No. E.18.IV.9 17.

situation can be recharacterized as human trafficking.[27] As highlighted by the UNODC in its Issue Paper on The Role of Consent in the Trafficking in Persons Protocol, the "means" element of trafficking is critical when determining consent and lack thereof.[28] The means of human trafficking render the victim unable to give genuine consent. Furthermore, the person being smuggled may be in such a vulnerable position that the smuggler can extort her, thus exploiting her by taking advantage of a vulnerable position in line with the definition of trafficking. There is, thus, overlap between the two. It must be assessed, as such, on a case by case basis whether human trafficking was present in a case of smuggling. At large, human trafficking is set apart from migrant smuggling by its inherently exploitative nature.

1.2.2 Movement

As a central difference between human trafficking and smuggling is also the presence (or lack thereof) of movement. Whereas smuggling inherently requires the transportation across a border, approaches toward the *actus reus* of recruitment, transportation, transfer, harbouring or receipt of persons in human trafficking vary. Initially, the international legislation of a common definition for human trafficking was intended to solve jurisdictional issues and was thus limited to situations in which a state border was crossed.[29] Later, the driving force behind the legislation was, at least for many parties involved, an interest in curbing immigration.[30] In both situations movement was a seen as a central element to human trafficking, whether within or across states. The preamble of the Trafficking Protocol as well as the Convention to which it is attached reflect these assumptions: the Preamble of the Trafficking Protocol explicitly refers to "a comprehensive international approach in the countries of origin, transit and destination"[31] and the subject matter of the Convention is limited to cases of crimes which take place across state borders.

This element has been challenged with the rise of "exploitation creep" – today, many interpret the act of harbouring to mean that human trafficking can encompass exploitative situations in which no movement occurs.[32] Gallagher is a proponent of this interpretation, describing human

[27] ibid 16.
[28] UNODC, 'Issue Paper on the on The Role of Consent in the Trafficking in Persons Protocol' 80–85.
[29] P Twomey, 'Europe's Other Market' (2000) 2 European Journal of Migration and Law 1, 8–9.
[30] James Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' [2008] Virginia Journal of International Law, Vol. 49, No. 1, 2008 57–58.
[31] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (n 12).
[32] Chuang (n 15).

trafficking as "the movement into, or *maintenance of* an individual in, a situation of exploitation through fraud, coercion, abuse of authority or other unlawful means."[33]

In the *Urizar* case, the Court found that human trafficking does not necessitate forced movement. Instead, they maintained that the offence could be committed through actions which limit the movements of another person for the purpose of exploiting them or facilitating their exploitation.[34] Focusing on the purpose of exploitation, the Court expressed that cases of human trafficking may be very different in nature. Whether they involve movement or migration or not does not matter, as long as a clear intent to exploit or facilitate exploitation can be shown.[35]

In the words of the OHCHR, human trafficking is "the process through which individuals are placed or maintained in an exploitative situation for economic gain"[36] and covers a wide range of conduct.

1.3 The human rights dimension of human trafficking

The Protocol, albeit widely and actively referred to in both criminal and human rights proceedings, was and is highly controversial. One of the deepest criticisms relates to the role of human rights in addressing human trafficking. This controversy concerns the choice to legislate on human trafficking internationally outside the realm of human rights law. Although human rights experts were involved in the drafting of the Protocol,[37] the instrument is foremost a transnational criminal law instrument, a suppression convention,[38] aimed at the cross-border criminal investigation, prosecution and punishment of human traffickers. The core of the Protocol revolves around facilitating transnational cooperation in criminal proceedings.[39]

If the failure of the instruments preceding the Protocol were due to the fact that their "emphasis was on penal sanctions without giving adequate consideration to the endemic social and psychological reasons for the existence of the problem and without any serious attempts at

[33] Anne T Gallagher, 'Human Rights and Human Trafficking', *A. Nollekamper and A. Plakokefalos (eds) The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 1. Emphasis added.
[34] *R. v. Urizar* (n 17) [75–76].
[35] ibid 71, 76.
[36] UN Office of the High Commissioner for Human Rights, 'Human Rights and Human Trafficking' (2014) Fact Sheet No. 36 1.
[37] Gallagher (n 3) 790. See also Jo Doezema, 'Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation' (2005) 14 Social & Legal Studies 61.
[38] Neil Boister, 'Responding to Transnational Crime: The Distinguishing Features of Transnational Criminal Law' in Harmen van der Wilt and Cristophe Paulussen (eds), *Legal Responses to Transnational and International Crimes* (Edward Elgar Publishing 2017) 31–34.
[39] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (n 12) See, inter alia, Articles 2 and 4.

changing subjectivities and mores",[40] the Protocol does little to reverse that. The Protocol's language concerning the protection of the rights of victims is weak, falling short of obliging states to effectively protect victims and potential victims of trafficking.[41] Hathaway has found indicia that some states intended these effects and argues that this is why human trafficking, as a form of modern slavery, should have been dealt with purely as a violation of human rights.[42] In her response to Hathaway, Gallagher makes a point of stating that human rights law has failed to respond to slavery despite its longstanding potential to do so. She finds that the criminal justice paradigm has furthered the agenda to end slavery more effectively than the human rights centered approach ever did.[43]

Human trafficking has, nonetheless, been brought back into the sphere of human rights law by way of human rights jurisprudence. The European Court of Human Rights ('ECtHR') was the first to extend the scope of guarantees offered by the prohibition of slavery, servitude and forced labour (Article 4) to human trafficking. Beyond the negative obligation of states not to engage in slavery, servitude, forced labour, and now human trafficking, in *Rantsev v. Cyprus and Russia*,[44] the Court laid down multiple positive obligations. These obligations, which to a great extent mimic those set forth in the European Trafficking Convention, include having national legal safeguards for the practical and effective protection of the rights of both actual and potential victims of trafficking. State parties must implement measures for criminal prosecution and punishment of traffickers, but also regulate businesses. Furthermore, states have a positive obligation to address encouragement, facilitation and tolerance of human trafficking within their immigration laws. Most importantly the Court emphasized that criminal justice responses are but one aspect of this set of obligations states must fulfil to suppress slavery, servitude, forced labour and trafficking. It additionally stated the requirement to have in place operational measures to protect victims or persons at risk of becoming victims.[45] In its following cases, the ECtHR has endorsed the Article 4 obligations it laid down in *Rantsev*.[46]

[40] Ved P Nanda and MC Bassiouni, 'Slavery and Slave Trade: Steps toward Eradication' (1972) 12 Santa Clara Lawyer 424, 440.
[41] Chuang (n 15) 615.
[42] Hathaway (n 30) 57.
[43] Gallagher (n 3) 793.
[44] *Rantsev v Cyprus and Russia* [2010] European Court of Human Rights Application no. 25965/04.
[45] ibid 283–289. For an in-depth analysis of the case, see Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017).
[46] *LE v Greece* [2016] European Court of Human Rights Application no 71545/12; *J and Others v Austria* [2017] European Court of Human Rights Application no. 58216/12.

2. Slavery and enslavement

The first international legal instruments addressing slavery succeeded, and only partially, in ending the legal status of slavery.[47] More recently, with the increased focus on human trafficking, "modern slavery" and "contemporary forms of slavery" have become the focus of the slavery debate. What these categories consist of is not set in stone, nor are they legal concepts – generally they refer to a handful of the most common, current exploitative practices[48] and are employed as a rhetorical tool to garner public attention.[49] The initial international definition of slavery has remained unchanged since its codification, but the extent to which it applies today and to the so-called modern forms of slavery is contested. Considering the centrality of the right to be free from slavery within the system of human rights law, it seems nevertheless indispensable to understand the law on slavery. A close look at the concept and its legal human rights and criminal aspects will help us navigate when and how it can be applied in a contemporary context. Not only will this chapter help to clear the air around slavery as a legal concept, but it will also lead the way into an analysis of which cases of human trafficking are slavery, not just rhetorically, but also legally.

2.1 History

It was the transatlantic slave trade and the movement to abolish it which brought about legislative attempts at curbing the practice. Among the first to criminalize slave trade was the United Kingdom.[50] Their Abolition of the Slave Trade Act of 1807 focused specifically on transatlantic slave trade and "abolished, prohibited, and declared to be unlawful" the "trading in the Purchase, Sale, Barter, or Transfer of Slaves, or of Persons intended to be sold, transferred, used, or dealt with as Slaves".[51] Following this development, multiple

[47] Nanda and Bassiouni (n 40) 426. Whilst the once-legal status of slavery has been eradicated in most of the world, some examples of it can still be found – see, for starters *Malawi African Association and Others v Mauritania* (2000) 149 AHRLR (African Commission on Human and Peoples' Rights); *Rabah v Mauritania* (2004) 78 AHRLR (African Commission on Human and Peoples' Rights); *Minority rights group international and Sos-esclaves on behalf of Said Ould Salem and Yarg Ould Salem V The Government of the Republic of Mauritania* African Committee of Experts on the Rights and Welfare of the Child Decision No: 003/2017; *Hadijatou Mani Koraou v The Republic of Niger* [2008] Economic Community of West African States Court of Justice Application No. ECW/CCJ/APP/08/08.

[48] For example, Anti-Slavery International includes debt-bondage, forced labour, human trafficking, child slavery, early marriage and descent-based slavery. 'What Is Modern Slavery?' (*Anti-Slavery International*) <https://www.antislavery.org/slavery-today/modern-slavery/> accessed 20 August 2018. The OHCHR includes child labour, children in armed conflict, traffic in persons, sexual exploitation, debt bondage, apartheid and colonialism. See

[49] Annie Bunting and Joel Quirk, 'Contemporary Slavery as More Than Rhetorical Strategy? The Politics and Ideology of a New Political Cause' in Annie Bunting and Joel Quirk (eds), *Contemporary Slavery: Popular Rhetoric and Political Practice* (UBC Press 2017).

[50] An Act for the Abolition of the Slave Trade 1807.

[51] ibid.

"International Criminal Law Suppression Conventions" were negotiated between British and East and West African leaders.[52] So, although some scholars maintain that slavery has always belonged primarily to the realm of human rights law, or even created the basis for human rights law,[53] it must be noted that slavery also has strong roots in international criminal law. While the first conventions only implicitly required criminalization of the acts of slave trading or enslaving, following early conventions made the requirement explicit.[54] Initially the conventions on slavery were aimed most centrally at ending the transatlantic slave trade. Thus, most provisions prohibited the sale or transfer of slaves, sometimes referred to as traffic in slaves,[55] but not the slavery itself.

Slavery was first codified on an international level as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[56] In the 1926 Slavery Convention "slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves." The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (henceforth the Supplementary Convention) was adopted three decades after the initial Slavery Convention. The Supplementary Convention obliges Parties to criminalize both the act of enslaving another person (art. 6) and "slave trade" (art. 3).

Though the right to be free of slavery had become a legal human rights norm, codified in the International Covenant on Civil and Political Rights and the regional human rights conventions, and deemed to be one enjoyed by every human, everywhere, at all times,[57] the drafting of the UN Protocol on human trafficking brought up the question again. Beyond that, "[t]here are indicia that at least some powerful governments … viewed the antitrafficking effort as an

[52] Roger S Clark, 'British Treaty-Making with African and Arab Leaders in the Nineteenth Century Aimed at the Suppression of the Slave Trade' in Sarada Balgopalan, Cati Coe and Keith Green (eds), *Diverse Unfreedoms and Their Ghosts* (Camden 2018).

[53] Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2012). See also, Hathaway (n 30); Gallagher (n 3).

[54] Clark (n 52); Nanda and Bassiouni (n 40).

[55] Additional Articles to the Treaties of 23 October 1817 and 11 October 1820 between Great Britain and Madagascar, signed at Tamatave, 31 May 1823. See Art. 1 in which "Slave-trade" and "Traffic in Slaves" are used synonymously.

[56] Slavery Convention 1926 Article 1.

[57] International Covenant on Civil and Political Rights 1966 Article 8; European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 Article 4; American Convention on Human Rights (n 5) Article 6; African Charter on Human and Peoples' Rights 1981 (OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)) Article 5.

extraordinary opportunity to both refocus their antislavery commitments in a more politically and economically comfortable fashion and aggressively to pursue border control (including refugee control) strategies under a human rights banner", as was briefly discussed earlier in this thesis. Hathaway goes on to point out, that "[o]ther, less influential, states often had 'dirty laundry' to hide on the antislavery front, making the narrowing of international attention to slavery politically palatable to them as well."[58] In essence, while there was a brief shift toward a human rights-oriented approach to slavery, the current political and economic atmosphere has been conducive to a renewed focus on the criminalization of transborder forms of human exploitation, including slavery.

2.2 Human rights law or criminal law?

The prohibition of slavery has been codified into virtually every international human rights instrument. It is a part of customary international law[59] and one of the few norms which has obtained jus cogens status.[60] Martinez has gone so far as to argue that the international law on slavery laid the foundations for human rights law[61] and other academics routinely claim slavery was a matter of human rights law before it was overtaken by a criminal justice focus in the 21st century.[62]

Albeit undoubtedly a central component of human rights law, slavery has always had one foot in criminal justice. The criminalization of slavery and, later, practices similar to slavery has been a central component of virtually every international agreement related to these issues.[63] Whilst the focus on investigating, prosecuting and punishing individual perpetrators may not have been predominant in the 20th century, the impetus for doing just that has characterized the 21st century. The introduction of the 1926 definition of slavery within the framework of international criminal law solidified and rejuvenated the international interest in the individual criminal responsibility of those responsible for enslavement.[64]

Indeed, the Rome Statute of the International Criminal Court (ICC) reiterated the definition of slavery in the contexts of the crimes against humanity of enslavement and sexual slavery as

[58] Hathaway (n 30) 57–58.
[59] Renee Colette Redman, 'The League of Nations and the Right to Be Free from Enslavement: The First Human Right to Be Recognized as Customary International Law' (1994) 70 Chicago-Kent Law Review 759.
[60] MC Bassiouni, 'International Crimes: Jus Cogens and Erga Omnes' Vol. 59: No. 4 Law and Contemporary Problems 68.
[61] Martinez (n 53).
[62] See, for example Hathaway (n 30). Gallagher (n 3).
[63] M Cherif Bassiouni, 'Enslavement as an International Crime' (1990) 23 New York University Journal of International Law and Politics 445, 459–517. Clark (n 52).
[64] Harmen van der Wilt, 'Slavery Prosecutions in International Criminal Jurisdictions' (2016) 14 Journal of International Criminal Justice 269.

well as in the definition of the war crime of sexual slavery.[65] "The widespread adoption of the ICC Statute by a significant number of countries where slavery crimes have occurred or are occurring", Tolbert and Smith suggest, "has created a potentially important impetus for the investigation and prosecution of slavery crimes in those countries."[66]

The current focus on the prospects of using a criminal law approach to slavery do not negate the human rights obligations states continue to have. The human rights obligations, however, extend beyond criminalization. Implicit in states' obligation to criminalize is the recognition that slavery is no longer only a state sanctioned practice. As a result, states have both the negative obligations to refrain from enslaving persons or maintaining conditions hospitable to slavery and a set of positive obligations to respect, protect and fulfil the human right to be free from slavery.

As will be discussed in more detail and in concrete terms below (chapter 3), the definition of slavery and its centrality takes on different qualities depending on whether it is applied in a criminal setting or in the application of human rights law. What remains without doubt, however, is that slavery can constitute both an abuse of human rights as well as a crime. The question which bears more debate is the relevance of the definition of slavery in the modern context – be it in that of criminal law or human rights law. This is what we will examine next.

2.3 Definition today

The international definition of slavery was set out in the 1926 Slavery Convention as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[67] This definition was reaffirmed in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ("Supplementary Convention"),[68] which also set forth the international obligation to end slavery and 'institutions and practices similar to slavery'. These practices include debt-bondage, serfdom, practices through which a woman is forcibly 'married' in return for money, can be transferred by her husband or family to another person or is liable to be inherited by another person upon the death of her husband, and the sale or transfer of children into exploitation

[65] Rome Statute of the International Criminal Court 1998 (A/CONF183/9) Article 7(2)(c); Elements of Crimes 2002 Article 7(1)(g)-2 and Article 8(2)(e)(vi)-2. See also Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 Michigan Journal of International Law 605.

[66] David Tolbert and Laura A Smith, 'Complementarity and the Investigation and Prosecution of Slavery Crimes' (2016) 14 Journal of International Criminal Justice 429, 429–430.

[67] Slavery Convention (n 56) Article 1(1).

[68] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

(Article 1). Article 1 of the Supplementary Convention states that these practices are to be abolished "whether or not they are covered by the definition of slavery contained in … the [1926] Slavery Convention", indicating that sometimes they may amount to slavery, whilst in other cases not. The 1926 definition, thus, stands, as it has not been replaced on the international level. On the contrary – the definition has been reiterated in law most recently in the Rome Statute of the International Criminal Court and endorsed in the recent jurisprudence of both international criminal tribunals as well as human rights courts.

What shall be explored, rather than what the definition of slavery is, is thus 1) how broadly the 1926 definition can be interpreted, and 2) what the relevance of the possible differences in interpretation may be. These two topics are the focus of the next sections.

2.3.1 Status or condition

If slavery is "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised",[69] two questions may be put forth. In the context of human rights, the most central is: when is a person subject to such status or condition? Secondly, in a criminal context, when is someone responsible for exercising any or all powers attaching to the right of ownership? This subsection will answer the first question, while the next subsection will focus on the latter.

The most rigorous attempts to define the status or condition of slavery come from academia, though courts have, even recently, been forced to grapple with the nuances. It is clear that the option between status *or* condition allows the definition of slavery to capture situations in which the person subject to slavery has not the legal status of a slave. Out of the two options, the status of slavery is more straightforward and constitutes the rarer manifestation of slavery today. The status of slavery coincides to a great extent with the slavery to which the transatlantic slave trade gave rise. Referred often to as "chattel slavery", the status of slavery refers to a legal status of slavery, namely that status which is recognized in front of the law as legal. Notwithstanding the relative effectiveness of the anti-slavery and abolition movement in eradicating the legal status of slavery,[70] sometimes cases pertaining to the status of slaves still arise. For example, in Mauritania, one of the last states to abolish slavery, local authorities and courts denied a plaintiff the right to the house bequeathed to him by his mother because she had been a slave. This, the plaintiff *Rabah* claimed, was "flagrant support of the government to the illegal institution of

[69] Slavery Convention (n 56) Article 1(1).
[70] Nanda and Bassiouni (n 40) 426.

slavery".[71] The African Commission on Human and Peoples' Rights agreed, noting that although slavery had been outlawed, its offshoots persisted due to the weakness of the judicial system in controlling and eliminating them.[72] In essence, this case demonstrates two things. First of all, slavery as a status still rears its ugly head. Secondly, even if supported by local laws, governments or courts, the status itself is not considered acceptable *de jure* under international human rights law.

Whilst a distinction between the status and condition of slavery is sometimes useful and illustrative, the recognition of the *de jure* unlawfulness of both must be maintained. Regrettably, courts and academics alike have had difficulties in defining what the *condition* of slavery embodies. These difficulties give rise to issues of legal uncertainty and, at worst, superficial and confused engagement with the definition. The condition of slavery is, nevertheless, worth more analysis, because by distinguishing between the status and the condition of slavery, the definition of slavery can be operationalized even when and where the status of slavery is "impossible" in law.[73]

Some common threads of reason come out of the academic and judicial interpretation of what the condition of slavery entails. Allain, who produced a compilation of the travaux preparatoires for the 1926 Slavery Convention,[74] opines that whilst the status of slavery is based on the slaveholder's exercise of a legal right of ownership over the slave, the condition of slavery is like the possession of heroin – even if ownership of a slave or of heroin is not recognized as legal, the possession over either may, in real life, take place.[75] Indeed, Allain and Hickey, in their reading of the definition of slavery in light of property law, find possession to be a prerequisite to the exercise of any or all powers attaching to the right of ownership.[76] This idea finds resonance elsewhere, though from the perspective of the person enslaved by possession: possession can be evidenced, from the perspective of the person possessed, as the deprivation of freedom and control of a person over her life. As Knott puts it: "slavery can simply be defined as the most extreme form of bondage, as opposed to freedom."[77] Knott's view reflects that of the drafters of the European Convention on Human Rights. The preparatory notes reveal that

[71] *Rabah v Mauritania* (n 47) [2].
[72] ibid 28–31.
[73] Stephen Tully, 'Sex, Slavery and the High Court of Australia: The Contribution of R v Tang to International Jurisprudence Case Comment' (2010) 10 International Criminal Law Review 403, 408.
[74] 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).
[75] Allain, 'The Definition of Slavery in International Law' (n 1) 274–275.
[76] Jean Allain and Robin Hickey, 'Property and the Definition of Slavery' (2012) 61 International and Comparative Law Quarterly 915, 932.
[77] Lukas Knott, 'Unocal Revisited: On the Difference between Slavery and Forced Labor in International Law' (2010) 28 Wisconsin International Law Journal 201, 209.

slavery was envisaged to mean the "worst form of bondage".[78] Bondage, in turn, means captivity and "subjugation to a controlling person",[79] and is synonymous with "a lack of freedom to act",[80] thus it, in its ordinary meaning, reiterates the idea of a deprivation of freedom or liberty.

In the Rome Statute, the Elements of Crimes elucidates that the exercise of power attaching to the right of ownership can take the form of "purchasing, selling, lending or bartering such a person or persons, or by imposing on them *a similar deprivation of liberty*."[81] Furthermore, a footnote to this provision clarifies that "[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status".[82] This indicates that the deprivation of liberty is a precondition for slavery to occur. While forced labour or servile status may occur within the context of slavery, they do not amount to slavery when there is no deprivation of liberty. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has expressed the above interpretation of the lack of liberty as an integral component of the condition of slavery. In the case of *Said Ould Salem and Yarg Ould Salem*[83] against the Mauritanian government, ACERWC uses "one's deprivation of liberty" as a synonymous with slavery.[84]

The analogy between a human and a piece of lifeless property is not an easy one. An object has no liberty to begin with, whereas a persons' liberty and her control over that liberty is much more complex of an issue. The antidote to slavery was, historically, freedom.[85] The definition of slavery is deeply connected to the transatlantic slave trade and the slavery which pursued, i.e. the status of slavery. In the case of Hadijatou Mani Koraou v The Republic of Niger,[86] a case brought before the ECOWAS Community Court of Justice, the applicant was sold to a tribe chief to work as a domestic servant and for the chief to have sexual relations with. Because the case involved the sale, purchase and transfer of the applicant, i.e. exercise of well-recognized powers of ownership, it "did not challenge the limits of the definition of slavery".[87]

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[78] European Commission of Human Rights, 'Preparatory Work on Article 4 of the Convention' (Council of Europe 1962) DH (62) 10 16.
[79] Merriam-Webster Dictionary, 'Definition of Bondage' <https://www.merriam-webster.com/dictionary/bondage> accessed 20 July 2018.
[80] Cambridge English Dictionary, 'Bondage Meaning' <https://dictionary.cambridge.org/dictionary/english/bondage> accessed 20 July 2018.
[81] Elements of crimes Article 7(1)(c) Element 1, emphasis added
[82] Ibid footnote 11
[83] *Said and Yarg Ould Salem v Mauritania* (n 47).
[84] ibid 25.
[85] Bassiouni, 'Enslavement as an International Crime' (n 63).
[86] *Hadijatou Mani Koraou v The Republic of Niger* (n 47).
[87] Helen Duffy, 'Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court' (2009) 9 Human Rights Law Review 151, 160.

Though the status of slavery may be rare today, the condition of slavery is necessarily analogous to the conditions imposed by the status of slavery. Even though some argue, that the definition of slavery being imposed by "*any or* all powers attaching to the right of ownership" (emphasis added) could cover cases in which a person still exercises autonomy over herself whilst being subject to a form of exploitation, this argument does not hold in front of a historical perspective. The definition of slavery is constructed to end the imposition of conditions to which the transatlantic slaves were subject to. This condition was maintained by way of their status, "openly framed and enforced by institutions of the society" and "created and structured by positive law, and were enforceable pursuant to law and by the legal and governmental institutions such as law enforcement, and the judiciary".[88] Though this status and its legal enforcement is, for the most part, absent in the world today, the exercise of any power attaching to the right of ownership needs to be understood as a condition in which it is *as if* the status also existed. The "chattel-property relationship between slaveholder and slave", integral to the definition of slavery,[89] must remain intact even when the legally enforceable status of that relationship is missing. As the United Kingdom's Foreign Office's Slave Department has put it: "No person shall by *any act or contract* whatever become the slave of another, that is his property, in such a sense as would put it in the power of a master to inflict death, pains, or punishment, on him according to the judgment or caprice of such master only."[90]

No power attaching to the right of ownership can, therefore, be exercised over a person who is not subject to a deprivation of liberty and thus to the power of a master to inflict upon the slave her unrestricted will. In other words, it is the deprivation of liberty which gives rise to the possibility to exercise such powers. By identifying an exercise of any powers attaching to the right of ownership, slavery can be set apart from a pure deprivation of liberty. When a person is subject to such status or condition as posited by the Slavery Convention, the slaveholder can exercise any or all powers attaching to the right of ownership. As such, the definition does not hinge on the number of powers exercised. These powers may range from forcing the slave to work in physically demanding conditions to the imposition of many different types of sexual violence.[91]

[88] Karen E Bravo, 'Making "Slavery" Work' [2015] Slavery Past, Present and Future Conference Proceedings Ebook 5–6 <http://www.ssrn.com/abstract=2801282> accessed 12 June 2018.
[89] ibid 6.
[90] Foreign Office, Slave Department, 'FO 97/432'.
[91] Patricia Viseur Sellers, 'Wartime Female Slavery: Enslavement?' (2011) 44 Cornell International Law Journal 115.

It is the underlying deprivation of the victim's freedom and liberty that makes forced labour or sexual violence and the many other forms of sexual violence an exercise of a power attaching to the right or ownership. In *The Queen v Tang*,[92] the Australian High Court was tasked with interpreting the definition of slavery. The respondent, charged with possessing a slave and exercising powers attaching to the right of ownership, was a brothel owner. She had allegedly imposed upon five complainants, Thai nationals who had voluntarily come to work for at the respondent's brothel as prostitutes,[93] a considerable debt and stringent remuneration for their work. They had been assisted into Australia on illegally obtained visas, and although "not kept under lock and key", had therefore to remain within the premises of the brothel so as to not be found by the immigration authorities.[94]

Noting that the Slavery Convention's language of "status or condition" showed an intent to both "withdraw legal recognition of slavery" and to suppress slavery, the Court determined that the definition was not limited to chattel slavery.[95] Whilst recognizing that slavery may occur in the course of practices similar to slavery, the Court shied away from conflating slavery with them. Instead, it deemed it "unnecessary, and unhelpful, for the resolution of the issues in the present case, to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage", maintaining nonetheless that "some of the institutions and practices it covered might also be covered by the definition of slavery in Art 1 of the 1926 Slavery Convention … the various concepts are not all mutually exclusive."[96]

The Australian High Court maintained that "harsh and exploitative conditions of labour do not of themselves amount to slavery",[97] but, after finding a sufficient degree of possession, the Court conceded that the case was one of slavery and, in aforementioned context, forced labour was an exercise of a power attaching to the right of ownership.

2.3.2 The crime of enslavement

The task of identifying a victim's status or condition is a task which is different from the task of identifying a perpetrator. When it comes to criminal proceedings, the individual criminal liability of a person is the sole focus. The proceeding itself is, most likely, premised upon a person having been seemingly enslaved, but the task of the court is to find out whether the

[92] *The Queen v Tang* [2008] HCA 39 M5/2008.
[93] ibid 6.
[94] ibid 18–16.
[95] ibid 25–27.
[96] ibid 29.
[97] ibid 32.

person charged with slavery caused the status or condition of slavery to occur and whether she did so with a particular intent.

In the case of slavery, confusion sometimes ensues from the fact that the victim's condition (slavery) is defined in the same terms as the crime (slavery or enslavement). The definitions of the two also liken each other – the definition of the crime of slavery is "the exercise of any or all powers attaching to the right of ownership".[98] Again, as put into context in the subsection above, any such exercise is always premised upon demonstrating that the perpetrator deprived a victim of her liberty to such an extent that the exercise can genuinely be one of powers attaching to the right of ownership.

The case of *Kunarac*, heard before the International Criminal Tribunal for the former Yugoslavia, concerned the individual criminal liability of the defendants Kunarac and Kovac for enslavement. The case challenged the notion of chattel slavery, because instead of buying or selling their victims, or taking total physical control over them, they had imprisoned them, deprived them of control over their lives[99] and raped, humiliated and degraded them.[100] While the victims had some freedom to leave the apartment, they were inhibited from doing so alone and were required to attend to household chores.[101] Thus, the judgement concerned the issue of whether the definition of slavery applied to the exercise of the powers of ownership where *a legally recognizable* ownership did not exist and, if so, how such exercise could be identified.

The appeal judgement confirmed what the Trial Chamber had come upon: the definition of slavery encompassed, beyond chattel slavery, also *de facto* slavery.[102] The Appeal Chamber elaborated, that in contemporary forms of slavery the juridical personality of the victim is destructed, but not as much as in cases of chattel slavery. It noted specifically, that: "the law does not know of a "right of ownership over a person". Article 1(1) of the 1926 Slavery Convention speaks more guardedly "of a person over whom any or all of the powers attaching to the right of ownership are exercised." That language is to be preferred."[103]

The Appeals Chamber further reiterated the factors the Trial Chamber had found relevant for assessing whether powers attaching to the right of ownership have been exercised.[104] These factors include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or

[98] Slavery Convention (n 56) Article 1(1); Rome Statute (n 65) Article 7(2)(c).
[99] *Kunarac et al* [2002] International Criminal Tribunal for the former Yugoslavia (IT-96-23 & 23/1) [9].
[100] ibid 13.
[101] ibid 12.
[102] ibid 117.
[103] ibid 118.
[104] ibid 119.

coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour". Radical, however, was the Appeal Chamber's finding, that the duration of detention or the lack of victim's consent were not determining factors, but only ones to be taken into consideration in conjunction with the other factors.[105] It is the individual relationship between the accused and the victim, the Court found, which determines whether, in a specific case, powers attaching to the right of ownership have been exercised.[106]

In conclusion, courts depict some ambivalence when it comes to the definition of slavery. Nonetheless, the definition persists and applies to both the status and condition of slavery. Of the indicia of powers attaching to the right of ownership set forth in 1951, some have remained central to the interpretation of slavery today. In 1951, those indicia were described as

> 1. the individual of servile status may be made the object of a purchase; 2. 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; 3. 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; 4. the ownership of the individual of servile status can be transferred to another person; 5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it; 6. the servile status is transmitted ipso facto to descendants of the individual having such status.[107]

Of these indicia, the use of the labour of the victim of slavery in an unrestricted manner and the absence of compensation for that labour have become especially prevalent in the modern context. The judgement given in Tang found the ability to treat a victim as an object of sale and purchase to be of utmost importance,[108] whereas that factor was discarded by the Appeal Chamber in *Kunarac*. Furthermore, the High Court placed heavy emphasis on the exercise of powers of control over movement.[109] These cases have confirmed that lack of consent, total physical control and permanency no longer characterize slavery. Another central observation here is that the High Court in *Tang* did not find threat of force or coercion or subjection to cruel treatment and abuse to be of importance whereas in *Kunarac* those indicia were given weight. These indicia in the *Kunarac* cases deviate from Allain and Hickey's theorizations, which they

[105] ibid 120–121.
[106] ibid 149.
[107] The Secretary General of the United Nations, 'Report to the Economic and Social Council on Slavery, the Slave Trade, and Other Forms of Servitude' (1951) Submitted pursuant to the Council's resolution 388 (XIII) E/2357 para 37.
[108] *The Queen v Tang* (n 92) [44].
[109] ibid 44, 50.

base on documents such as the 1951 report (above) and on general theories of ownership. The factors of threat, force and coercion, albeit occasionally reiterated in slavery cases, find more prevalent counterparts in the definition of human trafficking. In the context of slavery, they serve as a means to establish and prove a substantial deprivation of liberty.

2.4 Relevance today

We have all been made increasingly aware that slavery persists. Nevertheless, many still question the applicability of the definition of slavery and its relevance in a modern context. Already in 1991 Bassiouni found, that "the more contemporary manifestations of the practices [of slavery and practices similar to slavery] elude conventional law."[110] Others after him have followed this vein of thinking and deemed the 1926 definition outdated, expressing their preference for newer definitions created by sociologists in its stead.[111] Advocates of these new definitions claim them to be better suited to cover modern manifestations of slavery,[112] whereas the 1926 definition is likely to apply only to so-called chattel slavery in which the victim is, by law, reduced to the same status as an object.

I have, however, shown that the definition still stands and applies to slavery – though the legal concept may not cover as expansionist an agenda as some wish it did. What was first a legal concept seemingly limited to the transatlantic slave trade and chattel slavery has been recognized as applicable beyond that context: in (rarer) cases of slavery based on status, and in cases of slavery based on condition. The fact that there are legal limits to the particular cases covered by the definition of slavery is not necessarily detrimental to the pursuit of abolishing slavery because the problem is, rather than the narrowness of the law, the general lack of application and appreciation of the prohibition by courts. Courts hear very few cases on slavery and, as Sellers has noted on multiple occasions, genuine cases of slavery are often charged under other crimes, especially insofar as the slavery is female slavery.[113]

[110] Bassiouni, 'Enslavement as an International Crime' (n 63) 458.
[111] For the most popular proposed definition of slavery see, especially, Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press 1999).
[112] Nicholas Lawrence Mcgeehan, 'The Marginalization of Slavery in International Law' (Thesis, European University Institute 2013).
Mary Graw Leary, 'Modern Day Slavery: Implications of a Label Perspectives on Fighting Human Trafficking' (2015) 60 Saint Louis University Law Journal [i].
[113] Sellers, 'Wartime Female Slavery' (n 91).

3. Is human trafficking slavery or enslavement, is slavery human trafficking?

Several peculiar and contradictory claims about the nature of the relationship between human trafficking and slavery have been made. Some argue that human trafficking is slavery.[114] The ECtHR has been reluctant to make specific distinctions but has generally found that human trafficking falls somewhere within the scope of the prohibition of slavery, servitude and forced labour.[115] Kirby, in his dissenting opinion in Tang, expressed that human trafficking "commonly operates in conjunction with, or as part of, slavery",[116] indicating that human trafficking could be one factor of slavery. The IACtHR went further in its conflation, concluding that slavery now encompasses human trafficking.[117]

This chapter will assess the relationship between human trafficking and slavery in the contexts of human rights law, transnational criminal law and international criminal law. Building on the overlaps in definitions and interpretations of relevant laws by different courts and tribunals, I set out to dispel some of the obtrusive confusion that, today, lingers in academia, media, courts and politics. As a starting point, this chapter will briefly restate the definitions of human trafficking and slavery and analyze their overlaps. In the second part, the chapter shall pin-point the central differences of the transnational criminal law and international human rights law systems because those differences impact the way in which the courts interpret and apply the laws on human trafficking. In the third part, the argument that some cases of human trafficking are slavery, whilst others are not, will be explained.

3.1 Human trafficking is not always slavery

There is an immediate linguistic overlap in the definitions of human trafficking and slavery. Namely, in line with the Trafficking Protocol's definition the purpose of human trafficking is exploitation, of which slavery is given as but one example in a non-exhaustive list. In *D'Souza*, the defendant argued that the trafficking provision was too broad and vague to serve its purpose of ending slavery. The Ontario Superior Court disagreed, stating that the purpose of the provision was, instead, "to prevent human trafficking and protect vulnerable persons, especially women and children, by criminalizing a wide range of conduct aimed at exploiting them."[118] In essence, if the purpose of the provision had been, as argued by the defence, to end enslavement

[114] Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008); Mcgeehan (n 112).
[115] *Rantsev v. Cyprus and Russia* (n 44) [282].
[116] *The Queen v Tang* (n 92) [116].
[117] *Workers of the Hacienda Brasil Verde v Brazil* [2016] Inter-American Court of Human Rights Series C No. 318 [268].
[118] *R. v. D'Souza* (n 21) [157–165].

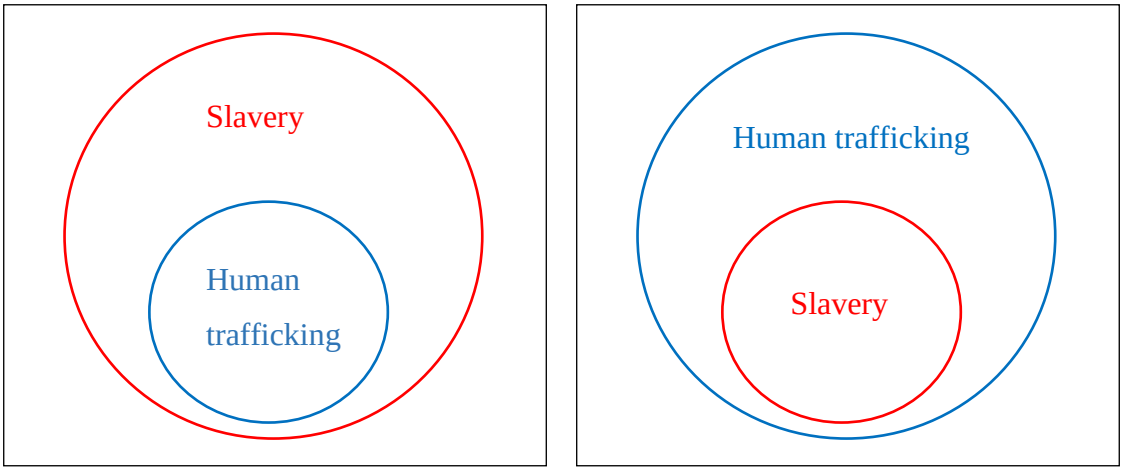
and slavery, it may have been too broad, but the purpose of the law was not such. The Rome Statute poses a similar view. Article 7(2)(c) reads

> '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.

Based on the references above, it would seem obvious that human trafficking is a wider concept than slavery – a course of conduct leading to many types of exploitation, sometimes even to exploitation amounting to slavery. Despite this seemingly clear relationship,[119] the arguments that human trafficking is a form of (modern) slavery and that slavery is always human trafficking have gained traction in recent years.[120] This rhetoric often rests upon or is fueled by references to jurisprudence on human trafficking and slavery

3.1.1 Different conceptualizations of the relationship between human trafficking and slavery

There seems to be five mains models for conceptualizing the relationship between slavery and human trafficking. According to the first, trafficking is "the fastest growing form of slavery today,"[121] and, on a similar note, Twomey envisages that trafficking is ""a specific sub-category within this latter figure [contemporary forms of slavery], comprising those transported, generally across frontiers, with a view to their subsequent exploitation".[122]

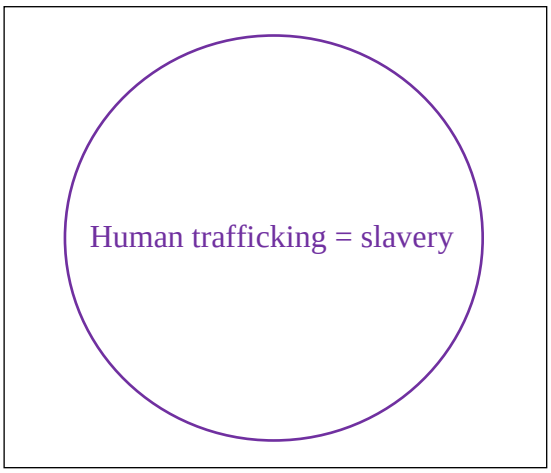


Model 1 Model 2

[119] For an academic analysis arriving at the same conclusion, see Harmen van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13 Chinese Journal of International Law 297.
[120] For a comprehensive, critical reading of these rhetorics, see Annie Bunting and Joel Quirk, *Contemporary Slavery: Popular Rhetoric and Political Practice* (UBC Press 2017).
[121] Amnesty International. Slavery today. A human rights resource for teachers of KS4 Citizenship, History, PSE, RE and related subjects.
[122] Twomey (n 29) 1.

The first conceptualization (Model 1) argues that there are other "forms of slavery" and that human trafficking is, in and of itself, always slavery. This model must legally be discarded at first glance, since the definition of human trafficking as a course of actions leading to exploitation such as slavery *or* forced labour *or* other types of exploitation already states that not all trafficking includes slavery.

Clark, on the other hand, argues that there is "slavery and other human trafficking", indicating essentially that slavery is one out of many types of human trafficking (Model 2).[123] Model 2 is also corroborated by van der Wilt, who argues that human trafficking encompasses slavery "as a subset", stating further that "enslavement and slave trade will constitute trafficking in human beings but not all trafficking in human beings is enslavement."[124] This claim is plausible, but is not sufficiently exact about how conceive of situations in which persons have not been recruited, transported or transferred into exploitation, but are instead born into the status of slavery, like in the recent case of *Said Ould Salem and Yarg Ould Salem.*[125]

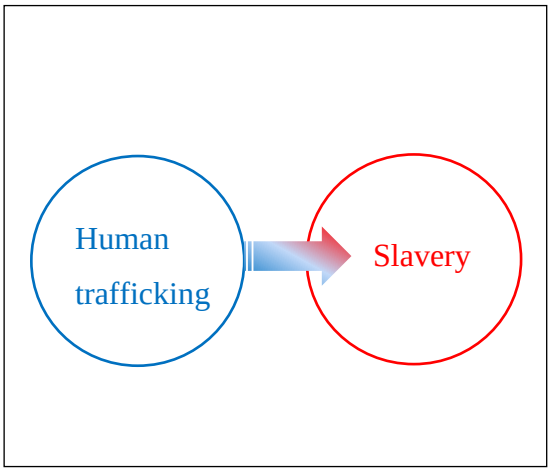


Model 3

The third popular conceptualization merges the first two. According to Model 3, all human trafficking is slavery and no distinction is made between "forms" or "types" of either.[126] This model assumes that any exploitative practice is slavery, but it is lacking in rigor in terms of explaining how a case of trafficking in which the final exploitation never ensued, even if the purpose of exploitation was present, could be considered slavery. Under this claim, even the

[123] Clark (n 52).
[124] Harmen van der Wilt, 'Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?' No. 2014-13 Amsterdam Law School Legal Studies Research Paper 5–6 <https://dare.uva.nl/search?identifier=bd402acb-9a2a-4473-967c-acf183e10a88> accessed 15 February 2018.
[125] *Said and Yarg Ould Salem v Mauritania* (n 47).
[126] Scarpa (n 114); Mcgeehan (n 112).

deception of a person into organ removal would be considered slavery, although clearly such a course of action does not fit the requirements of slavery, as set forth earlier.



Model 4

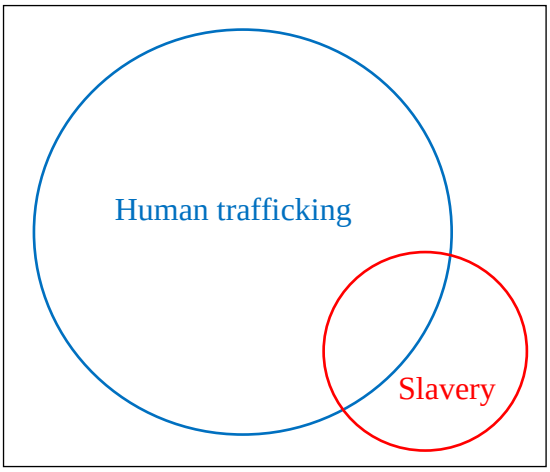
In the fourth scenario (Model 4), the definition of human trafficking captures the process of leading the victim into (potential) future exploitation, but not the exploitation which ensues. Hathaway, for example, is worried, that: "By rechanneling energies towards only the slave trade rather than slavery, there is no need to take action to address the plight of the more than approximately thirty million persons who are already enslaved today. By prohibiting only dealings in people affected by "inappropriate means" (e.g., by acknowledging the possibility of valid consent to enslavement), the Trafficking Protocol does not even tackle the slave trade as a whole."[127]

And while there are persons that, often relying on models 1, 2 or 3, dismiss this figure entirely, claiming that "individuals may be trafficking victims regardless of whether they once consented, participated in a crime as a direct result of being trafficked, were transported into the exploitative situation, or were simply born into a state of servitude. Despite a term that seems to connote movement, at the heart of the phenomenon of trafficking in persons are the many forms of enslavement, not the activities involved in international transportation",[128] neither view is fully supported by the law. The UN High Commissioner for Human Rights' Report on the Recommended Principles and Guidelines on Human Rights and Human Trafficking notes, that "States are also obliged to exercise due diligence in identifying traffickers, *including those who are involved in controlling and exploiting trafficked*

[127] Hathaway (n 30) 11.
[128] Paulette Lloyd and Beth Simmons, 'Framing for a New Transnational Legal Order: The Case of Human Trafficking' [2015] Faculty Scholarship 401 <http://scholarship.law.upenn.edu/faculty_scholarship/1698>.

persons"[129] (emphasis added). The UNODC Legislative Guide also states that "[n]o exploitation needs to take place."[130] In other words, states are obliged to exercise due diligence in identifying both traffickers who are not involved in controlling and exploiting victims following the transportation (such as recruiters and labour agencies) and traffickers who are. In this sense, a trafficker in the meaning of the international definition of trafficking is not only the person leading persons into exploitative situations, but also, following the transportation phase, the exploiter herself.

In light of the doubts cast on the three first models for conceptualizing the relationship between human trafficking and slavery, the fifth is most supported by the law and jurisprudence of international courts.



Model 5

Model 5 allows for the recognition that only some cases of human trafficking will be considered slavery and that some cases of slavery may not fit the definition of human trafficking. The Council of Europe Convention itself envisaged that "trafficking in human beings may result in slavery for victims" and this holds true. However, where persons are fraudulently transported into exploitative labor conditions or deceived into begging, for example by private employment agencies,[131] the course of action may not amount to slavery. On the other hand, cases in which persons are born into slavery and their status is maintained by governmental inaction do not reflect the definition of human trafficking. Thus, each case of human trafficking and slavery

[129] 'Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Addendum, Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 16) 4.
[130] UNODC, Division For Treaty Affairs, 'Legislative Guide For the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organixed Crime' (United Nations 2004) 269.
[131] ILO, 'Human Trafficking and Forced Labour Exploitation - Guidance for Legislation and Law Enforcement' (2005) Report 31–34 <http://www.ilo.org/global/topics/forced-labour/publications/WCMS_081999/lang--en/index.htm> accessed 23 July 2018.

must be examined on their merits to correctly define whether they constitute only one or the other, or both.

3.1.2 Navigating the concepts – case law of human rights courts

One of the most influential cases has been the case of *Rantsev v Cyprus and Russia*.[132] In *Rantsev*, the ECtHR heavily relied on the ICTY's *Kunarac* case to interpret Article 4 of the European Convention of Human Rights ('ECHR'). Article 4 reads: "1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour."[133] The case concerned the fate of Rantseva, a Russian citizen who moved to Cyprus to work at a cabaret on an artiste visa. Upon her attempt to return to Russia, the manager of the cabaret and his security guard fetched her and took her to the police. To the dismay of the manager, the police refused to detain her, because she was not an illegal immigrant. The following morning, Rantseva was found dead outside the manager's apartment.[134] Rantseva's father, the applicant, complained about the failure of Cyprus and Russia to investigate the trafficking of Rantseva, to protect her, and to punish her traffickers.[135]

The Court built its judgement on the assumption that the case had been one of human trafficking but never justified why this particular scenario constituted human trafficking. Instead, by relying on international definitions of trafficking, the Court concluded that human trafficking fit into the scope of Article 4.[136] This, it stated, was because

> There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention … the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself … falls within the scope of Article 4 of the Convention.[137]

What one may immediately notice is that what the ECtHR concludes is not in conflict with any of the aforementioned articulations of human trafficking as a concept wider than slavery. Instead, the judgement explicitly states that in the case at hand it is unnecessary to identify whether trafficking fits into any of the legal categories of slavery, servitude or forced labour,

[132] *Rantsev v. Cyprus and Russia* (n 44).
[133] European Convention for the Protection of Human Rights and Fundamental Freedoms (n 57) Articles 4(1) and 4(2).
[134] *Rantsev v. Cyprus and Russia* (n 44) [15–29].
[135] ibid 3.
[136] ibid 282.
[137] ibid.

purely on the basis that trafficking, whether or not it coincides with them, "threatens the human dignity and fundamental freedoms of its victims."

Although the ECtHR's judgement in *Rantsev* does take for granted that the common rhetoric that human trafficking is a form of modern slavery is true,[138] we must not forget that "modern slavery" has no legal meaning under international law. The judgement itself, in the legal analysis, does not conflate human trafficking with slavery. Thus, it should not be used as a basis for so doing in other contexts.

The most recent human rights jurisprudence on slavery and human trafficking, which, if not read carefully, may also be utilized in favor of blurring together human trafficking and slavery comes from the Inter-American Court on Human Rights ('IACtHR').[139] The case of *Workers of the Hacienda Brasil Verde v Brazil* was lodged with the Court for review of the situation of workers recruited mostly from Africa by "labor agents" to work in Brazil. Lured by promises of attractive wages, the workers arrived only to find out that they were indebted to these agents and their actual wages were significantly less than initially promised, rendering the workers unable to pay back their debt. Furthermore, the workers were kept at the estate, watched by armed guards, abused physically, sexually and verbally, and the conditions in which they toiled were dangerous and degrading.[140]

First, referring to *Kunarac*, *Rantsev* and *Mani v Niger*, as well as the 1926 Slavery Convention and the 1956 Supplementary Convention, the IACtHR concluded that the definition of slavery had expanded to include debt-bondage and serfdom,[141] forced labor and servitude[142] and, by way of the Rome Statute, also human trafficking.[143] However, some conflation may have ensued precisely because in some cases human trafficking may be slavery. In *Workers of the Hacienda Brasil Verde*, the IACtHR identified first the exercise of powers attaching to the right of ownership as exercise of control over a person whose individual liberty has been restricted. This interpretation is aligned with the international law on slavery, as discussed above in chapter 2. The exercise, the IACtHR found, was to be done with the intent of exploitation and generally through means of violence, deceit or coercion.[144] Here the Court very explicitly conflates the elements of human trafficking with the more stringent elements of slavery. Some

[138] ibid 281.
[139] *Workers of the Hacienda Brasil Verde v Brazil* (n 117). English translation available at 'Inter-American Court of Human Rights: Workers of the Hacienda Brasil Verde v Brazil, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318, 20 October 2016' (2017) 3 International Labor Rights Case Law 357.
[140] *Workers of the Hacienda Brasil Verde v Brazil* (n 117) [113–114].
[141] ibid 250.
[142] ibid 260–262.
[143] ibid 268.
[144] ibid 271.

of this may be explained by way of the Convention which the IACtHR interprets: the American Convention on Human Rights prohibits slavery and involuntary servitude "in all their forms" as well as "the slave trade and traffic in women."[145] Whilst, for example, the European Convention of Human Rights contains no mention of human trafficking, the American Convention includes it within the remit of the right to be free from slavery specifically (Article 6(1)).

An added level of complexity might arise from the fact that, unlike in *Rantsev*, the victims in the *Workers of the Hacienda Brazil Verde* case were victims of both slavery and human trafficking. Because the IACtHR has no other case law on human trafficking or slavery, it remains to be seen how it may deal with potential future cases in which only one of the two is present. However, an interesting point of comparison is the case of *Chowdury and Others v Greece*.[146]

The applicants in *Chowdury and Others* were 42 Bangladeshi migrants living in Greece without a work permit and recruited to work at the region's largest strawberry farm, Manolada. At Manolada, the applicants worked 12 hours a day, lived in "makeshift shacks made of cardboard, nylon and bamboo, without toilets or running water" and were not paid the 22 euros promised to them for each seven hours of work. After multiple unsuccessful strikes in demand of the unpaid wages, on a fateful day in April, between 100 and 150 started to move toward their two employers to demand their unpaid wages. One of multiple armed guards working at Manolada as the supervisors of the Bangladeshi workers opened fire, seriously injuring 30 of the workers, 21 of whom are applicants in this case.[147]

Following the event, the applicants exhausted the domestic remedies. The Patras Court of Appeal's public prosecutor dismissed the case "on the grounds that the material in the case file did not substantiate their allegations and that they had sought to present themselves as victims of human trafficking in order to obtain residence permits."[148] Following this, the Patras Assize Court heard the cases against the two employers and the armed guards charged with human trafficking but acquitted all of the defendants. The Assize Court found that the employment was covered by a contract setting forth similar circumstances to those of other comparable jobs and did not consider the workers in any way trapped or deceived by their reality. The prosecutor

[145] American Convention on Human Rights (n 5), Article 6(1).
[146] *Chowdury and others v Greece* [2017] ECtHR App. No. 21884/15.
[147] ibid 5–8.
[148] ibid 15.

refused to appeal the judgement, because "statutory conditions for an appeal on points of law were not met."[149]

The ECtHR took the position that

> restriction of freedom of movement is not a prerequisite for a situation to be characterised as forced labour or even human trafficking. The relevant form of restriction relates not to the provision of the work itself but rather to certain aspects of the life of the victim of a situation in breach of Article 4 of the Convention, and in particular to a situation of servitude. On this point the Court reiterates its finding that Patras Assize Court adopted a narrow interpretation of the concept of trafficking, relying on elements specific to servitude in order to avoid characterising the applicants' situation as trafficking … However, a situation of trafficking may exist in spite of the victim's freedom of movement.[150]

Here, despite *Chowdury* being in many ways similar to the case of *Workers of the Hacienda Brazil Verde*, it is the extent of the limitation to freedom that sets human trafficking apart from a case of human trafficking that is also slavery. Furthermore, the ECtHR notes that

> the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victim's feeling that his or her condition is permanent and that the situation is unlikely to change … in the present case the applicants could not have had such a feeling since they were all seasonal workers recruited to pick strawberries. However, by stating that the applicants' working and living conditions did not result in their living in a state of exclusion from the outside world, without any possibility of abandoning that employment relationship and seeking other employment … Patras Assize Court appears to have confused servitude with human trafficking or forced labour as a form of exploitation for the purpose of trafficking.[151]

Thus, not only is the possession of the victim by the perpetrator a distinguishing factor, but the permanency of the condition and the victim's inability to end the condition in any foreseeable timeframe are also factors which set boundaries between the types of human trafficking that are slavery or servitude on the one hand or forced labour or other types of exploitation on the other. Lastly, not only must the victim be deprived of their liberty (which is a different offence), but a form of exploitation, i.e. the exercise of a power, must follow. In sum, for slavery to occur, a

[149] ibid 16–31.
[150] ibid 123.
[151] ibid 99.

person must be reduced to the status of an object either by law, which very rarely occurs in our time, or through such an act which deprives a person of their liberty and autonomy. This alone would not yet constitute slavery were it not for the exploitation flowing from the power one person has over another. On the other hand, where there is exploitation without deprivation of liberty, slavery has not occurred. Such exploitation may, however, fit the description of human trafficking.

3.2 Interpretative differences

The differences in aims and interpretative methods of human rights law vis-à-vis criminal law can help explain the confusing relationship between slavery and human trafficking. The argument is simple, and may to some seem self-evident, but the conundrum has received relatively little attention.[152] Namely, human rights bodies interpret human rights and the state obligations that flow from those rights in an evolutive, teleological way. This interpretative method differs starkly from that used in criminal proceedings, whereby definitions of crimes must be construed strictly and narrowly.

Human rights law itself mandates that criminal proceedings function, to the extent possible, to the benefit of the defendant. The principle of *nullum crimen, nulla poena sine lege* which sets out that there can be no crime or punishment without pre-determined law has been confirmed by virtually all human rights conventions as central to criminal proceedings.[153] Moreover, the strict interpretation of that pre-existing law, to the benefit of the accused, is a central part of the principle of legality.[154] Human rights court themselves do not, however, interpret criminal provisions. Indeed, in a case concerning human trafficking, the ECtHR has articulated that "it is not its task to take the place of the domestic courts. It is primarily for the national authorities,

[152] On the way in which these systems may differ in relation to human trafficking, see Stoyanova, *Human Trafficking and Slavery Reconsidered* (n 45); Ryszard Piotrowicz, 'The Legal Nature of Trafficking in Human Beings Human Trafficking: Global and Local Perspectives' (2009) 4 Intercultural Human Rights Law Review 175.

[153] See The Universal Declaration of Human Rights 1948 (A/RES/217(III)) Article 11; International Covenant on Civil and Political Rights (n 57) Article 16; European Convention for the Protection of Human Rights and Fundamental Freedoms (n 57) Article 7; African Charter on Human and Peoples' Rights (n 57) Article 7; American Convention on Human Rights (n 5) Article 9.

[154] Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Springer 2017); Damien Scalia, 'The Nulla Poena Sine Lege: A Symptomatic Sign of Interactions between Strasbourg and The Hague' in Paolo Lobba and Triestino Mariniello (eds), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Brill 2017); Caroline Davidson, 'How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court' (2017) 91 St. John's Law Review 37; Harmen van der Wilt, 'Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test' (2015) 84 Nordic Journal of International Law 515.

notably the courts, to resolve problems of interpretation of domestic legislation. Its role is to verify whether the effects of such interpretation are compatible with the Convention".[155]

No single definition of human trafficking exists. As Allain has noted based on a comparison of multiple domestic codes, there is no "effective trafficking definition" – instead, "often [states] have set out what is in essence a variation on the theme, but in other instances they have provided a unique reading of what constitutes the criminal offense of trafficking in persons" instead of adopting the Trafficking Protocol's definition as is.[156] Despite acknowledging this, Allain is critical of the fact that the ECtHR did not consider the elements of human trafficking set out in the Trafficking Protocol. He argues, that "[a]s a result of these conflicting pronouncements-that on the one hand trafficking equals slavery and, on the other hand, that, teleologically, trafficking falls within the scope of Article 4 without determining under which provision-the [ECtHR] has failed to demonstrate or set out a clear understanding of the substance or content of Article 4 [i.e. the prohibition of slavery, servitude and forced labour]."[157]

What stands out in Allain's critique is his acknowledgement that human trafficking *teleologically* falls within the scope of Article 4. Indeed, it is this very detail which justifies the expansive (or, arguably, vague) way in which human rights courts, including but not limited to the ECtHR, have considered the relationship between slavery and human trafficking. Notwithstanding the potential problems this may create for criminal courts and advocates who seek guidance from human rights courts' judgements, it is entirely within the prerogative of human rights courts to withhold themselves from making a pronouncement on guilt or innocence and, instead, affirm on a teleological basis how states are obliged to protect human rights.

The ECtHR has been most candid about its approach to the right to be free from slavery. In Rantsev, when the Court abandoned a very strict approach to slavery which it had taken in *Siliadin*, it affirmed that it was interpreting Article 4 in an evolutive manner. In *Siliadin*, the Court was tasked with determining whether Article 4 was applicable to the applicant, an adolescent immigrant unlawfully present in France. The applicant had both been subject to forced labor and was deprived of her autonomy,[158] yet the Court decided that because the

[155] *Chowdury and others v Greece* (n 146).
[156] Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' in Jean Allain, *The Law and Slavery* (Brill 2015) 275 <http://booksandjournals.brillonline.com/content/books/b9789004279896s015> accessed 19 June 2018.
[157] Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 Human Rights Law Review 546, 555.
[158] *Siliadin v France* [2005] European Court of Human Rights Application no. 73316/01 [117–120].

definition of slavery "corresponds to the "classic" meaning of slavery as it was practised for centuries", the "evidence does not suggest that she [the applicant] was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object"."[159] So, although the decision was important for its impact on the development of positive obligations relating to slavery, servitude and forced labour,[160] the case also emphasized the ECtHR's rigid approach to the definition of slavery. The case on *Rantsev* turned this upside down. The Court deemed it unnecessary to determine whether human trafficking was slavery, servitude or forced labour "[i]n view of its obligation to interpret the Convention in light of present-day conditions",[161] finding that its task was, instead, to "examine the extent to which trafficking itself may be considered to *run counter to the spirit and purpose of Article 4* of the Convention such as to fall within the scope of the guarantees offered by that Article" (emphasis added).[162] Indeed, the Court premised its analysis on the fact that the ECHR "is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies".[163] Insofar as human trafficking is concerned, human rights jurisprudence should be understood in light of its nature – human trafficking has been deemed a criminal attack on victims' human rights and fundamental liberties and for the purpose of states' positive duties to protect them to apply, it is 'unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour"'.[164]

However, in treating neglectfully the distinctions between these categories, human rights courts have fed into the sword rather than the shield function of human rights law. Tulkens describes the relationship between human rights and criminal law as "paradoxical".[165] On one hand, human rights have the function of triggering criminal proceedings against the offenders of human rights (sword function). On the other hand, human rights fulfil a shield function for the protection of those accused in criminal proceedings.[166] In essence, whilst human rights courts

[159] ibid 122.
[160] Holly Cullen, 'Siliadin v France : Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) 6 Human Rights Law Review 585.
[161] *Rantsev v. Cyprus and Russia* (n 44) [282].
[162] ibid 279.
[163] ibid 277.
[164] ibid 282.
[165] Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 577.
[166] ibid 579.

are entitled to interpret human rights teleologically "so as to make its safeguards practical and effective"[167] also to those right-holders who may be at risk of becoming or have become victims of human trafficking or slavery, such interpretations may run counter to the principle of legality by conflating acts which, under criminal law, are strictly different offences.

Stoyanova suggests that the duty to criminalize human trafficking, and not slavery, servitude and forced labour, has found too much resonance in the ECtHR. In her view, part of the harm arising from the current ambiguity between these different concepts may be circumvented if the Court finds states to be in violation of their human rights obligations both when the national crimes are "obscurely defined" and "haphazardly distinguished".[168] In this way, even when the Court itself is not positioned so as to investigate whether a specific crime has taken place, the principle of legality is nevertheless ensured at a national level.

[167] *Rantsev v. Cyprus and Russia* (n 44) [275].

[168] Vladislava Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalizing Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3 Cambridge Journal of International and Comparative Law 37 <https://works.bepress.com/vladislava_stoyanova/9/> accessed 13 February 2018.

4. Human rights law versus criminal law

4.1 Can human trafficking violate human rights in the first place?

Beyond the question of interpretative differences, some question whether human trafficking can be brought within the system of human rights at all. Piotrowicz argues that human trafficking is "primarily a matter of criminal law" because it is "usually a private criminal act or enterprise".[169] For Piotrowicz, "[i]n the absence of State involvement, for instance through complicity or neglect, it is hard to see why [human trafficking] is anything more than a crime just like, say, murder, or theft."[170] This argument he asserts based on a strong and narrow conviction that human rights must correspond with state obligations – in the absence of a state's specific responsibility as a perpetrator of human trafficking Piotrowicz cannot conceive of a scenario in which the act of human trafficking itself could constitute a violation of human rights.[171] Moreover, Piotrowicz seems to conflate the State in a human rights proceeding with a defendant in a criminal proceeding - he asks: "is not the damage too remote?"[172] and fails to see how "the conditions that promote trafficking, or expose people to the risk of being trafficked, may themselves be human rights violations".[173]

According to this line of thinking, a human rights violation can only occur when a state can be held responsible. Piotrowicz recognizes that states have obligations related to, for example, criminalizing human trafficking, but in his view holding them accountable for not filling those obligations does not equal attributing the human trafficking to them. Yet he interprets this to mean, in turn, that human trafficking itself cannot violate human rights. Instead, by trafficking another person, the private individual who perpetrates the crime of human trafficking is responsible for violating a criminal law, not for violating the human right of the victim (because only states can violate human rights).[174] "[W]hy", asks Piotrowicz, "should a criminal act by a private individual perpetrated against another private individual be a breach of human rights?" Such a view of human rights is a limited view of human rights, narrow in scope and in terms of what one considers human rights to be. Of course, it is true that the subject of international human rights law is a state.[175] However, the state is not held to account in the same way that an individual as a defendant in front of a criminal charge would be. In a criminal proceeding, the

[169] Piotrowicz (n 152) 186.
[170] ibid.
[171] ibid 194.
[172] ibid 185.
[173] ibid 184.
[174] ibid 196.
[175] Human Rights Committee, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. CCPR/C/74/CRP.4/Rev.6.

defendant is the focus of the court. The point is to find out if, in simplified terms, the defendant has committed a specific act or set of acts with a specific intent to bring about a certain result.[176] Under general international law the effect of an act, even if committed by a private individual, can, however, be attributable to a state if the state failed to take measures to either prevent the effects or respond to them.[177] In human rights proceedings states can be held accountable for both acts they committed as well as for acts committed by non-state actors. The principle that states must protect persons from other private actors is the essence of positive state obligations that relate to negative human rights, such as the prohibition of slavery.

In the case of the prohibitions on slavery, servitude and forced labour, not only has human rights law imposed a duty for states to refrain from the practices themselves but has also set forth a separate duty to investigate, prosecute and punish "criminal attacks on human rights".[178] Although human rights law can impose duties only on states, criminal law has become one mechanism through which to respond to human rights violations committed by private individual rather than the state.[179] In its famous judgment in the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights pointedly confirmed this very point.[180]

In the context of human trafficking and slavery, it is no longer the state's negative obligation to refrain from trafficking persons that is most often captured by a human rights framework. Instead, it is a state's positive obligations to prevent and to respond to human trafficking by non-state actors that come into question. For example, in *J. and others v Austria,* the ECtHR noted that because "[t]he alleged treatment prohibited by Article 4 was not imputed to organs of the Austrian State, but to private individuals, namely the applicants' employers, … the present case concerns the positive obligations arising under this provision, rather than the negative obligations."[181] To clarify, it was not the state's negative obligation not to traffic people that had potentially been violated, but the positive obligations the state has toward victims and potential victims of human trafficking under human rights law. As I hope to have concisely established, even when human trafficking itself does not in and of itself contain a human rights violation, the positive obligations under the prohibition of trafficking may move

[176] Emmanuel Melissaris, 'Theories of Crime and Punishment' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 365–371; Paul H Robinson, 'Offence Requirements' in Paul H Robinson (ed), *Structure and Function in Criminal Law* (Oxford University Press 1997).
[177] International Law Commission, 'Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session' (2001) A/CN.4/SER.A/2001/Add.1 (Part 2) 38–39.
[178] Krešimir Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Brill 2017) 22.
[179] ibid 9.
[180] *Velásquez Rodríguez v Honduras* [1988] Inter-American Court of Human Rights (Ser. C) No. 4 [172].
[181] *J. and Others v Austria* (n 46) [108].

human trafficking into the realm of human rights law. Thus, the next section attends to the question of what, then, an approach to human trafficking rooted in human rights is.

4.2 A 'rights-based approach' to human trafficking and slavery

The international conventions relating to human trafficking are not human rights instruments, nor do they put in place an effective framework for the protection of human rights. They are primarily criminal law instruments providing for transnational state cooperation in criminal proceedings against individual perpetrators of human trafficking. Out of such instruments one regional instrument, namely the Council of Europe Convention on Action against Trafficking in Human Beings[182] (hereinafter 'CoE Trafficking Convention'), stands out. While the criminalization of human trafficking, the core of instruments such as the Trafficking Protocol, is one part of the CoE Trafficking Convention, the convention mandates also many positive measures to be taken by states to prevent human trafficking and to protect victims. These measures include prevention of human trafficking through:

1. "national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings" (Article 5(1)),
2. "effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings" (Article 5(2)),
3. "a Human Rights-based approach and … gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes" (Article 5(3)),
4. "appropriate measures, as may be necessary, to enable migration to take place legally, in particular through dissemination of accurate information by relevant offices, on the conditions enabling the legal entry in and stay on its territory" (Article 5(4)),
5. "specific measures to reduce children's vulnerability to trafficking, notably by creating a protective environment for them" (Article 5(5)), and
6. "[involving], where appropriate, nongovernmental organisations, other relevant organisations and other elements of civil society committed to the prevention of trafficking in human beings and victim protection or assistance" (Article 5(6)).

[182] The Council of Europe Convention on Action against Trafficking in Human Beings (n 13).

The CoE Trafficking Convention also obliges parties to take measures to discourage demand (Article 6), put in place border measures "[w]ithout prejudice to international commitments in relation to the free movement of persons" (Article 7), identify victims (Article 10), assist victims (Article 12), implement a system which allows, in some cases, authorities to grant victims residence permits (Article 14), ensure victims' access to compensation and legal redress (Article 15) and facilitate return and repatriation "with due regard for the rights, safety and dignity of that person" (Article 16).

The CoE Trafficking Convention is an illustrative starting point for a discussion on a rights-based approach to human trafficking for two reasons. Firstly, it is a rare articulation of a set of state obligations, beyond criminalization, to be found in a legal document relating specifically to human trafficking. Secondly, in its internationally influential jurisprudence, the ECtHR has built on this articulation, bringing human trafficking into the sphere of human rights law. *Rantsev* was the first case in which the Court extended the scope of guarantees offered by the prohibition of slavery, servitude and forced labor (Article 4) to human trafficking. Beyond the negative obligation of states not to engage in slavery, servitude, forced labor and now human trafficking, the Court laid down multiple positive obligations. These obligations include having national legal safeguards for the practical and effective protection of the rights of both actual and potential victims of trafficking. State parties must implement measures for criminal prosecution and punishment of traffickers, but also regulate businesses. Furthermore, states have a positive obligation to address encouragement, facilitation and tolerance of human trafficking within their immigration laws. The ECtHR stated the requirement to have in place operational measures to protect victims or persons at risk of becoming victims. Most importantly, the Court emphasized that criminal justice responses are but one aspect of this set of obligations states must fulfil to suppress slavery, servitude, forced labor and human trafficking .[183] In its following cases, the ECtHR has endorsed the Article 4 obligations it laid down in *Rantsev*,[184] albeit sometimes in perplexing, inconsistent ways.[185]

The ECtHR is not the only human rights body which has spelled out states' human rights obligations in cases of human trafficking and slavery. In *Federation of Catholic Family Associations in Europe (FAFCE) v. Ireland*[186] the European Committee of Social Rights

[183] *Rantsev v. Cyprus and Russia* (n 44) [283–289].
[184] See *M and Others v Italy and Bulgaria* [2012] European Court of Human Rights Application no. 40020/03; *L.E. v Greece* (n 46); *Chowdury and others v Greece* (n 146).
[185] Vladislava Stoyanova, 'L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR' [2016] European Human Rights Law Review 290.
[186] *Federation of Catholic Family Associations in Europe (FAFCE) v Ireland* [2014] European Committee of Social Rights Complaint No. 89/2013, (2015).

(ECSR) had to determine whether Ireland was protecting children from trafficking and forced labor to at an acceptable level. The complainant argued that although Ireland had in place a legal framework for the protection and assistance of victims and criminalization of traffickers, the framework was not being applied effectively. As proof the complainant used the example that Ireland had had a mere one prosecution and conviction of a person for trafficking children for sexual purposes, despite estimates that the rate at which children are trafficked in Ireland greatly supersedes what the level of prosecutions would imply.[187] The ECSR turned its attention to first to the legal framework and, in finding it sufficient, gave weight also to the institutional framework developed for the purposes of preventing human trafficking and assisting victims, including the National Action Plan, the establishment of a High-Level Interdepartmental Group on Trafficking and Anti Human Trafficking Unit, and the specialized units within police, the health care system and the legal aid board.[188] The Committee found Ireland to be in conformity with its obligations based upon these two aspects: the legal framework for the criminalization, investigation and prosecution of trafficking, and the institutional framework for prevention and assistance of victims. The three-pronged set of obligations to prevent, criminalize and assist victims has also been adopted by the IACtHR who held that the prohibition of slavery

> implies a duty on the State to prevent and to investigate possible situations of slavery, debt bondage, trafficking in persons and forced labor. Among other means, States have the obligation to (i) initiate an immediate effective investigation which will make it possible to identify, adjudge and punish the persons found to be responsible, whenever a complaint or reasonable grounds exist for believing that persons within the state's jurisdiction are being subjected to one of the situations foreseen in Article 6(1) or 6(2) of the Convention; (ii) repeal any legislation which legalizes or tolerates slavery or debt bondage; (iii) declare such situations to be crimes, with severe penal sanctions; (iv) conduct inspections or take other measures to detect such practices; and (v) adopt measures to protect and assist the victims.[189]

Beyond these sometimes elusive obligations to prevent trafficking, criminalize it and assist victims, some more specific obligations have also come out of human rights jurisprudence. The Human Rights Committee, in the communication by *Omo-Amenaghawon* against Denmark,[190]

[187] ibid 28–36.
[188] ibid 63.
[189] *Workers of the Hacienda Brasil Verde v Brazil* (n 117) [319].
[190] *Omo-Amenaghawon* [2015] Human Rights Committee Communication No. 2288/2013, CCPR/C/114/D/2288/2013.

clarified that states must "take into due consideration the special vulnerability of persons … who have been subjected to human trafficking, which often lasts for several years even after they have been rescued or are able to free themselves from their aggressors, and the author's particular status as witness in the criminal proceedings against her aggressors" and, before such a person may be deported States must take into "due consideration" the "specific capacity" of the recipient state's "authorities to provide the author, in her particular circumstances, with protection to guarantee that her life and physical and mental integrity would not be at serious risk."[191] Furthermore, the principle of non-punishment of victims human trafficking,[192] albeit only implied in relevant international jurisprudence,[193] has gained traction in at least some domestic proceedings whilst simultaneously being ignored in others.[194]

4.2.1 Centrality of criminalization

As became clear in many of the references to states' positive obligations under a human rights framework, the criminalization of human trafficking is, even there, absolutely fundamental. This reflects human rights courts increasing "quasi-criminal jurisdiction"[195] as guardians of what should be investigated and prosecuted, when and how. It is, furthermore, inseparable from the general rise of the carceral state; the rhetoric of anti-impunity as a cure to all wrongs has been influential also in the sphere of human rights, resulting in human rights courts being more and more concerned with the implementation of individual criminal responsibility.[196]

As noted in earlier chapters, the movement to abolish slavery has always concerned itself also with the criminalization of specific courses of action. Starting with its early jurisprudence on slavery, the ECtHR has found that states have a positive obligation to criminalize the abuses iterated under Article 4 of the ECHR.[197] This obligation was later extended beyond the conducts explicitly mentioned under that article to mandate the criminalization also of human trafficking. In the more recent judgment in *L.E. v. Greece,* even when referring to the set of other positive

[191] ibid 7.5.
[192] Marija Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance' (2017) 1 Journal of Trafficking and Human Exploitation 41. Andreas Schloenhardt and Rebekkah Markley-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons — Principles, Promises, and Perspectives' (2016) 4 Groningen Journal of International Law 10.
[193] Ryszard Piotrowicz and Liliana Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle' (2016) 16 Human Rights Law Review 669.
[194] Danielle Augustson, 'Protecting Human Trafficking Victims from Criminal Liability - A Legislative Approach' (2016) XVII The Georgetown Journal of Gender and the Law 625.
[195] Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 American Journal of International Law 1.
[196] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2014) 100 Cornell L. Rev 1069, 1119.
[197] Siliadin, C.N. and V. v. France etc.

obligations it set forth in *Rantsev*, the Court's assessment of actual compliance seems indifferent toward protection of victims and is non-existent in terms of prevention of human trafficking.[198] In its jurisprudence the IACtHR has also emphasized states' due diligence in terms of investigating and prosecuting slavery and human trafficking as crimes, even when, as Plant notes, "recent governments in Brazil—often in cooperation with business leaders and civil society groups—have adopted a range of creative law and policy measures to combat these abuses, to the extent that Brazil has often been recognized as a Latin American (if not global) leader in present-day initiatives to eradicate slavery and slave labor practices, forced labor, and human trafficking."[199] Indeed, the judgment itself gives but little recognition of or guidance toward developing these efforts, stressing instead the *erga omnes* obligation of states' to "initiate an investigation of their own accord in order to establish the individual responsibility involved."[200] Even the Human Rights Commission, when tasked primarily with determining the meaning of a human trafficking victim's right to life and the prohibition of inhuman or degrading treatment in the context of a deportation, builds its judgment upon the victim's "particular status as witness in the criminal proceedings against her aggressors"[201] as a justification for non-deportation.

This focus has been duly noted. In the case of *ZN v Secretary of Justice (No 2)*, heard by the Hong Kong Court of First Instance, the applicant ZN, a victim of human trafficking for forced labor, alleged that his rights had not sufficiently been protected under the right to be free from slavery, servitude and forced labor. The court examined the State's positive obligations, which it determined in light of international jurisprudence, and found that the Hong Kong government was in breach of its bill of rights' prohibition of slavery by not *criminalizing* human trafficking. The applicant had submitted that these positive obligations included an obligation to prevent trafficking,[202] yet the court looked past the other positive obligations set forth in international jurisprudence and mandated not preventive or protective measures, but those relating to investigation, prosecution and, ultimately, punishment of human traffickers.

Some scholars have noted this trend and expressed fear over the fact that a focus on the criminalization of human trafficking could produce undesirable outcomes in the grand scheme

[198] Milano (n 4) 711–713.
[199] Roger Plant, 'Workers of the Hacienda Brasil Verde v Brazil: Putting the Judgment in Perspective' (2017) 3 International Labor Rights Case Law 387, 388.
[200] *Workers of the Hacienda Brasil Verde v Brazil* (n 117) [362]; Unofficial translation accessed via 'Inter-American Court of Human Rights: Workers of the Hacienda Brasil Verde v Brazil, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318, 20 October 2016' (n 139).
[201] *Omo-Amenaghawon* (n 190) [7.5].
[202] *ZN v Secretary of Justice (No 2)* [2016] HKCFI HKEC 2766 [192, 196].

of things. Hathaway's main concern is that criminalization will, in the end, reduce the ability of migrants to access their rights to asylum.[203] This idea is corroborated by Shin, who finds that the current international approach to human trafficking, by focusing so much on states' duties to enforce criminal laws, not only empowers the state unduly but in doing so disempowers individuals. She writes: "This overemphasis [on criminal justice] marginalizes the need to protect and uphold victims' rights outside the criminal context, and drives attention away from structural problems that require broader reforms of law and policy."[204] While unease of this kind is rarely voiced in international judgments, Stangos' concurring opinion in *FAFCE v. Ireland*[205] is a refreshing reminder that options outside the criminal law framework ought to be sought. Although Stangos concurs, he does so with skepticism, and brings to attention that criminal law cannot eliminate human trafficking and can do "still less to prevent it." That the complainant organization raised questions only about the criminal law framework might have limited the capacity of the Committee to assess the impact of social policies, yet Stangos still raises the idea that such questions are of critical importance:

> This does not prevent me from wondering still, even after our decision, whether practical social measures have been taken by one or other of the many institutions and schemes set up to combat child trafficking in Ireland … such that the legal obligations that apply to Ireland under the Charter, as an international treaty for the protection of social rights, have actually been observed. In truth, in its response to this collective complaint, the Committee has failed to adopt an interpretative line which raises the Charter to the rank of a legal instrument capable of resulting in obligations on the Contracting Parties to combat child trafficking by means of effective prevention of the problem through social policies and practices.[206]

This point is crucial not only in terms of questioning the exclusive focus on criminalization of human trafficking. It also raises another potent idea: perhaps our human rights instruments should be acknowledged and interpreted as capable of resulting in obligations on states to effectively prevent human trafficking. It is a combination of these two aspects of Stangos' dissent that the next section will analyze – not only in the context of the Social Charter, but in terms of states' human rights obligations at large.

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[203] Hathaway (n 30) 6, 13.
[204] Yoon Jin Shin, *A Transnational Human Rights Approach to Human Trafficking: Empowering the Powerless* (Brill Nijhoff 2018) 229.
[205] *Federation of Catholic Family Associations in Europe (FAFCE) v. Ireland* (n 186).
[206] ibid Separate Concurring Opinion of Petros Stangos.

4.2.2 Looking beyond the crime

Human trafficking has, in the international legal arena, been framed as primarily a crime rather than as, for instance, an effect of neoliberalism, globalization, weak migrants' rights and socio-economic inequality. Not only may a crime-oriented approach, especially when paired with securitization, foster vulnerability to trafficking,[207] when viewed through a strictly criminal lens, the experience of trafficking becomes distorted and flattened. The condition of slavery or other exploitation endured by a victim may not always correspond neatly with individual criminal responsibility, even in the occasional cases where there is enough evidence to bring a case at all. As pungently verbalized by Gleeson CJ in the Australian case of *R. v. Tang*: "Those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy."[208]

As stated earlier, human rights obligations can be summarized as obligations to respect, to protect and to fulfil.[209] If one were to further explain these obligations, the obligation to respect would be characterized by the obligation of the state to refrain from interfering with the enjoyment of a right. In the case of the right to be free from slavery, this obligation takes the form of states' obligation not to enslave or traffic persons. The obligation to protect is also somewhat applied to the right to be free from slavery. It is this obligation that serves as the basis for the states' duties to prevent violations of the right by non-state parties, such as individual slave-holders or human traffickers. As was has become increasingly obvious, the obligation to protect is often taken to mean that the state must criminalize slavery and human trafficking and effectively enforce their criminal provisions. The operational measures to protect victims can also be read into the responsibility to protect. It is the last of the three, the obligation to fulfil, that has yet to be taken seriously within the context of slavery and human trafficking. This obligation concerns the creation of conditions allowing for the realization of a right.

The are at least three plausible ways in which to incorporate a view toward the possible human rights violations preceding the incident which may be described as a crime: by examining human rights conditions in multiple locations (1), by addressing the layered vulnerabilities of

[207] UN Women, 'Recommendations for Addressing Women's Human Rights in the Global Compact for Safe, Orderly and Regular Migration' (OHCHR 2016) INT/CMW/INF/8273 para 2.3.
[208] *The Queen v Tang* (n 92) [29].
[209] See generally Human Rights Committee, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (n 175). International Covenant on Civil and Political Rights (n 57) Article 2; International Covenant on Economic, Social and Cultural Rights 1976 (United Nations, Treaty Series, vol 993, p 3) Article 2(1).

persons to trafficking (2) and by considering human trafficking as a violation of rights other than the right to be free from slavery (3). These three approaches are by no means mutually exclusive but rather work in harmony toward a richer understanding of the interdependency of human rights.[210]

Starting with the first of the three ways to promote a fuller view toward the interaction of human rights, human rights courts may be able to determine the effects of the treatment endured by victims in their state of origin, causing them to be vulnerable to trafficking. This is a limited option insofar that most human rights courts are regional and there is yet to be a world court of human rights.[211] However, whilst human rights courts today do not have the possibility to examine the socio-economic or other conditions in all possible states of origin (states from which a person was initially trafficked into exploitation), not all trafficking takes place across regions or even across an international border. For example, in *Rantsev*, the ECtHR took a step in this direction by examining the obligations of both Cyprus, the destination state, and Russia, the state of origin. The Court noted that because Russia was a Contracting Party and had committed to protecting persons in its territory, and the trafficking allegedly commenced in Russia, "the Court is competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant's daughter from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death."[212] It is this aspect of human trafficking that is a valuable addition to the general prohibition of slavery, servitude and forced labor. Whereas these forms of exploitation do not imply a movement across or within states, the definition of human trafficking does, thus extending the scope of examination.

Human trafficking also broadens the extent to which a transition from one condition to another can be examined: it adds perspective to the different means and modes through which persons are positioned into exploitative conditions and, perhaps most importantly, lends an eye to the reasons behind it. Indeed, that the definition of trafficking explicitly recognizes the link between vulnerability and exploitation could even be described as strange. One of the means through which a person can be trafficked is by "abuse of power or of a position of vulnerability".[213] This

[210] The international covenants on human rights were built on the principle of interdependency of human rights; see UN General Assembly, 'Resolution 543 (VI). Preparation of Two Draft International Covenants on Human Rights' (1952) preamble.

[211] Such a court has, however, been proposed in detail, see Julia Kozma, Manfred Nowak and Martin Scheinin, *A World Court of Human Rights : Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010) <http://cadmus.eui.eu//handle/1814/20880> accessed 21 August 2018.

[212] *Rantsev v. Cyprus and Russia* (n 44) [205–208].

[213] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (n 12) Article 3(a).

provision can be at odds with establishing individual criminal liability. In the case of forced labor, for example, no such considerations are made available because the criminal offence rests upon an individual offender's explicit actions toward the victim. The ILO has also noted the way in which the Trafficking Protocol expands the perception. It contends that although "[t]he lack of viable economic alternatives that makes people stay in an exploitative work relationship does not in itself constitute forced labour … it may constitute a position of vulnerability as defined by the Palermo Protocol. *External constraints that can have an impact on free consent should therefore be taken into account*."[214] In sum, the definition of the Trafficking Protocol offers a lens through which one can examine the pre-existing inequalities in power and the vulnerabilities which heighten a risk of trafficking. These questions do not fit purely within the purview of criminal liability of an individual but express a concern for underlying systems and structures. The Trafficking Protocol seems also to indicate such an understanding – despite its otherwise weak language on human rights considerations, it explicitly includes the mandate 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."[215] Thus, it does not support the idea that human trafficking is attributable purely to individuals.

Having to depart ones' home due to sudden insecurity of survival, being forced to rely on irregular and unregulated transport to migrate, crisis and breakdown of state institutions, discrimination, inequality, poverty and lack of economic opportunities are all intimately connected with an exacerbated risk of a person becoming a victim of trafficking.[216] Vulnerability is a tool which, to date, has not been fully explored within human rights. At its best, the value of the concept of vulnerability is that it embodies considerations of an individual in a societal context – vulnerability, if used with care, can be a lens through which to "address

[214] ILO, 'Forced Labour and Human Trafficking - A Handbook for Labour Inspectors' (2008) 5. Emphasis added.
[215] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (n 12) Article 9(4).
[216] The Special Rapporteur of the Human Rights Council on trafficking in persons, especially women and children, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children' (UN 2016) A/71/303; E Galos and others, 'Migrant Vulnerability to Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes' (IOM 2017); The Special Rapporteur of the Human Rights Council on trafficking in persons, especially women and children, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo' (UN 2013) A/HRC/23/48 11–13; Commission of the European Communities, 'Communication From the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation' (1996) COM(96) 567 final.

different aspects of inequality" and it carries "power to further substantive equality".[217] However, this should be used not to label groups, but to examine what the "layers" of circumstances are that render people vulnerable.[218] So, rather than labeling all people living in poverty "vulnerable", in specific cases of human trafficking and within the framework of rights-claims made in front of human rights bodies, vulnerability can be a mechanism to use to assess the different "layers" of vulnerability that a trafficker may have been able to abuse. Enjoyment of rights on an "equal footing" requires sensitiveness toward the multiple ways in which people are on an unequal footing to exercise their rights. These may be anything ranging from illiteracy to poverty to social inequality and naming each layer necessarily sheds light on the ways states' fail to protect and fulfil the right to substantive enjoyment of all human rights and, in this context, the enjoyment of the right to be free from slavery, servitude and forced labor.

The Inter-American Court of Human Rights applied such an approach in the *Workers of the Hacienda Brasil Verde v Brazil* judgement, under the auspices of "structural discrimination". It considered, specifically, that the victimization of persons showed their vulnerability and that this vulnerability was rooted in their economic position. Additionally, the Court observed the poor prospects for work and employment in the regions the victims were from, their illiteracy and lack of schooling. This the Court regarded as structural discrimination and, given that, the state should have adopted special social protection measures.[219]

The ECtHR has also shown an increased willingness to explore and confirm the vulnerabilities of certain groups arising from societal inequalities.[220] The concept has, however, been used thus far in very few instances that are relevant to human trafficking and slavery. The case which is most interesting in this context is the case of *M.S.S. v. Belgium and Greece*, in which the ECtHR found that "the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously."[221] The Court held Greece accountable for the state of the applicant who "has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack

[217] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1057.
[218] Florencia Luna, 'Elucidating the Concept of Vulnerability: Layers Not Labels' (2009) 2 International Journal of Feminist Approaches to Bioethics 121, 129.
[219] 'Inter-American Court of Human Rights: Workers of the Hacienda Brasil Verde v Brazil, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318, 20 October 2016' (n 139) paras 338–341.
[220] Peroni and Timmer (n 217).
[221] *MSS v Belgium and Greece* [2011] European Court of Human Rights Application no. 30696/09 [232].

of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 [prohibition of inhuman or degrading treatment] of the Convention."[222] Furthermore, the Court found that the applicants socio-economic conditions were "accentuated by the vulnerability inherent in his situation as an asylum-seeker."[223] As Timmer and Peroni write, "[b]y unveiling all these deficiencies in the Greek asylum system, the Court is ultimately pointing to the institutional production of vulnerability of asylum seekers in Greece."[224]

That vulnerability is institutionally produced is a recurring theme. In *Sufi and Elmi v. the United Kingdom* the Court considers the "breakdown of social, political and economic infrastructures" caused by the direct and indirect parties of the conflict in Somalia as a risk to the right to be free from torture and inhumane and degrading treatment. The ECtHR connects this to the approach taken in the M.S.S. case, "which requires it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame."[225] This example also embodies the interaction between vulnerability and human rights violations taking place in multiple states: human rights courts can examine human rights conditions in states outside their jurisdiction, providing not accountability per se, but a softer form of attribution of responsibility.

This brings us to the third angle of added value. Vulnerabilities, because they differ based on place, time and person and because they may be layered (some persons may be vulnerable in more ways then one), relate to many different human rights. The Human Rights Committee has accentuated this especially well in its approach to human trafficking. In its concluding observations for Thailand, the Human Rights Committee has set forth many types of measures moving from the starting point of who, in Thailand, is vulnerable and how to proceed to prevent their trafficking.[226] Because "[t]he Committee notes with concern that certain groups are at a particularly higher risk of being sold, trafficked and exploited, i.e. street children, orphans,

[222] ibid 263.
[223] ibid 233.
[224] Peroni and Timmer (n 217) 1069.
[225] *Sufi and Elmi v the United Kingdom* [2011] European Court of Human Rights Applications nos. 8319/07 and 11449/07 [282–283].
[226] Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Thailand' (2005) CCPR/CO/84/THA.

stateless persons, migrants, persons belonging to ethnic minorities and refugees/asylum-seekers", it recommends that Thailand takes steps to, *inter alia*,

> 1. "make every effort, including preventive measures, to ensure that children who engage in labour do not work under conditions harmful to them and that they continue to have access to education",
> 2. "take action to implement policies and legislation for the eradication of child labour, inter alia through public-awareness campaigns and education of the public on the protection of the rights of children",
> 3. "continue to implement measures to naturalize the stateless persons who were born in Thailand and are living under its jurisdiction",
> 4. "review its policy regarding birth registration of children belonging to ethnic minority groups, including the Highlanders, and asylum-seeking/refugee children, and ensure that all children born in the State party are issued with birth certificates",
> 5. "take measures to effectively implement the existing legislation providing for the rights of migrant workers. Migrant workers should be afforded full and effective access to social services, educational facilities and personal documents, in accordance with the principle of non-discrimination",
> 6. "consider establishing a governmental mechanism to which migrant workers can report violations of their rights by their employers, including illegal withholding of their personal documents",
> 7. "humanitarian assistance be effectively provided to all victims of the tsunami disaster without discrimination, regardless of their legal status."[227]

The Committee has, in a similar manner, recommended steps to be taken to reduce the vulnerability of different groups to human trafficking in other countries[228] and its approach is aligned with its take on the principle of equality, which, it has pointed out, sometimes requires affirmative action to "diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[229] Such an approach is endorsed also by the Human Rights Council, who substantiates that "victims of trafficking are particularly exposed to racism, racial discrimination, xenophobia and related intolerance, and that women and girl victims are often subject to multiple forms of discrimination and violence, including on the

[227] ibid 6–7.
[228] Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Greece' (2005) CCPR/CO/83/GRC; Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Tajikistan' (2005) CCPR/CO/84/TJK.
[229] Human Rights Committee, 'General Comment 18 - Non-Discrimination' (1994) HRI/GEN/1/Rev.1 para 10.

grounds of their gender, age, ethnicity, culture and religion, as well as their origins, and that these forms of discrimination may themselves fuel trafficking in persons".[230]

It is only by looking beyond the crime that we can approach one of the pillars of a rights-based approach to human trafficking, namely that which requires us to "identify and redress the discriminatory practices and unjust distributions of power that underlie trafficking".[231] Private individuals may carry out what is perceived of as the crime of human trafficking, but there are structures and policies in place which aid them. As a result, regional human rights courts are becoming increasingly important as an arena in which to litigate cases of slavery.[232] Yet victims still face many obstacles in gaining access to them. Furthermore, although courts have already recognized that civil and political rights are interdependent with socio-economic rights and that their jurisdictions cover the corpus of human rights within their jurisdiction, enabling them to move beyond the slavery – human trafficking dichotomy by which criminal courts are bound, they are still to this day demonstrating a rather limited use of these capacities.

[230] Human Rights Council, 'Resolution 11/3 on Trafficking in Persons, Especially Women and Children' (2009).
[231] OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (UN 2010) Commentary HR/PUB/10/2 49.
[232] Helen Duffy, 'Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution' (2016) 14 Journal of International Criminal Justice 375.

5. Human trafficking as a crime against humanity under the jurisdiction of the ICC

Many UN bodies have voiced concern over the increase in human trafficking driven by conflict and post-conflict situations. One of the central elements in many of these conflict situations is the collapse of the state and the deterioration of the government. This both impacts the vulnerability of persons to trafficking and adversely affects capacity of the state to fulfil its human rights obligations. When a state collapses and a government deteriorates, two things can follow. First of all, there may be no-one to hold accountable for violations of human rights in a meaningful way. Secondly, there may be no state capable of holding private actors responsible for their illegal acts. When this happens and a state is genuinely unwilling or unable[233] to hold perpetrators of so-called core crimes to account, international criminal law may provide one avenue for justice. This accountability is directed at individuals in a criminal proceeding, much like in a domestic setting, but instead imposed on a supranational level by an international body. International criminal law dates back to the Nuremberg trials following World War II. In the wake of vast atrocities, a new international legal system was set up to hold individuals accountable even when they were acting in conformity with their national laws.[234] The more recent culminations of international criminal proceedings can be found in the ad hoc criminal tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). The ad hoc criminal tribunals were created by UN Security Council resolutions for the investigation and prosecution of crimes that took place in a specific place and a specific time and their statues can be seen as a reflection of customary law. Newer still is the first permanent institution, the International Criminal Court (ICC). The ICC, unlike its predecessors, abides by a comprehensive statute, the Rome Statute,[235] which is seen as the codification of international criminal law rather than just a reflection of customary law.[236] The Rome Statute lays down the jurisdiction of the ICC which, substance-wise, covers four international core crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression.

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[233] This is known as the principle of complementarity. See Rome Statute (n 65) Preamble, Articles 1 and 17. States continue to bear the primary duty to investigate, prosecute and punish perpetrators of these crimes. For an overview, see Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008); Sarah MH Nouwen, 'Fine-Tuning Complementarity' in Bartram S Brown (ed), *Research Handbook on International Criminal Law* (Edward Elgar Publishing 2011); Antonio Cassese, *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Salvatore Zappalà and Paola Gaeta eds, Oxford University Press 2008) 513–514.

[234] Antonio Cassese, 'Reflections on International Criminal Justice' (2011) 9 Journal of International Criminal Justice 271, 272–273.

[235] Rome Statute (n 65).

[236] M Cherif Bassiouni, 'Codification of International Criminal Law' (2017) 45 Denver Journal of International Law and Policy 333, 338–339.

While the ICTR and ICTY also had jurisdiction over the crimes of enslavement and sexual slavery, no mention was made of human trafficking. The Rome Statute of the ICC, however, contains a direct reference to human trafficking. Based on this inclusion, some academics have put forth and even vehemently argued in favor of the idea that a response from the ICC could provide a solution in current conflict-struck milieus. It is this claim that the current chapter will explore in light of the previous chapters. This chapter seeks to answer the question: in light of the definition of enslavement in international criminal law, can perpetrators of human trafficking be held individually criminally liable for a crime against humanity at the ICC?

5.1 Slavery and human trafficking in international criminal law

The Charter of the Nuremberg Tribunal already knew of the crime against humanity of enslavement but left it undefined.[237] The same was repeated in the statutes of the ICTY and ICTR, though these included some of the contextual elements to which we will turn in the next section. The Rome Statute of the ICC differs from the earlier statutes in that it both defines enslavement and also incorporates and defines sexual slavery as a crime against humanity. Because sexual slavery is, for the most part, defined in line with enslavement and for all intents and purposes is, *de facto*, a form of enslavement, I will not differentiate between the two in this thesis.[238]

The academics who have argued in favour of the idea that all cases of human trafficking would be within the substantive jurisdiction of the ICC under the crimes against humanity of enslavement and sexual slavery[239] most often base their argument on one or both of the two following claims. Firstly, some, often relying on human rights jurisprudence, argue that human trafficking is slavery and, thus, enslavement or, in tandem, that it is so serious an act that it should therefore be considered a crime against humanity.[240] Secondly, others propose that the

[237] Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement') 1945 Article 6(c).
[238] Sellers, 'Wartime Female Slavery' (n 91); Gay McDougall, 'Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict' (Economic and Social Committee 1998) Final Report E/CN.4/1998/13; Alexandra Adams, 'Sexual Slavery: Do We Need This Crime in Addition to Enslavement?' (2018) 29 Criminal Law Forum 297.
[239] The codification of these can be found in the Rome Statute (n 65) Articles 7(1)(c) and (g). See also Statute of the Special Court for Sierra Leone 2000 Articles 2(c) and (g).
[240] Scarpa (n 114); Jane Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' [2011] Columbia Law School Gender and Sexuality Online (GSL Online); Joshua Nathan Aston, *Trafficking of Women and Children: Article 7 of the Rome Statute* (Oxford University Press 2016); Clare Frances Moran, 'Human Trafficking and the Rome Statute of the International Criminal Court' (2014) 3 The Age of Human Rights Journal 32.

ICC's Rome Statute itself, by referring to human trafficking in the definition of enslavement, explicitly transposes human trafficking into the domain of the definition of enslavement.[241]

Neither of these two assertions survives scrutiny. The first is problematic because, as discussed in preceding chapters, not all human trafficking is slavery, and not all slavery comes about by way of human trafficking. Within a criminal legal locus, relying on teleological, evolutive human rights jurisprudence for a definition risks undermining the foundational principle of legality. While international criminal law has, especially in the past, had an uneasy relationship with the principle,[242] that the ICC now has its own statute to follow means it is less reliant on natural law or customary law than its predecessors. In a criminal process the Court needs to respect a stricter mode of interpretation.

It is true that the Rome Statute is ambiguous enough about the application of human rights law also in interpreting substantive definitions of crimes to have raised a great deal of discussion.[243] Scholars have observed so-called cross-fertilization or judicial dialogue especially in the context of the definitions of torture, rape and enforced disappearances.[244] Furthermore, as Mégret notes: "Human rights" fact-finding has increasingly focused on issues of criminal liability, operating as a sort of advance mechanism for domestic and international criminal justice. This articulation with potential criminal responsibility is one of the problematic characteristics of contemporary fact-finding both for criminal justice itself and for the work of human rights more generally. It may eventually further criminal processes but may also encumber them with "facts" that are not proven in ways that satisfy criminal justice's stringent

[241] M Cherif Bassiouni and others, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century' (2010) 81 Revue Internationale de Droit Pénal 417, 448–449; Fausto Pocar, 'Human Trafficking: A Crime Against Humanity' in Ernesto U Savona and Sonia Stefanizzi (eds), *Measuring Human Trafficking - Complexities and Pitfalls* (Springer 2007) 8–9.

[242] Joanna Nicholson, 'Strengthening the Effectiveness of International Criminal Law through the Principle of Legality' (2017) 17 International Criminal Law Review 656.

[243] Davidson (n 154); Neha Jain, 'Interpretive Divergence' (2017) 57 Virginia Journal of International Law 45; Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 European Journal of International Law 543; Beth van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 The Georgetown Law Journal 119; William A Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 Journal of International Criminal Justice 609.

[244] Michelle Farrell, 'Just How Ill-Treated Were You? An Investigation of Cross-Fertilisation in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law' (2015) 84 Nordic Journal of International Law 482; Elena Maculan, 'Judicial Definition of Torture as a Paradigm of Cross-Fertilisation: Combining Harmonisation and Expansion' (2015) 84 Nordic Journal of International Law 456; Gabriella Citroni, 'The Specialist Chambers of Kosovo - The Applicable Law and the Special Challenges Related to the Crime of Enforced Disappearance' (2016) 14 Journal of International Criminal Justice 123; Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' [2008] OHCHR Guidance materials.

standards."[245] Indeed, a common critique of the ECtHR's case law on human trafficking concerns specifically this: that the Court does not apply the definition of trafficking to the facts at hand[246] and does not engage in the definitions of human trafficking and slavery, servitude and forced labour.[247] Based on this, I would assert that it seems questionable to rely on human rights cases such as *Rantsev* to justify expanding the definition of enslavement. Despite its bad track record on abiding by general criminal principles,[248] international criminal law is, nevertheless, an expression of criminal jurisdiction[249] and as such should be bound by rules of criminal law.[250]

As regards the second argument, that the Rome Statute's provisions indicate a tacit or direct evolution of enslavement having expanded so as to cover all human trafficking, it simply demands a more scrupulous reading of the text of the Statute. The drafting of Article 7 on crimes against humanity was fraught with disagreement. This was especially so when it came to enslavement as a crime against humanity. A "complicated and confused discussion" followed the proposal to link trafficking with sexual exploitation, and to define it as a form of enslavement.[251] In the end, enslavement was agreed upon as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".[252]

The Rome Statute's definition does not indicate that human trafficking is now synonymous with enslavement. Indeed, the relationship between human trafficking and enslavement should still be understood within the framework previously established: human trafficking is a course of actions within which exploitation may occur. When this exploitation is based on such a deprivation of liberty that it equips the perpetrator with the power to exploit the victim as

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[245] Frédéric Mégret, 'Do Facts Exist, Can They Be "Found", and Does It Matter?' in Philip Alston and Sarah Knuckey, *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016) 46.
[246] Ramona Vijeyarasa and Jose-Miguel Bello Villarino, 'Modern Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev' (2012) 8(2) Journal of International Law and International Relations <http://classic.austlii.edu.au/au/journals/UTSLRS/2012/22.html> accessed 12 February 2018.
[247] Allain, 'Rantsev v Cyprus and Russia' (n 157); Vladislava Stoyanova, 'Irregular Migrants and the Prohibition of Slavery, Servitude, Forced Labour & Human Trafficking under Article 4 of the ECHR' (*EJIL: Talk!*, 26 April 2017) <https://www.ejiltalk.org/irregular-migrants-and-the-prohibition-of-slavery-servitude-forced-labour-human-trafficking-under-article-4-of-the-echr/#more-15156> accessed 21 August 2018.
[248] Brianne Leyh, 'Pragmatism over Principles: The International Criminal Court and a Human Rights-Based Approach to Judicial Interpretation' (2017) 41 Fordham International Law Journal; van Schaack (n 243).
[249] Bassiouni, 'Codification of International Criminal Law' (n 236).
[250] Rome Statute (n 65) Part III, see especially Articles 22-24; Cassese, *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (n 233) 508. For an overview of these considerations during the drafting of the Rome Statute, see Edward M Wise, 'General Rules of Criminal Law' (1997) 25 Denver Journal of International Law and Policy 313. On some of the most central tensions, see also Jain (n 243); Grover (n 243).
[251] The Advocacy Project, 'On the Record for a Criminal Court' (1998) Volume 1, Issue 14 <http://www.advocacynet.org/38917-2/> accessed 23 August 2018.
[252] Rome Statute (n 65) Article 7(2)(c).

property, and meets the other elements required for a crime against humanity to have taken place, it may also be considered the crime against humanity of enslavement.

As the Rome Statute seems to underline, enslavement may occur *in the course of* human trafficking. That the drafters of the Rome Statute took into consideration the different formulations of trafficking and slavery and arrived at casting human trafficking under the term enslavement seems, rather than indicia that the crime of enslavement now captures all human trafficking, a recognition of the fact that also sexually and otherwise exploited women may be victims of enslavement. Indeed, as discussed in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, a decision was made to word the article in this way to establish that human trafficking could be something other than "a niched form of sexual exploitation",[253] which, for too long, all exploitation of women has been seen to be. In this instance it must be noted that there is a contradiction between the Rome Statute and the ICC's Elements of Crimes document. Footnote 11 to Article 7(1)(c)'s element 1 states: "It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children." However, the Elements of Crimes merely assist the Court in its interpretation and application of the Statute. Because the Statute's definition of enslavement is authoritative and it has been established that cases of human trafficking which do not adhere to the definition of slavery are not slavery or enslavement, it seems plausible that this is but another device to alert the Court to the fact that enslavement may take place within an instance of trafficking.

I would argue not that human trafficking cannot be enslavement, but that not all human trafficking is. There are two ongoing cases in the ICC which will bring up this very question. In the *Ntaganda* case, the Prosecutor has brought charges of sexual slavery. Ntaganda has, allegedly, arrested, captured or detained multiple persons whom he has subsequently forced to work and sexually exploited. These charges are clearer than those brought against Ongwen. Ongwen is charged with sexual slavery, enslavement and "the crime of other inhumane acts as a crime against humanity in the form of forced marriage",[254] which, the Chamber ponders, "differs from the other crimes with which Dominic Ongwen is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests. It may be stated that forced marriage will generally be committed in circumstances in which the victim is

[253] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Discussion Paper, A/CONF.183/C.1/L.53

[254] *The Prosecutor v Dominic Ongwen* [2016] International Criminal Court ICC-02/04–01/05 [112].

also sexually or otherwise enslaved by the perpetrator."[255] The summarized evidence surely corresponds with the definition of human trafficking:

> In short, the evidence provided by the seven witnesses establishes that: (i) all seven women were abducted by the LRA; (ii) they were all distributed to Dominic Ongwen's household; (iii) they were all made so-called "wives" to Dominic Ongwen – whether immediately upon distribution to him or after a period of being domestic servants (referred to as ting tings) in his household; (iv) they were all regularly forced to have sexual intercourse with Dominic Ongwen either by brute force, threat of force, or other forms of coercion; (v) they were all deprived of their personal liberty for the duration of their abduction; and (vi) all of them, with the exception of (P-226), became pregnant as a result of rapes by Dominic Ongwen.

However, to be considered enslavement in light of its definition, this and other cases of human trafficking would first have to be equivalent to slavery. Again, exercise of powers attaching to the right of ownership would have to be established. The case law of international criminal tribunals is illustrative of how to determine such exercise, thus creating a set of useful guidelines for how to tell when human trafficking is enslavement. For this reason, we now turn to the leading jurisprudence.

Kunarac is, perhaps, the best-known case of enslavement, but it is not the only one in which an international criminal tribunal set out to define the exercise of powers attaching to the right of ownership. In *Kunarac*, the Appeals Chamber held that it is the individual relationship between the accused and the victim which ultimately determines whether, in a single case, the powers attaching to the right of ownership have been exercised.[256] It set forth a list of characteristics which are telling of a relationship in which a person is enslaved. These characteristics, taken together with those set forth in other judgments, are best viewed through the lens of the two steps taken to establish slavery: (1) a victim's loss of liberty and autonomy and (2) the exploitation of the victim through the exercise of exploitative powers. In the confirmation of charges against Ntaganda, the Pre-Trial Chamber confirmed that "in the absence of other factors, mere imprisonment or its duration are sufficient to satisfy the element of ownership over the victim of the crime of sexual slavery."[257] Both of the two interconnected steps are, thus, necessary. Then, because enslavement is a crime perpetrated by an individual, these two steps must have been intentionally caused by the perpetrator.

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[255] ibid 92.
[256] *Kunarac et al.* (n 99) [149].
[257] *The Prosecutor v Bosco Ntaganda* [2014] International Criminal Court ICC-01/04-02/06 [53].

The common strand which binds together the deprivation of one person's liberty by another is the existence of violence, force or threat of it to control their movement and their physical environment. When it comes to the exploitation of powers to which the preceding deprivation of liberty and autonomy paved the way, the most central examples include the subjection of the victim to abuse (both physical and mental), control of their sexuality and forced labour. It was this very criterion that, in *Kunarac*, were deemed central to enslavement.[258] The case law of the Special Court for Sierra Leone confirmed the conception of exercise of powers attaching to the right of ownership as unfurled by the ICTY[259] and the ICC's case law, albeit limited, has showed a similar perception.

In the *Katanga* case,[260] the ICC's Trial Chamber had to decide whether the "evidence established substantial grounds to believe that after the attack, civilians were abducted from the village of Bogoro by FNI and/or FRPI combatants and taken to camps where they were imprisoned, forced to become the "wives" of combatants of those groups and forced to engage in acts of a sexual nature" and, in sum, the Chamber found that it was "acts of sexual enslavement of women who were captured after the battle and taken to various military camps" that were before it "for determination."[261]

The victims had been "abducted", "incarcerated" and subsequently exploited sexually[262] and for different types of manual labour, including household chores[263] and transporting appropriated property.[264] The Court did not categorize the determining factors of enslavement, yet those that it found to be central fit within the two categories of (1) establishing ownership through deprivation of freedom and autonomy and (2) subsequent exercise of powers flowing from ownership, i.e. exploitation. As for the first step of enslavement, the Court was satisfied that the witnesses had been "abducted",[265] "incarcerated",[266] and/or "taken hostage"[267] and as a result were "extremely vulnerable" and deprived of their freedom of movement and autonomy.[268] It is noteworthy to mention, here, that the victims were not deprived of their freedom purely by circumstance but mainly through acts by the accused perpetrators: by a

[258] *Kunarac et al.* (n 99) [119].
[259] Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 Cornell International Law Journal 49, 61–63.
[260] *The Prosecutor v Germain Katanga* [2014] International Criminal Court ICC-01/04-01/07.
[261] ibid 985.
[262] ibid 1002–1021.
[263] ibid 1009.
[264] ibid 1014.
[265] ibid 1003, 1234 See also the witness testimonies.
[266] ibid 1003, 1006, 1017.
[267] ibid 1003.
[268] ibid 1007–1021.

combination of many means of violence, death threats, by imposing a fear of retaliation, constant surveillance, and/or coercion by means of "marriage".[269] Once the victims were in captivity, the accused had exploited them. For example, once one of the victims had been deprived of her freedom and autonomy, the Chamber notes, the combatants at Katanga's camp "all knew that they collectively enjoyed prerogatives attaching to the right of ownership."[270]

Katanga, among other cases of enslavement, could very well be described as human trafficking. Abduction generally connotates the taking away of a person through different means – thus, implicitly, the Chamber is taking into account the process through which the victims were removed from their initial state of being into slavery. More explicit is the attention given to the means through which the accused established and maintained ownership. Both in Kunarac and Katanga, the violence and force used to enslave the victims was central to the analysis. This is aligned with a famous quote from the judgment in *US v Oswald Pohl and Others* at the Nuremberg trials, which reads: "Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if *without lawful process* they are deprived of their freedom *by forceful restraint*. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - *compulsory uncompensated labour* - would still remain."[271]

The quote in *Pohl* does two things. First, it exemplifies the two steps through which slavery comes about. That a person first is deprived of her liberty and subsequently exploited, as has been central to newer cases also, is how slavery can be recognized and set apart from other deprivations of liberty or from cases of exploitation without a complete loss of autonomy. Secondly, when put into context, the quote aptly demonstrates the overlap of the crime of enslavement and human trafficking. The *Pohl* case concerned the mass deportation of persons, who had been "seized and abducted" in a "ruthless manner" into forced labor. Thus, clearly, the manner and transportation of persons into deprivation of freedom matters both to demonstrate that the victim's autonomy and freedom has been taken away and to demonstrate who is to blame. Indeed, force, violence and other coercive acts, especially when there is no monetary exchange or documentary record, serve as proof that an individual has committed a crime. Like in cases of forced labor, a crime cannot be proven if the victim is a victim by mere chance or due to lack of options. Instead, the action must be attributable to the perpetrator

[269] ibid 1001–1021.
[270] ibid 1013.
[271] *US v Oswald Pohl and Others* (1947) No 10, Vol 5 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council 958 (International Military Tribunal) 970 Emphasis added.

beyond a reasonable doubt. In this process, evidence of force and violence are vital to be able to sufficiently prove that the perpetrator did take control over the victim's freedom and autonomy, established control, and, furthermore, did so with intent or knowledge.

Once human trafficking has reached the threshold of one of the substantive definitions of a crime against humanity, it would still have to rise to the level of a crime against humanity, according to the contextual and chapeau elements developed in international criminal law. These elements are the topic of the next section.

5.2 Contextual requirements

Beyond meeting the substantive elements of a particular crime against humanity, human trafficking would have to reach the thresholds set for crimes against humanity more generally. These requirements are the contextual elements, iterated in the Rome Statute. Whichever the act (e.g. enslavement, forced displacement, enforced prostitution or other inhumane act) human trafficking is framed as, it must, to qualify as a crime against humanity, be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[272] This provision provides multiple, distinct points of consideration. First, there has to be an attack. The Rome Statute defines an attack as "A course of conduct involving the multiple commission of acts referred to in paragraph 1".[273] Paragraph 1 comprises the list of acts which are considered to fall within the ambit of crimes against humanity.[274] That the attack is a course of conduct already implies that there is someone conducting the commission of multiple crimes. In *Bemba*, the Trial Chamber held that "[a]n "attack" within the meaning of Article 7 refers to a "campaign or operation carried out against the civilian population" … [t]he requirement that the acts form part of a "course of conduct" shows that the provision is not designed to capture single isolated acts, but "describes a series or overall flow of events as opposed to a mere aggregate of random acts" … Further, as specified in the Statute and the Elements of Crimes, the "course of conduct" must involve the "multiple commission of acts"

[272] Rome Statute (n 65) Article 7(1).
[273] ibid Article 7(2)(a).
[274] Article 7(1) includes: (a) Murder; (b) Extermination; 4 Rome Statute of the International Criminal Court (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.

referred to in Article 7(1). In the Chamber's view, this indicates a quantitative threshold requiring "more than a few", "several" or "many" acts."[275]

However, that multiple commissions of acts took place is not yet enough. Instead, these acts must fit within the context of a widespread *or* systematic attack. Generally, a widespread attack refers to the scale of the attack and the number of victims, whilst a systematic attack is one in which the individual acts of violence are methodological and organized and there is an "improbability of their random occurrence."[276]

Secondly, the perpetrator must have knowledge of the (widespread or systematic) attack. This means that the individual perpetrator, in addition to having the specific *mens rea* to commit the act itself, must be knowingly participating in the widespread or systematic attack. This is closely connected to the nexus requirement arising from the wording "committed as *a part of*" (emphasis added) found in Article 7(1). These requirements, in other words, ensure that random crimes committed during an ongoing widespread or systematic attack are not all qualifiable as crimes against humanity. The widespread or systematic attack must be committed against a civilian population. Moreover, the Rome Statute defines that "'[a]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[277] What a state or organizational policy means is subject to a lot of debate and the relevant jurisprudence is lacking in consistency and clarity on the matter. In *Katanga*, the Trial Chamber concluded that State or organizational policy meant that the State's involvement was not necessary. As for how the concept organizational policy was to be understood, the Chamber insisted that

> the Elements of Crimes state that the organisation or State must "actively promote or encourage" the attack against the civilian population. That they so specify presupposes that the organisation in question has sufficient means to promote or encourage a campaign involving the multiple commission of acts referred to in article 7(2) of the Statute … It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population … Recalling that the method of interpretation that it must follow encompasses, inter alia,

[275] *The Prosecutor v Jean-Pierre Bemba Gombo* [2016] International Criminal Court ICC-01/05-01/08 [149–150].
[276] See, for example, *Prosecutor v Kordić and Čerkez* [2004] International Criminal Tribunal for the Former Yugoslavia IT-95-14/2-A [94]; *Kunarac et al.* (n 99) [94–97].
[277] Rome Statute (n 65) Article 7(2)(a).

> the purpose and object of the Statute the Chamber also underscores that a restrictive conception of the organisation requiring that it possess quasi-State characteristics, would not further the Statute's goal of prosecuting the most serious crimes. To so conceive the organisation would in effect exclude any entities that may have undertaken a widespread or systematic operation involving the multiple commission of acts under article 7(1) of the Statute pursuant to or in furtherance of their policy, on the sole ground that they are insufficiently hierarchical to be considered, in theory, as capable of pursuing or enforcing a policy whose aim is such an attack.[278]

Despite the worries of some, the ICC in particular (more so than its predecessors) has shown a readiness to prosecute non-state actors.[279] From an empirical perspective, Mégret concludes: "even aside from the flagrant Uganda and DRC cases, the ICC record suggests more than a passing interest in non-state actors: something resembling a thorough and unrelenting focus on them. The reality is, in fact, more dramatic—even worse—than is often understood. In light of a past that had been dominated by the struggle against state crimes, this evolution is particularly remarkable. The ICC, in short, does have a non-state actor problem, or at least is tilting so significantly towards prosecuting the like that this calls for a serious explanation."[280] Those who would like to see human trafficking captured by ICC's jurisdiction see this conception of organization as a confirmation that the ICC can prosecute organized criminal enterprises and gangs.[281]

The criterion set out in *Katanga* is, however, still hotly contested. It is unclear both whether the limits to what an organizational policy is are more a matter of jurisdictional legal limits and whether non-state actors, such as insurgencies and organized criminal groups, have the capacity to commit crimes grave enough to be prosecuted as international crimes, as envisaged when jurisdiction of the ICC was "limited to the most serious crimes of concern to the international community as a whole."[282] Judge Kaul dissented to the *Kenya* decision which iterated a similar set of factors as set forth in *Katanga*. According to Kaul, "violence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion, with fluctuating

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[278] *The Prosecutor v. Germain Katanga* (n 260) [1117–1122].
[279] Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 Leiden Journal of International Law 855.
[280] Frédéric Mégret, 'Is the ICC Focusing Too Much on Non-State Actors?' in Diane Marie Amann and Margaret M deGuzman (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (Oxford University Press 2018) 179.
[281] Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54 The International and Comparative Law Quarterly 445, 452–453; Kim (n 240).
[282] Rome Statute (n 65) Articles 1 and 5.

membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes."[283] Instead, Kaul finds that "the juxtaposition of the notions "State" and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities".[284] The underlying argument for this narrower interpretation is that "it is not the cruelty or mass victimization that turns a crime into a delictum iuris gentium but the constitutive contextual elements in which the act is embedded."[285] Along similar lines as Kaul, Schabas, for example, argues that removing the link with a state policy might trivialize international core crimes. In his opinion, requiring state policy as an element can clarify the distinction between special forms of criminality in contrast to deviant individuals committing crimes sufficiently prosecuted by the state itself.[286]

The focus on the criminalization of human trafficking in recent years would indeed suggest that states have an interest in investigating and prosecuting human traffickers. If and when this holds true, the principle of complementarity included within the Rome Statute does not allow the ICC to take over the criminal process. When human trafficking does not fall within the jurisdiction of the court, be it due to jurisdictional limits or those posed by the complementarity principle, Moran argues that it should. For Moran, "the seriousness of the crime itself … indicates that it is appropriate that the ICC have jurisdiction over it."[287] This teleological argument sits uncomfortably with the views of Kaul and Schabas and, ultimately, are challenged not only by the organizational policy element but by the general rationale of the Statute. In all truth, human trafficking is not the only crime for which these limits apply. And whilst Tavakoli and Moran are skeptical about whether human trafficking can meaningfully fulfil the contextual criteria of crimes against humanity,[288] the question remains: without these criteria, what is the rationale for internationally punishing crimes that do not? Many kinds of violence occurs, perpetrated both by deviant individuals as well as organized gangs, ranging from murder to rape, yet these

[283] *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Kaul* [2010] International Criminal Court ICC-01/09 [52].
[284] ibid 51.
[285] ibid 52.
[286] William A Schabas, 'State Policy as an Element of International Crimes' (2008) 98 Journal of Criminal Law and Criminology 953.
[287] Moran (n 240) 39.
[288] Nina Tavakoli, 'A Crime That Off Ends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime' (2009) 9 International Criminal Law Review 77, 81.

crimes are also subject to the same requirements. The cases which pose an attack on the civilian population for the purposes of the Rome Statute will be able to surpass these contextual issues, including when the attack comprises human trafficking.

5.3 Concluding remarks on international individual criminal liability for human trafficking

UN bodies,[289] experts,[290] and even the ICC's prosecutor[291] have voiced concern about increased human trafficking in and from conflict and post-conflict countries. Some of this traffic may be captured by the crime against humanity of enslavement (or sexual slavery), but only when the exercise of powers attaching to the right of ownership can be attributed to a perpetrator acting within the confines of the contextual requirements of crimes against humanity. This means many cases of human trafficking will escape the jurisdiction of the international criminal courts and tribunals. First, the cases which do not meet the definition of enslavement. These cases include trafficking in which either there is no deprivation of freedom and autonomy or in which the control obtained through this deprivation of liberty does not manifest itself in the exercise of exploitative powers. For example, cases in which persons are deceptively recruited into exploitative labour not rising to the level of slave labour will not be captured by the provision. Some of the elements of trafficking may amount to a different crime enumerated under Article 7(1) of the Rome Statute. The crime of forcible transfer may cover the transportation phase of human trafficking,[292] or enforced prostitution,[293] when slavery cannot be proven, could be used

[289] UN Security Council, 'Resolution 2331 (2016)' (2016) S/RES/2331 (2016); 'Report of the Secretary-General on Trafficking in Persons in Armed Conflict Pursuant to Security Council Resolution 2331 (2016)' (UN 2017); UN Secretary-General, 'Report of the Secretary-General on Conflict-Related Sexual Violence' (UN 2017) S/2017/249.

[290] 'Statement by the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro at the Human Rights Council - 32nd Session' (UN 2016) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20235&LangID=E> accessed 21 August 2018; 'Joint Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, Maud de Boer-Buquicchio, and the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro, Submitted in Accordance with General Assembly Resolution 71/177 and Human Rights Council Resolutions 34/16 and 35/5' (2017) A/72/164.

[291] ICC Prosecutor, 'Statement of ICC Prosecutor to the UNSC on the Situation in Libya' (ICC 2017) <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib> accessed 21 August 2018; ICC Prosecutor, 'Thirteenth Report of the Prosecutor on the Situation in Libya Pursuant to Resolution 1970 (2011)' (ICC 2017).

[292] Elements of Crimes (n 65) Article 7(1)(d)(1). The elements of forcible transfer are: "1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts. 2. Such person or persons were lawfully present in the area from which they were so deported or transferred." It is further specified that "The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment." This specification brings attention to the overlap between forcible transfer and human trafficking.

[293] ibid Article 7(1)(g)-3.

to prosecute some forms of exploitation occurring in the course of human trafficking. In this sense, I disagree with Siller's idea that "in all likelihood, the law of trafficking is encompassed under the umbrella of enslavement as a crime against humanity."[294] Trafficking is encompassed only insofar as the definition of the crime of enslavement is fulfilled – only when powers attaching to the right of ownership are exercised.

Secondly, these cases will be further pruned down by application of the contextual elements. There seems to be some leeway to adopt a wide conception of the "organisational policy" requirement. This will allow for the potential prosecution of some non-state actors engaged in human trafficking. Moran's argument that human trafficking ought to be included in the Rome Statute as its own core crime rather than as a crime against humanity, in light of due considerations, seems thus unnecessary. Many of the less structured gangs and individual human traffickers will, however, elude the necessary components of acting as "a part of" and "with knowledge" of the "widespread or systematic attack". These cases will be left for the domestic criminal courts to investigate and prosecute.

However, what I hope I have clearly argued in the section above is that enslavement can be applied to a number of cases of human trafficking, including cases of trafficking of women – as long as the trafficking in question fulfills the elements of the crime proscribed by law. In this sense I disagree with Tavakoli, who argues that it "is symptomatic of an international legal order that prioritises and affords greater protection to abuses of men's as opposed to women's human rights."[295] Indeed, already in the aftermath of the first World War, sexual and gender-based crimes, including rape and abduction for enforced prostitution have garnered international (criminal) attention.[296] Reasonable evidence as well as justified arguments suggest that the law would cover female enslavement and trafficking into enslavement just as much as male enslavement and trafficking if only it were effectively implemented.[297]

The third concluding point to be made about human trafficking and international law relates to the capacity of criminal law, in general, to address issues of human trafficking and slavery. At its worst, international criminal justice mimics the UN Security Council's "militaristic and carceral approach, in the name of protecting women, mostly from sexual violence, and

[294] Siller (n 2) 427.
[295] Tavakoli (n 288) 78.
[296] William A Schabas, 'International Prosecution of Sexual and Gender-Based Crimes Perpetrated during the First World War' in Martin Böse and others (eds), *Justice Beyond Borders: Essays in Honour of Wolfgang Schombourg* (Brill 2018).
[297] See especially Sellers, 'Wartime Female Slavery' (n 91); Adams (n 238).

promoting their rights."[298] There is great reason to at least question using international criminal law as the main means to combat human trafficking and slavery in conflict and post-conflict situations.[299] At the very least, that international criminal law could provide a "right to justice"[300] should not allude our attention away from the vast net of interdependent human rights which must be respected, protected and fulfilled. The justice provided by criminal law is a partial justice. It is an individualized justice which, even when gender is used as a tool to examine the ways in which violence is gendered,[301] cannot change the underlying inequalities and vulnerabilities. In this sense, what van der Wilt contends is true: "Trafficking in human beings is caused by structural – economic and social – inequities which create the supply and demand for services provided by people who can be easily exploited, because they are vulnerable. It is not caused by the demise of the state system that would primarily justify the intervention of the international community. Criminal law can of course not cure all societal ails, but it can play a modest role and should best be left in the hands of states who can mobilize their resources and integrate criminal law enforcement with other measures that will counter the scourge of trafficking in human beings."[302] However, whilst he argues that "[c]riminal law responses should be tailored to the nature and the causes of the crime", his contention brings me to an entirely different conclusion. Criminal law may have a modest potential to cure some societal ails, but only those which are the most extreme culminations of violence, attributable to individuals. Criminal law is not tailored toward social inequities because it cannot be.

The ICC has, despite the serious conflations it has made between its law and human rights law, maintained a distinction between itself and a human rights body.[303] It is a criminal court with the capacity to only address the culminations of human rights abuse that rise to the level of international core crimes. It should thus not be confused with measures taken to protect people from human rights abuse, especially since the idea that a criminal trial provides protection, even

[298] Dianne Otto, 'Women, Peace and Security: A Critical Analysis of the Security Council's Vision' in Fionnuala Ní Aoláin and others (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018).
[299] Karen Engle, 'A Genealogy of the Centrality of Sexual Violence to Gender and Conflict' in Fionnuala Ní Aoláin and others (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018).
[300] Marina Aksenova, 'The Emerging Right to Justice in International Criminal Law: A Case Study of Colombia' [2018] Forthcoming in M. Scheinin (ed) Human Rights Norms in 'Other' International Courts; iCourts Working Paper Series No. 135 <https://ssrn-com.ezproxy.eui.eu/abstract=3210522> accessed 22 August 2018; Valentina Spiga, 'The Right to Justice for Victims of Human Rights Crimes' (European University Institute 2013).
[301] Patricia Viseur Sellers, '(Re)Considering Gender Jurisprudence' in Fionnuala Ní Aoláin and others (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018); Lucy Hovil, 'Conflict, Displacement, and Refugees' in Fionnuala Ní Aoláin and others (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018).
[302] van der Wilt (n 124).
[303] See generally Leyh (n 248).

as a deterrent, has seriously been called into question.[304] On the other hand, Akhavan's idea that an international criminal prosecution, as long as it does not become "an instrument of hegemony for powerful states", can create a deterrent and thus preventative effect cannot be entirely discounted. Akhavan's idea is not applied in vacuum, but posits that "[p]ostmortem justice without a corresponding commitment of military, political, and economic resources significantly dilutes the message of accountability and undermines its long-term viability in preventing crimes."[305] In a similar line of thinking, Tallgren submits that a comparison of international law and criminal law already contains an inherent distortion, because "whereas criminal law is but a slice of our idea of a domestic legal system, international law is the whole cake."[306] While some purport international criminal law to be the last resort (i.e. *ultima ratio*) to protect human rights,[307] for which there are few alternatives after grave violations do occur,[308] can we really argue international criminal law to be the last resort if human rights law was never properly implemented in the first place?

The totality of the debate on the value of international criminal trials in the case of human trafficking is outwith the scope of this thesis. In the best-case scenario, however, it constitutes but one piece in the framework legal recognition of the rights of victims, used as a last resort when there is truly no state to be held to account. As Schabas argues, international justice is at its best not when it targets "the weak and marginal", but when it brings powerful states to account.[309] In the situations in which a human rights framework cannot bring states to account, international criminal law paves a pathway for some recognition of some of the harm done to some victims[310] where otherwise might be none and it creates a potential for reparations where otherwise would be nothing.[311] Cassese eloquently notes that "[w]hen the end of the numerous

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[304] Mauri Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 35.

[305] Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 The American Journal of International Law 7, 30.

[306] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 European Journal of International Law 561, 562.

[307] For a general discussion on the rhetoric/theory of ultima ratio, see ibid 585–590.

[308] ibid 587.

[309] William A Schabas, 'The Banality of International Justice' (2013) 11 Journal of International Criminal Justice 545, 545.

[310] M Cherif Bassiouni, 'Victims' Rights and Participation in ICC Proceedings and in Emerging Customary International Law' in Richard H Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Brill 2016).

[311] Although the Rome Statute provides for this potential, in practice, the successful implementation of these provisions remains to be realized. See Rome Statute (n 65) Article 75; Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 The International Journal of Human Rights 1204; Anne-Marie De Brouwer, 'What the International Criminal Court Has Achieved and Can Achieve for Victims/Survivors of Sexual Violence' (2009) 16 International Review of Victimology 183; Anne-Marie De Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families' (2007) 20 Leiden Journal of International Law 207; Linda M Keller,

bloody conflicts so rife in today's international community comes to pass, the feelings that normally linger are hatred and thirst for revenge. I know of only one instance where the victor has tried to understand and show compassion for the tragedy of the vanquished."[312] If retribution becomes the sole aim of a response to trafficking, that is not a commitment to human rights. Whatever place we give international criminal justice in the regime against human trafficking, it would do best to be rooted in compassion and be but one slice of the cake that is the international legal system.

'Seeking Justice at the International Criminal Court: Victims' Reparations' (2007) 29 Thomas Jefferson Law Review 189.

[312] Antonio Cassese, 'Clemency Versus Retribution in Post-Conflict Situations' (2007) 46 Columbia Journal of Transnational Law 1–2.

Conclusion

The aim of this thesis was to elaborate upon the ways in which human trafficking and slavery intersect in both criminal law and human rights law. The two concepts are not synonymous, but some cases of human trafficking are slavery. Ultimately, this will depend on whether a person was deprived of their freedom and autonomy and, subsequently, exploited on that basis. Because human trafficking is such a wide and elusive concept, it covers many courses of action which will not fulfil the criteria of slavery or enslavement. While most cases of slavery, today, could also be characterized as trafficking, some cases may evade the definition. This could happen, for example, when a person is born into the status of slavery and the status is upheld by courts rather than through the deception or violence of the slave-owner. In a similar manner, contemporary language makes the distinction between the crime of slavery and the condition of slavery a slippery one. That human trafficking and slavery are, today, perceived of as primarily a crime causes a cognitive dissonance: at once it is though that these types of exploitation are caused by socio-economic inequalities, yet also that they may somehow be attributed to an individual perpetrator. This focus on individual criminals shifts the responsibility away from the states and shields us from viewing slavery in its totality. In a way, slavery, defined as the status or *condition* of a person, could just as well be seen as just that: a condition. An analogy may help us understand this. That a person is dead is a condition, yet there are many different ways in which a person can become dead. Some of these ways constitute crimes dependent on the fulfilment of specific elements. Others are causes of nature, of famine, of illness. However, by framing slavery as a crime, we are not able to examine how it is that a specific person was reduced to such a condition. Instead, the criminal framework forces us to look only in one direction, at one type of death, at one type of slavery. This is why I advocate for a stronger emphasis on human rights. Whilst criminal law may be able to recognize the actions of individual persons, whereby, through violence and force, they commit the act of enslaving other persons to exploit them, this is but one way in which persons' liberty is taken away and they are forced into a life of exploitative toil. The criminal framework cannot address such violations, because the wrong is not attributable to one person. Instead, it is a systematic and structural failure, both domestically and internationally, to protect, respect and fulfil the most basic human rights of all persons.

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