

Spring 2020

Human Trafficking as "Modern Slavery": The Trouble with Trafficking as Enslavement in International Law

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Recommended Citation

Cody Corliss, Human Trafficking as "Modern Slavery": The Trouble with Trafficking as Enslavement in International Law, 71 S. C. L. REV. 603 (2020).

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**HUMAN TRAFFICKING AS “MODERN SLAVERY”: THE TROUBLE WITH
TRAFFICKING AS ENSLAVEMENT IN INTERNATIONAL LAW**

Cody Corliss*

*It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery.***

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* Legal Officer, Office of the Prosecutor, United Nations International Residual Mechanism for Criminal Tribunals. The views expressed herein are those of the author alone and do not necessarily reflect the views of the Mechanism or the United Nations in general. The author is grateful to Rafael Braga da Silva, Najwa Nabti, and Aparna Polavarapu for their thoughtful comments that undoubtedly improved this Article. In addition, much credit goes to the staff of the *South Carolina Law Review* for their tireless work to perfect this piece and their work on the legal symposium for which this Article was written.

** President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<https://perma.cc/CDT6-MR9H>].

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I. INTRODUCTION

Former President Obama is not alone in equating human trafficking with modern slavery. Other U.S. presidents,¹ U.S. secretaries of state,² and United Nations officials³ have made the same claim. As the U.S. State Department makes clear, "the United States considers 'trafficking in persons,' 'human trafficking,' and 'modern slavery' to be interchangeable umbrella terms that refer to both sex and labor trafficking."⁴

International law, on the other hand, has not explicitly found that human trafficking,⁵ a transnational crime, is equivalent to slavery.⁶ Enslavement, which is an international crime, is recognized as a crime against humanity in customary international law,⁷ identified as a legal obligation *erga omnes* by the International Court of Justice,⁸ and is part of the peremptory rules of

1. President George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030923-4.html> [<https://perma.cc/NFE4-KQM6>] (comparing modern forms of exploitation, including trafficking, to slavery).

2. Hillary R. Clinton, U.S. Sec'y of State-Designate, Testimony Before the United States Senate Foreign Relations Committee (Jan. 13, 2009), <https://2001-2009.state.gov/r/pa/ei/rm/113814.htm> [<https://perma.cc/69T7-XPRS>] ("I take very seriously the function of the State Department to lead our government through the Office on Human Trafficking to do all that we can to end this modern form of slavery.").

3. U.N. Office on Drugs & Crime, Global Report on Trafficking in Persons, Executive Summary (Feb. 2009), https://www.unodc.org/documents/human-trafficking/Executive_summary_english.pdf [<https://perma.cc/L8VB-3EVA>] (stating that trafficking in persons "is more accurately described as enslavement").

4. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 3 (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> [<https://perma.cc/CC7X-7VX3>]. In addition, in passing the Trafficking Victims Protection Act of 2000 (TVPA), Congress described the practice of human trafficking as "a modern form of slavery" that "involves grave violations of human rights." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(1), (23), 114 Stat. 1464 (codified at 22 U.S.C. § 7101(b)(1), (23) (2018)).

5. This Article uses the terms "trafficking," "human trafficking," and "trafficking in persons" interchangeably.

6. For the purposes of this Article, the terms "slavery" and "enslavement" will be used interchangeably. See *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 356 (Mar. 15, 2002) ("The Trial Chamber is satisfied that the offence of slavery under Article 3 of the Tribunal's Statute [referring to violations of the laws and customs of war] is the same as the offence of enslavement under Article 5 [referring to crimes against humanity]."). Although the two terms are synonymous, this Article will use "enslavement" when referring to the act as it is named when charging it as a crime against humanity. The Article will use "slavery" when describing the prohibited act under Article 4 of the European Convention on Human Rights.

7. *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 116 (June 12, 2002).

8. A legal obligation *erga omnes* is one owed by states to the international community as a whole, thereby allowing a state a legal interest to bring suit against another state in the

international law, the *jus cogens*.⁹ Human trafficking has achieved comparatively less attention within international criminal law. Where acts of trafficking have been addressed within the context of an international judicial institution, the charged crime has been enslavement, not trafficking.¹⁰ There has never been a criminal charge for “human trafficking” or “trafficking in persons” in an international judicial institution.¹¹ Rather than being an international crime, human trafficking has been classified as a transnational crime subject to domestic prosecution.¹²

The relationship between human trafficking and slavery in international law remains undefined. Moreover, the boundaries between human trafficking and slavery have long been blurred, beginning with the early campaigns to prevent the trafficking of women in Europe in the late nineteenth century. An uncertain relationship between the two crimes has continued into the present. For example, the 2000 Protocol to Prevent,

International Court of Justice regardless of whether the state has suffered direct harm. *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5).

9. A *jus cogens* norm is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); see also *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) (“[*Jus cogens* norms, norms derived from values taken to be fundamental by the international community, enjoy the highest status within customary international law and are binding on all nations.”).

10. Although trafficking in humans has yet to be charged as an international crime, the African Union Assembly adopted the Malabo Protocol in 2014 which, should it comes into force, would expand the mandate of the African Court of Justice and Human Rights to include jurisdiction to try a number of serious crimes in a regional criminal court. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, A.U. Doc. No. STC/Legal/Min. 7(1) Rev. 1 (May 15, 2014), art. 28J (establishing jurisdiction for the crime of trafficking in persons). Jurisdiction would not only include such core international crimes as genocide, crimes against humanity, war crimes, and aggression, but would also extend to, among other crimes, trafficking in persons. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, *supra*; see e.g. Matiangai Sirleaf, *The African Justice Cascade and the Malabo Protocol*, 11 INT’L J. TRANSITIONAL JUST. 71 (2017) (describing the proposed jurisdiction and role of the Court).

11. See Nicole Siller, *The Prosecution of Human Traffickers?: A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunals*, 2 EUR. J. COMP. L & GOVERNANCE 236, 236 (2015); Cónan Kenny & Nikita Malik, *Trafficking Terror and Sexual Violence: Accountability for Human Trafficking and Sexual and Gender-Based Violence by Terrorist Groups Under the Rome Statute*, 52 VAND. J. TRANSNAT’L L. 43, 55 (2019).

12. Robert Cryer describes transnational crimes as ones subject to “international suppression Conventions,” but for which there is “no international criminal jurisdiction.” ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 281 (2007); see Siller, *supra* note 11, at 237.

Suppress, and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)—the first international agreement to address all forms of human trafficking—defined the practice to include “slavery, or practices similar to slavery.”¹³ In addition, during the drafting of Trafficking Protocol, delegates explicitly borrowed terms from a 1930 International Labor Organization Convention that addressed forced labor, a practice similar to enslavement.¹⁴

This Article seeks to determine the relationship between the acts of human trafficking and enslavement to determine whether human trafficking should be prosecuted as enslavement under international criminal law. The Article begins by examining the two prohibited crimes. Parts II and III of this Article explore the efforts to prohibit and define enslavement and human trafficking under international law, as well as efforts by trafficking opponents to link the two crimes.¹⁵

Part IV of the Article examines the relationship between human trafficking and slavery within international law as discussed in judgments at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court for Human Rights (ECtHR) that have analyzed trafficking offenses in the context of enslavement charges or slavery prohibitions. As the Article demonstrates, the judicial decisions which have interpreted trafficking crimes in this context suggest an overlap of the terms that falls short of embracing trafficking and enslavement as interchangeable terms.

Part V examines the future of charging human trafficking crimes as crimes against humanity for enslavement at the International Criminal Court (ICC). The Statute of the International Criminal Court (ICC Statute)

13. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol].

14. *See id.*; Convention Concerning Forced or Compulsory Labour art. 2, ¶ 2, June 28, 1930, 39 U.N.T.S. 55 [hereinafter 1930 Forced Labour Convention].

15. As Anne T. Gallagher notes:

To identify a practice as slavery does more than raise the political and emotional ante. It also brings a very special kind of legal force to bear, because the prohibition on slavery is recognized as a rule of customary international law and regularly is identified as a legal obligation *erga omnes* and as part of *jus cogens*.

Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 798 (2009) (emphasis added); *see also* Denise Brennan, *Fighting Human Trafficking Today: Moral Panics, Zombie Data, and the Seduction of Rescue*, 52 WAKE FOREST L. REV. 477, 485 (2017) (arguing that “[w]hen trafficked persons are equated with modern-day slaves, when only their victimhood is highlighted through a kind of voyeuristic catalogue of abuse, then any and all actions to help them seem justified”).

classifies enslavement as a crime against humanity while defining the crime in a manner that melds the traditional definition of slavery with an added provision that includes trafficking in persons. At first blush, such a definition in the ICC Statute suggests that human trafficking could be widely charged as a crime against humanity, but this Article explores the significant jurisdictional hurdles in charging such a crime. Ultimately, the Article considers various arguments in favor of reclassification of trafficking as enslavement but ultimately finds that the arguments to reclassify trafficking as enslavement fall short. Although human trafficking has similarities to enslavement and may constitute enslavement under certain situations, this Article concludes that human trafficking should remain distinct from enslavement and remain a transnational crime which is best prosecuted at the domestic level.

II. THE PROHIBITION AND DEFINITION OF SLAVERY

Compared to the crime of human trafficking, the effort to eradicate global slavery has enjoyed a considerably longer period of international support, with multilateral and international conventions featuring prohibitions on slavery and the slave trade beginning in the early 1800s.¹⁶ Chattel slavery—the buying and selling of persons as legally recognized property—was abolished under international law and in all countries in the Western Hemisphere and Europe by the end of the nineteenth century.¹⁷ Moreover, the prohibitions against slavery and slave-related practices have achieved the level of customary international law and *jus cogens* status, with

16. See M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L & POL. 445, 454–61 (1991) (noting, for example, the 1815 Declaration Relative to the Universal Abolition of the Slave Trade, an instrument signed by eight nations which asserted that “the governments resolved to put an end to the slave trade, and that all the [p]owers with colonies had recognized by legislative acts, treaties, and other formal undertakings, the obligation and necessity for abolishing it” and establishing a “penal nature of the act” with the “duty to prohibit, prevent, and punish” it); Nina Tavakoli, *A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime*, 9 INT'L CRIM. L. REV. 77, 85 (2009) (recognizing slavery as “one of the first crimes to be prohibited under international law”).

17. See Seymour Drescher, *From Consensus to Consensus: Slavery in International Law*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 85, 96–97 (Jean Allain ed., 2012). See generally Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 214–15 (2007) (discussing the abolishment of the Trans-Atlantic slave trade, the abolishment of slavery throughout the British Empire in 1838, and the formal end of slavery as a legal institution in the Americas following Brazil's abolishment of slavery in 1888).

these prohibitions being some of the few human rights imperatives that attract virtually no principled dissent.¹⁸

The 1926 Slavery Convention, the first to define slavery, defined the term as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."¹⁹ The Slavery Convention, signed by thirty-five state parties,²⁰ established a duty to criminalize the conduct and called on parties to "prevent and suppress the slave trade" with the ultimate goal of the "complete abolition of slavery in all its forms."²¹ Although some have critiqued the Slavery Convention's definition of slavery as "bare-bones,"²² the definition has achieved the status of customary international law.²³

The Slavery Convention also addressed forced labor, recognizing that forced labor practices had the potential to become equivalent to slavery.²⁴

18. See Bassiouni, *supra* note 16, at 447–49; James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 VA. J. INT'L L. 1, 7–8 (2008) (recognizing that "the duty to eradicate slavery is one of only two human rights clearly identified by the International Court of Justice as an *erga omnes* norm . . . an obligation owed by states to the international community as a whole"). In addition, the Universal Declaration of Human Rights stipulates that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." G.A. Res. 217 (III)A, Universal Declaration of Human Rights, at 73 (Dec. 10, 1948).

19. Convention to Suppress the Slave Trade and Slavery art. 1(1), Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927) [hereinafter 1926 Slavery Convention] amended by Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51; Bassiouni, *supra* note 16, at 455 (noting that the 1926 Slavery Convention defined slavery for the first time).

20. These parties comprised the following: Abyssinia, Albania, Australia, Austria, Belgium, the British Empire, Bulgaria, Canada, Cuba, China, Colombia, Cuba, Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Greece, India, Italy, Latvia, Liberia, Lithuania, the Netherlands, New Zealand, Norway, Panama, Persia, Poland, Portugal, Romania, the Kingdom of the Serbs, Croats and Slovenes, South Africa, Spain, Sweden and Uruguay. Bassiouni, *supra* note 16, at 467.

21. 1926 Slavery Convention, *supra* note 19, arts. 2(a)–(b); see also Bassiouni, *supra* note 16, at 467–68.

22. E.g., Luis CdeBaca, *Successes and Failures in International Human Trafficking Law*, 33 MICH. J. INT'L L. 37, 41 (2011).

23. Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239, 273 (2009) (describing the 1926 definition as the one "settled in international law"); see Bravo, *supra* note 17, at 263 (noting that the legal definition of slavery has not been altered since the 1926 Slavery Convention).

24. Notably, the language of the 1926 Slavery Convention states that forced labor could develop into analogous conditions, not that the practices were analogous. Article 5 of the Slavery Convention states:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection suzerainty or

Under Article 5 of the Slavery Convention, where forced labor practices still survived, the parties to the Convention agreed to end the practice, to ensure that “adequate remuneration” would be provided and the practice would “not involve the removal of labourers from their usual place of residence.”²⁵ A caveat in the prohibition of forced labor practices remained: Forced labor could still be “exacted for public purposes.”²⁶

A second convention, the 1930 Forced Labour Convention, adopted by the General Conference of the International Labour Convention, similarly sought to prohibit forced labor. Although this Convention included some exemptions,²⁷ it defined forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”²⁸ Adopted in response to the imposition of forced labor upon indigenous populations by colonial powers,²⁹ the Forced Labour Convention provided that each member of the International Labour Organization which ratified the Convention would undertake to “suppress the use of forced or compulsory labour in all its forms.”³⁰ A subsequent 1957 Abolition of Forced Labour Convention further solidified the prohibition against forced labor practices, with a more affirmative requirement that members take measures to “secure the immediate and complete abolition of forced or compulsory labour.”³¹

Most significantly for an understanding between the relationship between trafficking and slavery, the 1930 Forced Labour Convention provided a key foundation for the final definition of trafficking in the

tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

1926 Slavery Convention, *supra* note 19, art. 5. As Bassiouni writes, “The implication in Article 5 is that forced labor is not identical in its invidiousness to slavery; the latter is completely unacceptable, while the former is merely undesirable.” Bassiouni, *supra* note 16, at 468.

25. See 1926 Slavery Convention, *supra* note 19, art. 5.

26. See *id.*

27. For example, forced labor explicitly did not include compulsory military service, work done as part of normal civic obligations, court-mandated forced labor following conviction for a crime, and work or services exacted during in an emergency situation. See 1930 Forced Labour Convention, *supra* note 14.

28. *Id.* ¶ 1.

29. Kevin Bales et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 68 (2005).

30. 1930 Forced Labour Convention, *supra* note 14, art. 1. For additional discussion of early attempts to outlaw the forced labor component of human trafficking, see Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 A.B.A. J. LAB. & EMP. L. 1, 17–19 (2015).

31. Convention Concerning the Abolition of Forced Labour art. 2, June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959).

Trafficking Protocol. The definition of trafficking in the earliest drafts of the Trafficking Protocol focused on sexual trafficking to the exclusion of other contemporary trafficking situations, such as labor trafficking, debt bondage, or forced marriage.³² During the drafting stage of the Trafficking Protocol, Australia and Canada proposed that the definition of trafficking should expand to incorporate the understanding of forced labor reflected in the 1930 Forced Labour Convention, with the explicit goal of expanding the Trafficking Protocol beyond its initial aim of protecting the trafficking of women and children.³³ The Australian and Canadian proposal was successful, thereby expanding the definition while also intertwining a connection between human trafficking and forced labor as a form of slavery.

The 1956 Supplementary Slavery Convention affirmed and augmented the definition in the 1926 Slavery Convention. "Slavery" continued to be defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," while "slave" was defined as "a person in such condition or status."³⁴ As some have argued, such a definition encompasses both *de jure* and *de facto* slavery.³⁵

III. THE PROHIBITION AND DEFINITION OF HUMAN TRAFFICKING

Although early treaties ratified to end human trafficking had their origins in efforts to eliminate sexual trafficking, and particularly the sexual trafficking of white women, the offense of human trafficking today refers to any number of situations. In addition to sex trafficking, individuals are trafficked to serve as forced labor in factories or agricultural settings, into domestic servitude, forced marriages, and for use in armed conflict.³⁶

32. See generally Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 983–88 (2001) (describing early discussions regarding the definition of "trafficking" in the Trafficking Protocol).

33. Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, Proposals and Contributions Received from Governments, U.N. Doc. A/AC.254/5/Add.3, at 5 (Feb. 8, 1999).

34. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 7(a), Apr. 30, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 [hereinafter 1956 Slavery Convention].

35. See Allain, *supra* note 23, at 262.

36. Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 623 (2009). There is some indication that trafficking offenses are roughly split between sex trafficking and labor trafficking—or that labor trafficking may be more common—but that sex trafficking is more frequently reported and captures more attention in the media. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1696–97 (2010).

A. *Early Sexual Trafficking Prohibitions*

The boundaries between slavery and human trafficking blurred in the very first international agreement to combat human trafficking, an agreement whose very title invoked slavery. The 1904 International Agreement for the Suppression of the White Slave Trade was designed to combat the trafficking and voluntary migration of white European women to Arab and Eastern states to serve as concubines or prostitutes.³⁷ Although the term “white slave” had been used in the early nineteenth century to describe English factory workers toiling in brutal conditions,³⁸ the term fell out of use until its resurrection by Victor Hugo in 1870.³⁹ While the term slave appeared in the 1904 Agreement’s title, the offense itself was more akin to our modern understanding of sex trafficking.

Moreover, the 1904 Agreement limited its concern to one gender and one race, namely white women,⁴⁰ a limitation that would presage future understandings of human trafficking.⁴¹ Although Hugo had been explicit

37. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 [hereinafter 1904 Agreement]. For a general discussion of the background of the Agreement, see Ahmed Muhammed Bachaka, *The International Legal Framework to Combat Human Trafficking*, 68 J. L. POL’Y & GLOBALIZATION 41, 42 (2017); Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 7–8 (2004) (noting that international outcry over “white slavery” had the explicit intent to rescue victims who had been coerced into foreign prostitution); Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT’L L.J. 163, 165–69 (1994). Although the international concern initially blossomed around the plight of European white women, the issue similarly caught the attention of lawmakers in the United States, resulting in Congress’s 1910 enactment of the White-Slave Traffic Act, also known as the Mann Act, which prohibited the interstate transportation of “any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.” White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012 & Supp. 2015)); see also Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415, 421 (2017) (providing background on the creation of the Mann Act).

38. Todres, *supra* note 36, at 640.

39. Demleitner, *supra* note 37, at 165–66.

40. Todres, *supra* note 36, at 639–40 (noting that the 1904 treaty focused on trade in whites and preventing “procur[ement] of women and girls for immoral purposes abroad”).

41. Bruch, *supra* note 37, at 3 (“The early emphasis on protecting white women now seems obviously racist and sexist. Yet that emphasis has continued to pervade the current discussions of, and policy towards, human trafficking.”); see Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464 (2015) (arguing that racism has led to an epidemic in human trafficking generally, and in sex trafficking in particular, and that such racism has largely “undermined effective legal and policy responses”); Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1149 (2010) (discussing the lesser attention paid to male victims of human trafficking).

that slavery only remained a problem for white women,⁴² delegates meeting to again consider the issue in 1910 recognized and questioned the limiting nature of the term white slave.⁴³ Delegates acknowledged that the term failed to capture the plight of nonwhite women, but following a debate which emphasized the term's then-widespread use, delegates decided to keep *white slave* in the title of the resulting 1910 Agreement.⁴⁴

Ultimately the fledging United Nations would take up the issue of sex trafficking with the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.⁴⁵ The 1950 Convention, meant to supersede earlier treaties, including those ratified in 1904 and 1910,⁴⁶ was the first to address trafficking in gender-neutral terms, and it eliminated a requirement that trafficking needed to be international in character.⁴⁷

B. *A Contemporary Understanding of Human Trafficking*

An international agreement that addressed all forms of human trafficking did not emerge until late 2000 when the U.N. General Assembly adopted the Protocol to Prevent, Suppress, and Punish Trafficking in

42. Demleitner, *supra* note 37, at 165–66. Demleitner quotes a letter from Hugo to a British social reformer saying that “[t]he slavery of black women is abolished in America; but the slavery of white women continues in Europe.” *Id.* (quoting PROSTITUTION IN AMERICA: THREE INVESTIGATIONS, 1902–1914, at 197 (Edwin R.A. Seligman ed., reprint 1976)); see also Todres, *supra* note 36, at 640 (suggesting Hugo’s belief that the adoption of the post-Civil War Reconstruction Amendments in the United States ended any question of slavery for black women).

43. Demleitner, *supra* note 37, at 166.

44. International Convention for the Suppression of White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20; Demleitner, *supra* note 37, at 166. According to Jonathan Todres, the decision of the Madrid Conference delegates to continue to use the term “white slave” even after recognizing that the term reflected a failure to cover women of color and all men and children “demonstrated that increasing the chance of success of a campaign to protect white women was of greater value to the international community than calling attention” to a wider plight of women of color, men, and children. Todres, *supra* note 36, at 640.

45. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 (approved by General Assembly Dec. 2, 1949).

46. In addition to the 1904 and 1910 Treaties, the 1950 Convention would also supersede treaties on trafficking that had been ratified in 1921 and 1933. *Id.* art. 28. The 1921 Convention changed the term “white slave traffic” to “traffic in women and children” and extended the protection to male minors. International Convention for the Suppression of the Traffic in Women and Children art. 2, Sept. 30, 1921, 9 L.N.T.S. 415. Demleitner, *supra* note 37, at 172 (describing the history and significance of the 1950 Convention).

47. Demleitner, *supra* note 37, at 172.

Persons, Especially Women and Children (Trafficking Protocol) as a supplement to the 2000 U.N. Convention Against Transnational Organized Crime.⁴⁸ The United States, which was concurrently developing its domestic legislation on trafficking, had the greatest impact on international consensus on the definition of the term.⁴⁹ When delegates were negotiating the Trafficking Protocol, the United States made clear its interest in minimizing the differences between the definition it developed domestically and the one that the Trafficking Protocol would apply internationally.⁵⁰ The United States' Trafficking Victims Protection Act (TVPA) was ultimately signed into law on October 11, 2000, approximately two months before the General Assembly adopted the Trafficking Protocol.⁵¹

The Trafficking Protocol established what has become the generally accepted international definition of human trafficking.⁵² The definition in Article 3(a) of the Trafficking Protocol reflects the breadth of human trafficking practices:

48. Trafficking Protocol, *supra* note 13; United Nations Convention Against Transnational Organized Crime and its Protocols, *opened for signature* Nov. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003).

49. ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 22 (2010); *see also* Bravo, *supra* note 17, at 228 (noting that antitrafficking efforts were coalescing on the international front at the same time the issue was being studied in the U.S. Congress).

50. GALLAGHER, *supra* note 49; *see also* Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 442 (2006) (noting that the United States introduced the first draft of the Trafficking Protocol).

51. As Anne T. Gallagher notes, the TVPA's operational provisions extended to what she called the most "severe forms of trafficking":

(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or where the person induced to perform such an act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

GALLAGHER, *supra* note 49, at 23. *See generally*, Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2018) (describing the purposes and findings of Congress in enacting the legislation).

52. For example, the Council of Europe Convention on Action Against Trafficking in Human Beings adopted the Trafficking Protocol's definition verbatim. *Compare* Council of Europe Convention on Action Against Trafficking in Human Beings art. 4, May 16, 2005, C.E.T.S. No. 197 with Trafficking Protocol, *supra* note 13, art. 3(a). *See also* Siller, *supra* note 11, at 245 (noting that nations have used the Trafficking Protocol's definition of human trafficking as a model when crafting domestic legislation); Kenny & Malik, *supra* note 11, at 56 (noting "the Trafficking Protocol's definition remains the core provision in international law" for defining trafficking).

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁵³

In addition to defining human trafficking in Article 3(a) above, Article 3(b) of the Trafficking Protocol states that “[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) [the above definition] of this [A]rticle shall be irrelevant where any of the means set forth in subparagraph (a) have been used.”⁵⁴ Such emphasis on the consent of the victim in Article 3(b) reinforced the notion that human trafficking is an act forced upon the victim, or carried out by coercion or deception.⁵⁵

A comparison between the definition of trafficking in the Trafficking Protocol and the definition of slavery in the Slavery Convention further illustrates the scope of Article 3. The definition of trafficking is, in essence, three parts: (1) an action (recruitment, transport, transfer, harbor or receipt of a person); (2) achieved through threat, use of force, coercion, deception, or fraud; and (3) for the purpose of exploitation.⁵⁶ As the definition in the Trafficking Protocol makes clear, slavery or practices similar to slavery are possible forms of exploitation, but not the only ones.⁵⁷ Slavery, on the other hand, is defined by the condition of ownership: “the status or condition of a person over whom any or all of the powers attaching to the right of

53. Trafficking Protocol, *supra* note 13, art. 3(a).

54. *Id.* art. 3(b).

55. See Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L. J. 473, 477 (2003); Gallagher, *supra* note 32, at 986; Tom Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 INT'L & COMP. L.Q. 445, 447 (2005); see also Jennifer L. Brinkley, *A Path Forward: Florida's Efforts to Combat Human Trafficking*, 71 S.C. L. REV. 637, 640–41 (2020) (discussing the various methods traffickers use to secure and exploit victims). The Trafficking Protocol also mandated that each State Party not only adopt legislative and other measures to criminalize human trafficking but also establish comprehensive policies and programs to prevent and combat human trafficking. Trafficking Protocol, *supra* note 13, arts. 5, 9(a).

56. Trafficking Protocol, *supra* note 13, arts. 3(a)–(b).

57. *Id.*

ownership are exercised.”⁵⁸ As such, the definition of slavery under customary international law meets the criteria of trafficking, but trafficking as defined under the Trafficking Protocol will not always rise to the level of slavery.

C. *Trafficking vs. Smuggling*

The emphasis on the consent of the victim in Article 3(b) of the Trafficking Protocol also served a second purpose, namely to distinguish trafficking from smuggling.⁵⁹ Although the two terms are often confused and were previously used interchangeably,⁶⁰ a separate protocol, the Protocol Against the Smuggling of Migrants by Land, Sea and Air, defines smuggling as “[t]he procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.”⁶¹ As the U.S. Immigration and Customs Enforcement explains, where trafficking is exploitation-based, smuggling involves a service—transportation or fraudulent documents—provided to an individual voluntarily seeking illegal entry into a foreign country.⁶²

The consent element reflects the victim of both acts: trafficking is a crime against the trafficked victim, where smuggling is a crime against the state.⁶³ The language within the Smuggling Protocol reaffirms this

58. 1926 Slavery Convention, *supra* note 19, art. 1(1).

59. Some scholars have suggested the distinction regarding consent stems from gendered stereotypes, with smuggling seen as an endeavor reserved for male economic migrants and trafficking seen as mostly as mostly impacting females. *See, e.g.*, Abramson, *supra* note 55, at 479 (suggesting that consent was not perceived as an issue for the stereotypical “smuggled person,” a male economic migrant who has chosen to migrate for economic reasons, because he would be free from the control of smugglers upon arrival at his destination); Gallagher, *supra* note 32, at 983 (noting that, although the ratified Trafficking Protocol covers all people, it was initially intended to apply only to women and children).

60. *See* ANNE T. GALLAGHER & FIONA DAVID, *THE INTERNATIONAL LAW OF MIGRANT SMUGGLING* 44 (2014) (noting the confusion between the concepts of migrant smuggling and human trafficking); Obokata, *supra* note 55, at 446 (suggesting that the terms were previously used interchangeably).

61. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), *opened for signature* Nov. 15, 2000, T.I.A.S. No. 13127, 2241 U.N.T.S. 507 [hereinafter *Smuggling Protocol*].

62. U.S. Immigration & Customs Enf’t, *Human Trafficking vs. Human Smuggling*, CORNERSTONE REP., Summer 2017, <https://www.ice.gov/sites/default/files/documents/Report/2017/CSReport-13-1.pdf> [<https://perma.cc/RQ5N-AMB5>].

63. Yehuda Goor, *Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps*, 36 BERKELEY J. INT’L L. 111, 143 (2018); Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in*

distinction. The Smuggling Protocol is explicit that migrants are not liable to criminal prosecution for having been smuggled.⁶⁴ Still, rather than being labeled as "victims" in the text of the Smuggling Protocol, smuggled persons are described as "migrants" or "object[s]" of smuggling.⁶⁵ In practice, however, the distinction between trafficking and smuggling can often be blurred, with acts of smuggling transforming into acts of trafficking.⁶⁶

IV. THE BOUNDARIES OF TRAFFICKING AS ENSLAVEMENT IN INTERNATIONAL LAW

Enslavement is a crime against humanity under the Nuremberg Charter,⁶⁷ the Tokyo Charter,⁶⁸ the statutes of ad hoc tribunals, and the ICC.

Domestic Laws: From the United States Protocol to the European Convention, 14 TUL. J. INT'L & COMP. L. 357, 370–71 (2006).

64. Smuggling Protocol, *supra* note 61, art. 5.

65. *Id.* pmbl., art. 4.

66. See JØRGEN CARLING ET AL., DANISH REFUGEE COUNCIL, REG'L MIXED MIGRATION SECRETARIAT, BEYOND DEFINITIONS: GLOBAL MIGRATION AND THE SMUGGLING-TRAFFICKING NEXUS 4 (2015) <https://ssrn.com/abstract=3014244> [<https://perma.cc/PT7R-D5AY>] ("Those who facilitate irregular movement have rapidly expanded and diversified their operations, with some recognising the opportunity to maximise their profits by exploiting smuggled migrants either during their journey or at their destination. In such situations, the carefully crafted distinction between trafficking and smuggling dissolves."); Gallagher, *supra* note 15, at 817 ("It is important to accept that no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world. Unless states were prepared to invent exploitation where it did not necessarily exist—or deny it where it did—they had little option but to separate formally the (inherently exploitative) practice of trafficking from the (only incidentally exploitative) practice of migrant smuggling. As a result, states were required to disregard reality that both trafficking and migrant smuggling are processes that are often interrelated and almost always involve shifts, flows, overlaps, and transitions."); U.S. Immigration & Customs Enf't, *supra* note 62.

67. Charter of the International Military Tribunal, Annexed to the London Agreement, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288. Article 6(b) of the Charter, which defined war crimes, prohibited the deportation of the civilian population for slave labor. Article 6(c), defining crimes against humanity, prohibiting enslavement. For example, the Nuremberg Judgment convicted Hitler deputy Fritz Sauckel of war crimes and crimes against humanity for his role in the Nazi forced labor program where approximately 5 million people were deported for slave labor from occupied territories to Germany in support of the Nazi war effort. *International Military Tribunal (Nuremberg), Judgement and Sentences*, reprinted in 41 AM. J. INT'L L. 172, 312–13 (1947).

68. Charter of the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, T.I.A.S. No. 1589 (listing murder, extermination, enslavement, deportation, or other inhumane acts committed against any civilian population as crimes against humanity). For a discussion of enslavement charges at the Tokyo Tribunal, including its failure to adequately bring enslavement charges against Japanese leaders for the wartime enslavement of over 100,000 Burmese, Indonesian, Chinese, Japanese, Korean, Taiwanese, and Filipino "comfort

The prohibition against enslavement and its place as a crime against humanity are unquestioned in international law today. As international law decisions below demonstrate, however, the role of trafficking as a form of enslavement—thereby constituting a crime of humanity in its own right—remains undefined.

A. Prosecutor v. Kunarac

In 2001, the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) convicted Dragoljub Kunarac and Radomir Kovač for, among other crimes, enslavement as a crime against humanity for crimes they committed in the Bosnian town of Foča during the conflict in the former Yugoslavia.⁶⁹ Kunarac was convicted of enslavement for depriving two women of any control over their lives and treating them as property.⁷⁰ Kovač was convicted for detaining two victims in his apartment for four months, where he imprisoned the girls, exercised de facto powers of ownership, and treated the victims as property.⁷¹

The enslavement charge required an act of judicial interpretation on the part of the Trial Chamber as the Statute that created the tribunal did not define “enslavement.”⁷² Relying upon the definition of slavery in the 1926 Slavery Convention, the Trial Chamber found that enslavement as a crime against humanity was the “exercise of any or all of the powers attaching to the rights of ownership over a person.”⁷³ The Trial Chamber found that the *actus reus* of the crime “is the exercise of any or all of the powers attaching to the right of ownership over a person,” while the *mens rea* is “the intentional exercise of such powers.”⁷⁴

women” to provide recreational sex to Japanese soldiers, see Patricia Viseur Seller, *Warime Female Slavery: Enslavement?*, 44 CORNELL INT’L L.J. 115, 117-120 (2011).

69. Prosecutor v. Kunarac, Case Nos. IT 96-23-T & IT-96-23/1-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

70. *Id.* ¶¶ 728–29.

71. *Id.* ¶¶ 747, 781–82.

72. *Id.* ¶ 518. Under Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Tribunal had the power to prosecute persons for crimes against humanity, including enslavement. S.C. Res. 827, art. 5 (May 25, 1993).

73. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 519, 539.

74. *Id.* ¶ 540. The *Kunarac* Appeals Chamber noted that the law knew of no “right of ownership over a person,” stating that the preferred language from the 1926 Slavery Convention was the more guarded language that enslavement “of a person [included that] over whom any or all of the powers attaching to the right of ownership are exercised.” Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶ 118 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

The *Kunarac* Appeals Chamber agreed that the Trial Chamber's definition was not overly broad and properly reflected customary international law of enslavement at the time the crimes occurred.⁷⁵ Moreover, the Appeals Chamber accepted the Trial Chamber's finding that the concept of slavery had evolved beyond chattel slavery to encompass various forms of slavery based upon the exercise of any or all of the powers attaching to the right of ownership.⁷⁶ Ultimately, the Appeals Chamber determined that "whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement," approvingly citing the *Kunarac* Trial Chamber's list of factors to determine whether enslavement was committed.⁷⁷ Such 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 coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor.⁷⁸ In the paragraph preceding that finding, the Trial Chamber also noted "[f]urther indications" of enslavement, which included "the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."⁷⁹

The *Kunarac* Trial Chamber's language suggests that human trafficking, while not necessarily enslavement in itself, is an indication of enslavement. Still, the Appeals Chamber's indicia of enslavement seemed to fuse elements of enslavement and trafficking. Notably, the *Kunarac* Appeals Chamber's further indicia of enslavement largely fall within the legal definition of human trafficking as defined by the Trafficking Protocol, including the "threat or use of force or coercion", deception, "abuse of power or of a position of power or of a position of vulnerability" for exploitation.⁸⁰ Exploitation under the Trafficking Protocol includes sexual exploitation, forced labor practices, slavery, or practices similar to slavery.⁸¹

Like the Trafficking Protocol, the *Kunarac* judgments negate the consent of the victim. As discussed previously,⁸² the Trafficking Protocol stated that the consent of the victim to trafficking is "irrelevant" where the purpose of the act is exploitation.⁸³ The *Kunarac* Trial Chamber found that

75. *Id.* ¶ 124.

76. *Id.* ¶ 117.

77. *Id.* ¶ 119.

78. *Id.* (citing *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 543).

79. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 542.

80. Trafficking Protocol, *supra* note 13, art. 3(a).

81. *Id.*

82. *See supra* Section II.A.3.

83. Trafficking Protocol, *supra* note 13, art. 3(b).

consent to enslavement is “often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.”⁸⁴ The *Kunarac* Appeals Chamber noted that consent may be relevant to determining whether the Prosecutor had established the elements of the crime relating to the exercise of powers attaching to ownership, but stated that “circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.”⁸⁵

B. *Cases in the European Court of Human Rights*

Article 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) prohibits slavery, servitude, and forced or compulsory labor, but the text does not explicitly prohibit human trafficking.⁸⁶ In two recent cases, the court examined instances of human trafficking and the connection between that crime and Article 4 of the Convention. In doing so, the decisions have shaped—and, at the same time, obscured—the relationship between slavery and trafficking.

1. *Siliadin v. France*

The European Court of Human Rights (ECtHR) considered the bounds of slavery and servitude in *Siliadin v. France*, and ultimately suggested a narrow interpretation of the concept of slavery.⁸⁷ The case involved a Togolese minor who had gone to France with the understanding that, after completing her work, she would be remunerated with an air ticket, her immigration status would become regularized, and she would be sent to school.⁸⁸ Eventually, Siliadin was “lent” to Mr. and Mrs. B, for whom she worked for fifteen hours per day, with no days off, for several years, and without receiving wages.⁸⁹ In the French courts, Mr. and Mrs. B were convicted for having obtained the services of a vulnerable individual, a

84. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 542.

85. Prosecutor v. *Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶ 120 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

86. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 4(1)–(2), Nov. 4, 1940, 213 U.N.T.S. 221.

87. *Siliadin v. Fr.*, 2005-VII Eur. Ct. H.R. 333.

88. *Id.* at 367.

89. *Id.*

criminal offense under the French Criminal Code, but the two were acquitted of the charge of exposing an individual to working conditions incompatible with human dignity.⁹⁰

The applicant argued that France violated Article 4 of the European Convention on Human Rights because French criminal law did not contain specific criminal provisions on slavery, servitude, or forced or compulsory labor, thereby flouting France's positive obligations under the Convention.⁹¹ The ECtHR agreed that France had violated its positive obligations under the European Convention on Human Rights,⁹² but it ultimately distinguished the conditions of slavery and servitude, denying that the applicant was exposed to slavery.⁹³ Citing the definition under the 1926 Slavery Convention as the "classic" definition of slavery, the ECtHR found that, although the applicant was denied her personal autonomy, she was not held in slavery in "the proper sense" because Mr. and Mrs. B. did not exercise a genuine right of legal ownership over the girl, thus reducing her to the status of an object.⁹⁴ Instead, the ECtHR found that the applicant had been held in servitude. While the court recognized that servitude was "linked with the concept of 'slavery,'" it defined servitude as "an obligation to provide one's services that is imposed by the use of coercion."⁹⁵ The *Siliadin* decision did not address trafficking explicitly,⁹⁶ but the facts of the case suggest that the applicant was a victim of trafficking. Moreover, the ECtHR's language that obtaining services through coercion was akin to servitude suggests that the trafficking was servitude, but not slavery.

The ECtHR's interpretation of slavery in *Siliadin* is considerably narrower than the ICTY's *Kunarac* decision. Unlike *Kunarac*, the court in *Siliadin* seemed loath to move beyond an understanding of slavery from the 1926 Slavery Convention. As Ariela Gross and Chantal Thomas note,

90. *Id.* at 342.

91. *Id.* at 364.

92. *Id.*

93. In its submission, France had suggested that servitude was close to slavery, but that slavery was "at the extreme end of the scale." The distinction, according to the Government's submission, was that "servitude reflected a situation of exploitation which did not require that the victim be objectified to the point of becoming another person's property." *Id.* at 366.

94. *Id.* at 369. The French courts had found that the applicant "had a degree of independence" since she, among other things, spoke French, traveled around Paris to take and collect the family's children, left the house for shopping, attended church services, regularly called her uncle, and met her father and uncle in person and had not complained about her situation. *Id.* at 344.

95. *Id.* at 369.

96. As the Court noted, there existed "no legislation in France prior to 18 March 2003 that directly made it an offence to traffic in human beings." *Id.* at 365.

however, such a line of logic makes the 1926 Slavery Convention largely irrelevant since “*de jure* slavery is now abolished nearly everywhere.”⁹⁷

2. Rantsev v. Cyprus and Russia

Although the ECtHR did not explicitly determine whether trafficking was slavery or servitude in *Siliadin*, the issue of human trafficking and the scope of Article 4 of the European Convention on Human Rights would be directly considered in the 2010 *Rantsev v. Cyprus and Russia* decision. Because human trafficking was not explicitly proscribed under Article 4, the court in *Rantsev* would need to determine if human trafficking was covered under the state’s positive requirements under Article 4’s prohibitions of slavery, servitude, and forced and compulsory labor.

Rantsev concerned the mysterious death of a Russian national who had travelled to Cyprus to work as an “artiste,” a term synonymous with prostitute.⁹⁸ Shortly after beginning her work at a cabaret, Ms. Rantsev had quit her job and stated her intent to return to Russia.⁹⁹ A week later, the owner of the cabaret, where Ms. Rantsev formerly worked, learned that she was at a discotheque. The cabaret owner promptly went to the establishment, collected her, and took her to the police station to declare her an “illegal immigrant.”¹⁰⁰ Rather than arresting Ms. Rantsev, however, the police returned her to the care of the cabaret owner.¹⁰¹ The next morning, Ms. Rantsev was found dead on the street below the apartment where she had been returned, having apparently tried to escape from the apartment’s balcony.¹⁰²

The victim’s father brought a case to the ECtHR that stated that his daughter had been a victim of trafficking. The application alleged that, since neither Cyprus nor Russia had specific criminal provisions addressing human trafficking, both nations had failed their positive obligations under Article 4 of the European Convention on Human Rights. The ECtHR agreed. In its decision, the court expanded the scope of Article 4 to include human trafficking, noting that the European Convention on Human Rights is a

97. Ariela J. Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 LAW & HIST. REV. 99, 114 (2017); see also GALLAGHER, *supra* note 49, at 187 (criticizing the court’s rigid interpretation of slavery).

98. *Rantsev v. Cyprus and Russia*, 2010-I Eur. Ct. H.R. 65, 90.

99. *Id.* at 77.

100. *Id.*

101. *Id.*

102. *Id.*

"living instrument which must be interpreted in the light of present-day conditions."¹⁰³

The court's analysis seemed to recognize that human trafficking applied many of the same conditions as slavery while simultaneously refusing to explicitly take such a position. For example, the *Rantsev* court recounted trafficking in ownership terms, bringing it in line with the earlier *Siliadin* decision that equated slavery to ownership:

The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the rights of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of the victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions.¹⁰⁴

Moreover, the ECtHR went on to recognize the Trafficking Protocol and the Cypriot Ombudsman positions that trafficking was modern slavery.¹⁰⁵

Even though its language suggested that trafficking represented a form of ownership akin to slavery, the *Rantsev* court ultimately declined to reach that finding:

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. In view of its obligation to interpret the convention in the light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery," "servitude" or "forced and compulsory labor." Instead, the Court concludes that trafficking itself . . . falls within the scope of Article 4 of the Convention.¹⁰⁶

While human trafficking now falls under Article 4 of the European Convention on Human Rights, under *which* category it falls (slavery, servitude, forced and compulsory labor) remains undetermined.

103. *Id.* at 123–24.

104. *Id.* at 124.

105. *Id.*

106. *Id.*

The reluctance of the ECtHR to classify trafficking under an existing prohibition in Article 4 of the Convention seems sound when one returns to the definition of trafficking in the Trafficking Protocol. According to the definition in the Protocol, trafficking may take different forms of exploitation, including slavery, servitude, and forced labor.¹⁰⁷ Thus, the ECtHR was being asked to classify trafficking, an umbrella term, into one of three potential subsets, any of which could qualify as a form of trafficking under the Protocol. The ECtHR understandably declined to make such a finding. Instead, by finding that trafficking fell within the scope of Article 4 generally without stating precisely where it fell, the ECtHR prohibited trafficking without compartmentalizing it under slavery, servitude, or forced or compulsory labor.

The *Rantsev* decision has been hailed as significant for its expansion of the scope of Article 4 to encompass human trafficking, but also disappointing for its ultimate circumvention of a finding on the relationship between trafficking and slavery.¹⁰⁸ While some scholars have argued that the decision overruled the narrow decision of slavery in *Siliadin*,¹⁰⁹ the court's language seems clear that it was not making such a pronouncement. As other scholars have noted, a precise relationship between slavery and human trafficking has yet to be delineated.¹¹⁰

107. Trafficking Protocol, *supra* note 13, art. 3(a); see discussion *infra* Section III.B.

108. GALLAGHER, *supra* note **Error! Bookmark not defined.**, at 189; Harmen van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT'L L. 297, 312 (2014).

109. See Roza Pati, *States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia*, 29 B.U. INT'L L.J. 79, 81 (2011) (stating that *Rantsev*'s determination that trafficking fell under Article 4 of the European Human Rights Convention "overruled [the Court's] classical interpretation it had espoused only as recently as 2005" in *Siliadin*); *id.* at 130 (stating that international criminal law and human rights law "therefore agree on the inclusion of certain forms of human trafficking in the concept of enslavement or slavery"). *But see* van der Wilt, *supra* note 108, at 312 ("The incorporation of trafficking in human beings within the scope of Article 4 is not decisive, because that provision encompasses several concepts, next to slavery, and the ECtHR refrains from indicating under which tag trafficking can be brought.").

110. GALLAGHER, *supra* note 49, at 191 (suggesting that the relationship between slavery and trafficking remains in a state of flux); van der Wilt, *supra* note 108, at 312.

V. THE FUTURE OF HUMAN TRAFFICKING AS ENSLAVEMENT

A. *The International Criminal Court (ICC)*1. *Trafficking as a Crime Against Humanity Under Article 7*

The Rome Statute (ICC Statute), which established the ICC, provides the clearest guidance on the prosecution of human trafficking as a form of enslavement as a crime against humanity.¹¹¹ Article 7, which enumerates the crimes of humanity under the ICC Statute, defines "enslavement": "the exercise of any or all 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."¹¹²

The first part of the definition in the text reflects the traditional understanding of slavery as ownership over another human as defined in the 1926 Slavery Convention, but the latter singles out trafficking as one situation where such ownership power may be exercised. Interestingly, only trafficking is listed in the definition. The trafficking clause proposed in the ICC Statute initially spoke of "deprivation of physical liberty" and "for the purpose of sexual exploitation" while later proposals included references to "slavery-related practices" and "forced labour."¹¹³ All were ultimately eliminated.¹¹⁴

The ICC's Elements of Crimes suggests a broader understanding of enslavement to include situations where the "perpetrator exercised any or all of the powers attaching to the right of ownership . . . such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."¹¹⁵ A footnote adds:

It is understood that such deprivation of liberty may, in some circumstances, including exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also

111. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

112. *Id.* art. 7(2)(c).

113. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 161 (2010).

114. *Id.*

115. Rep. of the Preparatory Comm'n for the Int'l Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2, at 10 (2000) [hereinafter ICC Elements of Crimes].

understood that the conduct described in this element includes trafficking in persons, in particular women and children.¹¹⁶

Thus, where the first part of the definition of enslavement in Article 7 of the ICC Statute suggests a view of enslavement akin to the 1926 Slavery Convention, the latter clause in the definition and the Elements of Crimes imply a broadened understanding of the term.¹¹⁷ In addition, the Office of the Prosecutor has referenced the Trafficking Protocol as an interpretive guide for the crime of human trafficking under Article 7 of the ICC Statute, a further indication of the importance of the Trafficking Protocol to understand trafficking and its relationship to enslavement under international law.¹¹⁸

2. *Difficulties of Bringing Trafficking Cases Before the ICC*

Although the language of the ICC Statute indicates that trafficking could be a form of enslavement under Article 7, a number of jurisdictional requirements mean that, in practice, human trafficking is very unlikely to be prosecuted as a stand-alone charge of enslavement in the ICC. If trafficking is to be charged as enslavement at the ICC, a charge will likely come as one or more counts within a multi-count prosecution and only where the ICC's jurisdictional requirements are met.¹¹⁹

116. *Id.* at 10 n.11. In addition, William A. Schabas notes that the footnote was added to address concerns that enslavement might be restricted to acts which involved a commercial exchange. SCHABAS, *supra* note 113, at 161.

117. See Jonas Nilsson, *Article 7: Enslavement*, in COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 40, 41 (Mark Klamberg ed., 2017).

118. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, POLICY ON CHILDREN 22 n.58 (Nov. 2016), https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF [<https://perma.cc/RH33-MFUH>].

119. For example, Kunarac was convicted at the ICTY for the enslavement of two girls. *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 728-745 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 22, 2001). The enslavement count came as part of a systematic attack against by the Bosnian Serb Army and paramilitary groups against the Muslim civilian population in three municipalities in Bosnia and Herzegovina. *Id.* ¶ 578. The Kunarac Chamber recognized that the attack, not individual acts of an accused, must be "widespread or systematic." *Id.* ¶ 556. Specifically, without the existence of the underlying systematic attack against the Muslim civilian population, the enslavement of the two girls would have constituted an isolated incident and not qualified as a crime against humanity. "For example, the act of denouncing a Jewish neighbour to the Nazi authorities—if committed against a background of widespread persecution—has been regarded as amounting to a crime against humanity. An *isolated act*, however—i.e. an atrocity which did not occur within such a context—cannot." *Id.* ¶ 431 (quoting *Prosecutor v. Kupreškic*, Case No. IT-95-16-T,

a. *Chapeau Elements*

While the language of Article 7(2)(c) suggests a path to prosecute human trafficking in the ICC, the chapeau elements, which must first be met for any crime against humanity charge, present a formidable barrier in a trafficking case. All crimes against humanity require proof that they were committed "as part of a widespread or systematic attack directed against a civilian population"¹²⁰ In addition, for the ICC to have jurisdiction, the conduct must involve "the multiple commission of acts" that were committed "pursuant to or in furtherance of a [s]tate or organizational policy to commit such attack."¹²¹

Significantly, trafficking is typically conducted by private actors operating outside state control.¹²² Still, traffickers operating outside state control could conceivably commit a crime against humanity pursuant to state or organizational policy.¹²³ The ICC Pre-Trial Chamber, finding that private organizations could commit a crime against humanity pursuant to state or organizational policy, established a non-exhaustive list of factors to be considered:

- (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group

Judgement, ¶ 550 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 20, 2002)). A single act could therefore be regarded as a crime against humanity if it takes place in the relevant context. *See* discussion *infra* notes 120–28 and accompanying text.

120. ICC Statute, *supra* note 111, art. 7(1).

121. *Id.* art. 7(2)(a). The Elements of Crimes states that the State or organizational policy requires that the State or organization "actively promote or encourage such an attack against a civilian population." ICC Elements of Crimes, *supra* note 115, at 5, 10.

122. *See, e.g.,* Maria L. Ontiveros, *Is Modern Day Slavery a Private Act or a Public System of Oppression?*, 39 SEATTLE U. L. REV. 665, 681 (2016) (noting the general government understanding that trafficking is a private criminal act).

123. In *Prosecutor v. Gombo*, the Pre-Trial Chamber held:

The requirement of "a State or organizational policy" implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalized. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.

Case No. ICC-01/05-01/08, Decision on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 81 (June 15, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF [<https://perma.cc/XV3T-C3TE>]; *see also* Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges, ¶¶ 184–85 (Jan. 23, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF [<https://perma.cc/F52T-94QY>] (finding that "organizations not linked to a State may . . . carry out a policy to commit an attack against a civilian population").

possesses, in fact, the means to carry out a widespread or systematic attack against the civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above criteria.¹²⁴

Although a private criminal organization might theoretically face criminal liability for trafficking crimes before the ICC, the reach is unquestionably limited.¹²⁵ The proscribed trafficking would need to be widespread or systematic, conducted pursuant to government or organizational policy, and with the criminal organization largely operating pursuant to a number of indicating factors. Very few human trafficking situations would meet the ICC's crimes of humanity chapeau requirements.

In addition, a state's willful failure to take measures to stop a crime against humanity may indicate a de facto policy to further the crime.¹²⁶ Here, the awareness of the crimes makes the state complicit if the intent behind the inaction is to further the attack, rather than a state's inability to prevent it.¹²⁷ In such a circumstance, however, criminal culpability before the ICC could fall upon the leaders of the state who were complicit in the crime in addition to private nonstate actors who committed the trafficking.¹²⁸

124. *Ruto*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges, ¶ 185.

125. See, e.g., Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 *YALE L.J.* 550, 633 (2008) (recognizing that nonstate transnational human traffickers would typically be outside the reach of the ICC).

126. The ICC's Elements of Crimes states:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such an attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action. ICC Elements of Crimes, *supra* note 115, at 9 n.6.

127. Charles Chernor Jalloh, *What Makes a Crime Against Humanity a Crime Against Humanity*, 28 *AM. U. INT'L L. REV.* 381, 426 (2013).

128. Andreas Schloenhardt, *Transnational Organised Crime and the International Criminal Court: Developments and Debates*, 24 *U. QUEENSL. L.J.* 93, 103 (2005) (stating that nonstate transnational traffickers could also be liable for crimes against humanity provided the widespread and systematic elements were met). *But see* Martinez, *supra* note 125 (suggesting nonstate traffickers would be outside the reach of the ICC).

b. *Complementarity*

As the ICC Statute makes clear, the ICC does not operate on the basis of primary jurisdiction.¹²⁹ Under the principle of complementarity, the responsibility for investigating and prosecuting perpetrators for crimes within the ICC's jurisdiction first falls to domestic legal systems.¹³⁰ Jurisdiction is only granted to the ICC when a country with primary competency is unwilling or unable to investigate or prosecute the crime at hand, or if a country undertakes investigations or prosecutions that are not genuine.¹³¹

The complementarity principle seems to run into two competing issues for human trafficking. On the one hand, the Trafficking Protocol requires state parties to adopt legislation criminalizing human trafficking and to prosecute offenders.¹³² At the same time, many developing nations or countries immersed in or emerging from conflict typically lack the resources to effectively detect and prosecute human trafficking, even where it is prohibited by law.¹³³ Consequently, the states where trafficking is most

129. ICC Statute, *supra* note 111, pmbi., art. 17; Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 396 (2000) (noting that the ICC does not operate on the basis of primary jurisdiction).

130. Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 21 (2003) (explaining that jurisdiction initially resides with the domestic courts); Cody Corliss, *Prosecuting Members of ISIS for the Destruction of Cultural Property*, 45 FLA. ST. U. L. REV. 183, 217–18 (2017) (discussing complementarity in relation to the prosecution of terror groups).

131. Fatou Bensouda, Prosecutor of the ICC, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (Nov. 6, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=191106-stat-icc-otp-UNSC-libya> [<https://perma.cc/HBT8-MD7C>] (“It is worth recalling that the ICC is a court of last resort in accordance with the principle of complementarity. It only acts when States do not genuinely investigate and prosecute serious international crimes or are unable to do so.”); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 64–65 (2008) (examining complementarity under the ICC Article 13 generally); Corliss, *supra* note 130 (discussing complementarity where a nation with primary competency is unwilling or unable to investigate or prosecute); *see also* Siller, *supra* note 11, at 243–44 (stating that, given the positive complementarity structure of the ICC, “any notion that the ICC should be responsible for international trafficking prosecutions would be unduly burdensome and outside of the capacity of this international court”).

132. Trafficking Protocol, *supra* note 13, art. 5.

133. *See, e.g.*, Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 29 (2011) (noting that “[p]articularly in developing countries, many justice systems simply lack the resources to detect and prosecute” such crimes as trafficking and forced labor); Cody Corliss, *Truth Commissions and the Limits of Restorative*

likely to flourish are also the states with the fewest resources to combat the crime.

c. Gravity

The ICC Prosecutor is required to consider the “gravity of the crime” when deciding whether to open a formal investigation.¹³⁴ Consequently, the ICC’s gravity requirement serves as a statutorily required threshold below which the ICC should not exercise jurisdiction.¹³⁵ Under the circumstances, scholars have suggested that a trafficking case would be unlikely to reach the gravity threshold, and that a trafficking-related charge before the ICC would come only in conjunction with other violations of international law.¹³⁶

Two recent decisions in the ICC cast light on the Court’s gravity analysis, but also suggest a more nuanced understanding of gravity, particularly with respect to crimes that have discriminatory victimization. In the first, the ICC Prosecutor reaffirmed the decision not to proceed with an investigation into the events surrounding a May 31, 2010, incident where members of the Israeli Defense Forces (IDF) killed ten individuals aboard

Justice: Lessons Learned in South Africa’s Cradock Four Case, 21 MICH. ST. INT’L L. REV. 273, 282–83 (2013) (examining limited judicial resources of post-conflict justice systems).

134. ICC Statute, *supra* note 111, arts. 17(1)(d), 53(1)(b)–(c); *see* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06 (OA4), Judgement on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defense Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ¶ 23 (Dec. 14, 2006), https://www.icc-cpi.int/CourtRecords/CR2007_01307.PDF [<https://perma.cc/J4E9-6Y7A>] (noting statutory barriers to jurisdiction related to gravity of the offense); Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18 OA, Judgement on the Appeal of Mr. Al Hassan Against the Decision of Pre-Trial Chamber I entitled ‘Decision relative a l’exception d’irrecevabilite pour insuffisance de gravite de l’affaire soulevee par la defense, ¶ 59 (Feb. 19, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00536.PDF [<https://perma.cc/5AYB-8N5E>] (finding that the gravity requirement “is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity”). Although the gravity requirement is central within the ICC Statute, there has been little judicial or academic sources discussing the doctrinal contours of the subject. Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L.J. 1400, 1401 (2009); *see also* Stuart Ford, *The Meaning of Gravity at the International Criminal Court: A Survey About the Seriousness of Mass Atrocities*, 24 U.C. DAVIS J. INT’L L. & POL’Y 209, 210–11, 215–16 (2018) (emphasizing the crucial aspect of the gravity requirement, but acknowledging limited agreement on the meaning of the term).

135. *See* deGuzman, *supra* note 134, at 1403 (arguing that the ICC’s gravity requirement requires the Prosecutor to consider, among other things, the degree of gravity each situation presents in relation to other crimes the Court might pursue).

136. Kenny & Malik, *supra* note 11, at 70 (“[W]hile extremely serious in and of itself, the crime of human trafficking would unlikely reach the gravity threshold required to activate the ICC’s jurisdiction.”).

the *Mavi Marmara*, one of several vessels which aimed to break an Israeli blockade of Gaza.¹³⁷ In addition to the ten deaths, the incident resulted in the wounding of up to fifty-five people and outrages upon the personal dignity of potentially many others. Although the Prosecutor recognized that there was a reasonable basis to believe that war crimes had been committed, the Prosecutor determined that the fact pattern indicated that no potential case was sufficiently grave to be admissible before the Court.¹³⁸ Specifically, the Prosecutor noted a number of factors that were considered in reaching the decision, including the difficulty identifying the specific perpetrators; that the ten individuals who were alleged to have been willfully killed were not necessarily killed by the same one or more perpetrators, with similar disparate perpetrators for those who had been alleged to have been injured or subjected to outrages in personal dignity; the unique fact pattern where those who were killed or injured were proximate to the passengers' violent resistance to the IDF boarding of the ship; and that no information suggests that medium or high-level IDF members who did not participate in the boarding operation were implicated in a plan or policy to commit the crimes.¹³⁹ The Prosecutor also gave considerable weight to the limited scale of the victimization in the situation and that no countervailing factors offset the limited numbers.¹⁴⁰ Finally, the Prosecutor noted that the fact pattern of the alleged crimes would likely require a series of prosecutions of even more confined scope, where considerations of gravity would be even more acute.¹⁴¹

Less than three months later, the Appeals Chamber affirmed the Pre-Trial Chamber's determination that the case against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud for his role in crimes committed during an Islamist group's occupation of Mali had sufficient gravity to proceed. In *Al Hassan*, the Prosecution's case alleged ten direct victims of forced marriage, sexual slavery and rape, twenty-two direct victims of torture and other ill treatment, sixty direct victims of the passing of

137. Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, Case No. ICC-01/13-Anx1, Final Decision of the Prosecutor, ¶ 1 (Dec. 2, 2019); Isabel Kershner, *After Deadly Raid at Sea, Israel Is Sharply Criticized*, N.Y. TIMES, May 31, 2010, at A1.

138. Situation on the Registered Vessels, Case No. ICC-01/13, at ¶ 1.

139. *Id.* ¶ 89.

140. The Prosecutor indicated that countervailing factors would include discriminatory victimization, the special status of the victims as recognized under international law (such as peacekeepers or humanitarian assistance workers or cultural objects), public spectacle criminality (such as where widespread audiovisual distribution is part of the alleged conduct), or "product line" criminality where criminality is shown to form part of a well-established and systematic course of conduct (such as the running of a detention center). *Id.* ¶ 91.

141. *Id.* ¶ 93.

sentences without due process, the destruction of ten protected buildings, and the crime of persecution which affected the entire population of the Timbuktu region of Mali.¹⁴² The Appeals Chamber also determined that the Pre-Trial Chamber was correct to weigh additional factors in finding suitable gravity, including the nature and extent of the charged crimes, the repercussions of them on the direct victims and the population of the region as a whole, the discriminatory motive of the alleged crimes on religious or gender-based grounds, the vulnerability of certain victims, that the crimes were part of a widespread and systematic attack against the civilian population, and the significant role that the Prosecutor attributes to Al Hassan.¹⁴³ Both the Prosecutor's decision not to open an investigation in the *Comoros* case—the case related to the *Mavi Marmara*—and the Appeals Chamber decision in *Prosecutor v. Al Hassan* recognized that a gravity assessment must be conducted on a case-by-case basis, using a holistic evaluation of both quantitative and qualitative criteria.¹⁴⁴

Interestingly, both decisions recognized that discriminatory victimization (or lack thereof) would be considered in an analysis of gravity, indicating that crimes with a gender-based component could be deemed graver. These decisions suggest that a trafficking case—and particularly ones involving sexual trafficking—could meet the gravity threshold provided the crimes also meet the chapeau elements of a crime against humanity.

One string of trafficking crimes that would likely meet the chapeau elements for crimes against humanity, for example, are the arrests as a result of Operação Garina.¹⁴⁵ Charged in Brazil rather than in the international criminal context, the Operação Garina arrests occurred following a \$45 million, ten-year operation where an international gang orchestrated the sexual trafficking of approximately 1,500 women from São Paulo nightclubs to work as prostitutes for affluent clients in Angola.¹⁴⁶

142. *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18 OA, Judgement on the Appeal of Mr. Al Hassan Against the Decision of Pre-Trial Chamber I Entitled 'Decision relative a l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense,' ¶ 101 (Feb. 19, 2020) https://www.icc-cpi.int/CourtRecords/CR2020_00536.pdf [<https://perma.cc/5AYB-8N5E>].

143. *Id.* ¶ 102.

144. *Id.* ¶ 117(iii).

145. "Garina" is slang in Angolan Portuguese for "little girl." *A Senior Angolan Wanted by Brazil for Human Trafficking*, AGENZIA FIDES (Nov. 19, 2013), http://www.fides.org/en/news/34723-AFRICA_ANGOLA_A_senior_Angolan_wanted_by_Brazil_for_human_trafficking [<https://perma.cc/8674-KDBJ>].

146. Marti Moreira, *Police Arrest Brazilian Gang that Lured Women to Work as Prostitutes in Angola*, EBC (Oct. 25, 2013), <http://www.ebc.com.br/english/2013/10/police-arrest-brazilian-gang-that-lured-women-to-work-as-prostitutes-in-angola> [<https://perma.cc/XE>].

After accepting the offers and arriving in Angola, traffickers stripped the women of their freedoms, forced them to have unprotected sex with foreign clients, and offered the victims fake anti-AIDS cocktails.¹⁴⁷ In addition to criminal gangs in Brazil, the sexual trafficking operation had ties to high level government officials in Angola, including General Bento dos Santos Kangamba, a relative of Angola's President, José Eduardo dos Santos.¹⁴⁸ Such a crime, if charged as an international crime, would likely constitute a crime against humanity given the systematic nature of the criminal operation,¹⁴⁹ the large number of victims, and the role of high level political figures. Moreover, based on the *Al Hassan* decision, Operação Garina would have sufficient gravity for the ICC to exercise jurisdiction.

B. Reconsidering Human Trafficking as Enslavement

Although international criminal law decisions have suggested an overlap between enslavement and trafficking, the two terms are not synonymous. Trafficking has three components to its definition under the Trafficking Protocol: (1) an action of recruitment, transfer, or receipt of a person; (2) conducted by threat, use of force, coercion, fraud or deception, or other means; and (3) for the purpose of exploitation, including the practice of slavery or practices similar to slavery. The definition of enslavement, which

39-ELXB]; Camila Campos, *Interpol procura ex-militar e empresário de Angola por tráfico de mulheres [Interpol Seeks Ex-military and Businessman from Angola for Trafficking in Women]*, DW AFRICA (Oct. 30, 2013), <https://www.dw.com/pt-002/interpol-procura-ex-militar-e-empres%C3%A1rio-de-angola-por-tr%C3%A1fico-de-mulheres/a-17194197> [https://perma.cc/E98F-LHZC].

147. Moreira, *supra* note 146.

148. Aristides Cabeche, *Dos Santos In-Law in Sex Slavery Bind*, MAIL & GUARDIAN (Nov. 14, 2013), <https://mg.co.za/article/2013-11-14-dos-santos-in-law-in-sex-slavery-bind/> [https://perma.cc/CP8W-4VDH]; Camila Campos, *Bento Kangamba na lista de procurados pela Interpol [Bento Kangamba on Interpol's Wanted List]*, DW AFRICA (Nov. 12, 2013), <https://www.dw.com/pt-002/bento-kangamba-na-lista-de-procurados-pela-interpol/a-17220949> [https://perma.cc/5DZG-TQAA]; *see also* TRF-3, H.C. No. 5009209-53.2018.4.03, Relator: Des. Edf. Paulo Fontes, 07.05.2018, JUDICIAL I, 03.07.2018, 264 (Braz.) (“The case records show that the [Bento dos Santos Kangamba] was reported in the so-called Operation Garina, ‘for allegedly being part of a criminal organization, in which the activity developed, according to the Federal Public Ministry, is mainly the international trafficking of women for the purpose of sexual exploitation.’”).

149. *See* Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges, ¶ 158 (Jan. 23, 2012), (noting factors to establish the systematic nature of an attack); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgement, ¶ 383 (Sept. 26, 2013) (“[C]rimes against humanity specifically defines crimes committed either on a large-scale or in an organised manner. The essence of crimes against humanity is a systematic policy of a certain scale and gravity directed against the civilian population, and in practice, these crimes are often committed by organised groups.”).

focuses solely on the powers attaching to ownership, is decidedly narrower. As the Trafficking Protocol definition suggests, slavery is a potential end purpose and result of trafficking, but it is not the only one.¹⁵⁰ Other trafficking situations include sexual exploitation, prostitution of others or servitude, and although such crimes are unquestionably heinous, they are not enslavement. Only a small percentage of trafficking victims qualify as slaves.¹⁵¹ The common description of trafficking as “modern slavery” reflects this distinction, a seeming nod that trafficking is different from the traditional understanding of slavery as defined in the 1926 Slavery Convention.¹⁵²

A number of scholars have advocated the expansion of trafficking as enslavement, seeking to redefine trafficking as a crime against humanity.¹⁵³ As Harmen van der Wilt has persuasively argued, however, merely expanding the definition of crimes against humanity to include trafficking weakens the power and understanding of the category of crimes that encompass crimes against humanity, a designation specifically created in the aftermath of the Holocaust.¹⁵⁴ Moreover, as this Article indicated previously, classifying all trafficking acts as crimes against humanity would

150. Harmen van der Wilt contends that enslavement and trafficking in humans should be distinguished because trafficking “encompasses a wide gamut of criminal activities that vary in intensity and duration.” Harmen van der Wilt, *Slavery Prosecutions in International Criminal Jurisdictions*, 14 J. INT’L CRIM. JUST. 269, 282 (2016). As he notes, “The pimp who exploits the charms of his lover or prostitute would easily fall within the definitional scope of trafficking in human beings, while he would probably not qualify as a ‘slave trader.’” *Id.*

151. Gallagher, *supra* note 15, at 810.

152. Unlike “old” slavery, “modern slavery” avoids legal ownership, has low purchase prices, and typically involves a short-term relationship between the slave and exploiter. KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 14–15 (2004).

153. See e.g., Roza Pati, *Human Trafficking: An Issue of Human and National Security*, 4 U. MIAMI NAT’L SECURITY & ARMED CONFLICT L. REV. 29, 33 (2014) (stating that “human trafficking is enslavement, a crime against humanity, as it includes the exercise of any or all of the powers attaching to the rights of ownership over a person . . .”) (internal quotes omitted); Obokata, *supra* note 55, at 451 (advocating the treatment of trafficking in humans as crime against humanity); Idil Atak & James C. Simeon, *Human Trafficking*, 12 J. INT’L CRIM. JUST. 1019, 1036 (2014) (stating that the prosecution of a human trafficking case as a crime against humanity “would be beneficial in advancing criminal justice.”). Conversely, a number of scholars have questioned equating human trafficking to slavery. See, e.g., Bravo, *supra* note 17, at 243 (noting that the analogy between trafficking and the trans-Atlantic slave is “pervasive,” but stating that such an analogy is “superficial, counterproductive, and harmful”); Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Anti-Trafficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269, 272 (2006) (arguing that equating human trafficking and sexual slavery is a damaging over-simplification).

154. See van der Wilt, *supra* note 108, at 313 (noting the danger of “semantic inflation” and stating that “the dilution of crimes against humanity trivializes the category which historically originated in the unimaginable atrocities of the Holocaust”).

require a widespread reinterpretation of the chapeau elements in order for most trafficking crimes to qualify. If one specifically seeks to incorporate trafficking as enslavement at the ICC, one runs into additional issues of gravity and complementarity. Only a small number of trafficking crimes are likely to meet these elements.

Others who seek to define trafficking as enslavement suggest that elevating trafficking to an international crime will enable states to better prosecute it.¹⁵⁵ If human trafficking is classified as a form of slavery, for example, it becomes an international crime subject to universal jurisdiction.¹⁵⁶ Universal jurisdiction, which has its roots in attempting to prosecute piracy committed at sea, allows any nation to prosecute foreign offenders for certain heinous acts committed abroad against nonnationals.¹⁵⁷ Even advocates of the proposal acknowledge that the creation of universal jurisdiction is unlikely to substantially increase prosecution.¹⁵⁸ In addition, many trafficking crimes—by some estimates more than 75%—do not involve the crossing of a national border.¹⁵⁹ Although universal jurisdiction would allow prosecution even where trafficking occurred wholly within the borders of one country, one nation investigating and prosecuting a crime that occurred solely in another jurisdiction seems increasingly unlikely, particularly as trafficking is a crime that occurs in all nations throughout the world.

Advocates also point to the additional policy benefits of defining trafficking as enslavement, noting that its reclassification will emphasize the gravity of the crime while encouraging states to fight it.¹⁶⁰ Such an argument

155. See e.g., Miriam Cohen, *The Analogy Between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction*, 16 BUFF. HUM. RTS. L. REV. 201, 225 (2010) (supporting universal jurisdiction for human trafficking crimes involving grave human rights violations such as sexual slavery and forced labor, but questioning whether trafficking should be classified as slavery); Clare Frances Moran, *Human Trafficking and the Rome Statute of the International Criminal Court*, 3 AGE HUM. RTS. J. 32, 33 (2014) (advocating that human trafficking should be a core international crime under ICC jurisdiction rather than a crime against humanity); Tavakoli, *supra* note 16 (advocating the reclassification of trafficking in women as slavery, thereby giving it status as an international crime).

156. Cohen, *supra* note 155.

157. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987); see Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791–95 (1988) (discussing universal jurisdiction and its origins).

158. Tavakoli, *supra* note 16, at 93 (acknowledging that “states may of course not necessarily embrace this extended jurisdictional reach,” particularly given “practical concerns about overburdening the courts and collective evidence in international cases”).

159. TRAFFICKING IN PERSONS REPORT, *supra* note 4.

160. Tavakoli, *supra* note 16, at 94–95.

understates the significant role that the Trafficking Protocol has played in nations developing their own domestic laws criminalizing trafficking.¹⁶¹ To date, 175 parties have ratified the Trafficking Protocol, and 168 nations have passed domestic legislation criminalizing human trafficking pursuant to the Protocol's framework.¹⁶² States now have overwhelmingly enacted antitrafficking laws built upon the Trafficking Protocol's definition and the Protocol's mandates, such as mandates for programs to prevent and combat trafficking and to criminalize the act.¹⁶³ Finally, outside the realm of international law, the United States provides an added stick through the TVPA, which allows for sanctions for any nation which does not comply with the minimum standings for the elimination of trafficking and fails to make a significant effort toward compliance.¹⁶⁴

VI. CONCLUSION

Human trafficking has been cast as a type of slavery since the very first international attempts to end trafficking in the nineteenth century. Even recently, governments and foreign leaders have called trafficking “modern slavery.” International judicial organs, such as the ICTY and ECtHR, have not followed those calls. Instead, the ICTY in *Kunarac* and the ECtHR in *Rantsev v. Cyprus and Russia* have noted the overlapping elements between the two crimes. As such, certain conduct will satisfy the elements of both

161. As an example, the European Court of Human Rights noted when it decided *Siliadin v. France* that France did not criminalize the trafficking in humans until March 2003. *Siliadin v. France*, 2005–VII Eur. Ct. H.R. 365, ¶ 98.

162. U.N. Treaty Collection, Status of Treaties, A Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000), <https://treaties.un.org/doc/Publication/MTDGS/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf> [<https://perma.cc/PGD5-QHRT>]; TRAFFICKING IN PERSONS REPORT, *supra* note 4, at 6 (reporting that 173 parties have acceded to the treaty, but Bangladesh and Palau have acceded to the Trafficking Protocol since the Report's publication).

163. Trafficking Protocol, *supra* note 13, arts. 5; 9. For example, after five Burundians and one Kenyan received Rwandan prison sentences for trafficking seventeen women to Uganda where they would then be flown to Saudi Arabia, Rwanda prosecutors cited the international trafficking protocol to which the nation subscribes as the basis for the charges. Kelly Rwampapera, *Human Trafficking Convicts Now Appeal 10-Year Sentence*, RWANDA TODAY (Jan. 27, 2020), <http://rwandatoday.africa/news/Human-trafficking-convicts-now-appeal-10-year-sentence/4383214-5433812-r44wnx/index.html> [<https://perma.cc/S3LP-W7DC>].

164. Trafficking Victims Protection Act, 22 U.S.C. § 7107 (2018). Global compliance with antitrafficking efforts is analyzed annually by the U.S. State Department and published as its TRAFFICKING IN PERSONS REPORT. For a general discussion and subtle critiques of the U.S. monitoring and sanctions regime on trafficking, see Chuang, *supra* note 50.

trafficking and enslavement, but the two crimes remain distinct. The ICC Statute suggests that trafficking may constitute enslavement, a crime against humanity, but the crime against humanity chapeau elements and the court's jurisdictional and gravity restrictions suggest that, standing alone, few trafficking crimes will be charged as crimes against humanity under the ICC's enforcement regime.

Unquestionably, human trafficking is a global and depressing problem, with an estimated 24.9 million global victims.¹⁶⁵ Reclassifying human trafficking as slavery may seem sensible upon first impression, given the heinous nature of both crimes and their overlapping relationship. Further analysis suggests that international law has been prudent to resist the calls to reclassify trafficking as enslavement. Under the status quo, trafficking can constitute the crime of enslavement in certain situations, but not all victims of trafficking can be considered slaves. Recasting trafficking as enslavement will create no new avenues to prosecution for most trafficking crimes, but it could bring a number of drawbacks. Such a redefinition could weaken the impact of crimes against humanity generally, strain investigative and prosecutorial resources, and lead to questions of jurisdiction. As a result, the prosecution of human trafficking crimes is better served if it remains distinct from the crime of enslavement and if it remains a transnational crime prosecuted at the domestic level.

165. Michael Pompeo, Message from the Secretary of State, *in* TRAFFICKING IN PERSONS REPORT, *supra* note 4.