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The Normative Basis for Combating Human Trafficking:

*A Victim - Centred
Framework*

A thesis submitted in
fulfilment of the requirements
of the award of the degree

Doctor of Philosophy

By
Dimitra Hatziplis
B.Sc(Arch) LLB (Hons)

CERTIFICATE OF ORIGINALITY

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institute of higher learning, except where due acknowledgment is made in the text.

I also declare that the intellectual content of this thesis is the product of my own work, even though I may have received assistance from others on style, presentation and language expression.

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Dimitra Hatziplis

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Any omissions and errors in this work are my sole responsibility.

ABSTRACT

Human trafficking is the movement of a person from one place to another through the use of force, fraud or coercion for the purpose of exploitation. It is thought to be one of the fastest growing international crimes generating profits only second to arms trading. It is also the largest manifestation of contemporary slavery. In an effort to suppress trafficking, the international community came together in 2000 to draft international law to combat the problem. Unfortunately, these efforts have had little impact on reducing trafficking. It is the position of this thesis that one of the reasons for this failure is that there was little normative legal theory underpinning the provisions in the instruments adopted to deal with trafficking. The articulation of a clear normative premise for action by states in combating trafficking is essential because without it the objectives for international action become ambiguous leaving room for varying interpretations for state action.

Essentially, the existing international legal framework as reflected in the international instruments is a product of infused criminal law and migration concerns neither of which has been adequate in dealing with the problem of trafficking. Indeed, many of the responses by state parties mirror historical attempts to deal with trafficking from the early 1900s. What is missing however is a proper victim centred approach which would work to reduce trafficking, protect victims and even address state concerns by enhancing criminal law efforts.

The search for an appropriate normative theoretical framework necessarily requires an analysis of the role played by migration, gender, consent, human rights and slavery in trafficking. Indeed, all of these factors provide valuable insights into trafficking while also illustrating the motivation behind different views concerning trafficking. For example, migration concerns and crime control lie at the heart of state interests whereas many feminist groups perceive trafficking to be a gender issue.

After a detailed analysis of the various issues underpinning trafficking, appropriate law reforms can be formulated that are informed by ideologies set in values, attitudes and

beliefs that are fundamentally victim – centred. When the well being of the victim is prioritised, the response that flows will have the effect of also providing tools for dealing with irregular migration, crime control, gender and labour issues. However, this can only result from a shift in focus to the exploitation of the victim and a re-evaluation of the definition and treatment of slavery. The current perception of slavery as a practice steeped in proprietary rights akin to chattel slavery is antiquated and provides little insight into modern practices. However this perception can be corrected with a re-definition of slavery as an infringement of personal autonomy. This would result in a clearer understanding and treatment of modern day slavery. This also leads to the conclusion that trafficking should be considered a sub category of slavery and that efforts to eradicate trafficking should also be matched by efforts to eradicate slavery in general.

ABBREVIATIONS

AFP	Australian Federal Police
BVF	Bridging Visa F
BWS	Battered Wife Syndrome
CJSC	Criminal Justice Stay Certificate
CJSV	Criminal Justice Stay Visa
GAATW	Global Alliance Against Traffic in Women Coalition
HRC	Human Rights Caucus
IHRN	International Human Rights Network
ILO	International Labour Organisation
IOM	International Organisation for Migration
NGO	Non Governmental Organisation
ODIHR	Office for Democratic Institutions and Human Rights
OPTN	Organ Procurement and Transplantation Network (United States)
PWPTV	Permanent Witness Protection (Trafficking) Visa
SAARC	South Asian Association for Regional Cooperation
SRTR	Scientific Registry of Transplant Recipients
TVPA	<i>Trafficking Victims Protection Act of 2000</i>
TWPTV	Temporary Witness Protection (Trafficking) Visa
UN	United Nations
UNAFEI	Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders
VIS	Victim Impact Statement

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PART I

AN INTRODUCTION TO TRAFFICKING AND
ANTI – TRAFFICKING EFFORTS

1 INTRODUCTION

Human trafficking is the largest manifestation of contemporary slavery in the world today.¹ 2007 is the 200th anniversary of the abolition of the transatlantic slave trade and yet tragically, it is estimated that 800,000 people are trafficked internationally each year while countless others are trafficked within their own countries.² While there is no real evidence to support this, it is thought that human trafficking is one of the fastest growing international crimes for organised criminal groups, believed to generate profits only second to arms trafficking.³ Trafficking is an attractive ‘enterprise’ for organised criminal groups because the trade in humans can be exploited repeatedly.⁴ Additionally, the high profits, low risk of detention and minor penalties associated with trafficking are also attractive.⁵ While human trafficking is a crime against the individual, it is also the kind of crime that ‘does not cause a visible violation of public order’.⁶ This contributes both to the viability of the crime and to the difficulties associated with detecting it. Consequently, while trafficking victims are not easily detectable, their numbers are estimated to be ‘enormous’.⁷

¹ United States *Trafficking Victims Protection Act of 2000*, sec. 102(a). See also, *Resolution on Improving the Coordination of Efforts against Trafficking in Persons*, UN GAOR, 61st sess, [1] UN Doc A/Res/61/180 (2007) which refers to trafficking ‘and other contemporary forms of slavery’ (my emphasis).

² Department of State, United States of America, ‘Trafficking in Persons Report’, 2007, 10.

³ Baher Azmy, ‘Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda’ (2002) 71 *Fordham Law Review* 981, 992.

⁴ Jacqueline Bhabha, ‘Lone Travellers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children’, (2000) 7 *University of Chicago Law Roundtable* 269, 144.

⁵ Louise Shelley, ‘Trafficking in Women: The Business Model Approach’ (2003) 10(1) *The Brown Journal of World Affairs* 119, 121.

⁶ Monika Smit, Senior Researcher at the Bureau of the National Rapporteur in Trafficking in Human Beings, The Netherlands, OSCE Office for Democratic Institutions and Human Rights, ‘Conference Report’ (Europe Conference Against Trafficking in Persons Berlin 15 – 16 October 2001), 35.

⁷ Cornelia Sonntag-Wolgast, Parliamentary State Secretary at the German Ministry of the Interior, OSCE Office for Democratic Institutions and Human Rights, ‘Conference Report’ (Europe Conference Against Trafficking in Persons Berlin 15 – 16 October 2001), 36.

Essentially, trafficking has flourished as a result of the relationship or ‘seemingly irresolvable dilemma’⁸ between the increasing numbers of people who wish to migrate (from states of ‘origin’) and the increasingly restrictive migration policies of ‘receiving’ states.⁹ This situation has forced the movement of many people underground as they seek alternative means to fulfil their goal. As they are often unable to navigate through various state’s migration criteria and policies, they become vulnerable to traffickers, who seek to exploit them. That is, the traffickers provide a means of migration and opportunities of work to those that wish to migrate but are uncertain as to how to do so on their own. However, the role of the trafficker goes further than that, otherwise the trafficker would only be guilty of assisting the person with illegal migration.¹⁰

What turns the situation into a grave offence is that the trafficker or someone else involved with the trafficking subsequently either intends to or actually exploits the labour of the person that they assisted to migrate. The trafficked victim is at the control of the ‘employer’, often denied basic medical assistance, subject to physical and even sexual abuse and cut off from the outside world.¹¹ While the trafficker assists the person to leave their home, they also fulfil the demand of labour in the informal economy at the place of destination. In order for trafficking to be a viable trade for the traffickers, there must be a market demand for the services of trafficked people.

Clearly, trafficked people are victims of various offences but the international community has grappled with coming to terms with what this really means. While states may wish to come to their own individual definitions, the transnational nature of the crime of trafficking requires at least a degree of international cooperation. While often viewed as a migration issue, human trafficking is far more complex than that, and in formulating a definition of what constitutes trafficking, questions necessarily arise. For example, if trafficking differs from irregular migration, then what is it about

⁸ Aninia Nadig and John Morrison, ‘Human Smuggling and Refugee Protection in the European Union: Myths and Realities’, in Joanne van Selms et al (ed) *The Refugee Convention at Fifty: a view from forced migration studies* (2003) 161, 161.

⁹ *Note by the Secretary General, Smuggling and trafficking in persons and the protection of their human rights*, UN GAOR, 57th sess, [para. 23] UN Doc E/CN.4/Sub.2/2001/26 (2001).

¹⁰ This is known as ‘human smuggling’.

¹¹ Baher Azmy, ‘Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda’ (2002) 71 *Fordham Law Review* 981, 997.

trafficking that sets it apart? The answer to this question is manifold. General opinion is that a degree of deception or coercion is required.¹² However, this thesis will analyse the role of coercion to reach a better understanding of the role of consent in trafficking.

In the late 1990s, the international community came together to agree on a universally accepted definition of trafficking, acknowledging that trafficking is often a transnational offence and as such requires inter-state cooperation.¹³ The international community convened in Vienna and after intensive negotiations, the first international consensus on the definition of trafficking and smuggling came about in 2000 with the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (the 'Trafficking Protocol')¹⁴ and the *UN Protocol against the Smuggling of Migrants by Land, Sea and Air* (the 'Smuggling Protocol').¹⁵ The two Protocols supplement the *UN Convention on Transnational Organised Crime*¹⁶ adopted by the UN General Assembly in November 2000.

While the *Trafficking Protocol* was intended to form the basis for international cooperation in the eradication of trafficking and the protection of victims, there is little evidence of any improvement in trafficking, since the agreement came into force on 29 September 2003. Many call for a multi-disciplinary approach to eradicate trafficking, steeped within a human rights framework; however it is the basis of this thesis that most of such calls are rhetorical because of a lack of analysis into examining how various other issues fit with trafficking.

¹² *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN ESCOR, Substantive Session, Addendum, [7] Un Doc E/2002/68/Add.1 (2002), Guideline 2.*

¹³ Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260, 266.

¹⁴ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime* adopted 15 November 2000, 40 ILM 377 (2001) (entered into force 25 December 2003).

¹⁵ *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* adopted 15 November 2000, 40 ILM 384 (entered into force 28 January 2004).

¹⁶ *United Nations Convention Against Transnational Organised Crime*, adopted 15 November 2000, 40 ILM 335 (2001) (entered into force 29 September 2003). The third Protocol supplementing the Organised Crime Convention is the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime* adopted 31 May 2001, UN Doc A/55/255 (entered into force 3 July 2005).

1.1 Objectives of the work

The principal objective of this thesis is to develop a theoretical framework that can be used as the normative basis for international action to combat trafficking. To achieve this objective, it is proposed to first examine the historical foundations and analyse the emerging trends in trafficking, to help establish the current dimensions of the phenomenon. It is also proposed to analyse comprehensively the current conventional and customary international law on trafficking to evaluate their effectiveness in dealing with the problem.

The thesis takes the view that several factors impact on trafficking. Thus in developing a framework to deal with trafficking, a proper analysis is required of the role played by the factors such as migration, human rights, feminism and perspectives on criminal law. It is the view in this thesis that current international practice is not informed by any specific theoretical foundation. Based on the different factors that impact on trafficking and emerging trends and countermeasures in dealing with it, it proposes to identify and evaluate the different possible theoretical basis for the current international approach on trafficking.

1.2 Central issues posed by trafficking to be examined in this thesis

Article 2 of the *Trafficking Protocol* states that it aims to:

- (a) prevent and combat trafficking in persons, paying particular attention to women and children;*
- (b) protect and assist the victims of such trafficking, with full respect for their human rights; and*
- (c) promote cooperation among States Parties in order to meet those objectives.*

While the stated objectives of the state parties appear clear enough in this provision, what is far from clear is the philosophy that informed or underpinned the adoption of these aims. The stated objectives of the Protocol raise several issues which are central to this thesis:

In the fight against trafficking what should be the international agenda? Should the focus be on crime prevention or should it be on victim protection? Should human rights be the essential basis that underpins state action in dealing with trafficking or should border control and principles of immigration be the central basis for dealing with the problem?

Each of the foregoing questions in turn raises issues of legal theory that informs the normative basis of state action. One of the issues of concern in this thesis therefore is the role of legal theory in the development of an effective regime to combat trafficking.

1.3 Hypothesis

The thesis involves a central hypothesis and a number of sub-hypotheses. The central hypothesis is that current international efforts to combat people trafficking show little if any defined theoretical framework that informs state action. The thesis therefore proposes that if the international community is to develop sustainable solutions to people trafficking, then it is essential to identify and adopt an appropriate theoretical framework as the normative basis for combating it. The articulation of a clear normative premise for action by states in combating trafficking is essential because without it the objectives for international action become ambiguous leaving room for varying interpretations for state action.

The first sub-hypothesis is that by its nature human trafficking involves criminal law; however, neither criminal legal theory nor practice offers any sustainable solution in combating trafficking.

The second sub-hypothesis is that while feminist legal theory, consent theory, labour theory and migration push-pull theories may offer some insight into trafficking as a phenomenon; the theories do not offer a sound basis for developing effective solutions to trafficking.

The third sub-hypothesis is that trafficking intrinsically calls for a humanitarian victim-centred approach. A victim centred approach calls for a re-analysis of the definition and role of slavery in our society, the key being the exploitation of all victims, not just ones that are trafficked because trafficking is a sub category of slavery. A victim centred approach with a focus on the exploitation of the victim must therefore be the axis for an

appropriate theoretical frame work to inform international strategies on combating trafficking.

1.4 The place of legal theory in dealing with people trafficking

As noted earlier, legal theory is highly relevant to the discourse on international action to combat people trafficking. In this regard, it will be illustrated that while there are a number of theories that appear or may be used to underline efforts to combat trafficking, both within the *Trafficking Protocol* and independently of it, many resulting anti-trafficking efforts reflect the specific interests of proponents of the measures rather than an objective theoretical appraisal of the options open to states. It is important to analyse the complexities of pressures which shape legal doctrine, because these social, political and economic conditions influence the direction and ultimately the success or failure of the law.¹⁷

A potential problem with addressing theories underlining trafficking is that 'legal theory' does not have a single agreed meaning and is frequently employed rhetorically.¹⁸ It is described as being 'abstract' and 'contrary to professional experience, generalized or metaphysical'.¹⁹ This is problematic because trafficking is a real problem with real victims. A theoretical framework will however assist in putting analysed legal material and its background in a useful order.²⁰ The aim is to find a way to reconcile legal theory and practice through the dichotomy between the way real life and social conditions shape the law and the way that the law can and should respond to social needs, 'good theory is practical and ... good practice is informed by theory'.²¹

¹⁷ Robert B M Cotterrell, 'English Conceptions of the Role of Theory in Legal Analysis' (1983) 46(6) *The Modern Law Review* 681, 698.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Merton LeRoy Ferson, 'Teaching Theory and Practice in the New Day' (1945- 1946) (24) *North Carolina Law Review* 423.

²¹ Stephen Wizner, 'The Law School Clinic: Legal Education in the Interests of Justice' (2001 -2002) (70) *Fordham Law Review* 1929, 1932, describing the 'legal realist' theory advanced by the Yale Law School in 1930s.

There are two types of legal theory: descriptive legal theory and normative legal theory.²² Descriptive legal theory does nothing more than describe the theory as it is, giving a 'short, abstract description of law' whereas normative legal theory evaluates the current law against some ideal.²³ Nevertheless, descriptive theories are not value free because they are based on law.²⁴ Despite the shortcomings of descriptive legal theory, its usefulness lies in giving analysis an extra depth or meaning that strikes at the core of what is being analysed. This then provides an appropriate springboard from which to formulate normative theory. Deconstructing legal theory means to look at the law and challenge its claims of objectivity and rationality because of the limited base on which the law is built.²⁵

The analysis of international law may mean recognition of the tension between theory and local experience.²⁶ As the law does not consist of a purely logical application of a principle,²⁷ the aim in developing normative legal theory is to produce law that represents the basic values of the international community. A successful past example of this is the law against piracy, which received international consensus as representing the values of the international community. An example of a law that would be questionable in terms of representing international agreement would be the criminalisation of the drug trade which may not represent the values of the international community.²⁸ Accordingly, there may be difficulties in coming to a consensus as to an appropriate theory. A simple example to be discussed below is the difficulty in coming to an agreement as to what should constitute rights theory.²⁹

²² Michael S Moore, 'A Theory of Criminal Law Theories' (1990) (10) *Tel Aviv University Studies in Law* 115, 121.

²³ Ibid.

²⁴ Ibid, 126.

²⁵ Hilary Charlesworth, 'Feminist Critique of International Law and their Critics' (1994 – 1995) *Third World Legal Studies* 1, 3.

²⁶ Ibid, 12.

²⁷ CR Snyman, 'The Tension between legal theory and policy consideration in the general principles of criminal law' (2003) *Acta Juridica* 1, 1.

²⁸ Patrick Fitzgerald, 'New Developments in Criminal Law: Implications for the International Scene' (1991(60) *Revsita Juridica UPR* 1271, 1282.

²⁹ Michael P Zuckert, 'Do Natural Rights Derive from Natural Law?' (1997) (20) *Harvard Journal of Law and Public Policy* 695, 697.

It is also difficult to quantify the efficacy of a law because there is no real basis for saying that a particular crime has been reduced or increased. This is because detection agencies cannot guarantee that their findings are based on actual numbers.³⁰ Indeed the difference between actual and perceived figures can lead to a 'gross distortion' of reality.³¹ It is therefore difficult to analyse the actual effectiveness of any law. Nevertheless, an important catalyst to change of the law is the development of legal theory³² and critical discussion is an important way to affect social change.³³

Furthermore, it is difficult to say whether the law can be a vehicle for social change. That is, in looking at the relationship between law and society, the question arises as to whether beyond reflecting economic and social forces, whether the law has any autonomy to be able to modify the 'character of those forces'.³⁴ And, as said above, any result will not be found through logic and argument but will reflect 'ideology, psychology or vested interests'.³⁵ Legal language will not be sufficient to alter the beliefs of someone who has other aspirations³⁶ and it may not be possible to come to a solution that is universally acceptable because different researchers, with different backgrounds may not be able to come to a common view.³⁷ However to adopt this position means to ultimately fail in coming to any solution regarding any problem. The best one can aim for is to carefully examine what is, analyse any shortcomings and provide some basis for the way forward. This can be achieved by looking at ideas

³⁰ S Owen-Conway, 'Crime and Punishment in Modern Society' (1975 – 1976) 9(2) *The University of Queensland Law Journal* 266, 267.

³¹ *Ibid.*

³² Patrick Fitzgerald, 'New Developments in Criminal Law: Implications for the International Scene' (1991(60) *Revsita Juridica UPR* 1271, 1274.

³³ Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 27.

³⁴ David Jabbari, 'From Criticism to Construction in Modern Legal Theory' (1992) (12) *Oxford Journal of Legal Studies* 507, 520.

³⁵ Jude Wallace, 'Current Problems in Legal Theory' (1977 – 1978) (4) *Monash University Law Review* 230, 236.

³⁶ *Ibid.*, 243.

³⁷ Peter Ziegler, 'A General Theory of Law as a paradigm for Legal research' (1988) (51) *The Modern Law Review* 569, 574.

within a particular social context whereupon the idea of justice will become more obvious.³⁸

While some believe that theoretical frameworks can only serve to progress a science if created within an existing paradigm,³⁹ it is at least true to say that normative legal theory must be measured against current theory. In relation to human trafficking, this will be achieved by examining a number of relevant legal theories discussed throughout the thesis.

1.5 A review of the current literature

There are a number of jurists that have focused their efforts on human trafficking and have provided valuable insight into the various issues surrounding trafficking. However the majority of the literature is lacking a theoretical basis. There is little evidence of writing on the theoretical frameworks underpinning anti-trafficking efforts, and little evidence of cross-disciplinary analysis that may have enhanced the insight into trafficking.

Anne Gallagher's work at the Office of the United Nations High Commission for Human Rights has exposed her to the many negotiations regarding trafficking. Gallagher's participation at numerous international conferences on trafficking has provided valuable insight into the human rights dimension of human trafficking as well providing for a comprehensive review of various state positions.⁴⁰

Ryszard Piotrowicz has written prolifically in the area of migration and migration policies as well as in trafficking. Piotrowicz recognises the varied motivations of tackling trafficking by different groups, for example, as an issue of national security for

³⁸ Jude Wallace, 'Current Problems in Legal Theory' (1977 – 1978) (4) *Monash University Law Review* 230, 245.

³⁹ Peter Ziegler, 'A General Theory of Law as a paradigm for Legal research' (1988) (51) *The Modern Law Review* 569, 576.

⁴⁰ See Anne Gallagher, 'Background Paper' (Background Paper prepared for the Technical Consultative Meeting on Anti-Trafficking Programs in South Asia: Appropriate Activities Indicators and Evaluation Methods, September 11 -13, 2001); Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975; Anne Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties' 12 *FMR* 25; Anne Gallagher, Kate Fitzgerald, and Joanna Bourke-Matigny, 'Consideration of the Issue of Trafficking, Background Paper' (Advisory Council of Jurists, The Asia Pacific Forum of National Human Rights Institutions, New Delhi, India 11 –12 November 2002).

states that may be at odds of protecting human rights. Piotrowicz suggests that methods be found to tackle trafficking that recognises the various interests. His focus is on protecting and assisting the victim and suggests alternative instruments other than the *Trafficking Protocol* from which to meet this end.⁴¹

Jo Doezema has written interesting work on the various aspects of trafficking, bringing into question common pre-conceptions. Doezema has explored the concept of society's perception of the relative innocence of trafficking victims, questions trafficking data as well as early accounts of human trafficking from the early 1900s.⁴²

As might be expected, the extensive writings of the International Organisation for Migration (IOM) focus on trafficking as a migration issue. The primary authors of the IOM publications include Frank Laczko, John Salt, Amanda Klekowski von Koppenfels, Khalid Koser, and Ronald Skeldon amongst others.⁴³ The IOM writers have provided an excellent analysis of trafficking in various different regions as well as suggesting processes to tackle the problem.

There have been a couple of doctrinal research works on trafficking that have recently been published. One of these is Conny Rijkens', *Trafficking in Persons – Prosecution from a European Perspective* that was published in 2003. Rijkens' work focuses on improving cooperation amongst European States in order to improve the prosecution of trafficking offenders. More recently in 2006, Tom Obokata published his thesis on

⁴¹ See Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers' (2002) 14(2 & 3) *International Journal of Refugee Law* 263; Ryszard Piotrowicz, 'Irregular Migration Networks: the Challenge posed by People traffickers to States and Human Rights' in Bogusz, Barbara; Cholewinski, Ryszard; Cygan, Adam; and Szycczak, Erica (eds) *Irregular Migration and Human Rights: theoretical, European and International Perspectives* (2004); Ryszard Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2005) 24 *Australian Yearbook of International Law* 159; Ryszard Piotrowicz, 'The Smuggling of Migrants: Vienna Vilifies Villains and Vindicates Victims' (2001) 75(3) *Australian Law Journal* 155.

⁴² See Jo Doezema, 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23; Kamala Kempadoo, and Jo Doezema, (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998); Jo Doezema, *Who gets to choose? Coercion, Consent and the UN Trafficking Protocol* (9 October 2002) Commercial Sex Information Service <http://www.walnet.org/csis/papers/doezema-choose.html> 4 June 2007.

⁴³ See Ronald Skeldon, *IOM Migration Research Series No. 1 - Myths and Realities of Chinese Irregular Migration* (2000); IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003); Frank Laczko, and David Thompson, (eds) *Migrant Trafficking and Human Smuggling in Europe – A review of the evidenced with case studies from Hungary, Poland and Ukraine* (2000); Frank Laczko, Irene Stacher, and Amanda Klekowski von Koppenfels, (eds), *New Challengers for Migration Policy in Central and Eastern Europe* (2002)

Trafficking of Human beings from a Human Rights Perspective – Towards a Holistic Approach which analysed the human rights aspect of trafficking from both a state and non-state actor perspective.

Numerous jurists have written on the criminal aspect of trafficking such as Andreas Schloenhardt,⁴⁴ John Slat and Jeremy Stein.⁴⁵ Schloenhardt in particular has provided a comparative analysis between organised crime and legitimate businesses breaking down the various players of trafficking into their various roles.

Ann Jordan provides a valuable analysis of the *Trafficking Protocol* and supports rights based approach to trafficking victims.⁴⁶ Many other writers have also focused their attention on analysing the effectiveness of the *Trafficking Protocol* such as Elizabeth Defeis,⁴⁷ LeRoy Potts,⁴⁸ Jennifer Enck,⁴⁹ Joan Fitzpatrick,⁵⁰ Ivy Lee and Mie Lewis⁵¹ amongst many other writers. All of these works have contributed to this thesis.

⁴⁴ Andreas Schloenhardt, 'Organised Crime and the Business of Migrant Trafficking', (AIC Occasional Seminar Canberra, Australian Institute of Criminology, 10 November 1999); Andreas Schloenhardt, 'Migrant Trafficking and Regional Security', (2001) *Forum for Applied Research and Public Policy* 83.

⁴⁵ John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467; John Salt, Jennifer Hogarth 'Definitions of the concepts of Trafficking, Smuggling, and Organized Crime' in Frank Laczko, David Thompson (eds) *Migrant Trafficking and Human Smuggling in Europe – A review of the evidenced with case studies from Hungary, Poland and Ukraine* (2000); John Salt, and Jennifer Hogarth, 'Definitions of the concepts of Trafficking, Smuggling, and Organized Crime' in , Frank Laczko; and David Thompson, (eds) *Migrant Trafficking and Human Smuggling in Europe – A review of the evidenced with case studies from Hungary, Poland and Ukraine* (2000)

⁴⁶ Ann D Jordan, *Global Rights, Annotated Guide to the Complete UN Trafficking Protocol* (2002); Ann D Jordan 'Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002).

⁴⁷ Elizabeth F Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach', (2004) 10 *ILSA Journal of International & Comparative Law* 485.

⁴⁸ LeRoy G. Potts, 'Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons', (2003) 35(1) *The George Washington International Law Review* 227.

⁴⁹ Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369.

⁵⁰ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143.

⁵¹ Ivy C Lee and Mie Lewis, 'Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts', (2003) 10 *U.C. Davis Journal of International Law and Policy* 169.

While there are many academic articles on theoretical frameworks and issues that are close to trafficking, there has been little work in applying one to the other. For example, Joaquin Arango's⁵² work in the social sciences explaining migration theories has not previously been applied to human trafficking outside of the work of the IOM.⁵³

Similarly, while feminists have played a very active role in the debate on trafficking, there has been little written on explaining feminist legal theory in relation to trafficking. See for example, the writings on feminist legal theory by Cynthia Grant Bowman and Elizabeth M Schneider,⁵⁴ Hilary Charlesworth,⁵⁵ and Jenny Morgan⁵⁶ amongst many others. These theories are understood by feminists but have not been clearly explained in the writings of the feminist activists.

There are many feminist activists that have published their work on trafficking. For example, Beverly Balos has a strong interest in prostitution and supports the view that no women can consent to prostitution comparing prostitution to trafficking, regardless of consent or exploitation.⁵⁷ In this regard, see also the writings of the Coalition Against Trafficking in Women.⁵⁸ Other feminist legal writers have attempted to turn the focus on exploitation and away from the consent of the prostitute to her work. For example,

⁵² Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283.

⁵³ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003).

⁵⁴ Cynthia Grant Bowman and Elizabeth M Schneider, 'Feminist Legal Theory, Feminist Lawmaking and the Legal Profession' (1998 – 1999) (67) *Fordham Law Review* 249.

⁵⁵ Hilary Charlesworth, 'Feminist Critique of International Law and their Critics' (1994 – 1995) *Third World Legal Studies* 1.

⁵⁶ Jenny Morgan, 'Feminist Theory as Legal Theory' (1988) (16) *Melbourne University Law Review* 743.

⁵⁷ See Beverly Balos, 'Teaching Prostitution Seriously' (2001) 4 *Buffalo Criminal Law Review* 709; Beverly Balos, 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation', (2004) 27 *Harvard Journal of Law and Gender* 137.

⁵⁸ Coalition Against Trafficking in Women, *An Introduction to CATW* <http://www.catwinternational.org/about/index.php> at 4 June 2007

Jane Larson has written on prostitution as a form of labour.⁵⁹ Melissa Ditmore and Marjan Wijers also support this view.⁶⁰

Importantly to this thesis, the invaluable work of Don Herzog and consent theory has not been applied to issues such as consent in trafficking.⁶¹ Significantly, the dichotomy between criminal law theory and victim-oriented theory has not been applied to the *Trafficking Protocol*. While trafficking is often quoted as being a violation of human rights, apart from the work of Tom Obokata, there is no significant research into the connection between human rights and trafficking. However, very interesting work has been undertaken by Martha Nussbaum in the area of human rights, or more precisely 'capabilities'.⁶² This thesis then examines whether human rights or capabilities can be applied to trafficking in a meaningful way.

Importantly, the scholarly works from our colleagues in the departments of history and comparative sciences such as David Brion Davis,⁶³ Paul Lovejoy⁶⁴ and Orlando Patterson,⁶⁵ have not been used by lawyers to enhance our understanding of modern day slavery in the context of its place in history. Kevin Bales has written extensively on slavery and has provided valuable insight into trafficking as a modern manifestation of

⁵⁹ See Berta E Hernandez-Truyol, and Jane E Larson, 'Sexual Labor and Human Rights' (2006) *Columbia Human Rights Law Review* 391; Jane E Larson, 'Prostitution, Labor and Human Rights, (2004) 37(3) *UC Davis Law Review* 673; Jane E Larson,

⁶⁰ Melissa Ditmore; and Marjan Wijers, members of the Human Rights Caucus, 'Moving the focus from morality to actual conditions – The negotiations on the UN Protocol on Trafficking in Persons' (2002) 79 <http://www.nswp.org/pdf/NEMESIS.PDF> at 4 June 2007.

⁶¹ Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 237, although Herzog was not superficially describing forced labour.

⁶² See Nussbaum, Martha C, 'Sherman J Bellwood Lecture: In Defense of Universal Values' (2000) 36 *Idaho Law Review* 379; Nussbaum, Martha C, 'Symposium: Human Rights on the Eve of the Next Century: Beyond Vienna and Beijing: Human Rights Theory: Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273; Nussbaum, Martha C, 'Twentieth Anniversary Reflections: Human Rights and Human Capabilities' (2007) 20 *Harvard Human Rights Journal* 21.

⁶³ David Brion Davis, *Slavery and Human Progress* (1984); David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770 – 1823*, (1999); David Brion Davis, *The Problem of Slavery in Western Culture*, (1966).

⁶⁴ Paul Lovejoy, *Transformations in Slavery – A History of Slavery in Africa, Second Edition*, (2nd ed, 2000).

⁶⁵ Orlando Patterson, *Slavery and Social Death*, (1982).

slavery. His work through his NGO 'Free the Slaves' has done much to raise awareness of trafficking but is insufficiently applied in legal discourse on trafficking.⁶⁶

To a limited extent, alternative frameworks are suggested by a small number of writers. Kara Abramson questions the role of consent in trafficking concluding that a labour framework would be more appropriate⁶⁷ while Nilanjana Ray conducts a preliminary analysis of trafficking frameworks.⁶⁸

Overall, while excellent research has been undertaken in trafficking, there is a poverty of analysis of trafficking from within theoretical frameworks.

1.6 Methodology

The methodologies followed in this thesis have been adopted from Terry Hutchinson's *Research and Writing in Law*.⁶⁹

The primary methodology used was the 'Traditional Doctrinal Research' model.⁷⁰ This model requires an assembly of the facts; identification of the legal issues; analysis of the issues with a view to searching for the law; background reading mainly of journal articles, United Nations documents and published books; analysis of primary material including international treaties and some national legislation; synthesis of all the issues in context; and the combination of the above to come to some tentative conclusions. Other than published books, journal articles, United Nations documents and primary materials such as international treaties and national legislation were obtained mainly through electronic means.

⁶⁶ See Kevin Bales, *Disposable People: New Slavery in the Global Economy* (Rev. ed. 2004); Bales, Kevin, *Understanding Global Slavery, A Reader*, (2005); Kevin Bales, Laura E Fletcher, and Eric Sotver, et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47

⁶⁷ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473.

⁶⁸ Nilanjana Ray, 'Looking at Trafficking Through a New Lens' (2006) 12 *Cardozo Journal of Law and Gender* 909.

⁶⁹ Terry Hutchinson, *Research and Writing in Law* (2nd ed, 2006)

⁷⁰ *Ibid*, 34.

As the thesis focused on theoretical frameworks, theoretical research techniques were adopted.⁷¹ Theoretical research is based in philosophy and in many of the areas examined in this thesis, extended to other disciplines. In particular, migration theories are prevalent in the social sciences and slavery theories are discussed in social sciences and historical writings. Extending the work into these and other fields added a level of research to trafficking that is both unique and interesting.

Theoretical research necessitated the use of the jurisprudential method for its analysis of theoretical underpinnings.⁷² The jurisprudential method of research was particularly important to the analysis of the theoretical frameworks because it provided the challenge of identifying and exposing the underpinnings of the law. This then allowed for the development of a normative basis for re-assessing the law and making suggestions for its development.

As suggested by Hutchinson, the method used for critiquing legal theory was to state each theory and examine the main arguments for and against the theory. Then, adapting each theory to the issue of trafficking, the validity or importance of each theory was analysed. Of course, as Hutchinson points out, the very nature of theory and divergent views means that critiquing legal theory can lead to generalisations regarding the law that can work to reduce the complexity of an idea for the benefit of conciseness. This challenge is an inherent problem when one attempts to analyse or apply theory.

Generally, a combination of the above research methodologies were used in this thesis.

1.7 Structure of thesis

The thesis is divided into two main sections. The first section comprising chapters one to five introduces efforts in trafficking and anti-trafficking.

Following the introductory chapter, chapter two contains an analysis of the various requirements that go together to make up the crime of trafficking. Problems with the definition are illustrated in scenarios describing common trafficking like situations. An alternative definition of trafficking is then suggested and similarities between trafficking

⁷¹ Ibid, 43.

⁷² Ibid, 53.

and other irregular migration practices are explored. Statistics regarding trafficking along with the role played by organised crime are also explored in this chapter as trends and developments in trafficking.

Chapter three explores early efforts to deal with trafficking in the early 1900s. Some of the approaches adopted to combat trafficking in these early times are somewhat mirrored today in modern efforts. This chapter discusses how definitional problems regarding trafficking also existed in these early efforts and led to poor results in identifying trafficking victims and protecting them from exploitation.

Chapter four analyses recent efforts to combat trafficking through an examination of the *Trafficking Protocol*. An analysis is undertaken of the three purposes of the *Trafficking Protocol* that are assessed against the backdrop of the various sections of the agreement. Labour Conventions pertaining to trafficking are also briefly examined at the conclusion of the chapter.

As reference is made to the legislation of the United States and Australia throughout the thesis, chapter five analyses the trafficking legislation that has been enacted in each of these countries. This chapter is also the end of part I of the thesis.

The second part of the thesis comprising chapters' six to eleven analyses the various theoretical approaches to trafficking. Having concluded the analysis of the *Trafficking Protocol* and state legislation in the previous section, chapter six questions the success of current approaches to trafficking, namely criminal law theory. An examination is made of the positive role that a victim centred approach could play in trafficking both in eradicating trafficking and assisting victims as well as enhancing the effectiveness of the criminal law approach.

The treatment of consent in legal instruments has created major problems in combating trafficking because of the shift of attention from exploitation to the conduct of the victim. Accordingly, chapter seven re-assesses consent through an analysis of consent theory.

Considering that states often view trafficking as a violation of migration law, chapter eight explores migration theory and its application to trafficking. The push and pull

factors of trafficking are examined in order to come to some conclusion regarding the importance of migration in trafficking.

Discourse on trafficking frequently takes place within feminist circles and feminist groups have taken a strong interest in all aspects of trafficking debate. This attention has translated to a strong gender focus in trafficking. The usefulness of feminist legal theory in trafficking is therefore questioned in chapter nine as an appropriate tool in combating trafficking.

In an effort to apply a victim centred approach to trafficking, trafficking is frequently referred to as a violation of human rights. A brief history of the development of human rights theory is undertaken and human rights law is applied to trafficking in chapter ten. An examination is made both of state and non- state involvement in trafficking to find who can be held accountable for human rights violations in trafficking and under what circumstances.

Chapter eleven explores exploitation of the victim by looking at slavery from a historical perspective in order to enhance understanding of modern day slavery practices. A better understanding of slavery within its historical context suggests that legal definitions of slavery be amended to reflect common practice.

Chapter twelve contains concluding comments. Also, figure 4 in the appendix contains a list of state parties to the more relevant international instruments discussed throughout the thesis.

2 HUMAN TRAFFICKING – AN ANALYSIS OF THE CRIME

2.1 Introduction to the definition of trafficking

In simple terms, human trafficking is the movement of a person from one place to another through the use of force, fraud or coercion for the purpose of exploitation.

The *Trafficking Protocol* defines trafficking under article 3 as:

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

The *Trafficking Protocol* applies to those offences that are transnational in nature and those that involve an organised criminal group.⁷³ State parties are therefore obliged to legislate in order to criminalise a range of trafficking related offences. State parties are required to adopt legislative and other measures to establish as criminal offences conduct as set out in article 3 of the *Trafficking Protocol*⁷⁴ including attempting to commit the offence, participating as an accomplice or organising or directing other persons to commit an offence as established in the Protocol.⁷⁵ In essence, the

⁷³ While the Protocol requires the transnational element to establish the offence, when read in conjunction with article 34.2 of the *Organised Crime Convention*, the state party must establish its domestic law independently of the transnational nature of the crime or the existence of an organised criminal group.

⁷⁴ As will be discussed in more detail below, including: an attempt to commit and offence (subject to the basic concepts of its legal system); participating as an accomplice and organising or directing others to commit the offence (*Trafficking Protocol*, art 5.2).

⁷⁵ *Trafficking Protocol* article 5.

instrument provides a minimum guideline, and states are encouraged to legislate further. While the Protocol requires the transnational element to establish the offence, when read in conjunction with article 34.2 of the *Organised Crime Convention*, the state party must establish its domestic law independently of the transnational nature of the crime. In a similar way, an organised criminal group as set out in the *Organised Crime Convention* need not be a deciding factor in domestic legislation.

The *Trafficking Protocol* definition did not advance the understanding of trafficking.⁷⁶ Its strength lies in the agreement reached by states to provide universal standards in its treatment. However, the definition does not illustrate any further understanding of trafficking and ignores the realities faced by many trafficking victims. This point will be illustrated below by describing likely scenarios faced by trafficking victims and the deficiencies of the *Trafficking Protocol* in addressing their situations. Overall, the principal shortcoming of the definition within the *Trafficking Protocol* is that it is not victim focused.

Put simply, the requirements for trafficking within the *Trafficking Protocol* are:

1. *Recruitment, transportation, transfer, harbouring or receipt of person*
2. *By means of the threat of 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*
3. *For the purpose of the exploitation, which at a minimum shall include: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*

The definition of trafficking within the *Trafficking Protocol* formed the basis of other international agreements. For example, in its Council framework decision of 19 July 2002, the European Union recognised human trafficking as a practice constituting

⁷⁶ For example, see Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1165 who says that the *Trafficking Protocol* preserves rights previously enshrined in other human rights documents.

serious violations of fundamental human rights and human dignity, involving ruthless practices such as the abuse and deception of vulnerable persons, the use of violence, threats, debt bondage and coercion. The European Union then proceeded to adopt the *Trafficking Protocol* definition and required member states to implement the definition in domestic law before 1 August 2004.⁷⁷

The various parts of the definition of trafficking will now be broken up to be analysed separately.

2.1.1 The actus reus of trafficking: Recruitment, Transportation, Transfer, Harboursing or Receipt of Persons

Although not a topic often discussed, there seems to be some confusion in the literature as to whether the *Trafficking Protocol* requires the victim of trafficking to undergo any movement, from one place to another. Some of this confusion arises because of the wording of article 3 which requires ‘recruitment, transportation, transfer, harboursing or receipt of persons’ which implies that each term is not a requirement in itself. On this matter, the travaux preparatoires⁷⁸ are silent. However, it would be incorrect to assume that this means that the *Trafficking Protocol* intends to criminalise exploitation without movement. Firstly, trafficking can apply to an offender that *intends* to traffic a person but who has not yet transported the victim because they were caught prior to the act. In this way, a trafficking offence can be made out even where there is no transportation but only because the transportation has not taken place *as yet*. Trafficking offences occur in the context of movement and the only question regarding this part of the definition should be concerning domestic trafficking. That is, some sort of physical movement or transport is required for the offence of trafficking to be made out. In cases of domestic trafficking, it is difficult to say how *much* movement is required to satisfy the Act. One author has suggested that what is required is a ‘constructive’ or ‘substitute’ crossing in

⁷⁷ Council framework decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) [2002] OJ L 203/1, para. 3 and art. 10.

⁷⁸ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime on the work of its first to eleventh sessions, Addendum, Interpretative notes for the official records (travaux preparatoires) of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, UN GA, 55th sess, UN Doc A/55/383/Add.1 (2000). (‘Travaux preparatoires’)

the event that there is no transportation across a geographical or political boundary.⁷⁹ In essence, transportation requires that the victim be moved to an unfamiliar area, cut off from 'known social structures'.⁸⁰ This is a reasonable interpretation of what is required under domestic trafficking, however there seems to be little written on this point at the moment and actual cases regarding domestic trafficking will need to come before the courts in order to test this assumption.

Uncertainty regarding movement in trafficking is more apparent in the area of international trafficking. The reason for the confusion as to the issues of transport can be traced to the legislation of the United States.⁸¹ The first requirement of recruitment, etc in the definition of trafficking within the TVPA is very similar to the *Trafficking Protocol* as it requires: 'recruitment, harbouring, transportation, provision, or obtaining of a person'. Other than the term 'provision' the wording is almost identical and yet the United States Department of State published in 2005, that there is no requirement that the person be transported from one place to another.⁸² The question arises as to the meaning of the word 'harbour' and whether this could mean to hold the person without the person having undergone movement prior to or subsequently to the harbouring for the purpose of exploitation. For example, Jennifer Chacon believes that actual transportation is unnecessary in trafficking because exploitation can occur in the person's recruitment, harbouring or receipt. As exploitation is the key, Chacon argues that the offence of trafficking has been made out.⁸³ It seems however that this goes against the intention of the Protocol. Most likely, as noted above, the only way that trafficking without movement can be made out is regarding the offence of *intending* to traffic, that is exploitation within the context of some movement, even if it has not happened yet.

⁷⁹ Alison N Stewart, 'Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective' (1998) 20 (11) *Women's Rights Law Reporter* 11 at 15.

⁸⁰ *Ibid.*

⁸¹ *Trafficking Victims Protection Act of 2000* (TVPA).

⁸² Department of State, United States of America, 'Trafficking in Persons Report', 2005, 12.

⁸³ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 2983.

If the Protocol did not require any movement at all, whether actual or intended; then the *Trafficking Protocol* would apply in normal instances of slavery such as sweatshop workers. While this would be the ideal outcome for the protection of victims, it is unlikely to be the case that this was the intention of the drafters. Further, the *Trafficking Protocol* is an instrument involving national security issues and migration control and the addition of the *Smuggling Protocol* further puts it in the context of the movement of people. Accordingly, while the United States TIP Report 2005 states that actual movement is not required to prove the offence, it is assumed that this means that it is not required to prove the offence when trying the accused for *intended* trafficking.

Also important is that there must be a connection between the transportation and the exploitation. That is, the exploitation of the victim must occur in a way that connects it with the transportation. The exploiter must take 'receipt' of the person as part of the transaction. This is important because the *Trafficking Protocol* excludes irregular migrants working under exploitative situations that are not being exploited by their trafficker. This will be explained in more detail below in the illustrative scenarios.

Nevertheless, while movement is required to prove trafficking, anti trafficking efforts should go further. While trafficking must include transportation, there should also be an effort to eradicate exploitation that does not require the transportation of the victim. Trafficking should be tackled from the wider perspective of the eradication of slavery whether the slavery took place in the context of trafficking or not. Indeed, criminalising trafficking but not slavery does not make sense. The current *Trafficking Protocol* is mirrored somewhat in past actions.

That is, early efforts to suppress the slave trade made the *slave trade* as such illegal but did not legalise slavery.⁸⁴ Today, we have a similar situation. Trafficking as a crime has taken on significance, but without a corresponding movement to end modern slavery such efforts are weak. Either trafficking should have been a sub category of slavery or, there should have been a simultaneous re-assessment of the *Slavery*,

⁸⁴ While the *Slavery Convention* enshrined a duty on states to progressively eradicate slavery and the slave trade, it did not contain an actual human right for the abolition of slavery as such, see Renee Collette Redman, 'Beyond the United States, the League of Nations and the Right to be free from Enslavement, the First Human Right to be recognised as customary international law', (1994) 70 *Chicago-Kent Law Review* 759, 764.

Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926,⁸⁵ (the ‘*Slavery Convention*’) just like what occurred in 1956 with the amendments to the *Slavery Convention*.⁸⁶ However, the drafting of the *Trafficking Protocol* within a law enforcement background, instead of from within a human rights framework⁸⁷ indicates that the elimination of exploitation may not have been at the heart of the instrument. This thesis will analyse the drive behind the *Trafficking Protocol* by an analysis of the theoretical frameworks that underpin it.

2.1.2 Coercive practices to achieve the consent of the victim

The definition of trafficking means that trafficking can be established when traffickers gain control of their victims by coercive or deceptive means or by exploiting relationships, by using violence and physical or psychological abuse.⁸⁸ Additionally, the reference to the ‘abuse of power or of a position of vulnerability’ expands the scope of trafficking because it recognises that where such an abuse of power has occurred, trafficking can be proved even where there has not been any actual threat or use of force provided that the victim did not have any means to refuse being trafficked.⁸⁹ Further, the addition of possibilities such as ‘abuse of power’ have been praised for going

⁸⁵ *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, opened for signature 1925 September 1926, 60 LNTS 253 (entered into force 9 March 1927) (the ‘*Slavery Convention*’).

⁸⁶ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957).

⁸⁷ The *Trafficking Protocol* was developed in Vienna by the UN Crime Commission (the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime (referred to as the ‘Vienna Process’)), a law enforcement body. The human rights bodies are located in Geneva and New York.

⁸⁸ John Salt, Jennifer Hogarth ‘Definitions of the concepts of Trafficking, Smuggling, and Organized Crime’ in Frank Laczko, David Thompson (eds) *Migrant Trafficking and Human Smuggling in Europe – A review of the evidenced with case studies from Hungary, Poland and Ukraine* (2000) 21.

⁸⁹ Ollus, Natalia ‘The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel’, 122nd International Training Course Reports of the Course, ‘The Effective Administration of Criminal Justice to Tackle Trafficking in Human Beings and Smuggling of Migrants’, UNAFEI, written 15 August 2002, Resource Material Series 62, 16 at 22, [http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland\(1\).pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland(1).pdf) at 4 June 2007.

beyond conventional concepts to encompass abuses of social or cultural authority over vulnerable people.⁹⁰

However, as will be discussed later in the thesis, coercive practices are extremely problematic in the context of trafficking, because it is not necessarily the coercive practices of the trafficker that induce the victim to consent but the lack of meaningful choice that may leave the victim with little alternative.

The result of the *Trafficking Protocol* is that where the victim ‘consents’ to the exploitation, it will not be considered to be a trafficking situation. However, while this outcome is a positive one for the offender in that they will not be charged with the more serious crime of trafficking, the outcome for the victim is unsatisfactory. The lack of the initial coercive element or the lack of intent means that the victim may be viewed as an illegal migrant despite having been a victim of exploitation or prostitution, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs. Instead of falling within the *Trafficking Protocol*, the person would then fall within the *Smuggling Protocol*. The protective mechanisms in the former may be minimal at best but are even less within the latter.

An analysis of consent theory will reassess the role of consent in trafficking. The conclusion throughout the thesis is that it is the exploitation of the victim and not consent should form the pivotal part of the crime of trafficking. Further, exploitation should form the basis of the prosecution because it seems odd that a trafficker could avoid prosecution because of not using coercive means to achieve the consent of the victim. The trafficker should be prosecuted for exploiting the victim despite consent.

2.1.3 Exploitation

Subject to the domestic laws of the individual state, the *Trafficking Protocol* allows for the offence of trafficking to be made out even if the exploitation has not yet commenced. That is, the ‘purpose’ must be exploitation. This is important because it allows for the prosecution of traffickers who may have been arrested by police in the

⁹⁰ Jane E Larson, ‘Prostitution, Labor and Human Rights,’ (2004) 37(3) *UC Davis Law Review* 673 at 679.

process of trafficking, say in the recruitment or transfer of the victim, but prior to the placement of the victim in an exploitative situation.

Exploitation is the key to trafficking because without exploitation, the process is more likely to mirror smuggling which is irregular migration. Trafficking is a grave crime not because of issues such as the circumvention of migration laws but because of the abuse of the victim.

2.1.4 The mens rea

Whilst not contained in article 3, intent is an important part of the makeup of trafficking. Where the person is subjected to exploitation as per the definition, lack of initial intent means that without the intention to traffic the person, the offender cannot be charged with a criminal offence and without the offence, the Protocol does not provide for the protection of the victim. Potentially therefore, a situation that commenced as smuggling without an intention to exploit the person but results in an exploitative situation may not qualify as trafficking. This means that where A (the exploiter) acts as a smuggler and then B (the victim) is exploited without A's knowledge or intent, then A is not guilty of trafficking and B is unlikely to be viewed as a trafficking victim in any meaningful sense. This is because there was no intent to traffic the person. That being the case, because there is no offender of trafficking, the victim does not have the possibility to act as a witness; and without a defendant there is no mechanism for the victim to be protected.⁹¹

Another problem with the requirement for intent is that in the early stages of the trafficking process, it is difficult to prove that A intends to exploit B. The result is that if the authorities attempt to apprehend the offender or recover a victim of trafficking in

⁹¹ There is also the situation where A intended to exploit B but because B consented to the exploitation, B will again not be characterised as a trafficking victim. Conversely, any consent by B to the process of trafficking is negated when the coercive elements are found to have been present.

the early part of the trafficking process, the lack of evidence makes the apprehension and recovery difficult.⁹²

Shortfalls in the current definition of trafficking are best illustrated through the scenarios below describing various situations containing trafficking elements.

2.2 An illustration of how the current definition affects trafficking victims

A and B are sitting next to each other on a bus travelling from country of origin Y to the country of destination Z. Neither A nor B are migrating under the correct procedure for Country Z; but both A and B intend to overstay a tourist visa. A has been unwittingly recruited by a human trafficker and has been given the address of what they believe to be a legitimate employer at destination Z. B was assisted in their application for a tourist visa, but is going to destination Z without any further assistance in the hope of finding employment. B was told by family and friends that it is fairly easy to find employment at Z because there is a demand for cheap migrant labour. After a short while A and B start talking and B explains that they are anxious as to where they will find employment. A suggests that if B is unable to find employment, then A could ask their employer if there is any availability for B. A believes that they will work under difficult but acceptable conditions at a factory although they are unsure as to what that work may be. A also gave the trafficker a large advance in money for payment in transport and for finding A employment and accommodation. On arrival, A goes to the address printed on the paper they were given and B goes to make general enquiries as to employment.

Upon arrival at the place of employment, A is asked to hand over their identity papers for 'safekeeping', is showed into accommodation that houses several other people in a small room and commences work in the factory. A is made to work 14 hour days, is prohibited from leaving the premises, does not speak the local language, is not paid any money and is told that should they attempt to leave they will be captured by the authorities as an illegal and perhaps dangerous migrant. A is a slave and clearly has been trafficked. A falls within the definition of a trafficking victim under the

⁹² Jyoti Sanghera, "Unpacking the Trafficking Discourse" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 15.

Trafficking Protocol and is entitled to whatever small protection mechanisms it contains. What about B?

2.2.1 Scenario 1

B spends a few days looking for employment, and eventually decides to follow the directions given to them by A, going to A's employer to seek employment. B is tricked by the employer and hands over their identity papers and similarly to A is put to work immediately under the same conditions. The employer takes the papers not as collateral against the costs of bringing B to the factory because B has come at their own expense and willingly, but because the factory has many slaves and they are afraid that B may contact the authorities. The employer knows that this is a possibility because the conditions at the factory are so poor.

B may be a slave but because they are not at the factory through 'recruitment, transportation, transfer, harbouring or receipt of persons' they do not fall within the protection of the *Trafficking Protocol*. As such, B will most likely be viewed as an illegal migrant. The employer may be charged under some sort of slavery laws if available in the destination Z but B would not be entitled to any protection under the *Trafficking Protocol*.

2.2.2 Scenario 2

While spending time seeking employment, B is unsuccessful. Because of difficult home conditions, B is not able to return to their country of origin. The country of origin may have been recovering from natural disaster, high unemployment rates or B may need to support their family. .

B has heard that A's employer is ruthless and treats their employees very poorly. This is why B has spent so much time looking for alternative employment. Due to a lack of alternatives, B feels that they have no other choice but to go to A's place of employment. B is made aware by other irregular migrants that the working conditions are very poor and they will be treated like a slave. Nonetheless, B chooses to go to the factory. A's employer accepts B's offer of work and takes B's papers. B hands over their papers and agrees to work at the factory.

As in Scenario 1, B is a slave in Scenario 2 also. However, apart from still not having been recruited, transported... by a trafficker, B has actually consented to the exploitation and further such consent was not achieved via any coercion or deception on the part of the employer. Again, B is probably nothing more than an illegal migrant. But now, their status as a slave may also be questioned because they consented. The factory owner may be in breach of certain labour laws which may or may not apply because B is an illegal worker.

2.2.3 Scenario 3

A and B are sitting next to each other on a bus travelling from country of origin Y to the country of destination Z. Neither A nor B are migrating properly to Z but are both intending to overstay a tourist visa. A has been unwittingly recruited by a human trafficker and has been given the address of what they believe to be a legitimate employer at destination Z.

As in Scenario 2, B has many reasons to leave the country and seek employment abroad, despite the risks. A and B are going to work in the same factory but in this scenario, B is fully aware that they are going to work as a slave. The employer went to country Y and explained to B that they should not go and work in the factory if they had any misgivings because the conditions were extremely harsh and they would not be permitted to cease employment there if they changed their minds.

The employer has chosen to be frank with the victims because they previously had too many 'employees' escaping and creating trouble with the authorities. The employer discovered that despite knowing the slavery like conditions, many people would consent to work there because it was still better than their impossible home conditions. Also, having the consent of the workers, no matter how poor the working conditions meant that if caught, the employer could not be found guilty of the graver offence of human trafficking due to the non-coercive consent. Furthermore, destination Z did not have well developed anti-slavery laws and they would more likely be charged with the lesser crime of breaching labour laws which on balance was an acceptable risk.

B may be working under slave conditions but their consent means that they will most likely be viewed as an illegal migrant and almost certainly face immediate deportation.

All 3 scenarios are variations of trafficking but due to the reasons given, B is not viewed as a victim of trafficking in any of them and there is no possibility for protection under the *Trafficking Protocol*. In reality, scenario 3 is not that unlikely but unfortunately, laws do not take into account individual circumstances of people who are forced to work in very sub-standard conditions including under slavery conditions. The result is that the *Trafficking Protocol* will capture few victims because it excludes many likely situations.

The *Trafficking Protocol* has not allowed for very possible alternatives to the ones envisaged by the definition and as such, the Protocol does not address the realities of trafficking being unduly concerned with the process of trafficking which includes the requirement for coercive consent. However, coercive consent is a complicated issue inadequately dealt with in the *Trafficking Protocol*. The *Trafficking Protocol* is also not concerned with exploitative labour that is not connected with the movement of the victim between the place of origin and destination.

Trafficking even without the *Trafficking Protocol* is an offence however in the past, there was no offence of human trafficking as such,⁹³ it being treated instead as a collection of lesser offences such as kidnap, fraud, false imprisonment etc. Indeed, cases of trafficking were viewed as isolated incidents.⁹⁴ However, just as it was deemed appropriate to pay particular attention to a law against human trafficking that took into account the gravity of the offence as a whole, so too a renewed effort is required to outlaw slavery from an international perspective in a way that emphasises the gravity of the offence to the international community as a whole. National legislation should be made consistent with international standards after the international community re-evaluates slavery in its modern context.

The question then arises as to how best deal with drafting a definition of trafficking that best takes the above concerns into consideration.

⁹³ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 481.

⁹⁴ Kevin Bales, Laura E Fletcher, Eric Sotver et al, Free the Slaves, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 57.

2.3 An alternative definition of human trafficking

Kara Abramson suggests a sophisticated approach to a new definition of trafficking that is somewhere between the *Trafficking and Smuggling Protocol*, removing the need for consent and exploitation to include the ‘illicit transport or harboring of a person within or across border for the purposes of using that person for unregulated or improperly regulated forms of labor’.⁹⁵ This distinguishes trafficking from smuggling by focusing not on the legality of the transport but the movement of people for the exploitation of their labour. Abramson suggests that exploitative labour be defined as including unrecognised forms of labour and seemingly legal forms of labour that ‘involve a pattern of serious violations and abuses of labor law’⁹⁶:

*‘‘Trafficking in Persons’ means the recruitment, transportation, transfer, harbouring, or receipt of persons by any means, for the purpose of the exploitation of their labor, as defined through illegal work or illegally recognized work that is carried out in a pattern of serious non-conformity with existing labor laws.’*⁹⁷

While this definition is framed within a labour context is an improvement on the *Trafficking Protocol* taking an accurate account of the exploitation that occurs within the labour context, it is also problematic for a number of reasons. Firstly, the definition is so broad as to represent an ideal of how trafficking for exploitative labour should be defined, capturing numerous trafficking victims, who have experienced various levels of exploitation. Governments would be unlikely to accept such a definition and the result would be that no action would be taken at all. Most importantly however is that the definition fails to protect victims of trafficking that are not in exploitative labour conditions such as trafficking victims for the purposes of forced marriage⁹⁸ or the trafficking of victims for the purposes of the removal of organs.

⁹⁵ Kara Abramson, ‘Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol’ (2003) 44(2) *Harvard International Law Journal* 473, 498.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, 499

⁹⁸ See generally Sigma Huda, *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children*, UN Doc A/HRC/4/23 (2007) on forced marriages.

While exploitative labour may be the most significant area of trafficking, this thesis is concerned with extreme types of trafficking analogous to slavery that include all types of exploitation.

Abramson's definition has a lot of merit, however, victims of trafficking that can be compared to slaves need the international community's urgent attention. Abramson's definition is so wide⁹⁹ that it is unlikely to be implemented and victims of trafficking will not receive the protection and assistance that they require.

It is also crucial that efforts be made to care for victims of slavery that have not been trafficked, because the emphasis on transportation rather than exploitation produces an unusual result. That is, two people in exactly the same exploitative situation will be treated differently depending on how they arrived at their place of exploitation. However, while suggestions will be made in ways to improve the definition of slavery, the focus of this thesis will be on trafficking.

Probably the most appropriate definition of slavery has been formulated by the NGO group, Global Rights: Partners for Justice. Global Rights departed from the language of the *Trafficking Protocol* finding it to be 'descriptive and potentially confusing'. Global Rights shifted the focus from the means that people are trafficked to the process of moving them for exploitation.¹⁰⁰ This simple definition is an excellent definition of trafficking with its emphasis on exploitation and is a better alternative to other definitions on Trafficking.¹⁰¹ This definition has been adopted as the normative definition of trafficking within this thesis:

"Trafficking in persons' is the recruitment, transportation, transfer, harbouring or receipt of persons, by any means, for forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

⁹⁹ And perhaps appropriate.

¹⁰⁰ Ann D Jordan, Global Rights, *Annotated Guide to the Complete UN Trafficking Protocol* (2002), 7.

¹⁰¹ Jordan, Ann D, Global Rights, *Annotated Guide to the Complete UN Trafficking Protocol* (2002), 7.

Nevertheless, even with a succinct definition of trafficking, trafficking victims may be difficult to detect because there are similarities between trafficking and other forms of irregular migration. The international community was concerned to highlight the differences between trafficking and smuggling by enacting the two separate Protocols. A clear understanding regarding the difference between these phenomena is crucial for efforts to combat these crimes.¹⁰²

2.4 Trafficking, smuggling and irregular migration

While trafficking in persons has received attention in international instruments for many years, 'smuggling in persons' is more novel.¹⁰³ The distinction between trafficking and smuggling is important to make because while very similar, the differences impact greatly on the victim. Smuggling in persons is a reflection of the concern for the criminal activity of the illegal entry of migrants into a country, but the *Smuggling Protocol* is not intended to criminalise the illegal migrant. Trafficking differs to smuggling in that the concepts of forced and voluntary movements of the trafficked and smuggled person are questioned, as is the question of choice (primarily where and when to work) and legality.¹⁰⁴

Prior to international consensus on the definitions surrounding trafficking and smuggling, various bodies attempted to formulate definitions from which to then discuss the different aspects. Confusion arose as a range of terms were used to describe the phenomenon. The terms 'people smuggling' and 'people trafficking' were used interchangeably in the literature and further terminology was also developed such as 'alien smuggling', 'trafficking of aliens', 'illegal immigrant smuggling', 'human trafficking', 'trade of human beings', 'human commodity trading', 'human trade', 'trafficking in human beings' and 'trafficking in persons'.¹⁰⁵

¹⁰² Report of the Secretary General, 'International Migration and Development', UN GA, 6th Sess, [75] UN Doc A/60/871 (2006).

¹⁰³ United Nations Office on Drugs and Crime, *Legislative guide for the against the Smuggling of Migrants by Land, Air and Sea (Smuggling of Migrants Protocol)*, Part Three (2004) ('Legislative Guide for the *Smuggling Protocol*') paragraph 27.

¹⁰⁴ John Salt 'Trafficking and Human Smuggling: A European Perspective' in Reginald Appleyard, John Salt (eds) *Perspectives on Trafficking of Migrants* (2000) (Offprint of *International Migration* Vol.38(3) Special Issue 1/2000) 35.

¹⁰⁵ *Ibid*, 19.

One of the main points that needed clarification was that trafficking was different from smuggling and that trafficking and smuggling should afford their respective victims different levels of protection and assistance from the receiving state. There is a general perspective that smuggled people flee, often because of human rights violations and extreme poverty, whereas trafficked people are victims of serious and systematic human rights violations.¹⁰⁶ That is, trafficking is considered to be an offence against the person, as opposed to smuggling which is perceived as an offence against state sovereignty.¹⁰⁷ The smuggled person is someone who illegally crosses a border but whose relationship with the smuggler essentially terminates upon arrival and smuggling usually involves short term profit for the smuggler while traffickers enjoy long term exploitation for economic gain.¹⁰⁸ The importance in the clarification between smugglers and traffickers is that traffickers commit a graver offence due to the ongoing criminality once the victim arrives at their destination.¹⁰⁹ At first glance, this distinction may seem fairly clear.

Eventually, the international community came to define smuggling in article 3 of the *Smuggling Protocol* as:

'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, for the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

¹⁰⁶ Note by the Secretary General, *Smuggling and Trafficking in persons and the protection of their human rights*, UN GAOR, 57th sess, [para 22] UN Doc E/CN.4/Sub.2/2001/26 (2001).

¹⁰⁷ See generally Ollus, Natalia 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel', 122nd International Training Course Reports of the Course, 'The Effective Administration of Criminal Justice to Tackle Trafficking in Human Beings and Smuggling of Migrants', UNAFEI, written 15 August 2002, Resource Material Series 62, [http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland\(1\).pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland(1).pdf) at 4 June 2007 16 at 17; and Patsy Sorenson, European Parliament, Belgium, OSCE Office for Democratic Institutions and Human Rights, 'Conference Report' (Europe Conference Against Trafficking in Persons Berlin 15 – 16 October 2001), 38.

¹⁰⁸ Amy O'Neill Richard, O'Neill Richard, Amy, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime', (DCI Exceptional Intelligence Analyst Program An Intelligence Monograph, November 1999), 1.

¹⁰⁹ Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167 at 172

'Illegal entry' shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State

The *Smuggling Protocol* focuses on the smuggler being an agent that is only involved in assisting the migrant to cross the border. The distinction enables governments to deal much more stringently with persons who fall under this category and differs greatly from the protection principles in the *Trafficking Protocol*. Indeed, the result is a clear incentive for governments to view people as being smuggled rather than trafficked.¹¹⁰ Many human rights groups disagree with the distinction in the definitions which give governments these powers. However the weakness of the instruments in this regard is probably deliberate.¹¹¹

The *Smuggling Protocol* is intended to criminalise the 'business' of illegal migration, where organised criminal groups make profits from facilitating illegal migration. It was the intention of the drafters of the *Smuggling Protocol* that certain sanctions be provided to those found to be smuggled that do not apply to those that are simply illegal migrants. This is because smuggling is recognised as a form of transnational crime and therefore is more serious than illegal migration. In actual fact, it is difficult to find any real protection provisions for smuggled persons in the *Smuggling Protocol*; instead they are viewed as the 'object' of the smuggling.¹¹²

There is some confusion as to the overlap between trafficking and smuggling. Some believe that the person is still characterised as being smuggled even where that person is mistreated at the hands of the smugglers or is misled as to the nature and perils of the journey *provided that*: an exploitative relationship does not develop or is envisaged by the original parties and there was consent by the smuggled person to the journey.¹¹³ Indeed, it is easy to see how a smuggling relationship may develop to something more

¹¹⁰ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 995.

¹¹¹ *Ibid*, 1000.

¹¹² Francois Crepeau, 'The Fight Against Migrant Smuggling: Migrant Containment over Refugee Protection', in Joanne van Selms et al (ed) *The Refugee Convention at fifty: a view from forced migration studies* (2003) 173, 176.

¹¹³ Anne Gallagher, Kate Fitzgerald and Joanna Bourke-Matigny, 'Consideration of the Issue of Trafficking, Background Paper' (Advisory Council of Jurists, The Asia Pacific Forum of National Human Rights Institutions, New Delhi, India 11 –12 November 2002).

serious. For example, in an attempt to recover debts or additional payments for the smuggling process, smugglers may confine their 'clients' and the process degenerates into one more akin to trafficking.¹¹⁴ However, it is submitted that where an exploitative relationship develops without initial intent or coercion, it would be difficult to find a case of trafficking.

A similarity shared, and a common reason for the confusion between the two groups is that most trafficked and smuggled people are irregular migrants. However, perceptions of illegal migrants as stow-aways on leaking ships are inaccurate. In reality, most people who continue their stay illegally, for example in Australia, do so as over-stayers of tourist and student visa.¹¹⁵ Similarly, in the United States, it is believed that most illegal entrants are facilitated by document fraud rather than arriving via shipwrecked smuggling boats.¹¹⁶ As such, it is more accurate to speak of irregular migration as opposed to illegal migration as the victim may drift in and out of legal status.¹¹⁷

Irregular migrants are persons who are in an irregular situation, not fulfilling the requirements concerning entry, stay and exercise of an economic activity established by the state where they are present.¹¹⁸ While some irregular migrants are illegal from the moment that they arrived at their destination, others may have entered legally but lost their status during their stay, for example, working tourists who do not exit the country

¹¹⁴ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: the Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking', (2003) 24 *Michigan Journal of International Law* 1143, 1150.

¹¹⁵ 'Overstayers' describe people suspected of remaining in the Australian community unlawfully after their temporary visa expires. As at 30 June 2005, the Australian Government estimated around 47,800 overstayers were in Australia. Of these, 40,630 were visitors, 2,860 were students, 2,220 were temporary residents and 2,090 fell into other categories. See Department of Immigration and Multicultural Affairs, See Department of Immigration and Multicultural Affairs, Australian Government, 'Overstayers and People in Breach of Visa Conditions – fact sheet 86,' revised 30 January 2007.

¹¹⁶ Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 175.

¹¹⁷ John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467, 470.

¹¹⁸ This definition is based on the International Conference on Population and Development, 'Report of the International Conference on Population and Development' (International Conference on Population and Development, Cairo. Egypt, 5 -13 September 1994, [75] UN Doc A/CONF.171/13 (1994)).

when they are supposed to.¹¹⁹ Other examples include corporate expatriation and international student visas which are both legitimate migration tools but which may be manipulated in order to facilitate trafficking and smuggling.¹²⁰

The International Organisation for Migration ('IOM') blends a number of definitions so that smuggling and trafficking further define aspects of irregular migration:

*Irregular migration refers to migrants who either entered without inspection, or entered with the use of an illegally acquired or falsified visa or passport or who overstayed a legally acquired visa. Irregular migrants generally have relied upon a third party to assist them, whether they employed a forger to make a false visa (facilitator), paid a person to help them cross the border (smuggler) or were exploited after transit by the person who transported them across the border (trafficker).*¹²¹

The distinction between trafficking and smuggling is useful, and while the differences between the two may appear obvious, at the grass roots level, there is much overlap and the distinction is difficult to make.¹²² The protection and provisions relating to each is different in the two protocols and the instruments do not outline how the distinction is to be made and by whom.¹²³

2.4.1 Problems in distinguishing between trafficked and smuggled persons

¹¹⁹ *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, [43] UN Doc A/60/871 (2006).

¹²⁰ John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467, 469.

¹²¹ Ronald Skeldon *IOM Migration Research Series No. 1 - Myths and Realities of Chinese Irregular Migration* (2000) 7.

¹²² *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, UN ESCOR, Substantive Session, Addendum, [7] Un Doc E/2002/68/Add.1 (2002).

¹²³ NGO Joint Submissions on Protocol against the Smuggling of Migrants by Land, Air and Sea and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Eighth Session, Vienna, 21 February - 3 March 2000, Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, para. A.A.3. <http://www.december18.net/web/general/page.php?pageID=161&menuID=36&lang=EN> at 4 June 2007.

There are inherent ambiguities in determining the status of a person, for example, such as in deciding who is an illegal migrant and who is a legitimate refugee¹²⁴ and with the changing nature of international migration, the differences between smuggling and trafficking become even more difficult to differentiate between.¹²⁵

There are many similarities between victims of trafficking and smuggled migrants as these groups of people are often exploited and frequently moved around by organised criminal groups for the purpose of generating illegal profits.¹²⁶ Smuggled people are also sometimes violated and exploited during transportation or upon arrival,¹²⁷ risk life threatening situations, abuse and deceit.¹²⁸ They are often hidden during transport and risk injury or death through drowning, freezing, suffocating or being crushed, further exasperated by overcrowding, lack of food, poor sanitation, severe dehydration and environmental extremes.¹²⁹ 'There is no straight divide between humanitarian and commercial trafficking... In some cases the 'agent' ... is both a criminal and a saver of lives'.¹³⁰ Some authors argue that some traffickers even save lives and such cases are more likely to lead to the conclusion that it is a smuggling situation.¹³¹

¹²⁴ Gabriela Rodriguez Pizarro Pizarro, Gabriela Rodriguez, *Report of the Special Rapporteur on Specific Groups and Individuals 'Migrant Workers'* [para 42] E/CN.4/2002/94 (2002).

¹²⁵ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 2986.

¹²⁶ United Nations Office on Drugs and Crime, *Legislative guide for the against the Smuggling of Migrants by Land, Air and Sea (Smuggling of Migrants Protocol), Part Three* (2004) paragraph 29.

¹²⁷ Frank Laczko, Amanda Klekowski von Koppenfels and Jana Barthel, 'Trafficking in Women from central and eastern Europe: A review of statistical data' in Frank Laczko, Irene Stacher and Amanda Klekowski von Koppenfels (eds), *New Challengers for Migration Policy in Central and Eastern Europe* (2002) 153, 156.

¹²⁸ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 481.

¹²⁹ Free the Slaves, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 87.

¹³⁰ John Salt, Jennifer Hogarth 'Definitions of the concepts of Trafficking, Smuggling, and Organized Crime' in Frank Laczko, David Thompson (eds) *Migrant Trafficking and Human Smuggling in Europe – A review of the evidenced with case studies from Hungary, Poland and Ukraine* (2000) 21 quoting Morrison (1998a: 1) in a report on trafficking and asylum-seekers.

¹³¹ Francois Crepeau, 'The Fight Against Migrant Smuggling: Migrant Containment over Refugee Protection', in Joanne van Selm et al (ed) *The Refugee Convention at fifty: a view from forced migration studies* (2003) 173, 181.

The IOM makes a human rights distinction between smuggling and trafficking. The IOM argues that trafficking is not merely assisting a person over the border but assisting the person over the border *in order to exploit that person for labour in a way that violates their human rights*. However, the IOM recognises that smuggling can result in human rights abuses where the smuggled person suffers such abuses as ‘rape, beatings and deprivation of food and water. In the most extreme cases, their smugglers place them in boats which are unsafe and the smuggled journey results in death’.¹³² Often, those who are being smuggled have no idea of the degree and nature of the exploitation that awaits them from those that assisted them. People may willingly put themselves into the hands of traffickers because tightening migration policies make people fear that beyond just entering the country, they will not be able to successfully find housing, work and protection from enforcement agencies who may deport them.¹³³ So, the person may initially put their trust into the hands of someone they believe will only facilitate their entry into another country with perhaps some small further assistance, and instead find themselves enslaved to their captor.

Beyond simply defining these terms, definitions of trafficking and smuggling have tended to reflect the motivations of their promoters.¹³⁴

2.4.2 Motivations for different definitions

To understand the differences behind different definitions of trafficking, one must understand the interests of the group putting forward the definition. Identifying an individual as a trafficked person carries different responsibilities for the state concerned than is the case when the same person is identified as a smuggled immigrant and a trafficked person is afforded additional protection to a person who is smuggled. Destination states wish to limit the people that will be eligible for relief and services in order to minimally impact the exploitation of the relief that may be available to

¹³² Ronald Skeldon *IOM Migration Research Series No 1.- Myths and Realities of Chinese Irregular Migration* (2000) 8.

¹³³ Kara C Ryf, ‘The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000’, (2002) 34 *Caw Western Reserve Journal of International Law* 45 at 48.

¹³⁴ Anne Gallagher ‘Background Paper’ (Background Paper prepared for the Technical Consultative Meeting on Anti-Trafficking Programs in South Asia: Appropriate Activities Indicators and Evaluation Methods, September 11 -13, 2001), 4.

trafficking victims.¹³⁵ For example, experience shows that competent investigative authorities appear likely to initially launch a smuggling investigation and if sufficient further evidence comes to light this may change the focus to human trafficking.¹³⁶

Nevertheless, the difference in characterising a person as being trafficked or smuggled is important because the status of the person will dictate the protection mechanisms applied to them.¹³⁷ For example, where a trafficking victim is incorrectly characterised, they will be less likely to be afforded the appropriate assistance and protection.¹³⁸

Accordingly, it is submitted that it is through an understanding of the core issues of trafficking, that a distinction can be made. Further, if parallel to strengthening trafficking efforts, similar efforts were made to eradicate slavery, then the shift of focus to exploitation would ensure that victims received the assistance that they required whether they entered the destination state as a smuggled person or trafficked victim.

2.5 Trends and developments in trafficking: From uncertain statistics to organised crime

Given the clandestine nature of trafficking, it is hard to obtain any accurate statistics on the volume and extent of the phenomenon. It is therefore prudent to state here that trafficking figures are unreliable. In the analysis and critique of the strategies to combat trafficking, it is therefore difficult to know whether a particular trafficking effort has been successful in reducing the numbers of victims. It is difficult to know if there is improvement in the numbers of people trafficked annually as the estimates are

¹³⁵ Ivy C Lee and Mie Lewis, 'Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts', (2003) 10 *U.C. Davis Journal of International Law and Policy* 169 at 173.

¹³⁶ Analytical report of the Secretariat, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2nd sess, Review of the implementation of the Protocol to prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, [para 35] Un Doc. CTOC/COP/2005/3 (2005).

¹³⁷ Therse Barone, 'The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution', (2003) 17 *Temple International and Comparative Law Journal* 579 at 592.

¹³⁸ See also, Anne Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties' 12 *FMR* 25 at 27

unreliable. It goes without saying that it is virtually impossible to know whether trafficking has been reduced. An unfortunate aspect of the unreliable statistics is that texts, monographs and reports on trafficking frequently make reference to figures which are recycled or repeated in other texts and referenced in academic papers which of course then gives the statistics an appearance of 'accepted fact'.¹³⁹

The difficulties with obtaining reliable data on the number of people trafficked every year¹⁴⁰ are due in part to imprecise definitions and inaccurate classifications of trafficked people¹⁴¹ Further reasons for inaccurate statistics include:¹⁴²

- *absence of comparable statistics from around the world;*
- *heterogeneous criminalisation of trafficking;*
- *the illicit nature of the crime;*
- *poor legal status of victims making them unable or unwilling to report the crime; and*
- *different ideological attitudes towards the sex industry.*

Despite the inherent problems associated with estimating the number of people trafficked globally every year,¹⁴³ authors make reference to various numbers. Bell and Blackell state that the UN estimates that 4 million people are trafficked annually, while White House officials from the United States estimate that there are approximately 2

¹³⁹ Alison Murray "Debt Bondage and Trafficking – Don't Believe the Hype" in Kamala Kempadoo and Jo (ed) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 55.

¹⁴⁰ See *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, [15] UN Doc A/60/871 (2006); Communication from the Commission to the European Parliament and the Council, '*Fighting trafficking in human beings – an integrated approach and proposals for an action plan*' COM 92005) 514 final, (Brussels, 18 October 2005),

¹⁴¹ Kristina Kangaspunta, 'Mapping the Inhuman Trade: Preliminary Findings on the Database on Trafficking in Human Beings', (2003) 3(1 & 2) *Forum on Crime and Society* 81, 85

¹⁴² Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 7.

¹⁴³ See generally, Martti Lehti and Kauko Aromaa, 'Trafficking in Human Beings, Illegal Migration and Finland', (HEUNI Publication Series No. 38, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2002).

million women and children trafficked annually for the sex trade.¹⁴⁴ Tiefenbaum estimates that there are 2 million women¹⁴⁵ trafficked every year and of these, 50,000 women are trafficked into the United States.¹⁴⁶ Again, Tiefenbaum does not reference how she came to her figures. Other unsubstantiated figures include 400,000 trafficked people a year into member states of the European Union and 2 million juvenile sex slaves trafficked from Eastern Europe.¹⁴⁷ Others put a 'range' to the trafficking, for example, 700,000 – 2 million a year.¹⁴⁸ In any event, while such varying estimates should bring about scepticism, in the arena of sex work and trafficking, they are accepted without question.¹⁴⁹

The unreliable statistics, lack of any proper theoretical framework and self interest of the states in dealing with the issues of trafficking present challenges to developing effective solutions to the problem of trafficking. Indeed, problems associated with identifying and quantifying trafficking victims existed even in past efforts of dealing with trafficking. These problems are exacerbated by the increasing involvement of organised crime groups in trafficking.

Organised crime is completely different from ordinary crime. Ordinary crime is usually conducted by individuals who seek out personal gain and instant gratification. Organised crime is more like the running of a business; except that it is illegal.¹⁵⁰ It

¹⁴⁴ Keith Bell and Gillian Blackell, 'The New Palermo Convention' (in *Globalism: People, Profits and Progress*, Proceedings of the 30th Annual Conference of the Canadian Council on International Law, Ottawa, October 18 – 20, 2001) 205, 207.

¹⁴⁵ My emphasis.

¹⁴⁶ Susan Tiefenbaum, 'The Saga of Susannah a US Remedy for Sex Trafficking and Violence Protection Act of 2000', (2002) 1 *Utah Law Review*, 107, 111.

¹⁴⁷ Ursula Smartt, 'Human Trafficking: Simply a European Problem?' (2003) 11(2) *European Journal of Crime, Criminal Law and Criminal Justice* 164, 165. For the last figure of 2 million adolescents, the author cites p 13 of *The Guardian*, 12 July, 2002.

¹⁴⁸ Amy O'Neill Richard, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime', (DCI Exceptional Intelligence Analyst Program An Intelligence Monograph, November 1999), 3; Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260, 263.

¹⁴⁹ Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23, 32.

¹⁵⁰ Andreas Schloenhardt 'Organised Crime and the Business of Migrant Trafficking', (AIC Occasional Seminar Canberra, Australian Institute of Criminology, 10 November 1999).

differs from legitimate business in that it cannot use the tools of the state for commerce. That is, if something goes wrong, the organisation cannot go to the courts and seek redress; furthermore, because of its very nature, it is highly secretive. Also it is usually entrepreneurial. That is, organised crime adapts to suit its environment and exploits business opportunities. Because of the differences from conventional crime, trafficking needs a broader 'organised crime' understanding and the international nature of the crime requires state consensus in order to tackle the problem.

Essentially, in the area of people trafficking, trafficking organisations identify that legal opportunities for migration are reducing, especially for non-skilled workers. However despite this, they recognise that people still wish to migrate. Traffickers exploit the opportunity between the number of people that want to migrate and the restrictive legal prospect for them to do so. The trafficker exploits the legal loopholes in migration policies, gaps in migration controls, opportunities to enter states during times when they are likely to be short staffed or during inclement weather.¹⁵¹ In order to do so, many trafficking groups rely on corrupt officials to assist them. Accordingly, trafficking is linked to organised crime in the *Trafficking Protocol*.

Because of the entrepreneurial nature of trafficking groups, it is thought that the traffickers also use their expertise in other areas such as drug trafficking to assist them in the process. Close links are claimed between trafficking and extortion, racketeering, money laundering, bribery of public officials, drug use, document forgery and gambling.¹⁵² Despite these assertions however, there is little substantial evidence that trafficking is indeed linked to these other crimes.¹⁵³

¹⁵¹ John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467, 477.

¹⁵² See Amy O'Neill Richard, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime', (DCI Exceptional Intelligence Analyst Program An Intelligence Monograph, November 1999), 13; Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260 at 264; John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467 at 477; Natalia Ollus, 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel', 122nd International Training Course Reports of the Course, 'The Effective Administration of Criminal Justice to Tackle Trafficking in Human Beings and Smuggling of Migrants', UNAFEI, written 15 August 2002, Resource Material Series 62, 16 at 17 [http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland\(1\).pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland(1).pdf) at 4 June 2007; Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land,

Paragraph 29 of the ‘Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Against Transnational Organised Crime’¹⁵⁴ (‘Legislative Guide for the *Trafficking Protocol*’) recommends governments ensure that criminal offences established in accordance with the *Organised Crime Convention* and Protocols are coherent. The rationale for this is that criminal groups may be involved in a number of different criminal offences for example, in trafficking and smuggling of persons as well as narcotics and firearm trafficking. In such instances, domestic legislation must be able to support the investigation and prosecution of criminal groups for more than one offence or for a multiple of offences. Hence there is a requirement to become a member to the *Organised Crime Convention* prior to the Protocols.¹⁵⁵ State parties are obligated to criminalise trafficking either as a single offence or as a combination of offences.¹⁵⁶

Where a state becomes a member to a Protocol as well, then the *Organised Crime Convention* and Protocol are intended to be read together, taking into account the purpose of the Protocol. Therefore, offences under the Protocol are deemed to be Convention offences for the purposes of extradition and other forms of cooperation.¹⁵⁷ The *Organised Crime Convention* requires that state parties take necessary steps, including legislative and administrative measures to ensure the implementation of its obligations under the *Organised Crime Convention*.¹⁵⁸

Air and Sea (2000) from a Refugee Protection Perspective’, (2002) 14 *International Journal of Refugee Law* 561, 578; Carolina Johansson Wennerholm, “Crossing Borders and Building Bridges: the Baltic Region Network Project” in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 13.

¹⁵³ Khalid Koser ‘Reconciling control and compassion? Human smuggling and the right to asylum’, in Edward Newman and Joanne van Selm (ed), *Refugees and Forced Displacement* (2003) 181 at 183.

¹⁵⁴ United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and Protocol Thereto, Part Two* (2004) (the ‘Legislative Guide for the *Trafficking Protocol*’)

¹⁵⁵ *Convention against Transnational Organised Crime*, article 37.2.

¹⁵⁶ Legislative Guide for the *Trafficking Protocol* paragraph 31.

¹⁵⁷ Elizabeth F Defeis, ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach’, (2004) 10 *ILSA Journal of International & Comparative Law* 485 at 487.

¹⁵⁸ *Convention against Transnational Organised Crime*, article 34.1.

The *Organised Crime Convention* contains general powers for dealing with transnational organised crime while the Protocols deal specifically with trafficking and smuggling. The *Organised Crime Convention* is especially important because of the complex nature of transnational crime that may have many facets that do not fall neatly under the Protocol requirements alone.

In order for the *Trafficking Protocol* to apply, the trafficking must be acting for a 'financial or other material benefit'. This provision is enacted so that smuggling for humanitarian assistance or smuggling family members does not accidentally fall within the scope of the Protocol.¹⁵⁹ Essentially for the traffickers, trafficking is a business¹⁶⁰ and it is that business side that authorities are trying to quash.

While the Protocol requires the transnational element to establish the offence, when read in conjunction with article 34.2 of the *Organised Crime Convention*, the state party must establish its domestic law independently of the transnational nature of the crime. That is, while governments should have to prove some degree of transnationality or the existence of an organised criminal group for some parts of the Protocol, neither needs to be proved by the prosecution in order to obtain a conviction for trafficking in persons or any other offence established by the *Organised Crime Convention* or Protocols.¹⁶¹ Offences are to be established in the domestic law of state parties independently of the transnational nature or the involvement of an organised criminal group. This merely asserts that state parties retain their right when drafting their domestic legislation, to criminalise certain behaviour at the domestic level without requiring the transnational element. Essentially, this allows for the criminalisation of domestic trafficking. Smuggling on the other hand, needs the transnational element because smuggling within one country without the crossing of international borders and without the coercive and exploitative elements of trafficking, is merely the movement of a person within one sovereign state. Without the exploitation of prostitution, slavery like practices, servitude or the removal of organs without consent, no offence has taken place.

¹⁵⁹ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975 at 996.

¹⁶⁰ Khalid Koser 'Reconciling control and compassion? Human smuggling and the right to asylum', in Edward Newman and Joanne van Selm (ed), *Refugees and Forced Displacement* (2003) 181 at 184.

¹⁶¹ Legislative Guide for the *Trafficking Protocol* paragraph 24.

The consent requirement means that where a person is moved from one place to another and consents to being exploited, they will be characterised as having been smuggled and not trafficked, leading to a lower threshold of protection for the person and a lower level of criminalisation for the exploiters. As discussed throughout this paper, the unfortunate outcome is that while the Protocol seeks to criminalise the offender, where there has been consent, a loophole is created and the victim's acquiescence works as a barrier to the victim's protection and the offender's prosecution. This result is inappropriate because it allows the offender to avoid higher levels of criminalisation even though they have exploited the victim. However, a better understanding of consent theory can provide a better approach to the issue of consent as will be explained later in the thesis.

2.5.1 The size of trafficking groups

Trafficking can be conducted by small networks as well as highly organised groups.¹⁶² The problem is that it is thought that relative to law enforcement bodies, trafficking groups are flexible and better organised.¹⁶³ Literature regarding the size of criminal groups operating people trafficking rings ranges from claiming that trafficking is conducted by small groups to large, organised criminal business structures. While the *Trafficking Protocol* falls under the Convention, the definition of what constitutes an organised criminal group within the treaty, recognises that within trafficking, criminal groups tend to be smaller than what is seen in other areas of organised crime. While it may be that the criminalisation of trafficking is a fairly new offence, it also points to evidence of smaller operators.

An unusual outcome of the Convention is the combined effect of article 2 of the Convention and article 2(a) of the *travaux prepratoires*, which allows for 'unstructured structured groups and unorganised organised groups'.¹⁶⁴ That is, while article 2 of the

¹⁶² Louise Shelley, 'Trafficking in Women: The Business Model Approach' (2003) 10(1) *The Brown Journal of World Affairs* 119, 121.

¹⁶³ John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467, 485.

¹⁶⁴ Paul Williams, 'Discord within Consensus: the UN Trafficking instruments' (Paper presented at People Trafficking, Human Security and Development Symposium, Canberra, Australia, 1 September 2004), 7.

Convention defines an organised group as consisting of a structured group of 3 or more persons, article 2(a) of the *travaux preparatoires* states that the inclusion of a specific number of persons would not prejudice the rights of states pursuant to article 34(3) of the Convention. Article 34(3) of the convention says that state parties may adopt more strict or severe measures than those provided for in the convention in preventing and combating organised crime. The combined effect of the three articles means that states can legislate to criminalise, as Williams puts it, ‘unstructured structured groups and unorganised organised groups’.

Trafficking into the United States is thought to be organised mainly by small crime rings, loosely connected criminal networks and corrupt individuals who traffic their own nationals.¹⁶⁵ The literature often makes mention of the so called ‘mom and pop outfits’¹⁶⁶ and statistics show that traffickers caught in the United States are not on the International Criminal Police Organisation’s database, providing further evidence that trafficking groups tend to be smaller.¹⁶⁷ Smaller sized groups do not mean that they are not effective. Modern technology means that there is not always a direct correlation between the size of the group and its ability to function successfully.¹⁶⁸ On the other hand, there is evidence of large transnational groups based in places such as the Fujian Province in China.¹⁶⁹ The result is that small and large trafficking groups have been found to operate productively. This shows that trafficking is an extremely difficult crime to prosecute because of the potential enormity of the problem and the flexibility of successfully committing the crime.

¹⁶⁵ Amy O’Neill Richard, ‘International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime’, (DCI Exceptional Intelligence Analyst Program An Intelligence Monograph, November 1999), vii.

¹⁶⁶ A common term used in trafficking see for example, John Salt and Jeremy Stein, ‘Migration as a Business: The Case of Trafficking’, (1997) 35(4) *International Migration* 467 at 476; Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, ‘Transatlantic Workshop on Smuggling’ (2001) 15 *Georgetown Immigration Law Journal* 167, 170.

¹⁶⁷ Amy O’Neill Richard, ‘International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime’, (DCI Exceptional Intelligence Analyst Program An Intelligence Monograph, November 1999), p. vii..

¹⁶⁸ LeRoy G. Potts, ‘Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons’, (2003) 35(1) *The George Washington International Law Review* 227 at 230.

¹⁶⁹ Khalid Koser ‘Reconciling control and compassion? Human smuggling and the right to asylum’, in Edward Newman and Joanne van Selm (ed), *Refugees and Forced Displacement* (2003) 181 at 190.

While some groups may be made up of only a couple of people, other outfits may employ about a dozen people including a driver of a vehicle or boat, enforcers for the journey duration, others in charge of rounding up customers and collecting money as well as look outs and others for when the victim reaches their destination.¹⁷⁰ A more complex group involving a hierarchy of players may mean that the victim is unable to identify the true profiteers in the trafficking process as they probably have never come into contact with them.¹⁷¹ In the instance of large organised trafficking groups, assistance to the authorities for prosecution are likely to produce traffickers from the lower levels of the trafficking process while the more senior members may go unpunished.

Certainly, well organised and larger organisations are more suitable to responding to alternating trafficking routes when flexibility is required.¹⁷² The ‘push-down pop-up’ effect typically used to describe drug trafficking, is also evidenced in human trafficking whereby trafficking in one region is reduced only for traffickers to adjust and shift the geographic focus to another place.¹⁷³

The many types of groups involved in trafficking, from the very small to very large indicates that measures to combat trafficking need to be flexible and thorough. A law enforcement regime that deals with these variations is a necessary tool. Further, having a Convention dealing with Organised Crime is helpful in assisting states to uniformly implement legal measures. For this reason, the Convention's reference to various sized organised criminal groups assists states to allow various groups to fall within their jurisdiction.

2.5.2 Complexity of the trafficking process

¹⁷⁰ John Salt and Jeremy Stein, ‘Migration as a Business: The Case of Trafficking’, (1997) 35(4) *International Migration* 467, 476.

¹⁷¹ *Ibid*, 478.

¹⁷² Khalid Koser ‘Reconciling control and compassion? Human smuggling and the right to asylum’, in Edward Newman and Joanne van Selm (ed), *Refugees and Forced Displacement* (2003) 181 at 191.

¹⁷³ Phil Marshall and Susu Thatun, ‘Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region’, in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 44.

Similarly, the trafficking process itself may range from being simple to large and complex. For example, traffickers may simply escort their victims on foot to cross a border and deliver them to a place of work. On the other hand, there are cases of irregular migrants crossing the straits of Gibraltar in tiny boats forced to swim the last few hundred meters to shore.¹⁷⁴ Smuggled and trafficked people have been found in refrigerated trucks, in buses with double roofs or false baggage compartments as well as leaking ships.¹⁷⁵ Despite the complexity or size of the trafficking group the trafficking process is composed of 3 main stages:¹⁷⁶ the recruitment of the victims from the place of origin; the travel component as the victims are transported to the place of destination; and the process in which the victims are inserted and integrated into destination countries.¹⁷⁷ If the group is caught at the recruitment time, some legislation may allow for the prosecution of the crime before it has taken place.¹⁷⁸

Trafficking groups are also extremely difficult to detect because of their ability to blend with legitimate business.

2.5.3 Blending of legitimate and illegitimate business

Trafficking is used in clandestine activities such as domestic servitude or prostitution in countries where prostitution is illegal.¹⁷⁹ However, trafficking and other illegal activities are also integrated in legitimate businesses. Legitimate business blend trafficked people to provide cheap labour to support their enterprise. That is, the business itself may be legal but aspects of the operation (that is, some or all of the labour) are illegal. Indeed, the forced labour may be only one of a number of illegal

¹⁷⁴ John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467, 482.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid, 477.

¹⁷⁷ This also applies to human smuggling.

¹⁷⁸ For example, Australian legislation.

¹⁷⁹ Although trafficking for prostitution also occurs in countries where prostitution is legal.

activities.¹⁸⁰ The illegality factor may also affect the trafficking victims themselves who may be illegal immigrants or below the legal age for work and it is the illegality that also prevents the person from accessing the rights held by the citizens of the community.¹⁸¹

Activities of these blended businesses are thought to be supported by a host of professionals including accountants, lawyers, financial advisers, bankers, chemists, politicians, judges, local government officials, and law enforcement officers, members of the military, media executives, other business people, community activists and even the clergy.¹⁸² Because of the large numbers of people involved, the detection of trafficking groups will also be difficult.

This blending of legitimate and illegitimate business becomes important because it goes to the substance of the shortfalls of the Protocol. The Protocol was created because it was intended to add gravity to the seriousness of the offence of trafficking and thereby to remove the need to prove the individual elements that go to make up trafficking. The difficulty here is that the substance, that is, the exploitation of the person in itself is not given sufficient gravity because of elements such as consent to trafficking. The result is quite strange because it makes the slave *trade* illegal but not slavery itself.¹⁸³ For example, a business may be carrying out legitimate work producing garments. Essentially they are running a sweat shop but only one of the forty 'employees' was transported from one place to another to get there (that is, they were trafficked). The rest of the 'workers' either found work there by their own means or they were transported while consenting to working as slaves. Subject to national laws the owner would only be charged with a grave offence for the one trafficked employee and would

¹⁸⁰ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47 at 57.

¹⁸¹ Jyoti Sanghera, "Unpacking the Trafficking Discourse" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 9.

¹⁸² John McFlarane, 'Transnational Crime: Response Strategies (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Australian Institute of Criminology Canberra, 21 – 22 June 2001). P. 3.

¹⁸³ Slavery is illegal however there is doubt whether consensual slavery is.

probably be charged with breaking labour laws for the rest of the workers. The Protocol is not concerned with the substance, which in the writers view is the exploitation, but it is concerned with the criminal activity which requires the forced transportation of people. This further proves that the *Trafficking Protocol* is more concerned with the crime of illegal migration than exploitation because it is the illegal movement that is emphasised in the Protocol.

2.5.4 Corruption

Trafficking cannot exist to the scale that it does without corruption.¹⁸⁴ As an offence, corruption is targeted under article 8 of the *Organised Crime Convention*; however the Convention does not define corruption because it was considered too complex an issue to be adequately covered by a convention on transnational organised crime.¹⁸⁵ Subsequently, in resolution 55/61 of 4 December 2000, the General Assembly decided to establish an ad hoc committee for the negotiation of an instrument on Corruption in Vienna at the headquarters of the Centre for International Crime Prevention, Office for Drug Control and Crime Prevention. The Convention approved by the Ad Hoc Committee was adopted by the General Assembly by resolution 58/4 of 31 October 2003.

The international nature of the crime means that trafficking at the large scale claimed could not be possible without the collaboration of criminal groups with law enforcement officers such as border police.¹⁸⁶ It is believed that police corruption exists in nations where police are inadequately paid. Low paid border officials in countries of origin have been known to take bribes to turn a blind eye to the exportation of victims.¹⁸⁷ Local police have been known to hold on to trafficked people's passports and even

¹⁸⁴ Louise Shelley, 'Trafficking in Women: The Business Model Approach' (2003) 10(1) *The Brown Journal of World Affairs* 119,129.

¹⁸⁵ Dimitri Vlassis, 'The Negotiation of the Draft United Nations Convention Against Corruption' (2002) 2(1) *Forum on Crime and Society* 153.

¹⁸⁶ Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260, 266.

¹⁸⁷ John Salt and Jeremy Stein, 'Migration as a Business: The Case of Trafficking', (1997) 35(4) *International Migration* 467, 482.

frequent brothels where trafficked women are kept¹⁸⁸ leading to an inherent fear of police by victims.¹⁸⁹ There is little incentive to refrain poorly paid officials from involvement with organised criminal groups.¹⁹⁰ Indeed such groups often view the victims of trafficking as deserving of their fate.¹⁹¹ Furthermore, there is a belief that such activities are protected by corrupt politicians.¹⁹² Victims often fear the police also because in some cases, where victims escape and report to the police, they face being sent back to their traffickers because of police involvement.¹⁹³

Considering the important role played by corruption, mere criminalisation of offenders is insufficient to close the loopholes that facilitate trafficking. Trafficking is a multi-faceted problem and in order to deal with corruption, law enforcement provisions would work more efficiently with other methods such as education of the gravity of trafficking. Improvement of home conditions both to prevent people falling prey to traffickers and to eliminate corruption are important, however both of these are inherently difficult problems for impoverished countries.

Organised crime is a large force to be reckoned with and the Convention gives some assistance to states to put systems in place both to deal with the phenomenon and cooperate with other states in order to deal with the international aspect. An understanding of the strength of organised crime, and the level of corruption involved should have resulted in greater protection mechanisms for victims however, any protection to victims is contingent on the victim's assistance to police for the enforcement process. It is unfortunate that such knowledge of the gravity and scale of

¹⁸⁸ Martina Vandenberg, 'Complicity, Corruption and Human Rights: Trafficking in Human Beings', (2002) 34 *Case Western Reserve Journal of International Law* 323, 326.

¹⁸⁹ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 74.

¹⁹⁰ Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369 at 385.

¹⁹¹ *Ibid*, 387.

¹⁹² Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260 at 266.

¹⁹³ Ann D Jordan 'Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 29.

organised crime did not inspire the drafters of anti trafficking instruments in the past or in recent times to also take a humanitarian view and approach to victims. An analysis of early responses to trafficking will reveal that a misunderstanding of the crime of trafficking also existed in the past, leading to ineffective efforts adopted to combat it.

3 COMBATING TRAFFICKING: EARLY RESPONSES

3.1 Introduction

History often contains valuable lessons and this is also true in the case of trafficking. Today, we are dealing with trafficking without reference to the past as if it is a modern problem. However, this is not the first time that the international community has attempted to address human trafficking. Human trafficking had previously been dealt with as a gender issue in the context of prostitution, albeit with few positive results. The failures of past efforts may provide some insight into ways of addressing trafficking today.

Human trafficking as we know it became an issue in the early 1900s at a time of adverse economic conditions, as concern arose to halt the alleged sale of white women in Europe and the United States for the purposes of prostitution and exploitation.¹⁹⁴ Reports at the time abounded of white women who had been tricked into a life of trafficking and prostitution. Newspapers and other publications circulated stories that were 'shocking and titillating'.¹⁹⁵

'[T]he promise of a good situation, or the promise of a suitable marriage, were the means invariably used to entrap and ensnare them. Once in the hands of the traffickers, they were hurried away, from country to country, until the highest bidders obtained the virtue, honour, and the like of the victims of these inhuman traffickers... Here was indeed a revelation, so far as I personally was concerned. For a long time I had known of the existence of this traffic, but I had no

¹⁹⁴ Elizabeth F Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach', (2004) 10 *ILSA Journal of International & Comparative Law* 485,485.

¹⁹⁵ See generally, William Alexander Coote, Secretary National Vigilance Association for the Suppression of the White Slave Traffic, London, England, "The Suppression of the White Slave Traffic" in Ernest A. Bell (ed), *Fighting the Traffic in Young Girls or War on the White Slave Trade* (1910), 29 – 47.

*idea of its widespread character. I had not dreamt of the scientific and business-like manner in which it was conducted.*¹⁹⁶

Descriptions of trafficking victims may appear melodramatic and even comical to the modern reader: '[o]ne thing should be made very clear to the girl who comes up to the city, and that is that the ordinary ice cream parlor is very likely to be a spider's web for her entanglement'.¹⁹⁷ Other stories told of the trafficking of women in terms of organised crime as sensational stories appeared in print around the Western world. Widespread panic emerged as fears were held regarding the protection of young and 'virtuous' women entering a life of prostitution.

In fact, subsequent to the enactment of legislation dealing with trafficking, the actual numbers of such cases was found to be small.¹⁹⁸ This was at odds with the prior reporting of numerous suffering victims. There are many possible reasons why this was the case. Some reasons may include that the stories were untrue and there were no victims of trafficking to be found. While the stories were taken as 'literal truth[s]' many contemporary historians question the actual extent of the 'white slave traffic' even describing it as a cultural myth.¹⁹⁹ Most likely the descriptions were so theatrical that very few real examples could be found to match the stories given. The stories told of innocent young virgins who under deceit, force and sometimes drugging and kidnapping were lured into forced prostitution, kept compliant through violence.²⁰⁰ However, the narratives did not leave room to accommodate the many women in prostitution and their

¹⁹⁶ William Alexander Coote, Secretary National Vigilance Association for the Suppression of the White Slave Traffic, London, England, "The Suppression of the White Slave Traffic" in Ernest A. Bell (ed), *Fighting the Traffic in Young Girls or War on the White Slave Trade* (1910), 31 – 32.

¹⁹⁷ Edwin W. Sims, United States District Attorney, Chicago, "Menace of the White Slave Trade", in Ernest A. Bell (ed), *Fighting the Traffic in Young Girls or War on the White Slave Trade* (1910), p. 71.

¹⁹⁸ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking, (2004) 40 *Stanford Journal of International Law* 1 at 7.

¹⁹⁹ See generally Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23.

²⁰⁰ *Ibid.* 38.

varied reasons for being there. Most likely there were women that had been tricked but there was no real acknowledgment of the varied reasons for women to enter prostitution and therefore no avenue to locate legitimate trafficking victims.

This approach resulted in some problems. Firstly, holding this model as the only possibility leads to the expectation that only such women required protection. More importantly, there were few instances to match the stories making it difficult to find victims. In essence, the law was disconnected from the reality and so was ineffective in making a significant change.²⁰¹ So, even if there were legitimate victims there were no appropriate mechanisms in place to assist them.

Similar problems exist today with a renewed interest by some groups to portray trafficked women in terms not dissimilar to the early 1900s. The following story was printed in a law journal in 2002 and contains striking similarities to the story above that was printed in 1910:

'Susannah is pretty. She is a twenty-two-year old unemployed factory worker, desperately seeking work and barely surviving.... Susannah lives at home with her family in a war torn shack surrounded by rubble and ugly memories. Quite unexpectedly, a friendly old woman named Angel comes up to Susannah one day and speaks to her in a gentle tone. Angel uses all her charm and persuasion to snare her carefully chosen victim. Angel showers Susannah with compliments, tempts her with gifts, a drink, dinner in her home; and like a guardian angel, offers Susannah the opportunity of employment, prosperity, a visa and a passport out of this life of misery. Angel is a devil in disguise. She is a well-dressed, prosperous-looking agent of a loan shark who works in the lucrative international crime business of trafficking young women into foreign lands where they end

²⁰¹ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 2987.

*up in seedy brothels only to engage in the dehumanizing labor of forced prostitution.*²⁰²

Today as in the past, such unusual stories focus attention away from the realities of trafficking. There are further examples of similarities between past and present anti-trafficking efforts. The treatment of prostitutes as witnesses and their required detention in certain circumstances also differs little from today's experiences because trafficking victims often are incarcerated pending the trial of their trafficker and frequently treated as illegal migrants and subject to mandatory detention:

*'It has been necessary for [the white slave's] own protection as well as for other reasons – to commit some of these unfortunates to various prisons pending the trial of the cases in which they are to appear as witness, and practically every one of them gives unmistakable evidence that imprisonment is a welcome liberation by comparison with the life of 'White Slavery'.*²⁰³

Despite the failings of the efforts of the past century to address trafficking, a closer analysis is nevertheless required in order to gain a better understanding of the most appropriate way forward.

3.2 Agreements enacted to eradicate trafficking 1904 – 1959

The first modern effort to suppress the trafficking in persons can be found in 1904, in the *International Agreement for the Suppression of the "White Slave Traffic,"*²⁰⁴ ('1904 Agreement'). The purpose of the *1904 Agreement* was to stop and prevent the procurement of white women and girls for 'immoral purposes' abroad but it did not provide for the punishment of the offenders of trafficking. Fundamentally, there was a

²⁰² Susan Tiefenbaum, 'The Saga of Susannah a US Remedy for Sex Trafficking and Violence Protection Act of 2000', (2002) 1 *Utah Law Review*, 107, 109.

²⁰³ Edwin W. Sims, United States District Attorney, Chicago, "Menace of the White Slave Trade", in Ernest A. Bell (ed), *Fighting the Traffic in Young Girls or War on the White Slave Trade* (1910), p. 67.

²⁰⁴ *International Agreement for the Suppression of the "White Slave Traffic"* opened for signature 18 May 1904, 1 LNTS 83 (entered into force 18 July 1905) ('1904' Agreement).

racial undertone to the *1904 Agreement* that sought to protect only white women, implying that white slavery was worse than black slavery:²⁰⁵

*'it was inconceivable that their female compatriots would willingly submit to sexual commerce with foreign, racially varied men. In one way or another these women must have been trapped and victimised. So European women in foreign bordellos were construed as 'white slaves' rather than common prostitutes.'*²⁰⁶

Today, protection of trafficking for prostitution does not carry with it racial prejudice but gender prejudices still persist as some feminists seek to limit agreements on trafficking to women in prostitution.²⁰⁷

Women were viewed as chaste and virtuous, and prostitutes 'the passive victims of social disequilibrium and the brutality of men'.²⁰⁸ Prior to the mid-nineteenth century, prostitution was viewed as immoral but not as a serious offence²⁰⁹ but the emerging image was of the young, naïve and innocent girl lured or deceived by evil traffickers into a life of sordid horror.²¹⁰ The victims 'innocence' was established by stressing her youth and virginity, bridging the gap between the pre-Victorian concept of the 'fallen woman' and the Victorian 'sexual deviant', removing the prostitute's responsibility for her actions and viewing all prostitutes as victims.²¹¹

²⁰⁵ Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23, 30.

²⁰⁶ *Ibid*, 29 quoting from Guy (1192), 203.

²⁰⁷ Note for example that early discussions concerning the *Trafficking Protocol* were of a Protocol for 'women and children' only, see; Melissa Ditmore, 'Trafficking in Lives – How Ideology Shapes Policy' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 109.

²⁰⁸ Marlene D Beckman, 'The White Slave Traffic: The Historical Impact of a Criminal Law Policy on Women', (1984) 72 *Georgetown Law Journal* 1111, 1115.

²⁰⁹ Jane E Larson, 'Prostitution, Labor and Human Rights, (2004) 37(3) *UC Davis Law Review* 673, 674.

²¹⁰ Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23, 24.

²¹¹ Suzanne H Jackson, 'To Honour and Obey: Trafficking in "Mail-Order Brides"', (2002) 70 *George Washington Law Review* 475 at 534. Indeed, similar problems regarding consent and the role of the "victim" remain today and will be discussed in this paper.

While the *1904 Agreement* did not define trafficking, the signatories agreed to undertake to organise an authority to coordinate all relevant information and to correspond with similar departments abroad. The aim was to prevent women and girls destined for an ‘immoral life’ by keeping watch at railway stations, ports of embarkation and en route for the persons in charge of the women and girls in order to obtain, within legal limits, all information likely to lead to the detection of the criminal traffic, whose detection is to be reported to competent authorities.²¹² The 1904 Agreement sought to protect women of age who have suffered abuse or coercion and to protect all trafficked underage girls. Shortly after, Switzerland opened a government office designated to combat trafficking in women for commercial exploitation, and this office is operational to this day.²¹³

Trafficking was addressed again in 1910 within the *International Convention for the Suppression of the ‘White Slave Traffic’*, (the ‘*1910 Convention*’).²¹⁴ The *1910 Convention* made it a punishable offence to procure, entice, or lead away, even with her consent, a woman or girl under age²¹⁵, for immoral purposes notwithstanding that the various acts constituting the offence may have been committed in different countries.²¹⁶ In relation to women of age, article 2 made it a punishable offence to procure, entice, or lead away, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion a woman for immoral purposes, again notwithstanding that the various acts constituting the offence may have been committed in different countries. In effect, the *1910 Agreement* is similar to the *1904 Agreement* which makes trafficking an offence in all women under age and an offence in non consensual women of age. Interestingly, the *1910 Convention* specifically states that the detention of a woman or

²¹² *1904 Agreement*, art. 2.

²¹³ Martti Lehti, ‘Trafficking in women and children in Europe’, (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 19.

²¹⁴ *International Convention for the Suppression of the “White Slave Traffic”*, opened for signature 4 May 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244 (entered into force 4 May 1949) (the ‘*1910 Convention*’)

²¹⁵ The words ‘woman or girl under age, woman or girl over age’ refers to under or over 20 years of age. See The *1910 Convention*, para. B. This was later amended by article 5 of the 1921 Convention (see below), which increased this to 21 years of age.

²¹⁶ *1910 Convention*, art. 1.

girl in a brothel, without her consent is a matter for internal legislation and is not dealt with in the Convention, despite its gravity.²¹⁷

Therefore, the *1910 Convention* specifically required the procurement, enticement or leading away of the woman, or basically, the transport of the woman from one place to another, in order for the offence of trafficking to be made out and consensual prostitution in women of age was not criminalised. This is interesting because despite any assumptions that prostitution was a moral issue, the *1904 Agreement* and *1910 Convention* recognised that some women consent to prostitution.

The term ‘white slave trade’ came to equate prostitution with abolitionism and subsequently, the governments of Great Britain and the United States came to criminalise prostitution for falling outside of the normal realm of contract.²¹⁸

While the *1904 Agreement* and the *1910 Convention* were not widely adopted, international concern persisted and efforts continued to eradicate trafficking for the purposes of prostitution.²¹⁹ The *International Convention for the Suppression of the Traffic in Women and Children*, (the ‘*1921 Convention*’)²²⁰, was intended as a Supplementary Convention to the *1904 Agreement* and the *1910 Convention* and was ratified by a substantially larger number of members than the 13 state parties of the earlier Agreement and Convention.²²¹ It entered into force on 15 June 1922 and called for the prosecution of persons engaged in the traffic of children of either sex for ‘immoral purposes’,²²² and for the regulation of employment agencies and offices to ensure the protection of women and children seeking employment in another country.

²¹⁷ Ibid, art. D.

²¹⁸ Berta E Hernandez-Truyol and Jane E Larson “Sexual Labor and Human Rights” (2006) *Columbia Human Rights Law Review* 391, 422.

²¹⁹ Elizabeth M Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking,’ (2004) 40 *Stanford Journal of International Law* 1, 9.

²²⁰ *International Convention for the Suppression of the Traffic in Women and Children*, opened for signature 30 September 1921 9 LNTS 415 (entered into force 15 June 1922) (the ‘*1921 Convention*’)

²²¹ 33 States signed the *1921 Convention* and by 1928 a further 8 States signed it.

²²² This particular Convention does not use the words “immoral purposes” however; article 2 calls for the prosecution of offenders of article 1 of the 1910 Convention which does use the term.

Importantly, the *1921 Convention* extended the protection from girls to include boys and also raised the relevant age limit.²²³

Subsequently, the *International Convention for the Suppression of the Traffic in Women of Full Age*, (the '*1933 Convention*') was entered into.²²⁴ The *1933 Convention* was intended to complete the *1904 Agreement*, the *1910 Convention* and the *1921 Convention*. Article 1 of the *1933 Convention* criminalised anyone, who in order to gratify the passions of another person, procured, enticed or led away even with her consent, a woman or girl of full age²²⁵ for immoral purposes to be carried out in another country, notwithstanding that the various acts constituting the offence may have been committed in different countries. The *1933 Convention* went further by punishing attempted offences and within legal limits, preparatory offences. There is an important shift in the *1933 Convention* because it no longer accepted that a woman could consent to prostitution echoing national legislation of the United States and the Great Britain. This abolitionist view of prostitution which continues to today, has been described as falling within a 'morality framework' of trafficking.²²⁶

In 1937, the League of Nations prepared a draft Convention that consolidated earlier treaties and secured international cooperation in the abolition of brothels and the prosecution of brothel owners by arguing that the existence of the brothel system was no longer purely a domestic issue as it was the centre of the trafficking system.²²⁷ The goal of the draft 1937 Convention was to abolish any regulated prostitution, repress third parties from benefiting from prostitution and rehabilitating prostitutes.²²⁸

²²³ Further international agreements were entered into, however these will be discussed below as the focus in this part of the paper is specifically on trafficking in modern agreements.

²²⁴ *International Convention for the Suppression of the Traffic in Women of Full Age*, opened for signature 11 October 1933, 50 LNTS (entered into force 24 August 1934).

²²⁵ 'Full age' probably refers to 21 years of age, as amended in article 5 of the 1921 Convention.

²²⁶ Nilanjana Ray, 'Looking at Trafficking Through a New Lens' (2006) 12 *Cardozo Journal of Law and Gender* 909, 910.

²²⁷ Nora V Demleitner, 'Forced Prostitution: Naming an International Offense', (1994) 18 *Fordham International Law Journal* 163, 171.

²²⁸ *Ibid*, 171.

The thinking behind this was that by excessively regulating brothels and prostitution, the state sanctioned the practice and at the same time marginalised prostitutes. By criminalising prostitution, it became virtually impossible for the woman to escape as they came to be viewed as deviants.²²⁹

The outbreak of World War II took attention away from the issue of trafficking and the draft 1937 Convention was never signed. In its resolution 43(IV) of 29 March 1947, the Economic and Social Council requested the Secretary General to resume the study of the draft 1937 Convention and to make any necessary amendments to bring it up to date.²³⁰

The Convention for the Suppression of the *Traffic in Persons and of the Exploitation of the Prostitution of Others* 1950 was signed on 21 March 1950 at Lake Success, New York and entered into force on 25 July 1951 (the '*1950 Convention*')²³¹. The *1950 Convention* consolidated the prior agreements, and embodied the substance of the 1937 draft Convention that extended the scope of those abovementioned instruments. Indeed article 28 states that the *1950 Convention* superseded the 1904, 1910, 1921 and 1933 treaties which were to be terminated when the state parties signed the *1950 Convention*. The preamble of the *1950 Convention* provides that 'prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community'.

Accordingly, the *1950 Convention* rejected the regulatory approach as discussed in the draft 1937 Convention as there was the belief that with the end of regularisation, there would be an end to the sanctioning of brothels and prostitution and ultimately an end to trafficking for prostitution.²³² Prostitution itself was not punished, the goal was to

²²⁹ Ibid, 173.

²³⁰ United Nations Crime and Justice Information Network, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, Section I 'Convention for the Suppression of the traffic in Persons and of the Exploitation of the Prostitution of Others' (1999), 1.

²³¹ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 21 March 1950, 1342 UNTS, (entered into force 25 July 1951) (the '*1950 Convention*'). For state parties to this instrument, see figure 4 of the appendix.

²³² Nora V Demleitner, 'Forced Prostitution: Naming an International Offense', (1994) 18 *Fordham International Law Journal* 163 at 173.

abolish the exploitation of prostitution rather than all prostitution 'prostitution is considered incompatible with the dignity of the human person, it is not prohibited, for it is regarded as a personal choice and hence a private matter'.²³³

The *1950 Convention* focused on the punishment of any person who '[p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person' or '[e]xploits the prostitution of another person, even with the consent of that person'.²³⁴ The *1950 Convention* sought to check the traffic in persons of either sex for the purpose of prostitution. In order to prevent international traffic in persons for the purpose of prostitution, states were required to enact regulation as necessary to protect immigrants or emigrants, and in particular, women and children, both at the place of arrival and departure and while en route. There were further requirements for states to arrange for appropriate publicity warning the public of the dangers of the aforesaid traffic; and to take appropriate measures to ensure supervision of railway stations, airports, seaports and en route, and of other public places.²³⁵ However, the enforcement provisions of the Convention were very weak, had limited value²³⁶ and were generally considered ineffective.²³⁷

The *1950 Convention* was the last instrument that directly abolished trafficking for the next 50 years. All of these agreements were based on a morality framework and have been criticised for failing to address a large portion of the problem of trafficking including other exploitation such as forced labour and even other sexual exploitation outside of prostitution.²³⁸

²³³ Ibid, 174 quoting the United Nations Department of International Economic and Social Affairs, Activities for the Advancement of Women, Equality, Development and Peace at 17, UN Doc. ST/ESA/174 (1985).

²³⁴ *1950 Convention*, art. 1.

²³⁵ *1950 Convention*, art. 17.

²³⁶ Elizabeth F Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach', (2004) 10 *ILSA Journal of International & Comparative Law* 485, 485.

²³⁷ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking', (2004) 40 *Stanford Journal of International Law* 1, 10.

²³⁸ Nilanjana Ray, 'Looking at Trafficking Through a New Lens' (2006) 12 *Cardozo Journal of Law and Gender* 909, 911.

Until today, the Agreements and Conventions only dealt with prostitution as a practice of trafficking and ignored forced labour and broader slavery conditions. Similarly, forced labour and slavery were dealt with in other instruments that ignored trafficking.²³⁹ Further, none of the instruments improved the conditions for trafficked people, not even the women that they were focusing on.

In 1959, the United Nations commissioned a report on the effectiveness of the *1950 Convention*, the Secretariat prepared the report and presented it to the Social Commission.²⁴⁰ The report found that there actually were a very low percentage of foreign prostitutes in most countries. Reasons given were threefold: domestic legislation based on the *1950 Convention* acted as a disincentive to traffickers; higher education and general equality for women reduced the chance of women falling prey to traffickers; and there was a loss of incentive with the closing of brothels around the world.²⁴¹ The study recommended the punishment of brothel owners and traffickers but not of prostitutes themselves, who should instead be rehabilitated if they agreed.

Nevertheless, many countries did not sign the *1950 Convention* because of the strong stance that it took against the regulation of the sex industry.²⁴² In 1994, the above Convention came under a great deal of criticism and there emerged two basic approaches to trafficking and prostitution: the regulationist school and the abolitionist school. 'Regulationists' believed that prostitution was a 'necessary evil' that should be controlled by strict state regulations while 'abolitionists' argued that men are responsible for women in prostitution and that no woman can truly consent to working as a prostitute.²⁴³

²³⁹ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking,' (2004) 40 *Stanford Journal of International Law* 1, 11.

²⁴⁰ United Nations Crime and Justice Information Network, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, Section I 'Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others' (1999), 1. Referring to the 'Study on the Traffic in Persons and Prostitution' (United Nations Publication St/SOA/SD/8, Sales No. 59.IV.5).

²⁴¹ Nora V Demleitner, 'Forced Prostitution: Naming an International Offense', (1994) 18 *Fordham International Law Journal* 163, 174.

²⁴² For example, Australia did not sign the 1950 Convention.

²⁴³ Jo Doezema, 'Who gets to Choose? Coercion, Consent and the UN Trafficking Protocol' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 22. The "prohibitionist" view of prostitution is that all elements of prostitution are illegal and even the prostitute herself is liable for prosecution.

The term 'regulation' referred to the system whereby brothels become subject to regulation, such as forced medical examinations.²⁴⁴ In practise this meant that the prostitute could work under licence from the state within a brothel that had to comply with the state in matters of zoning laws, health and safety standards and labour law protection for the sex worker. The other approach also regarded prostitution as work but relied on the organisation and unionisation of sex work, which would then protect the sex worker. Essentially, both approaches saw prostitution as legitimate work²⁴⁵ but it is the unionisation and organisation of sex work that has emerged over recent years. The regulationist school does not condone slavery within prostitution however it takes the position that women are able to make an informed and voluntary choice to enter the sex industry on the balance of their opportunities and on the calculation of the risks involved.²⁴⁶

The abolitionist view on prostitution saw all forms of prostitution as immoral and arose as a response to the Contagious Diseases Act in England in 1864, 1866 and 1869, whereby any woman suspected of prostitution could be detained by police and subjected to an examination.²⁴⁷ To this day, many NGOs and indeed sectors of the United Nations continue to argue for the abolition of prostitution as a legitimate form of work on the basis that they believe such work is never really of free choice. Abolitionists see the woman as a victim but all activities surrounding prostitution as illegal.²⁴⁸ Although the abolitionists do not specifically oppose the amelioration of working conditions in prostitution, prostitution is equated to slavery and there is no equation of prostitution with accepted work practices.²⁴⁹ Abolitionists believe that issues such as voluntary

²⁴⁴ Ibid, 26.

²⁴⁵ *Report of the Secretary General, 'Integration of the human rights of women and a gender perspective: Violence against women'*, UN ECSOR, 59th sess, UN Doc. E/CN.4/2003/75 (2003), 14 – 15.

²⁴⁶ Jo Bindman "An International Perspective on Slavery in the Sex Industry" in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 68.

²⁴⁷ Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23, 26.

²⁴⁸ Marjan Wijers "Women, Labor, and Migration – The Position of Trafficked Women and Strategies for Support" in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998) p. 73.

²⁴⁹ Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391, 401.

prostitution are akin to legitimising the practise and they strongly oppose any such suggestion.²⁵⁰ Abolitionist standards of the 1933 and 1949 Conventions carried through to national legislation of various states that forbid prostitution, barring prostitutes from legal redress and protection.²⁵¹ Debates regarding prostitution persist to this day and will be discussed further in the chapter on gender.

3.3 Conclusion

Few of the early efforts dealing with trafficking had any positive impact on reducing the crime. As has been illustrated, the first problem was that descriptions of trafficking victims were so extreme, that few victims of trafficking were ever found. While this may be because there were no victims of trafficking, most likely the reason for falling to locate victims was that the picture of victim was unrealistic. As discussed, this is being echoed today by defining trafficking in a way that eliminates most victims of trafficking because of their level of complicity in the trafficking process.

Like today, legal responses to early trafficking focused on warning potential victims, criminalising traffickers and promoting international agreements but did not consider the rights, needs or interest of trafficking victims.²⁵² Conversely, these early efforts did not expand to encompass other aspects of trafficking, such as trafficking for forced labour or slavery like practices as they do today.

Other than describing trafficking in a way that makes it unlikely to identify victims of trafficking, there are further examples of similarities between the old and new stories. While most modern accounts of trafficking contain a little less melodrama, the essential basis of deceit still forms the core of our current understanding. Modern agreements still require coercion and deceit or abuse of power to obtain the consent of a person to work under slavery like conditions. All definitions today regarding trafficking, other

²⁵⁰ Ibid.

²⁵¹ Jo Doezema, "Who gets to Choose? Coercion, Consent and the UN Trafficking Protocol" in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 24.

²⁵² Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking, (2004) 40 *Stanford Journal of International Law* 1, 3.

than those that perceive all prostitution as trafficking require a degree of deception or coercion.²⁵³

Further problems with early trafficking efforts result from a focus on trafficking for the purposes of prostitution. While today's *Trafficking Protocol* seeks to protect all victims of trafficking, there continues to be a focus on the trafficking of women²⁵⁴ as can be seen from article 2(a) which states that the purpose of the Protocol is to 'prevent and combat trafficking in persons, paying particular attention to *women and children*.'²⁵⁵ The role of female victims in trafficking will be discussed in the chapter on gender however it is true to say that there is a particularly large contingent of NGOs that represent the rights of women in trafficking and that the trafficking of men is not equally represented.

Lastly, the shift in focus from regulationist to abolitionist views of prostitution along with discussions as to consent regarding prostitution continues to this day. Unfortunately, as in the large representation of feminist NGOs in trafficking, such concerns have acted to take attention away from the many victims of trafficking of both genders including other exploited people whether in labour or other areas.

The long gap since 1950 without an appropriate agreement regarding trafficking led to the enactment of the *Organised Crime Convention* in 2000.

²⁵³ *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN ESCOR, Substantive Session, Addendum, Un Doc E/2002/68/Add.1 (2002) p. 7, Guideline 2.*

²⁵⁴ And children.

²⁵⁵ My emphasis.

4 RECENT EFFORTS TO ERADICATE TRAFFICKING – THE *TRAFFICKING PROTOCOL*

At the 7th Session of the Commission on Crime, Prevention and Criminal Justice, 1998, Argentina proposed the drafting of a new Convention against ‘trafficking in minors’,²⁵⁶ citing growing evidence of the involvement of organised criminal groups in this activity.²⁵⁷ Argentina was attempting to create a tool to combat trafficking to and from their country²⁵⁸ however, as trafficking is a problem that involves actors from various states, they knew that any real attempt to combat trafficking would have to spring from the international community as a whole. Argentina had been pushing forward this initiative in the context of the *Convention of the Rights of the Child*²⁵⁹ but results were not forthcoming.²⁶⁰ Subsequently, Argentina was concerned that a purely human rights instrument would be insufficient to address the problem of trafficking considering the gravity of the offence and instead lobbied for the instrument to be drafted as part of a broader international response against transnational organised crime.²⁶¹ Additionally, the high profits, low risk of detention and minor penalties associated with trafficking meant that organised criminal groups were regularly involved with the phenomenon.²⁶²

²⁵⁶ Argentina had previously made note of the problem of the trafficking of minors in other fora of the United Nations, see for example, *Report of the Secretary General, ‘Strategies for Crime Prevention and Control, Particularly in Urban Areas and in the Context of Public Security, Measures to Prevent Trafficking in Children’*, UN ESCOR, 6th sess, UN Doc. E/CN.15/1997/12 (1997).

²⁵⁷ United Nations Office on Drugs and Crime, *Trafficking in Persons: the New Protocol* http://www.unodc.org/unodc/trafficking_protocol_background.html at 4 June 2007

²⁵⁸ Ann D Jordan, *Global Rights, Annotated Guide to the Complete UN Trafficking Protocol* (2002), 2.

²⁵⁹ *Convention on the Rights of the Child*, opened for signature 20 Nov. 1989, 1577 UNTS 44 (entered into force 20 Sept. 1990). See figure 4 of the appendix for a list of state parties to this instrument.

²⁶⁰ Vlassis, Dimitri, ‘The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process’, 119th International Training Course Visiting Experts’ Papers, UNAFEI, Resource Material Series no. 59, October 2002, 475 at 492, available at http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch24.pdf at 4 June 2007.

²⁶¹ Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975 at 982.

²⁶² Louise Shelley, ‘Trafficking in Women: The Business Model Approach’ (2003) 10(1) *The Brown Journal of World Affairs* 119 at 121.

Greece recommended that the instrument be widened to include all victims of trafficking and not just women and children. Shortly after, Austria prepared and presented a draft Convention²⁶³ regarding trafficking and smuggling to the Commission after noticing increasing numbers of smuggled migrants facilitated by transnational organised criminal groups into Austria.²⁶⁴ Similarly, Italy became alarmed by the sinking of a ship carrying illegal immigrants off its coast and undertook an initiative at the International Maritime Organisation to provide directives regarding the treatment of trafficked people at sea. Italy then joined forces with Austria and jointly presented to the Commission²⁶⁵ a draft protocol to deal with trafficking at sea, to be attached to the convention drafted by Austria.²⁶⁶

The Commission recommended to the General Assembly that an open ended ad hoc committee be established for the purposes of elaborating a convention against international organised crime and of discussing the elaboration of international instruments, as necessary, with reference to the trafficking of women and children, the illegal transportation of migrants and the eradication of illicit fire arm manufacture and trafficking.²⁶⁷ The intention in structuring the instruments as a parent Convention and

²⁶³ Letter dated 16 September 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General, GA, 52nd sess, UN Doc A/52/357 (1997).

²⁶⁴ Vlassis, Dimitri, 'The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process', 119th International Training Course Visiting Experts' Papers, UNAFEI, Resource Material Series no. 59, October 2002, 475, 492, available at http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch24.pdf at 4 June 2007.

²⁶⁵ Proposal submitted by Austria and Italy, *Draft Elements of an International Legal Instrument against illegal trafficking and transport of Migrants*, UN GAOR, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 1st sess, UN Doc A/AC.254/4/Add.1 (1998)

²⁶⁶ *Draft United Nations Convention against Transnational Organized Crime*, UN GAOR, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 1st sess, UN Doc A/AC.254/4 (1998). See also Vlassis, Dimitri, 'The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process', 119th International Training Course Visiting Experts' Papers, UNAFEI, Resource Material Series no. 59, October 2002, 475 at 492, available at http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch24.pdf at 4 June 2007.

²⁶⁷ Report of the meeting of the inter-sessional open-ended intergovernmental group of experts on the elaboration of a preliminary draft of a possible comprehensive international convention against organized transnational crime, *International Cooperation in Combating Transnational Crime: Implementation of the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime: Question of the Elaboration of an International Convention against Organized Transnational Crime, and other Possible International Instruments*, UN ESCOR, Commission on Crime Prevention and Criminal Justice, 7th sess, UN Doc E/CN.15/1998/5 (1998); see also Vlassis, Dimitri, 'The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International

subordinate²⁶⁸ Protocols was to allow for maximum flexibility and therefore greater consensus²⁶⁹ allowing states the freedom to choose which instruments to ratify.²⁷⁰

The drafting of the Protocol established a forum whereby governments could agree on a universal minimum standard definition for the term 'trafficking in persons'. Such a consensus was required in order for states to be able to form a standard international basis for domestic criminal offences that were at the same time sufficiently similar to other domestic criminal offences to support international cooperation. By agreeing on a definition of trafficking, the consensus could lead the way for international standardisation for investigation, prosecution, support and assistance for victims and broader international efforts in the fight against transnational organised crime.²⁷¹

The ad hoc committee was officially established in December 1998 and held its first session in Vienna in January 1999.²⁷² In order to facilitate the work of the committee the chairman, Luigi Lauriola of Italy invited interested countries to form an informal group which was referred to as 'Friends of the Chair'. This group met in July 1999 to discuss issues surrounding the Convention and to set a timetable to ensure work was completed by the end of 2000, a little over a year after, the first discussions began.²⁷³ The text of the Convention was finalised in the tenth session in July 2000 and the texts of the *Trafficking Protocol* and *Smuggling Protocol* were completed at the eleventh session in October 2000. The Convention provides for general provisions relevant to each of the

Convention and the Negotiation Process', 119th International Training Course Visiting Experts' Papers, UNAFEI, Resource Material Series no. 59, October 2002, 475 at 493 available at http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch24.pdf at 4 June 2007.

²⁶⁸ But not subservient to the Convention, see Paul Williams, 'Discord within Consensus: the UN Trafficking instruments' (Paper presented at People Trafficking, Human Security and Development Symposium, Canberra, Australia, 1 September 2004), 2.

²⁶⁹ United Nations Office for Drug and Crime Prevention, *Summary of the United Nations Protocol Against Transnational Organized Crime and Protocols Thereto*, p. 2. <http://www.unodc.org/palermo/convsumm.htm> at 4 June 2007

²⁷⁰ However, any states wishing to sign the *Protocols* can only do so after first signing the parent *Convention*.

²⁷¹ Legislative Guide for the *Trafficking Protocol* paragraph 35.

²⁷² Hence this is also referred to as the 'Vienna Process'.

²⁷³ *Informal Group of the "Friends of the Chair" of the Ad Hoc Committee on the Elaboration of the Convention against Transnational Organized Crime*, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime, 1st sess, UN Doc A/AC.254/2 (1998)

Protocols, whereas the Protocols contain more specific provisions, supplementing and adapting the Convention rules for application to specific problems.²⁷⁴

The *Convention against Transnational Organised Crime* was adopted in November 2000 and in accordance with article 38, entered into force on 29 September 2003. As at 10 July 2008, there were 147 signatories and 144 Parties to the *Organised Crime Convention*.²⁷⁵ The *Organised Crime Convention* is actually supplemented by three Protocols, however relevant to this thesis are the first two; the *Trafficking Protocol* and *Smuggling Protocol*.²⁷⁶ As at 10 July 2008, The *Trafficking Protocol* had 117 signatories and 118 parties²⁷⁷ and the *Smuggling Protocol* had 112 signatories and 112 Parties²⁷⁸. The purpose of the *Organised Crime Convention* is to promote cooperation to prevent and combat transnational crime more effectively.²⁷⁹ International cooperation is crucial because international trafficking and smuggling operations involve a number of state actors, including source, transit and destination countries.²⁸⁰

4.1.1 Criminalisation and the effectiveness of the relevant articles

²⁷⁴ United Nations Office for Drug and Crime Prevention, *Summary of the United Nations Protocol Against Transnational Organized Crime and Protocols Thereto*, 4, <http://www.unodc.org/palermo/convensumm.htm> at 4 June 2007.

²⁷⁵ United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist.html> at 10 July 2008. Australia ratified the Convention and the Smuggling Protocol on 27 May 2004 and ratified the Trafficking Protocol on 15 September 2005.

²⁷⁶ The third Protocol is the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime* adopted 31 May 2001, UN Doc A/55/255 (entered into force 3 July 2005).

²⁷⁷ United Nations Office on Drugs and Crime, *Protocol to Suppress and Punish trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against transnational Organized Crime* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> at 10 July 2008.

²⁷⁸ United Nations Office on Drugs and Crime, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html> at 10 July 2008.

²⁷⁹ *Organised Crime Convention*, art. 1.

²⁸⁰ Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 179.

The obligation to criminalise trafficking is directly linked to the definition of trafficking under the *Trafficking Protocol*. Importantly, the criminalisation article in the *Trafficking Protocol* contains no optional elements²⁸¹ as can be found in the protection and assistance of victims section. The criminalisation of offenders is governed by article 5 of the *Trafficking Protocol* which states that state parties *must* adopt legislative and other measures as may be necessary to establish as a criminal offence, conduct as set forth in article 3 of the *Trafficking Protocol*, when those offences are committed intentionally. It must be noted, that whilst the wording is ‘and other measures’, those other measures must be founded in law, criminalisation is not permitted without legislation. The requirement of ‘intention’ means that negligence will be insufficient to constitute an offence under the *Trafficking Protocol*.²⁸² Just as the criminalisation in the Protocol is intimately related to the definition of trafficking, assistance mechanisms for victims of trafficking are closely linked with the victim’s role in assisting the prosecution. Therefore the requirement of intent becomes important to the victim in the sense that if the perpetrator does not act with intent, then they cannot be charged with trafficking and hence no protection would follow for the victim (because there is no prosecution).

While generally, the negotiators of the Protocol were of the view that attempts to commit the basic trafficking offence should be criminalised, it was also understood that such a requirement may not be able to be applied to the criminal justice systems of certain governments where the actual offence must be committed in order to establish that the offence meets the criminal legislation.²⁸³

The effect of article 5 is that internal trafficking or trafficking that is committed by two persons, such as a husband and wife team are not covered under the Protocol. This is so even though all trafficking is a serious offence and similarly damaging to the victims. Therefore it is appropriate that states go beyond the Protocol and legislate to criminalise all forms of trafficking, even those that are committed wholly within one state and also

²⁸¹ Legislative Guide for the *Trafficking Protocol* paragraph 46.

²⁸² Although ‘recklessness’ may be sufficient in some national legislation. See for example the later discussion on Australian law.

²⁸³ Legislative Guide for the *Trafficking Protocol* paragraphs 41 – 42.

to criminalise small time traffickers who may be operating alone or with just one other person.

Despite the written purpose of the *Trafficking Protocol*, the focus remains on crime control and deterrence of unlawful migration.²⁸⁴ Its focus on retributive justice does little to prevent further trafficking and little to assist the victim. Nevertheless, it is important to note that the *Trafficking Protocol* creates obligations on states to treat people who have been trafficked as victims.

Humanitarian provisions in the *Trafficking Protocol* exist in order to enhance the effectiveness of enforcement provisions.²⁸⁵ Indeed, traffickers often receive less punishment than their victims²⁸⁶ who are usually deported for illegal entry into the state. The purpose of the *Trafficking Protocol* was to redress this issue and prosecute traffickers with the gravity that their crime deserves. So far, the law has been inadequate to address the types of activities that traffickers have been engaged in.²⁸⁷

On the other hand, many source countries lack both the legal framework and political capability to create, adopt and enforce adequate trafficking laws, largely due to the large organised crime presence in those countries.²⁸⁸ Seen from this light, a focus on trafficking as an arm of organised crime is appropriate. Nevertheless, a multi-disciplinary approach is preferred to one that in reality only adopts enforcement provisions. Further, the protection of victims of trafficking could have greatly enhanced the criminalisation parts of the agreement.

²⁸⁴ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1151.

²⁸⁵ Ivy C Lee and Mie Lewis, 'Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts', (2003) 10 *U.C. Davis Journal of International Law and Policy* 169, 187.

²⁸⁶ See for example, Tiffany St. Claire King, 'The Modern Slave Trade' (2002) 8 *University of California Davis Journal of International Law and Policy* 293.

²⁸⁷ Kara C Ryf, 'The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000', (2002) 34 *Caw Western Reserve Journal of International Law* 45,52.

²⁸⁸ Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369, 393.

4.2 Section II of the *Trafficking Protocol*: Protection of Victims

Provisions relating to the assistance and protection of victims enshrined in section II of the *Trafficking Protocol* are weak. Section II should have enshrined a victim oriented approach that would have enhanced the criminalisation articles. However, the language of section II has been criticised because it merely calls on states to ‘consider’ providing assistance and protection ‘in appropriate cases’ and ‘to the extent possible under ... domestic law’.²⁸⁹ In other words, states are left to provide assistance and protection only to the extent that they decide, and such requirements are not mandatory. Further, protection mechanisms in the Protocol are mainly activated via the victim’s assistance in proceedings against the trafficker.

The *Trafficking Protocol* does not explicitly state that protection to victims is only available via the victim’s assistance to the prosecution of the trafficker. However, the first sub paragraph on the protection of victims of trafficking sets the context within which protection mechanisms for the trafficking victim are activated:

*‘1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.’*²⁹⁰

So from the very first provision on protection, the victim is presented as a witness to legal proceedings. There are provisions that provide protection to victims that are not contingent upon the victim’s assistance to prosecution proceedings such as article 6.3 which provides that state parties shall consider implementing measures to provide for the physical, psychological and social recovery of victims, with particular attention to appropriate housing, medical assistance and other assistance but again, such measures are not mandatory. Further, the practical application to the protection mechanisms is

²⁸⁹ See in particular *Trafficking Protocol* articles 6 and 7.

²⁹⁰ *Trafficking Protocol* article 6.1.

that national legislation is usually limited to providing assistance to victims in cases where the victim has provided assistance to the state.²⁹¹

Certainly the result of the *Trafficking Protocol* has not been to increase rights given to trafficking victims found to be irregular migrants. Victims remain illegal migrants and deportation seems to be the default response of many governments.²⁹² Indeed, deportation is a legitimate fear of trafficking victims.

During the drafting process, developing nations,²⁹³ and therefore countries of origin, sought higher protection mechanisms for trafficked victims whereas developed countries wanted to restrict the legal status of trafficking victims arguing that an enhancement of the rights of trafficked people would encourage trafficking and illegal migration.²⁹⁴ ‘Not only is there little protection for victims, but there is very little role for them to play – other than as subjects of stories that evoke shock and pity – in asserting or protecting their rights and interests’.²⁹⁵

Victims of trafficking are likely to be re-trafficked if they return to their place of origin and in regards to victims of sexual exploitation, it is often impossible for the victim to return to their place of origin for fear of condemnation and ridicule.²⁹⁶ Under the *Trafficking Protocol* however, Governments need do nothing more than consider allowing victims to remain in their territories temporarily or permanently. Providing

²⁹¹ Note however that this is not the case everywhere. For example, art 18 of the Alien Law in Italy provides a social protection residence permit to victims of trafficking regardless of their assistance to authorities. See Jennifer Burn, Sam Blay, and Frances Simmon, ‘Combating Human Trafficking: Australia’s Responses to Modern Day Slavery’, (2005) 79 *Australian Law Journal* 1, 9.

²⁹² Tiffany St. Claire King, ‘The Modern Slave Trade’ (2002) 8 *University of California Davis Journal of International Law and Policy* 293, 314.

²⁹³ Although the later discussion on how trafficking follows migration routes and that migration does not always flow from least advantaged to most advantaged societies.

²⁹⁴ Elizabeth F Defeis, ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach’, (2004) 10 *ILSA Journal of International & Comparative Law* 485, 489.

²⁹⁵ Elizabeth M Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking’, (2004) 40 *Stanford Journal of International Law* 1, 21.

²⁹⁶ Kamal Kempadoo, ‘Introduction – From Moral Panic to Global Justice: Changing Perspectives on Trafficking’ in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), xiv.

temporary residence permits only to victims who agree to testify against their traffickers appears abusive and discriminatory.²⁹⁷

In order for victims to receive protection from the state, many states require that the victim assist the state with the prosecution of the trafficker.²⁹⁸ To the extent that the victims are also witnesses, they are also covered by article 24 of the *Organised Crime Convention*. Generally, the provisions of the Protocol setting out procedural requirements and basic safeguards are mandatory, while requirements to provide assistance and support for victims are discretionary. This is explained in the paragraph 55 of the Legislative Guide for the *Trafficking Protocol* as a reflection of the concerns about the costs and difficulties in delivering social assistance in many developing countries that have problems in delivering such assistance to the general population, let alone to trafficking victims.

However, assistance to the victim is more complicated than one may expect. For a victim to appear as a witness in a trial against their trafficker is very difficult. The victim will be cross examined and probed in front of their tormentor. Victims are likely to feel a great deal of anticipation, fear and concern. Victims providing evidence will have their account questioned and inconsistencies exposed. As there is likely to have been a degree of consent to some part of the trafficking process, this consent may lead to victims having inconsistent stories.

The experiences of victims of trafficking are analogous to those of torture victims and witnesses at the International Criminal Tribunal for the Former Yugoslavia (ICTY).²⁹⁹ The experiences of the ICTY have shown that witnesses throughout the pre-trial process were influenced by the stability and safety of the witnesses living conditions, the amount of time that had passed between the war and the trial, fear of reprisals affecting

²⁹⁷ Mike Dottridge, Anti-Slavery International, United Kingdom, OSCE Office for Democratic Institutions and Human Rights, 'Conference Report' (Europe Conference Against Trafficking in Persons Berlin 15 – 16 October 2001), 32.

²⁹⁸ For example in order to apply for the T visa in the United States, the trafficking victim must assist the police in the proceedings against the trafficker.

²⁹⁹ Kevin Bales, Laura E Fletcher, Eric Sotver et al, Free the Slaves, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 97.

their children and whether the witness lived in the same town as their tormentor.³⁰⁰ Similar concerns are valid for victims of trafficking as they must be free of fear in order to approach the proceedings openly. If the victim fears reprisals, especially to their children, they are far less likely to assist the prosecution. Additionally, if they are held in detention or substandard accommodation in order to assist the police and yet the accused is free to continue in their comfortable housing, then the victim is likely to feel further victimised. Trafficking victims are also likely to be frightened to appear in front of their traffickers in a court room.

The role of corruption is also important. Victims of trafficking are often unwilling to assist police with trafficking prosecutions because of their experience with corrupt officials in the country of origin. There is a high incidence of law officials taking an active part in the trafficking of the victim and this situation makes trafficking victims distrust law enforcement agencies.³⁰¹

Many view the push for victims of trafficking to testify against their traffickers as being especially onerous and the situation is complicated by a number of factors. Prosecutors face many obstacles in the prosecution of traffickers.

Trafficking victims may be illegal immigrants or in breach of labour conditions.³⁰² Accordingly, many are reluctant to participate in criminal proceedings, fearing that they themselves will face some punishment. Victims also fear that they or their families will be harmed by the trafficker for their participation in the proceedings.³⁰³ Also, people that have already been trafficked often encourage other relatives and friends at the departure country to come to the destination country. The trafficked people therefore have a vested interest in keeping out of the way of law enforcement agencies. Fear of deportation and violence against them and their family and friends keep trafficked

³⁰⁰ Ibid, 96 citing Eric Stover, 'The Witness: War Crimes and the Promise of Justice in the Hague', 62 (2003).

³⁰¹ Ivy C Lee and Mie Lewis, 'Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts', (2003) 10 *U.C. Davis Journal of International Law and Policy* 169, 183.

³⁰² Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers' (2002) 14(2 & 3) *International Journal of Refugee Law* 263, 264.

³⁰³ Ibid, 264 – 265.

people quiet and for many reasons, victims are kept in a debt-bondage relationship with their trafficker.³⁰⁴

Apart from criticisms that the *Trafficking Protocol* only gives assistance to witnesses, the overall focus of the *Trafficking Protocol* and its perspective of viewing trafficking as a problem of ‘migration, law and order, and transnational organised crime’³⁰⁵ rather than as a crime against an individual highlights their concerns of border security over victim protection. The purported aims of the *Trafficking Protocol*, that is, the protection of victims, are easily questioned. Indeed, current efforts centred on criminalisation and border control have most likely not reduced trafficking³⁰⁶ but have merely pushed its practice underground.³⁰⁷

While it is important to note that there is no obligation on governments to legislate regarding the legal status of victims of trafficking, countries that have taken measures to grant victims temporary or permanent residence have had a positive effect on victims willing to assist authorities in relation to the trafficking.³⁰⁸ On the other hand, providing assistance to victims of trafficking based on their cooperation with authorities creates the perception that victims are foremost instruments of law enforcement.³⁰⁹

4.2.1 Protecting the privacy and identity of victims

³⁰⁴ Debt bondage also arises when people who are unable to take out loans at a financial institution come into contact with organised crime groups who lend them the money they need. The money is lent at exorbitant interest rates. Trafficking networks then grow up alongside the lending networks and the people are left with no choice but to pay off the debt by agreeing to work illegally abroad. See Gabriela Rodriguez Pizarro *Report of the Special Rapporteur on Specific Groups and Individuals ‘Migrant Workers’* Un Doc, [para 34] E/CN.4/2002/94 (2002).

³⁰⁵ Ratna Kapur, “Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference” in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 31.

³⁰⁶ See below on how there are no reliable statistics available to indicate whether trafficking has been reduced and therefore no real way of knowing whether the situation has been improved.

³⁰⁷ Ratna Kapur, “Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference” in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 31.

³⁰⁸ Legislative Guide for the *Trafficking Protocol*, paragraph 68.

³⁰⁹ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, ‘Hidden Slaves: Forced Labor in the United States’, (2005) 23 *Berkeley Journal of International Law* 47, 49.

State parties are obligated to protect the privacy and identity of victims in trafficking, in appropriate cases and to the extent possible under their domestic law.³¹⁰ The limitation of the requirement to maintain confidentiality of the proceedings, has been criticised on the basis that the right to privacy should be guaranteed considering that the right to privacy is enshrined in international law, and that the continued safety of the trafficking victim should be a primary consideration.³¹¹

The reason for this provision is that victims of trafficking or their families may be threatened by their traffickers, especially if the victim assists police in prosecuting the traffickers. However, the language protecting victims is weak, calling only for governments to protect the victim's identity and privacy in 'appropriate cases' and to the extent possible. Problems arise because if the victim does not feel confident that their identity will be protected, they may be less likely to assist police in the prosecution and in turn may be afforded less assistance than they should be. Governments must also ensure that, in appropriate cases, victims receive information on relevant court proceedings and have an opportunity to have their views presented and considered.³¹² This requirement is consistent with a victim oriented approach giving the victim dignity in the proceedings as the person who has actually suffered the harm. Unfortunately, the requirement is not mandatory and therefore difficult to ensure. Nothing is more frustrating than providing support measures for victims and listing them as 'optional'.

4.2.2 Optional support measures

Article 6.3, of the *Trafficking Protocol* contains an *optional* list of support measures intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation. That is, state parties are encouraged but not obligated to provide victims of trafficking with assistance with their physical, psychological and social recovery, including where appropriate: housing; counselling and information, particularly as regards their legal rights, in a language that the victim will understand;

³¹⁰ *Trafficking Protocol* article 6.1.

³¹¹ *Informal Note by the United Nations High Commissioner for Human Rights, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime*, 4th sess, [4] UN Doc A/AC.254/16 (1999).

³¹² *Trafficking Protocol* article 6.2.

medical, psychological and material assistance; and employment, educational and training opportunities.³¹³

Article 25.1 of the *Organised Crime Convention*, provides that each state party must take appropriate measures within its means to provide assistance and protection to victims of offences covered by the *Organised Crime Convention*, in particular in cases of threat or retaliation. This seems to be stronger language than that used in the *Trafficking Protocol* because it implies that where a government has the resources to act, then it must do so.³¹⁴ While there appears to be a discrepancy, *Organised Crime Convention* article 25.3 states that the provision repeats sections 6 of the *Trafficking Protocol* and does not add any additional protections.

Limiting assistance to ‘appropriate cases’ creates inherent problems. Once a person has been identified as a trafficking victim, then assistance should not be subject to ‘appropriateness.’³¹⁵ While the wording does not obligate governments, paragraph 62 of the Legislative Guide for the *Trafficking Protocol* encourages Governments to offer the support to trafficking victims not only on the humanitarian level but also on the basis that providing support, shelter and repatriation will increase the likelihood that the victim will provide assistance to the prosecutor. The Legislative Guide goes on to add that addressing social, educational, psychological and other needs of victims as they are discovered will ultimately prove less costly than assisting victims at a later stage, particularly as concerning children who may become re-victimised.

The *travaux prepratoires* indicate that the above assistance is applicable to the receiving state, until the victim has returned to their state of origin. While victims of trafficking are within its territory, state parties are obliged to endeavour to provide for their physical safety.³¹⁶ While this provision is quite weak in its language (state parties need only *endeavour* to provide safety to victims) the provision provides for the safety of all

³¹³ *Trafficking Protocol* article 6.3.

³¹⁴ Jordan, Ann D, Global Rights, *Annotated Guide to the Complete UN Trafficking Protocol* (2002), 24.

³¹⁵ *Informal Note by the United Nations High Commissioner for Human Rights, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime*, 4th sess, [5] UN Doc A/AC.254/16 (1999).

³¹⁶ *Trafficking Protocol* article 6.5.

victims of trafficking, and is not confined to particular victims. Using similar language, the *Trafficking Protocol* requires that governments ensure that their domestic legal system contains measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.³¹⁷

Governments are required to take into account the victim's age, gender and special needs, in particular the special needs of children, which is particularly relevant to instances involving sexual assault.³¹⁸ In addition to the above measures, governments are required to *consider* adopting legislative or other appropriate measures that permit victims of trafficking to remain in its territory, temporarily or permanently, in appropriate cases³¹⁹ giving appropriate consideration to humanitarian and compassionate factors.³²⁰ Ultimately, state parties are in no way obligated to allow victims to remain in the destination country. This does not amount to very much security for victims at all. In practise, some states³²¹ have provided for temporary visas for victims of trafficking who agree to act as witness for the prosecution in trafficking cases, but at the conclusion of the criminal proceedings, these witnesses are often required to return to the originating state.

These optional measures may seem to be within a victim protection framework but in reality add little if any assistance to victims. This approach will not assist either the victim or the prosecution. Ultimately, there is little incentive for trafficking victims to testify against traffickers.³²² The measures do not take into account the difficulties suffered by trafficking victims.

There is little understanding of the isolation suffered by victims of trafficking. Apart from being irregular migrants and in breach of domestic migration laws; victims are

³¹⁷ *Trafficking Protocol* article 6.6.

³¹⁸ *Trafficking Protocol* article 6.4.

³¹⁹ *Trafficking Protocol* article 7.1.

³²⁰ *Trafficking Protocol* article 7.2.

³²¹ See the later chapter on national legislation.

³²² *Informal Note by the United Nations High Commissioner for Human Rights, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime*, 4th sess, [4] UN Doc A/AC.254/16 (1999)

often poor, disenfranchised within their own countries and have little or no language skills in their destination country.³²³ Their situation is further exploited through the denial of medical care, withholding of wages which prevents them from a means to escape, as well as possible imprisonment by their captor and fear of arrest.³²⁴ The United Nations High Commissioner for Human Rights, advised the Ad Hoc Committee to insert a provision into the *Trafficking Protocol* obliging states to ensure the respect for and protection of the rights of illegal migrants.³²⁵ However, this did not eventuate.

One of the reasons that receiving states are reluctant to provide victims of trafficking with mandatory assistance such as residency is the fear that they will stimulate further trafficking. This is a legitimate concern.

4.2.3 Problems associated with giving victims of trafficking residency in the country of destination

Smuggled people are not permitted to remain in the territories of the destination country and despite suggestions by the Inter-Agency Group during the drafting of the instruments; there are no provisions for special protective measures for smuggled children.³²⁶ Nevertheless, there are legitimate concerns regarding the issue of giving residency to victims of trafficking in the country of destination and concerns on both sides of the argument are valid.

While it is important to provide assistance to victims, measures that provide citizenship on the basis of trafficking may perpetuate the problem. A serious concern is that this approach may become an incentive both for trafficking and illegal migration.³²⁷ States must be careful to navigate through the delicate balance of recognising the needs and

³²³ Aiko Joshi, 'The Face of Human Trafficking', (2002) 13 *Hastings Women's Law Journal* 31, 47.

³²⁴ *Ibid.*

³²⁵ *Informal Note by the United Nations High Commissioner for Human Rights, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime*, 4th sess, [2] UN Doc A/AC.254/16 (1999).

³²⁶ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 997.

³²⁷ Elizabeth F Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach', (2004) 10 *ILSA Journal of International & Comparative Law* 485, 489.

trauma of trafficking victims and fuelling pull factors.³²⁸ 'Enforcement officials thus may approach T visa applicants with a degree of suspicion that might distress victim advocates, but which reflects genuine concerns arising out of irregular migratory patterns'.³²⁹ Most delegations at the negotiation process were concerned that including a right to reside in the country of destination would further encourage illegal migration and trafficking.³³⁰

On the other hand, many human rights writers see such an outcome as being 'remote' and suggest that such an abuse of the law could be overcome by a requirement that the elements of the crime of trafficking be clearly demonstrated.³³¹ Human rights activists believe that practices such as mandatory detention and the perception of victims as illegal migrants leads to xenophobia and the criminalisation of the victim in the eye of the public.³³² Providing residency to trafficking victims independently of their assistance to the state would end the cycle of trafficking and prevent people being re-trafficked when they return to their countries of origin.³³³ Further, there are examples, such as in Italy, where providing visas to victims of trafficking have not 'opened the flood gates' to fraudulent claims.³³⁴ Further, many trafficking victims wish to return home but require some support before repatriation.³³⁵

³²⁸ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1156.

³²⁹ *Ibid.*, 1157, referring to US legislation.

³³⁰ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 992.

³³¹ Susan Tiefenbaum, 'The Saga of Susannah a US Remedy for Sex Trafficking and Violence Protection Act of 2000', (2002) 1 *Utah Law Review*, 107 at 165.

³³² O'Neill Richard, Amy, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime', (DCI Exceptional Intelligence Analyst Program An Intelligence Monograph, November 1999). 39.

³³³ Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260, 268.

³³⁴ Jennifer Burn, Sam Blay, and Frances Simmon, 'Combating Human Trafficking: Australia's Responses to Modern Day Slavery', (2005) 79 *Australian Law Journal* 1, 9.

³³⁵ *Ibid.*

There are many legitimate concerns for trafficking victims being returned home. The Iranians face persecution on return to Iran after claiming asylum in another country³³⁶ while many others, especially women trafficked for prostitution face humiliation.³³⁷ If the individual fears for their life, they will probably be willing to take a risk and be re-trafficked than remain where their original trafficker could find them.³³⁸ Ultimately, deporting victims to their place of origin may lead to re-trafficking.³³⁹

While both sides of the argument are valid, whatever approach is taken must be based on human rights concerns for the victim and not from a concern over state sovereignty. Further research must be conducted in the area to see which outcome would be the most appropriate for the victim.

It is the writer's view that it is doubtful that providing asylum would stimulate more trafficking. People turn to traffickers as a means of migration because they are unable to navigate through migration criteria and procedures. It seems therefore that a loophole which provided an additional avenue for the person to claim asylum would not be easily accessible to a person who fell victim to trafficking in the first place. Further, it seems unlikely that the trafficker would be forthcoming to the potential victim by telling them that trafficking will increase their chance of asylum at the time of recruiting them. The ultimate aim of the trafficker is to exploit the person on arrival at the destination. It is not the aim of the trafficker to provide asylum or residency to the victim. On balance therefore, it is preferable that states legislate to provide residency to victims of trafficking after carefully assessing that the person is a victim of exploitation. In any event, repatriation of the victim is not always as clear as it may seem.

³³⁶ Khalid Koser 'Reconciling control and compassion? Human smuggling and the right to asylum', in Edward Newman and Joanne van Selms (ed), *Refugees and Forced Displacement* (2003) 181, 191.

³³⁷ Suzanne Williams and Rachel Masika, "Editorial" in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 6.

³³⁸ Khalid Koser 'Reconciling control and compassion? Human smuggling and the right to asylum', in Edward Newman and Joanne van Selms (ed), *Refugees and Forced Displacement* (2003) 181, 191.

³³⁹ See generally, Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers' (2002) 14(2 & 3) *International Journal of Refugee Law* 263, 265; OSCE Office for Democratic Institutions and Human Rights, 'Conference Report' (Europe Conference Against Trafficking in Persons Berlin 15 – 16 October 2001).

For example, under article 8 of the *Trafficking Protocol*, governments must verify without unreasonable delay whether a trafficking victim is a national of their country or has the right of permanent residence and issue the necessary travel documents for re-entry.³⁴⁰ The state party to which the victim of trafficking was a national or in which they had the right of permanent residence at the time of entry into the receiving state, must facilitate and accept with due regard for the safety of that person, without delay. In effect, this provision imposes a positive obligation on the original state to ensure that the victim is protected on their return or that they do not suffer retaliation.³⁴¹ There is also an obligation on the original state to issue the victim of trafficking with travel documents or other authorisation as may be necessary to allow for the victim to return to that Country.³⁴² This is an important provision because it requires countries of origin to accept the return of the victim of trafficking. However, this does not alleviate the problem of stateless victims of trafficking. For example, people born in countries without proper documentation may be unable to prove to their country of birth that they were a resident prior to the trafficking incident.³⁴³

Such an example can be found in Australia.³⁴⁴ Peter Qasim arrived in Australia in 1998 and applied for asylum on the basis that he had been tortured and that his father had been killed. The Minister for Immigration assessed his claim and found that Qasim did not pose any danger to Australia but refused Qasim's application. Qasim was detained at Baxter Detention Centre on 9 September 1998 and eventually volunteered to return to his homeland in Kashmir, India. The Indian government argued that Qasim had not adequately proved that he was from India and refused his claim to return. Qasim was left in detention in Australia as a stateless person for 7 years.

³⁴⁰ *Trafficking Protocol* articles 8.3 and 8.4.

³⁴¹ This is especially important in incidences of the return of women and children trafficked for purposes of sexual exploitation., see Ann D Jordan, Global Rights, *Annotated Guide to the Complete UN Trafficking Protocol* (2002), 26.

³⁴² *Trafficking Protocol* article 8.4.

³⁴³ Ann D Jordan, Global Rights, *Annotated Guide to the Complete UN Trafficking Protocol* (2002), 26.

³⁴⁴ This example refers to an asylum claim not to trafficking but illustrates the problems associated with statelessness.

Qasim's case highlights the potential danger for trafficking victims who may be unable to prove nationality. Without proof of nationality, there is a chance of being refused re-entry to one's homeland. Again, such situations should be viewed from a human rights perspective and the violations suffered by victims be acknowledged so that situations such as Qasim's can be avoided. Qasim was in detention from the ages of 24 to 31 and was released having suffered great psychiatric damage. Trafficking victims should be protected from suffering such an outcome.³⁴⁵ However, there are no provisions that would ensure that such a situation could not occur again.

Certainly the current protection provisions contained in the *Trafficking Protocol* are wholly inadequate in protecting trafficking victims. Linking protection and support to the victim's cooperation with authorities is wrong. This process does not provide for the support of the victim and does little to help prosecution because there is little understanding of the difficulties faced by victims. The victim has already suffered and obliging them to act as witness against their trafficker could put them in ongoing risk, perhaps even life-threatening.³⁴⁶ In any event, a victim oriented approach that centred on the protection and assistance of the victim could lead to the victim's voluntary assistance to the prosecution. This would be beneficial to both the victim and it would have the added benefit of assisting the prosecution.

4.3 Section III of the *Trafficking Protocol*: Prevention and Cooperation

Within section III of the *Trafficking Protocol*, prevention of trafficking and cooperation measures are dealt with via push and pull factors and border control. That is, the Protocol as a whole attempts to provide a blended approach to the prevention of trafficking that is intended to be concerned with both humanitarian and sovereignty issues.

4.3.1 Article 9: Prevention of trafficking in persons – push and pull factors

³⁴⁵ See also the case of Phuongtong Simaplee discussed in the previous chapter. Simaplee was a trafficking victim discovered in an Australian brothel who was taken to detention on the basis that she was an illegal migrant and who died under tragic circumstances 3 days later.

³⁴⁶ Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers' (2002) 14(2 & 3) *International Journal of Refugee Law* 263, 268

The prevention of trafficking measures encapsulated in article 9 of the *Trafficking Protocol*, do not require legislation as they are non-legal measures. While the obligations are mandatory, the Protocol is non-specific and state parties are required to take some action on each point.³⁴⁷ How much action is required to be taken is left to the individual government.

Some push factors that lead people to fall into the hands of traffickers are addressed in article 9.4 requiring governments to take or strengthen measures including bilateral or multilateral cooperation to alleviate poverty, underdevelopment and lack of opportunity. Pull factors that encourage trafficking are addressed in article 9.5 of the *Trafficking Protocol*. Similarly to the previous article, article 9.5 requires governments through legislative or other measures, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, leading to trafficking.

This issue of push and pull factors is relevant from migration and labour perspectives and as such are dealt with in a chapter dedicated to those issues. However, while the Protocol makes provisions regarding push and pull factors, it is unlikely that governments will act on them as addressing push factors is a lengthy exercise in the provision of services for citizens and pull factors requires a reassessment of migration and labour laws. While both are necessary, it is unlikely that states will make a real effort to address these issues, and in any event, these are not mandatory provisions.

4.3.2 Information exchange, border measures and final provisions

Under the *Trafficking Protocol*, governments are required to establish comprehensive policies, programmes and other measure to prevent and combat trafficking in persons and to protect victims of trafficking, especially women and children, from re-victimisation.³⁴⁸ In order to assist in the prevention of trafficking, state parties are to

³⁴⁷ Legislative Guide for the *Trafficking Protocol* paragraph 74.

³⁴⁸ *Trafficking Protocol* article 9.

endeavour to undertake measures such as research, information and mass media campaigns, and social and economic initiatives.³⁴⁹

Requirements of educating the public can also be found in the earlier international agreements, see for example article 7 of the *International Convention for the Suppression of the Traffic in Women and Children 1921* that requires state parties to arrange for the exhibition of notices warning women and children of the danger of traffic and indicating places where they can obtain accommodation and assistance, in railway stations and ports.

However, making people aware of the dangers of trafficking without also providing them with alternative ‘livelihood options’ has been criticised. Despite the numerous stories of people who have suffered at the hands of traffickers, the majority of migration stories illustrate that migrants achieve a better standard of living.³⁵⁰ People may therefore believe that stories of trafficking are exaggerated and that trafficking poses a small overall risk. This does not mean that awareness campaigns are not helpful but that they should be accompanied by honest information and genuine choices.³⁵¹

State parties are required, as *appropriate*, to cooperate with one another, in accordance with their domestic law to exchange information about persons crossing borders. Specifically, to ascertain: whether persons crossing borders do so with or without travel documents, or whether they are victims or traffickers;³⁵² the types of travel documents used for the purposes of trafficking;³⁵³ the means and methods used by traffickers including recruitment and transportation of victims, routes and links between and among individuals and groups engaged in trafficking and possible measures for

³⁴⁹ *Trafficking Protocol* article 9.2.

³⁵⁰ Phil Marshall and Susu Thatun, “Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region”, in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 48.

³⁵¹ *Ibid*, 49.

³⁵² *Trafficking Protocol* article 10.1(a).

³⁵³ *Trafficking Protocol* article 10.1(b).

detecting them.³⁵⁴ This final measure has the potential of being misused by governments, who under the guise of protecting young women, may restrict their ability to travel freely.³⁵⁵

4.3.3 Article 11: Border measures

Clearly, border control is at the heart of the *Trafficking Protocol*.³⁵⁶ One of the characteristics of the modern nation-states has been the management of migration in terms of cultural and political diversity.³⁵⁷ Border measures are governed by article 11 of the *Trafficking Protocol* that provides that State Parties are to strengthen, to the extent possible, border controls, without prejudicing international commitments in relation to the free movement of people.³⁵⁸ State Parties are directed to legislate in order to prevent as much as possible, the means of transport operated by commercial carriers from being used for people trafficking.³⁵⁹ Taking into consideration the transnational nature of the crime of trafficking, state parties are obliged to consider strengthening cooperation among border control agencies.³⁶⁰ However, evidence indicates that tightening border controls leads to an increase in trafficking, not a reduction.³⁶¹ For example, the tougher controls on the US – Mexico border have diverted migrants to

³⁵⁴ *Trafficking Protocol* article 10.1(c).

³⁵⁵ Ann D Jordan, Global Rights, *Annotated Guide to the Complete UN Trafficking Protocol* (2002), 31, to be discussed further below.

³⁵⁶ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 994.

³⁵⁷ Aninia Nadig and John Morrison, 'Human Smuggling and Refugee Protection in the European Union: Myths and Realities', in Joanne van Selm et al (ed) *The Refugee Convention at fifty: a view from forced migration studies* (2003) 161, 162

³⁵⁸ *Trafficking Protocol* article 11.1.

³⁵⁹ *Trafficking Protocol* article 11.2.

³⁶⁰ *Trafficking Protocol* article 11.6.

³⁶¹ Phil Marshall and Susu Thatun, "Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region", in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 50.

more dangerous routes, with a corresponding increase in organised crime and an increase in deaths.³⁶²

While there is an obligation for commercial carriers to ensure that passengers on their vessels are in possession of travel documents, there is no ongoing obligation that those commercial carriers then report back to the state just what those documents may have been.³⁶³ Where commercial carriers violate the previous requirement, state parties must provide for sanctions³⁶⁴ however the nature of those sanctions is not specified in the Protocol.

‘Tougher border controls, rather than encouraging migrants to remain in the country of origin, tend to encourage migrants to remain in the country of destination. Once the border crossing has been undertaken, it is often too risky and / or too expensive to make a visit home.’³⁶⁵ In any event, even though appearing rather late in the *Trafficking Protocol* under article 11, border measures and the concern with illegal migration are at the heart of the *Trafficking Protocol*.

4.3.4 Article 14: Saving Clause

During the negotiation of both Protocols, the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees argued for the inclusion of specific clauses safeguarding the rights of illegal entrants to a state. That is, they argued that illegal entry or presence in a state should not adversely affect the person’s claim for asylum and that smuggled and trafficked people should be given full opportunity to make a claim for asylum, including the provision of adequate information.³⁶⁶ While there was resistance to the inclusion of such explicit provisions, a compromise was reached.

³⁶² Ibid, 51.

³⁶³ *Trafficking Protocol* article 11.3.

³⁶⁴ *Trafficking Protocol* article 11.4.

³⁶⁵ Phil Marshall and Susu Thatun, “Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region”, in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), p. 51.

³⁶⁶ Anne Gallagher, ‘Trafficking, smuggling and human rights: tricks and treaties’ 12 FMR 25, 27

The *Organised Crime Convention* and Protocols are intended to be read in conjunction with existing international rights, obligations and responsibilities of states and individuals under other international instruments³⁶⁷ are left to rely on the 'Saving Clause'³⁶⁸ contained in each Protocol which provides:

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

Paragraph 39 of the Legislative Guide for the *Trafficking Protocol* gives further examples of international agreements that should also be adhered to: the definition of 'international traffic in minors' as per the *1994 Inter-American Convention on International Traffic in Minors*,³⁶⁹ the definition of trafficking in the *2002 South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*,³⁷⁰ Annex 2 of the Convention

³⁶⁷ *Trafficking Protocol* 14.1.

³⁶⁸ See article 14 of the *Trafficking Protocol* and article 19 of the *Smuggling Protocol*.

³⁶⁹ Article 2(b) defines 'international traffic in minors' to mean 'the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means'. Article 2(c) defines 'unlawful include among others to include 'prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located' and article 2(d) defines 'unlawful means as including 'kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located'. See 1994 Inter-American Convention on International Traffic in Minors, adopted 18 March 1994 (entered into force 15 August 1997)

³⁷⁰ The *SAARC Trafficking Convention* was adopted by the South Asian Association for Regional Cooperation, whose members are Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka, in January, 2002. Article 2 of the *SAARC Trafficking Convention* states that its purpose is to promote cooperation amongst Member States so that they may effectively deal with the various aspects of prevention, interdiction and suppression of trafficking in women and children; the repatriation and rehabilitation of victims of trafficking and in preventing the use of women and children in international prostitution networks, particularly where the countries of the SAARC region are the countries of origin, transit and destination. The *SAARC Trafficking Convention* does not include trafficking for purposes other than prostitution such as slavery like purposes, debt bondage, child labour etc. Inexplicably, the member states did not adopt the *Trafficking Protocol* definition, even though the UN agreement preceded the *SAARC Trafficking Convention*.

based on article K.3 of the Treaty on the establishment of a European Police Office (Europol Convention)³⁷¹ and the decision of the Council of the European Union Framework Decision 2002/629/JHA of 19 July 2002 on human trafficking.³⁷²

Time will tell how effective the saving clause is in protecting the rights of smuggled and trafficked people on the balance of the provisions in the Protocols. For example, border protection provisions in the instruments means a tightening of security and patrol, which may lead to a lessening in the number of people that are able to enter the state and claim

It is not prostitution alone that is deemed to fall within the *SAARC Trafficking Convention* but the sexual exploitation or abuse for commercial purposes (see *SAARC Trafficking Convention* art. 1(2)). Trafficking means the moving, selling or buying of women and children for prostitution whether it is within a country or across international borders for consideration with or without the consent of the victim. While consent is not an element of the offence of trafficking, the *SAARC Trafficking Convention* includes women or children that are victimized or forced into prostitution by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means (see *SAARC Trafficking Convention* art. 1(5)).

The offence of trafficking is deemed to be "aggravating" (see *SAARC Trafficking Convention* art. 4) when; there is the involvement of an organised criminal group; the offender is involved in other international organized criminal activities; the offender uses violence or arms; the offender has misused their public office; the victim of trafficking is a child (that is, a person under 18 years of age) the trafficking is committed in a custodial or educational institution or social facility or in the child's immediate vicinity or in other places to which children and students visit for educational, sports, social and cultural activities; and also where the offender has had a previous conviction, particularly for similar offences, whether in a Member State or any other country.

While the term "child" in the convention includes boys as well as girls, the *SAARC Trafficking Convention* does not allow for the offence of trafficking that is not for the purpose of prostitution, and it does not allow for the trafficking of adult men at all, whether they are trafficked for the purpose of sexual exploitation or for any other purpose.

See South Asian Association for Regional Cooperation ("SAARC") Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, opened for signature 5 January 2002 (the '*SAARC Trafficking Convention*')

³⁷¹ According to the annex "traffic in human beings" means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children' see *Convention based on Article K.3d of the Treaty on European Union on the establishment of a European Police Office (Europol Convention)* [1995] OJ C 316

³⁷² Regarding human trafficking as a practice constituting serious violations of fundamental human rights and human dignity, involving ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion the European Union, through its Council framework decision of 19 July 2002, adopted the *Trafficking Protocol* definition of trafficking and required member states to implement the definition in domestic law before 1 August 2004. See *Council framework decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)* [2002] OJ L 203/1, para. 3 and art. 10.

asylum.³⁷³ In reality it will be difficult for a state to adequately and properly assess asylum rights if it limits possible avenues for seeking asylum.

It is submitted that the *Trafficking Protocol* was drafted within an inappropriate forum with little care for the complexities of trafficking. The absence of competent experts in the area led to the drafting of a totally inadequate instrument which pays lip service to other issues by way of a saving clause. The very important push and pull factors in trafficking, while mentioned in the *Trafficking Protocol*, are not backed up by any meaningful provisions. Ultimately, the *Trafficking Protocol* may purport to be in the interest of the victim but is ultimately concerned with border control.

4.4 Concluding Remarks on the *Trafficking Protocol*

Trafficking may be addressed from a variety of angles: as a gender issue; an illegal migration issue; and as a problem of transnational crime, amongst a whole host of other perspectives. The human rights dimension in each of these is obviously varied.³⁷⁴ The *Trafficking Protocol* focuses on crime control while purporting to be concerned with wider issues.

Nevertheless, it is questionable whether the Protocol meets its objectives. The Protocol has three main purposes and each of these three objectives will be examined in turn.

4.4.1 First purpose: “to prevent and combat trafficking in persons ‘paying particular attention to women and children’”

Prevention of trafficking within the Protocol is mainly in the form of the criminalisation of the offence of trafficking. States are given tools with which to combat the transnationality of the crime. This is primarily achieved via a uniform definition of the crime. States are also encouraged to standardise international legislation to eliminate safe havens for offenders. That is, the Protocol seeks to ensure that all states legislate to punish the crime of trafficking taking into account the gravity of the offence. However,

³⁷³ Anne Gallagher, ‘Trafficking, smuggling and human rights: tricks and treaties’ 12 FMR 25, 28.

³⁷⁴ Joan Fitzpatrick, ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking’ (2003) 24 *Michigan Journal of International Law* 1143, 1147.

the Protocol does little to address the root causes that people seek to leave their countries and fall into the hands of traffickers. These are known as ‘pull’ factors in trafficking. The Protocol also does little to examine how it is that receiving states have the market to absorb trafficked people. This is commonly referred to as the ‘pull’ factors. It is doubtful that states will commit to improving home conditions that contribute to push and/or pull factors for the benefit of trafficking victims and it is even unrealistic to expect that such action be taken.

Additionally, while the Protocol makes special mention of women and children as a principle concern; the provisions that actually seek to pay special attention to these two groups are difficult to find. Protective measures in article 6(4) urge that ‘age, gender and special needs of victims’ should be taken into account, but the actual measures are unspecific. Such a purpose should correspond with specific clauses requiring that states make provisions to prevent women and children falling prey to traffickers. This would mainly mean tackling push factors such as gender specific rights for women and pull factors relating to the relevant labour issues for women. Accordingly, the Protocol may state that its purpose is to prevent and combat the trafficking in persons however it is submitted that there is a focus on the criminalisation of the crime and not the prevention of it.

If inadequate provisions for legal migration or asylum are root causes of trafficking, then legal migration or asylum rules should be relaxed. However, the scale to which quotas would have to be amended in order to effect trafficking would be ‘politically unpalatable’.³⁷⁵ The problem is so large and complex that states may rather turn a blind eye and win support for isolated instances of helping victims of trafficking. At the same time markets would be ‘allowed’ to exploit the labour of trafficked and indeed smuggled people, leaving victims to fend for themselves.³⁷⁶

4.4.2 Second purpose: “to protect and assist the victims of such trafficking, with full respect for their human rights”

³⁷⁵ Khalid Koser ‘Reconciling control and compassion? Human smuggling and the right to asylum’, in Edward Newman and Joanne van Selm (ed), *Refugees and Forced Displacement* (2003) 181, 193.

³⁷⁶ Ibid.

It is submitted, that the purpose to protect and assist victims of trafficking is definitely not met within the Protocol. The current view of human trafficking is similar in many ways to the previous perception of the problem with the white slave trade.³⁷⁷ Then, while the aim was apparently the protection of innocent young women, their welfare was peripheral.³⁷⁸ Today, we have a similar result whereby trafficking victims are not given any guarantees of protection.

Humanitarian provisions in the *Trafficking Protocol* exist in order to enhance the effectiveness of enforcement provisions.³⁷⁹ Instances of victims of trafficking who receive relief from deportation (usually on a temporary basis) in order to assist authorities with prosecution is a palliative strategy that does not address the root causes of trafficking.³⁸⁰ Nor does it provide for any real protection. In fact, it even discourages victims from coming forward to authorities.

Traffickers often receive less punishment than their victims³⁸¹ who are usually deported for illegal entry into the state. The purpose of the *Trafficking Protocol* was to redress this issue and prosecute traffickers with the gravity that their crime deserves. So far, the law has been inadequate to address the types of activities that traffickers have been engaged in.³⁸²

Protection mechanisms in the *Trafficking Protocol* are contingent upon the complicity of the trafficking victim, but concerns that the trafficking victim may have about the process are not taken into account. Witnesses are not afforded protection under witness

³⁷⁷ See generally Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23.

³⁷⁸ Ibid, 40.

³⁷⁹ Ivy C Lee and Mie Lewis, 'Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts', (2003) 10 *U.C. Davis Journal of International Law and Policy* 169, 187.

³⁸⁰ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: the Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking', (2003) 24 *Michigan Journal of International Law* 1143, 1148.

³⁸¹ See for example, Tiffany St. Claire King, 'The Modern Slave Trade' (2002) 8 *University of California Davis Journal of International Law and Policy* 293.

³⁸² Kara C Ryf, 'The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000', (2002) 34 *Caw Western Reserve Journal of International Law* 45, 52.

protection programs; are not relocated pending trial and there is generally, no acknowledgment of the danger that they face.³⁸³ Providing support to victims as a mechanism to achieve their assistance in proceedings shows a preference of crime control than victim protection. It is as if the wrong is committed against the state alone and the wrongs committed against the victim are peripheral. This shows a strong criminal theory basis rooted in retributive justice.

The strong emphasis on law enforcement and criminalisation transfers the victim of trafficking from a victim of a serious crime to a witness and informant. The victim may be proved to be guilty of offences such as illegal migration, drug crimes and even perhaps as recruiters of other trafficking victims, making them simultaneously a victim, witness, illegal immigrant and offender.³⁸⁴ This complexity adds to the need for a multi disciplinary approach to trafficking as well as requiring a good understanding of the many perspectives of trafficking.

Definitions and legislation regarding trafficking are centred around the criminalisation of the perpetrator. Depending on the gravity of the offence in question, the law is formulated to provide a suitable punishment. Various state responses to the issue of trafficking have taken the stance of providing for levels of trafficking, ranging from a simple offence of trafficking to aggravated offences of trafficking.³⁸⁵ An offender of an aggravated offence of trafficking is given a heavier sentence. However while the victim may be 'elevated' from being a victim of trafficking to being a victim of an aggravated offence of trafficking, this does not usually translate to any additional protection mechanisms. Few states go on to provide meaningful assistance and protection to those people who it, by implication, views as victims of aggravated offences. The result is that the victims are viewed as illegal entrants into the state. A rights based approach

³⁸³ Martina Vandenberg, 'Complicity, Corruption and Human Rights: Trafficking in Human Beings', (2002) 34 *Case Western Reserve Journal of International Law* 323, 329.

³⁸⁴ Ollus, Natalia 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel', 122nd International Training Course Reports of the Course, 'The Effective Administration of Criminal Justice to Tackle Trafficking in Human Beings and Smuggling of Migrants', UNAFEI, written 15 August 2002, Resource Material Series 62, 16 at 17, [http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland\(1\).pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland(1).pdf) at 4 June 2007

³⁸⁵ See for example Australian and US legislation as will be discussed below.

would view the trafficked person as a 'rights holder' instead of as a mere victim³⁸⁶ and may prevent some of these problems.

4.4.2.1 Restriction of movement under the guise of anti-trafficking policy

In an effort to prevent trafficking, it is possible to further limit human rights. In their attempt to minimise trafficking, some states have responded by enacting stricter migration policies.³⁸⁷ Women in particular are faced with being restricted in their movement despite the *Trafficking Protocol* attempting to safe guard against this outcome.³⁸⁸ In relation to prostitution, anti-trafficking efforts have seen the restriction of the movement of prostitutes and other females in an attempt to protect them from possible trafficking³⁸⁹ as well as increased surveillance and deportation of sex workers.³⁹⁰ This results from a perception of trafficking as a migration and gender issue. That is, such attitudes assume that if borders can be tightened and women are restricted from travel, then trafficking can be reduced or eliminated.³⁹¹

Efforts to curb trafficking resulting in the restriction of the movement of people and in particular, women occurred 100 years ago. After international concerns of the traffic of white women for prostitution at the beginning the 20th century, Illinois congressman, James Robert Mann drafted the *White Slave Traffic Act* (1910) (commonly referred to as the '*Mann Act*'). Through its power to regulate interstate commerce, the 61st Congress passed this legislation on 25 June 1910. The *Mann Act* was intended to 'further regulate interstate commerce and foreign commerce by prohibiting the transportation therein for

³⁸⁶ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking, (2004) 40 *Stanford Journal of International Law* 1, 32.

³⁸⁷ *Informal Note by the United Nations High Commissioner for Human Rights, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime*, 4th sess, [6] UN Doc A/AC.254/16 (1999).

³⁸⁸ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking, (2004) 40 *Stanford Journal of International Law* 1, 21.

³⁸⁹ Melissa Ditmoreen and Marjan Wijers, 'Moving the focus from morality to actual conditions – The negotiations on the UN Protocol on Trafficking in Persons' NEMESIS 2003 nr.4 at <http://www.nswp.org/pdf/NEMESIS.PDF>, 79, 81.

³⁹⁰ Jo Doezema, 'Who gets to Choose? Coercion, Consent and the UN Trafficking Protocol' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 24.

³⁹¹ Ratna Kapur, 'Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 29.

immoral purposes of women and girls, and for other purposes'.³⁹² The *Mann Act* made it an offence to transport, in terms of interstate commerce from any State or Territory or the District of Columbia and in terms of international commerce, included transport from any State, or Territory or the District of Columbia to any foreign country and vice versa; any woman or girl for the purpose of prostitution, debauchery or for any other immoral purpose.

Mann acted in answer to US district attorney Edwin W Sim's claims of a nationwide white slavery ring:

*'The legal evidence thus far collected establishes with complete moral certainty these awful facts: that the white slave traffic is a system operated by a syndicate which has its ramifications from the Atlantic seaboard to the Pacific Ocean, with 'clearinghouses' or 'distribution centers' in nearly all of the larger cities; that in this ghastly traffic the buying price of a young girl is from \$15 up and that the selling price is from \$200 to \$600... This syndicate is a definite organization sending its hunters regularly to scour France, Germany, Hungary, Italy and Canada for victims. The man at the head of this unthinkable enterprise is known among his hunters as 'the Big Chief.'*³⁹³

Despite this and other similar stories from around the world regarding the abduction of innocent young girls for a life of debauchery; evidence was never produced. However, Mann acted quickly to address the issue and the allegations of his friend, the District Attorney and also to ratify the *1904 Agreement* by drafting the White Slave Act, extending the wording to include 'or for any other immoral purpose'. The addition of the element extending the prostitution requirement, coupled with the fact that police were unable to locate victims matching the stories put forth by the District Attorney; led

³⁹² *White Slave Traffic Act* (1910). See also *Knockout, Failing to Defeat Him in the Ring, His Enemies Take to the Courts*, <http://www.pbs.org/unforgivableblackness/knockout/mann.html> at 4 June 2007.

³⁹³ *Knockout, Failing to Defeat Him in the Ring, His Enemies Take to the Courts*, Public Broadcasting Service, <http://www.pbs.org/unforgivableblackness/knockout/mann.html> at 4 June 2007.

prosecutors to begin to use the legislation for other forms of sexual conduct going far beyond what was originally intended and envisaged.³⁹⁴

The Mann Act was not used to protect women but was used as a tool by a criminal justice system 'plagued with endemic racism, classism and sexism'.³⁹⁵ Primarily, the Mann Act was used to persecute prostitutes and black men.³⁹⁶ Fairly quickly, the Mann Act was broadened to capture a range of activities. The Court in *Wilson v United States* (1914)³⁹⁷ upheld that travel across State lines with the intention to commit an immoral act could be criminalised even if the immoral act had not yet occurred. But it was not until *Caminetti v United States* (1917)³⁹⁸ that the Court even further broadened their jurisdiction. In *Caminetti v United States*, the defendant Drew Caminetti, and his friend Maury Diggs, both married, took their mistresses by train from Sacramento to Reno whereupon both men were arrested. The court upheld the conviction against Caminetti even though the women were not prostitutes, were acting voluntarily and the defendants were not deriving any commercial profit. The effect of the law was to criminalise premarital and extramarital sexual relationships. Notably, Chuck Berry, Charlie Chaplain, Jack Johnson, William I Thomas and Frank Lloyd Wright were all prosecuted under the Mann Act.

This result is being echoed today with governments in some countries reacting to calls to protect their female citizens from trafficking by restricting their travel.³⁹⁹ However,

³⁹⁴ *Knockout, Failing to Defeat Him in the Ring, His Enemies Take to the Courts*, Public Broadcasting Service, <http://www.pbs.org/unforgivableblackness/knockout/mann.html> at 4 June 2007.

³⁹⁵ Suzanne H Jackson, 'To Honour and Obey: Trafficking in "Mail-Order Brides"', (2002) 70 *George Washington Law Review* 475, 536.

³⁹⁶ Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23, 30.

³⁹⁷ *Wilson v. United States*, 232 U.S. 563 (1914).

³⁹⁸ *Caminetti v United States*, 242 US 470 (1917).

³⁹⁹ See Martina Vandenberg, 'Complicity, Corruption and Human Rights: Trafficking in Human Beings', (2002) 34 *Case Western Reserve Journal of International Law* 323, 329; Phil Marshall and Susu Thatun, 'Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region', in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 51; Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 994.

contrary to intentions, a result of tightening border control and restricting the travel of women pushes trafficking activities further underground.⁴⁰⁰

4.4.3 Third purpose: “to promote cooperation among states parties in order to meet those objectives”

Cooperation between states is facilitated in order to criminalise trafficking through various articles in Section III of the Protocol. Unfortunately, as illustrated throughout this thesis, the purpose of such cooperation is criminalisation with the prevention of trafficking as a sort of ‘by-product’. Accordingly, the first part of the purpose, that is, the promotion of cooperation among states; is achieved through the Protocol but it is questionable whether the cooperation acts to meet the previous objectives.

4.4.4 General comments on the effectiveness of the *Trafficking Protocol*

The *Trafficking Protocol* is not a human rights treaty, and has been described as an instrument focusing on organised crime.⁴⁰¹ A ‘treaty framework’ is created in order to combat transnational organised crime⁴⁰² and deter unlawful migration. This is so even though there is some weak language suggesting that states provide some relief to victims.⁴⁰³

The *Trafficking Protocol* was developed in Vienna by the UN Crime Commission which is a law enforcement body. The human rights bodies are located in Geneva and New York and the *Trafficking Protocol* itself is primarily a law enforcement instrument⁴⁰⁴ with weak language⁴⁰⁵ in terms of human rights protections and victim

⁴⁰⁰ Ratna Kapur, “Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference” in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), p. 29.

⁴⁰¹ *Informal Note by the United Nations High Commissioner for Human Rights, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime*, 4th sess, [1] UN Doc A/AC.254/16 (1999).

⁴⁰² Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’, (2002) 14 *International Journal of Refugee Law* 561, 581.

⁴⁰³ Joan Fitzpatrick, ‘Trafficking as a Human Rights Violation: the Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking’, (2003) 24 *Michigan Journal of International Law* 1143, 1151.

⁴⁰⁴ Ann D Jordan, *Global Rights, Annotated Guide to the Complete UN Trafficking Protocol* (2002), 2.

assistance. The provisions of the Protocols with their strong emphasis on crime and border control indicate that governments primarily view the phenomenon as illegal entry into a state.⁴⁰⁶ The speed at which the Protocol was agreed is largely due to the little by way of hard obligations on states to offer assistance to trafficking victims.⁴⁰⁷

The true driving force behind the drafting of the *Organised Crime Convention* and the two relevant Protocols is the concern by Member States over sovereignty and security issues surrounding trafficking and smuggling.⁴⁰⁸ Primarily, states are concerned with trafficking and smuggling efforts to circumvent national immigrations restrictions.⁴⁰⁹

Traditionally, instruments addressing human trafficking have focused on crime control and migration and the response has depended on the perception of the victim's innocence.⁴¹⁰ Today's *Organised Crime Convention* and *Trafficking Protocol* still embody a law enforcement perspective.⁴¹¹ The very requirement that state parties first sign the *Organised Crime Convention* emphasises the law enforcement focus. This is not entirely a criticism because the various elements of the crime of trafficking, such as the use or threat of violence and exploitation are of themselves usually punishable in domestic courts anyway. The purpose of the *Organised Crime Convention* is to provide a universal response to the whole crime of trafficking, not just a domestic response to the smaller individual crimes that may not adequately consider the gravity of the offence.

⁴⁰⁵ See below.

⁴⁰⁶ Anne Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties' 12 FMR 25, 28.

⁴⁰⁷ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 979.

⁴⁰⁸ Ibid, 976.

⁴⁰⁹ Ibid.

⁴¹⁰ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: the Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking', (2003) 24 *Michigan Journal of International Law* 1143 at 1144.

⁴¹¹ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking, (2004) 40 *Stanford Journal of International Law* 1, 16.

Human rights groups are critical of the *Trafficking Protocol* viewing it as a 'lost opportunity to protect the rights of victims of trafficking'⁴¹². Governments are not required to provide any services to trafficking victims but are only encouraged to do so. Furthermore, there is increasing evidence of racism, xenophobia and intolerance directed towards refugees, asylum seekers and other foreigners.⁴¹³ From a human rights perspective therefore it has been argued that it would have been better had the Protocol been drafted within a human rights body.⁴¹⁴ The *Trafficking Protocol* is within the context of the *Organised Crime Convention*, and as such, human trafficking is viewed as a special danger posed by transnational organised crime, human rights concerns only being belatedly inserted.⁴¹⁵ Concerns regarding the Protocols overarching concerns with criminalisation, organised crime and border control have been heightened by the recent 'War on Terror' which has further jeopardised the protection of irregular migrants.⁴¹⁶

On the other hand, many source countries lack both the legal framework and political capability to create, adopt and enforce adequate trafficking laws, probably due to the large organised crime presence in those countries.⁴¹⁷ Seen from this light, a focus on trafficking as an arm of organised crime is appropriate. Nevertheless, a multi-disciplinary approach is preferred to one that only really adopts enforcement provisions.

⁴¹² Elizabeth F Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach', (2004) 10 *ILSA Journal of International & Comparative Law* 485, 490.

⁴¹³ Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective', (2002) 14 *International Journal of Refugee Law* 561, 576, referring to E Feller, 'The Convention at 50: The Way Ahead for Refugee Protection' (Apr. 2001) 10 *Forced Migration Movement* 6.

⁴¹⁴ Ann D Jordan, Global Rights, *Annotated Guide to the Complete UN Trafficking Protocol* (2002), 2.

⁴¹⁵ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: the Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking', (2003) 24 *Michigan Journal of International Law* 1143, 1148.

⁴¹⁶ Ratna Kapur, "Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), , 33.

⁴¹⁷ Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369 , 393.

While the *Trafficking Protocol* led to a largely internationally accepted definition of trafficking and is the product of infused crime control and human rights concepts, its achievement is largely 'symbolic'.⁴¹⁸ Criticism have been that the *Trafficking Protocol* preserves rights previously enshrined in other human rights instruments and directions to state parties to employ protective mechanisms for victims are stated in mild language.⁴¹⁹ The instruments provide for a confirmation of existing rights and the fact that obligations towards victims of trafficking have not been diluted can be viewed as a 'real achievement' when considered in the context of a mounting fear of strangers and a lowering of standards in their treatment.⁴²⁰

The phenomenon of trafficking is a complex issue requiring a multidisciplinary approach. Trafficking should have been addressed in a human rights treaty that emphasised the gravity of the offence. Trafficked people from all sectors should have been given a voice in these debates in order to lift the discussion from theory and rhetoric to a true discussion of trafficking as modern day slavery. The current debate ignores and marginalises the trafficking of persons perceived to be less innocent and trafficked people for the purpose of forced labour.⁴²¹ Further, push and pull factors need to be acknowledged. People who seek a better life outside of their country will migrate to a country that demands the type of labour that the migrant is able to offer. This relationship must be addressed as 'people will move illegally if legal means are not made available to them'.⁴²²

Certainly organised crime plays an important role in human trafficking, but the *Trafficking Protocol* while purporting to protect and assist victims provides very little

⁴¹⁸ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1165.

⁴¹⁹ Ibid.

⁴²⁰ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 1004.

⁴²¹ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking,' (2004) 40 *Stanford Journal of International Law* 1, 44.

⁴²² Ratna Kapur, "Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 38.

assistance. Again, state concerns could have been better preserved through a victim centred approach. A victim centred approach would have redressed the injustice done to the victim, motivated the victim to cooperate with authorities and properly redefined the focus of the international community.

The *Trafficking Protocol* had an important impact on other international agreements and domestic legislation that were enacted after it. The American and Australian legislation will be discussed briefly as reference is made to them throughout this thesis.

However, prior to that, there were other international agreements that impact on trafficking victims. As such, these existing agreements may also be said to fall into the category of current efforts to eradicate trafficking.

4.5 Labour Conventions that impact directly on Trafficking

The International Labour Organisation (ILO) estimated that in 2005, there were 12.3 million people working in forced labour worldwide and of these, around 2.4 million had been trafficked internally or across international borders.⁴²³ The ILO have analysed trafficking within a framework of supply and demand and by using sexual exploitation as an example; have explained the push and pull as an ‘exchange between recruiters and exploiters, despite a set of internally recognized rules, law and regulations designed to prevent it.’⁴²⁴ As the majority of trafficking victims seem to be economic migrants, and since they end up working in industries at the countries of destination that seem to demand such labour, a labour framework is required. There are presently a number of labour Conventions relevant to trafficking victims.

4.5.1 *ILO Convention No. 29: Concerning Forced or Compulsory Labour*

⁴²³ Danailova-Trainor, Gergana; and Belser, Patrick, International Labour Office, Geneva ‘Working Paper: Globalization and the illicit market for human trafficking: an empirical analysis of supply and demand’ (InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, International Labour Office, Geneva, December 2006), 1.

⁴²⁴ Ibid, 3.

The *Forced Labour Convention 1930*⁴²⁵ does not specifically mention trafficking but it covers aspects of trafficking in the sense that it is concerned with forced labour. In relation to prostitution, the *Forced Labour Convention 1930* only covers sex work if sex work is permissible in the destination country.⁴²⁶ So, while this may be helpful to prostitutes working in a country with a regulated sex industry, it does not help prostitutes working in a country which prohibits sex work especially if they consented. Article 2 of the *Forced Labour Convention 1930* defines ‘forced or compulsory labour’ as being all work or service which is exacted from any person under the threat of any penalty. The Convention then goes on to detail the terms of any permissible forced or compulsory labour.⁴²⁷ Also, that person must not have offered themselves voluntarily to that work. These requirements are similar to those found in the *Trafficking Protocol* because essentially they contain the elements of consent which pose problems for trafficking victims. A combination of consent theory must then be used to determine forced or exploitative labour within the concept of voluntariness.⁴²⁸ The *Abolition of Forced Labour Convention, 1957*,⁴²⁹ is not relevant to trafficking because it does not refer to labour in the private sector carried out for financial gain.⁴³⁰

⁴²⁵ *ILO Convention No. 29: Concerning Forced or Compulsory Labour*, adopted 10 June 1930, 39 UNTS 55 (entered into force 1 May 1932) (‘Forced Labour Convention, 1930’ or ‘Convention No. 29’). See figure 4 of the appendix for a list of state parties to this instrument.

⁴²⁶ Elizabeth M Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking,’ (2004) 40 *Stanford Journal of International Law* 1 at 24.

⁴²⁷ ‘Forced or compulsory labour’ does not include military service; work or service that forms part of the normal civic obligations; work or service that is required of that person as a consequence of a conviction of law; (however, see the *Forced Labour Convention, 1930*, article 2(c) which provides that the work or service must be carried out under the supervision and control of a public authority and that the person is not hired to or placed at the disposal of private individuals, companies or associations) any work or service required in the case of emergency, that is a natural emergency or war, that would endanger the existence or the well-being of the whole or part of the population; and also does not include minor community services.

⁴²⁸ As will be discussed in further detail below.

⁴²⁹ *ILO Convention No. 105: Concerning the Abolition of Forced Labour*, adopted 5 June 1957, 320 UNTS 291 (entered into force 17 January 1959) (the ‘*Abolition of Forced Labour Convention, 1957*’). See figure 4 of the appendix for a list of state parties to this instrument.

⁴³⁰ Article 1 of the *Abolition of Forced Labour Convention, 1957* provides that state parties must undertake to suppress and not to make any use of forced or compulsory labour: as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a method of mobilising and using labour for purposes of economic development; as a means of labour discipline; as a punishment for having participated in strikes; and as a means of racial, social, national or religious discrimination.

4.5.2 ILO Convention No. 182: Concerning Worst Forms of Child Labour

More specifically related to trafficking is the *ILO Convention No. 182: Concerning Worst Forms of Child Labour*.⁴³¹ Article 1 of the Convention binds member states to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour. ‘Worst forms of child labour’ is defined in article 3(a) as including: ‘all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict’. Sub paragraph (b) also includes in the definition the procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances. Indeed, *ILO Convention No. 182* is the most appropriate ILO agreement dealing with trafficking.

4.5.3 Conclusion on labour agreements

A better application of labour agreements would benefit the fight against trafficking. Providing a labour framework to eradicate trafficking would not mean a definitive list of acceptable and non acceptable practices as could be found in domestic legislation. This is because international consensus would be difficult to achieve. Generally, article 3(a) of *ILO Convention No. 182* is an appropriate article on which to base protection mechanisms for adult trafficking victims because of its focus is on exploitation rather than consent.⁴³² ‘Forced or compulsory labour’ would also include forced prostitution so the gender aspect of trafficking would be included within this context. Accordingly, a

Further ILO agreements that may be relevant include: *ILO Convention No. 97 of 1949 concerning Migration for Employment (Revised)*, adopted 1 July 1949, 120 UNTS 71, (entered into force 22 January 1952); *ILO Convention No. 118 concerning Equality of Treatment of Nationals and Non- Nationals in Social Security*, adopted 28 June 1962, 494 UNTS 271 (entered into force 25 April 1964); *ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, adopted 24 June 1975, 1120 UNTS 324 (entered into force 9 December 1978).

⁴³¹ *ILO Convention No. 182: Concerning Worst Forms of Child Labour*, adopted 17 June 1999, 38 ILM 1207 (entered into force 19 November 2000). See figure 4 of the appendix for a list of state parties to this instrument.

⁴³² Other than the provision for the ‘forced or compulsory recruitment of children for use in armed conflict’ as this would not be relevant to adults.

good labour framework for trafficking of adults⁴³³ would bind member states to take immediate and effective measures to secure the prohibition and elimination of the worst forms of labour.

Borrowing from the definition of worst forms of labour from *ILO Convention No. 182*, 'worst forms of labour' for adults should include:

'all forms of slavery or practices similar to slavery, such as the sale and trafficking of people, debt bondage and serfdom and forced or compulsory labour'

On the other hand, the ILO agreements can be difficult in their enforcement because they do not allow for individual complaints regarding breaches. They do however allow for complaints from governments and workers associations. The ILO relies on horizontal monitoring, publicity and behind the scenes pressure to induce voluntary compliance.⁴³⁴

It is argued that a focus on labour in trafficking will target criminal activity. This approach is preferable to agreements that focus on the intent of the trafficker because an excessive focus on the criminal side of trafficking may obscure the human rights side of trafficking.⁴³⁵

⁴³³ As it stands, *ILO Convention No. 143* is appropriate as it is for the protection of children.

⁴³⁴ Horizontal monitoring is required as there is no vertical authority to enforce sanctions, see Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391 at 416.

⁴³⁵ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 499 .

5 NATIONAL LEGISLATION RELATING TO TRAFFICKING

Two main examples have been chosen to illustrate the way that trafficking has been integrated in national legislation subsequently to the enactment of the *Trafficking Protocol*. An analysis will be conducted into the various provisions of the enacted laws within the theoretical frameworks that drove them. National legislation, drafted within the state's criminal code is obviously motivated by crime control. However, crime control alone will be insufficient in tackling trafficking which is a multifaceted problem and as discussed, a victim centred theory would enhance crime control efforts. Both the United States and Australia have made efforts to integrate the victim into the overall criminal framework but it remains to be seen if those efforts are sufficient in reducing trafficking.

In order to achieve consistency between the different approaches, 'A' represents the alleged trafficker and 'B' the alleged victim of trafficking. A diagrammatical representation of the *Trafficking Protocol* can be found in the appendix under figure 1. Diagrammatical representations of the legislation of the United States and Australia are listed as as figures 2 3 respectively.

5.1.1 United States

Like many other nations, the United States had various pieces of legislation that dealt with aspects of trafficking. Nevertheless, new legislation was enacted to meet shortfalls of existing law. For example, while anti-slavery legislation was designed to address involuntary servitude, the legislation required actual physical force and did not include practices that are more common to the contemporary slave trade such as black mail, coercion and fraud.⁴³⁶ Previous legislation also did not accept psychological manipulation as evidence of 'coercion' and required actual physical force in order to

⁴³⁶ Therese Barone, 'The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution', (2003) 17(2) *Temple International and Comparative Law Journal* 579 at 582.

prove involuntary servitude.⁴³⁷ International interest and the drafting of the UN instruments led to the enactment of the *Victims of Trafficking and Violence Protection Act of 2000*.⁴³⁸ Specifically, Division A contains the *Trafficking Victims Protection Act of 2000* ('TVPA'). Section 102(1) of the TVPA states that its purpose is to combat trafficking in persons, a phenomenon described as a contemporary manifestation of slavery, in order to ensure just and effective punishment of the traffickers and protection of their victims. Subsection 102(2) notes that trafficking is the largest manifestation of slavery today. The monitoring, reporting and sanction provisions within the TVPA establish a framework that operates in parallel to the *Trafficking Protocol*. The intention of the TVPA is to provide a complex, multi level approach to compliance.⁴³⁹ Another purpose of the TVPA is to enhance criminal penalties for traffickers and increase funding for enforcement. The Department of State is also required to prepare an annual trafficking report to increase the understanding of trafficking in order to improve and facilitate state practice.⁴⁴⁰

As can be seen in figure 2, the TVPA deems a person to be a 'victim of sex trafficking' when there has been recruitment, harbouring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.⁴⁴¹ A 'commercial sex act' is any sex act on account of which anything of value is given to or received by any person.⁴⁴² A person is also deemed to be a victim of sex trafficking if they satisfy the criteria below.

A 'victim of a severe form of trafficking'⁴⁴³ includes victims induced into a commercial sex act by means of force, fraud, or coercion. Coercion is defined as including threats of serious harm to or physical restraint against a person; any scheme, plan or pattern

⁴³⁷ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47 at 71.

⁴³⁸ *Victims of Trafficking and Violence Protection Act of 2000*.

⁴³⁹ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1147.

⁴⁴⁰ *Ibid*, 1159.

⁴⁴¹ *Trafficking Victims Protection Act of 2000* section 103(9).

⁴⁴² *Trafficking Victims Protection Act of 2000* section 103(3).

⁴⁴³ *Trafficking Victims Protection Act of 2000* section 103(8).

intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.⁴⁴⁴ A child under the age of 18 who has been induced to perform a commercial sex act is a victim of a severe form of trafficking even if they were not induced into the act by a means of force, fraud or coercion. One potential area of trafficking that is not addressed in the TVPA is that of mail-order brides as a potential form of exploitation. That is, non-commercial sex may be in the spirit of the Act, but does not fall within it.⁴⁴⁵ Accordingly, exploited mail order brides would only fall within the Act if they could satisfy the requirements of severe form of trafficking under labour or other services. The point is made here because there is a connection between mail order brides and sex work. The importance of mail order brides as a form of migration to the United States will be discussed in further detail in a later chapter.

Outside of trafficking for the purposes of a commercial sex act, sub paragraph 103(8)(B), states that a person is also characterised as a victim of severe trafficking if there has been the recruitment, harbouring, transportation, provision, or obtaining of that person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude⁴⁴⁶, peonage, debt bondage⁴⁴⁷ or slavery.

The treatment of trafficking victims for the purposes of a commercial sex act differs to other forms of labour because victims of commercial sex trafficking do not have to prove exploitation (that is; involuntary servitude, peonage, debt bondage, or slavery), although they must have been coerced. In relation to other forms of labour, the coercive elements must be proved along with the exploitation. This stance has been criticised by some writers for requiring non sex work victims to be subjected to near slavery

⁴⁴⁴ *Trafficking Victims Protection Act of 2000* section 103(2).

⁴⁴⁵ Linda Smith and Mohamed Mattar, 'Trafficking in Persons, Humanitarian Intervention and Energy Policy: Creating International Consensus on Combating Trafficking in Persons: US Policy, the Role of the UN and Global Responses and Challenges' (2004) 28 *Fletcher Forum of World Affairs* 155, 162.

⁴⁴⁶ 'Involuntary servitude' is defined in section 103(5) of the TVPA as a condition of servitude induced by means of any scheme or plan that was intended to induce a person to believe that if they do not comply with the scheme or plan, they, or someone else will suffer serious harm or physical restraint. Further, involuntary servitude can arise when there is either an actual or threatened abuse of the legal process.

⁴⁴⁷ As per section 103(4) of the TVPA 'debt bondage' is when a person pledges their services as security for a debt, and the reasonable value of those services is not applied towards the liquidation of the debt, or the length and nature of those services are not limited and defined.

conditions before receiving the same level of protection.⁴⁴⁸ The position of the TVPA in this regard is quite interesting because its treatment of other forms of labour is in line with the *Trafficking Protocol* however this national legislation has gone further by criminalising to the same level forced prostitution even if it does not result in exploitation. Conversely, it seems unlikely that forced prostitution would not result in exploitation. The legislation could have been simplified by including 'forced labour' in the list of labour or services and this would have resulted in capturing forced prostitution. It seems however that the position of the TVPA was intended to highlight that prostitution is illegal in the United States making reference to the belief that most human trafficking is trafficking of women and children for the sex industry.

In having two offences; of trafficking and severe trafficking, the legislation acknowledges that prostitution within the United States is illegal. However, where a person is found to have consented to work in the commercial sex industry, then 'B' is given the title of 'victim of trafficking' but is not afforded any protection mechanisms. This approach is somewhat in line with feminist groups that believe that a person cannot truly consent to prostitution but at the same time, the consent of 'B' is a bar to assistance to 'B' from the state, thereby departing from the position of these NGOs.

Similarly to the *Trafficking Protocol*, where 'A' did not use force, fraud or coercion to entice 'B' to be trafficked, then 'B' cannot be a victim of trafficking even if somehow they are exploited on arrival at their destination.

The legislation is criticised on the grounds that, while it makes reference to both victims of trafficking and severe victims of trafficking, it recognises that other forms of trafficking exist but it does not define what they might be. The result is that the TVPA does not protect the victims of trafficking who do not fall within the definition of 'severe' trafficking, making provisions only for minors and those sold into sexual slavery.⁴⁴⁹ These criticisms seem to be unfounded because the legislation appears to be very clear as to what constitutes 'other forms of trafficking'. That is, consensual sex trafficking for the purpose of participation in commercial sex acts is the only offence

⁴⁴⁸ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 495.

⁴⁴⁹ Therese Barone, 'The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution', (2003) 17(2) *Temple International and Comparative Law Journal* 579 at 592.

that constitutes trafficking only.⁴⁵⁰ In any event, victims of ‘other forms of trafficking’ are not able to access any protection mechanisms of the state so it seems that defining what else may fall into this category would not result in anything anyway.

Any victim centred approach is used to enhance the criminalisation process but is not at the heart of the TVPA. The TVPA provides for the provision of immigration services to a fixed number of victims of ‘severe forms of trafficking’ per year who assist police with investigations. Providing services to a fixed number of victims may be an effective way of administering the Act, but it seems to be an arbitrary mechanism that is inflexible towards the actual numbers of victims and their needs. While it is helpful that the protection mechanisms are enshrined in the actual legislation, protection based on assistance poses many problems and the TVPA has been criticised in this regard for failing to take a victim approach.⁴⁵¹ After all, providing assistance to victims of trafficking based on their cooperation with authorities creates the perception that victims are foremost instruments of law enforcement.⁴⁵² As such, while there may seem to be a victim centred approach integrated into the TVPA, in reality, concerns for the victim look to be solely for the purposes of criminalisation of the offender and not for the benefit of the victim. On the other hand, the Act has been praised for its ‘comprehensive attack on trafficking’.⁴⁵³

Regarding the substance of the Act, the TVPA has been praised by the NGO ‘Free the Slaves’ as providing a ‘progressive, proactive approach to trafficking’ in that it allows for international monitoring and sanction provisions and also establishes mandatory restitution from traffickers.⁴⁵⁴ While the United States retains a self imposed ‘right’ to

⁴⁵⁰ That is, the legislation states that “victims of severe forms of trafficking” are also “victims of trafficking”, but not all “victims of trafficking” are also “victims of severe forms of trafficking”.

⁴⁵¹ Theresa Barone, ‘The Trafficking Victims Protection Act of 2000’ (2003) 17(2) *Temple International & Comparative Law Journal* 579 at 594.

⁴⁵² Kevin Bales, Laura E Fletcher, Eric Sotver et al, Free the Slaves, Washington DC and the Human Rights Center of the University of California, Berkeley, ‘Hidden Slaves: Forced Labor in the United States’, (2005) 23 *Berkeley Journal of International Law* 47, 49.

⁴⁵³ Therese Barone, ‘The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution’, (2003) 17 *Temple International and Comparative Law Journal* 579 at 594.

⁴⁵⁴ Kevin Bales, Laura E Fletcher, Eric Sotver et al, Free the Slaves, Washington DC and the Human Rights Center of the University of California, Berkeley, ‘Hidden Slaves: Forced Labor in the United States’, (2005) 23 *Berkeley Journal of International Law* 47 at 73.

impose sanctions on countries for not preventing trafficking, the result is confusing as the United States is also a large destination country for irregular migrants and trafficking victims. That is, there is no real onus placed on the United States to reduce the exploitation of trafficking victims on arrival to the United States. In any event, it is doubtful that sanctions will assist nations to meet minimum standards when economic factors lead people to migrate and fall victim to human trafficking.⁴⁵⁵ Indeed, as will be discussed below, it is largely economic factors that lead to human trafficking so economic sanctions may lead to an increase in trafficking.

Also, the Act does not recognise America's role in 'pulling' victims of trafficking instead portraying itself as a passive recipient of trafficking victims.⁴⁵⁶ As such, the United States adopts a migration framework requiring other states to acknowledge and address the reasons why their populations migrate but takes no responsibility for the labour forces within its own borders that are able to accommodate such large numbers of trafficking victims per year. This is considering that the United States itself estimates that 800,000 to 900,000 men, women and children are trafficked annually each, 18,000 – 20,000 of which are trafficked into the United States.⁴⁵⁷

Overall, the emphasis on law enforcement within the TVPA undercuts any of the purported humanitarian goals and there is no clear evidence that the Act has reduced trafficking.⁴⁵⁸

⁴⁵⁵ Although see Aryeh Neier, "Economic Sanctions and Human Rights" in Samantha Power and Graham Allison (eds) *Realizing Human Rights – Moving from Inspiration to Impact* (2000), 292 who argues that sanctions may be a tool that result in improvements in respect for human rights by manifesting international condemnation, deterring other governments from similar abuses or by punishing offending regimes. In any event, although sanctions may indeed be helpful in this sense, in relation to trafficking, it is submitted that human rights violations are generally non-specific and while may be related to women rights and gender equality are also related to more difficult matters such as public welfare, education and development, which are difficult rights to impose in the developing world in countries with limited resources.

⁴⁵⁶ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 2979

⁴⁵⁷ United States, International Information Programs, *Fighting Human Trafficking Inside the United States* (2004) <http://usinfo.state.gov/gi/Archive/2004/May/12-381449.html> at 2 July 2007.

⁴⁵⁸ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 2979 – 2980.

5.1.2 Australian legislation

In 2005, the Australian Federal Parliament enacted the *Criminal Code Amendment (Trafficking in Persons) Act 2005*, embodying trafficking in Division 271 of the Schedule of the *Criminal Code Act 1995*. The *Criminal Code Act 1995*, provides that 'A' will be found to have committed an offence of trafficking in persons if they organise or facilitate the entry, proposed entry, receipt, exit, or proposed exit of 'B' to or from Australia. The consent element is defined as the use of force or threats, resulting in 'B's' compliance for the actual or proposed entry; or exit to or from Australia; or movement of 'B' from one part of Australia to another. The requirements for the offence of trafficking will have also been met if 'A' has been reckless as to whether the other person would be exploited by the first person or another after entry, exit or transport. Section 271.1 defines 'deceive' as mislead as to fact, including the intention of any person, or as to law, whether by words or other conduct. Further, 'threat' is defined as a threat of force, a threat to cause a person's removal from Australia; or a threat of any other detrimental action (unless there are reasonable grounds for the threat of that action). Absolute liability applies to the element of threat or force, meaning that the prosecution will not need to prove that the accused was aware that the threat or force would lead to the victim's consent.

Subsection 271.2(2) provides that the offence of trafficking is also met when the accused deceives the victim about the fact that the victim will be involved in the provision of sexual services or that they will be involved in exploitation, debt bondage or the confiscation of their travel or identity documents. Both of the above offences, that is, the trafficking of a person through the use of threat or force or the use of deceit about the victim's services will result in a maximum penalty of 12 years imprisonment. This differs to the *Trafficking Protocol* in that actual exploitation is not required for an offence of trafficking to be found.

Consensual prostitution in itself is not considered to be trafficking, and the *Criminal Code Act 1995* limits liability to include only sexual exploitation. In relation to sexual exploitation, the *Criminal Code Act 1995* provides that the offence of trafficking is made out when 'B' consented to the prostitution but was deceived as to: the nature of the sexual services; or the extent to which 'B' will be free to leave the place where they provide the sexual services; or the extent to which 'B' will be free to cease providing

sexual services; or the extent to which 'B' will be free to leave their place of residence; or if there is a debt owed or claimed to be owed by 'B' in connection with the arrangement to provide sexual services—the quantum, or the existence, of the debt owed or claimed to be owed.⁴⁵⁹ Further, sexual service is defined as the use or display of the body of the person providing the service for the sexual gratification of others. It is submitted that the section of the Act referring to sexual services may have been unnecessary because sexual exploitation could have been covered by general terminology on exploitation. Nevertheless, the wording provides clear guidelines for handling trafficking for sexual exploitation and as such is beneficial.

The maximum penalty is raised to 20 years imprisonment in the event of an 'aggravated' trafficking offence when the accused subjects the victim to cruel, inhuman or degrading treatment; giving rise to a danger of death or serious harm to the victim; or where the accused is reckless as to that danger. The legislation also provides for more severe penalties for the trafficking of children. Extended geographical jurisdiction applies to the offences of trafficking meaning that the Courts have jurisdiction over Australian citizens, (other than in domestic trafficking) even when the crime of trafficking has been committed in another country.⁴⁶⁰

Debt bondage is defined in paragraph 10 of the Dictionary of the *Criminal Code 1995* as arising when a person pledges their personal services⁴⁶¹ as security for a debt that is actually owed or claimed to be owed⁴⁶² when the debt is manifestly excessive, the reasonable value of the services provided by the victim are not applied towards the liquidation of the debt, or when the length and nature of the services provided are not limited and defined. Though the Act in relation to trafficking makes specific mention of the rule of double jeopardy, Australia has eliminated this defence in cases involving sexual relationships with children.⁴⁶³

⁴⁵⁹ *Criminal Code Act 1995* (Cth) s 271.2(2C).

⁴⁶⁰ Section 271(10) Subject to a foreign law defence – that is, that there is no corresponding crime in the foreign jurisdiction.

⁴⁶¹ Or the services of another person under their control.

⁴⁶² This includes any actual or claimed debts that arise after the pledge is given.

⁴⁶³ Linda Smith and Mohamed Mattar, 'Trafficking in Persons, Humanitarian Intervention and Energy Policy: Creating International Consensus on Combating Trafficking in Persons: US Policy, the Role of

In order for trafficking to be made out, 'B' must either: consent to their transportation because of threat or actual force against them; have agreed to be transported in order to provide sexual services but is deceived about the nature or condition of the work;⁴⁶⁴ 'A' deceives 'B' about the eventual exploitation; or 'A' transported 'B' but was reckless as to whether 'B' would be exploited. This final element goes far beyond the *Trafficking Protocol* in that 'A' need not have acted with the intent of exploiting 'B'. Indeed, proposed trafficking into or out of Australia is also captured by the legislation, although proposed domestic trafficking is not. The legislation also provides for the criminalisation of domestic trafficking in persons and there is no requirement in the legislation for the involvement of an organised criminal group. As will be discussed throughout this paper, it is regrettable that the legislation requires a degree of coercion.

The concept of 'recklessness' may at first glance appear to get to the basis of trafficking but it is submitted that the low threshold may capture coyotes or others who would ordinarily be characterised as smugglers at best.⁴⁶⁵ This is unfortunate because the legislation should be aimed at punishing the gravity of the offence of trafficking, and recklessness may leave room for the misuse of the legislation.

Overall however, the addition of 'recklessness' is an excellent solution to the *Trafficking Protocol* and the shortfall in the United States' legislation because it allows for criminalisation of 'A' even where there was no intention by 'A' for 'B's' eventual exploitation. This essentially provides a victim focus, acknowledging that an exploitative situation may arise subsequently to a smuggling relationship. Conversely, in the event that 'A' assists 'B' to enter Australia in an irregular manner⁴⁶⁶ and 'B' completely independently of 'A' comes into contact with other parties that then subject 'B' to exploitation as described in the legislation, then 'B' is not a victim of trafficking unless they are also transported from one part of Australia to another. In those circumstances, the offender may be charged with other offences such as false

the UN and Global Responses and Challenges' (2004) 28 *Fletcher Forum of World Affairs* 155 at 166, citing EPCAT International online database.

⁴⁶⁴ As set out in the legislation.

⁴⁶⁵ Alison N Stewart, 'Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective' (1998) 20 (11) *Women's Rights Law Reporter* 11 at 17.

⁴⁶⁶ That is, while many smuggled people enter Australia on illegal boats, far more illegal entrants enter Australia on student or working visa's and then overstay their visa allowance. "A" may not be the captain of the leaking ship but instead may facilitate "B" with obtaining and overstaying a legitimate visa.

imprisonment, inhuman and degrading treatment etc. This brings into question the protection mechanisms for 'B'.

However, if the exploitation of 'B' arises completely independently of the transportation of 'B' then however regretful and grave the outcome may be, it will not be characterised as trafficking. This is unfortunate because the purpose of the *Trafficking Protocol* was to create an offence of trafficking without requiring the various elements of the offence to be proved. The intention was to streamline the offence making it easier for the prosecution by looking at the substance rather than the minutia. This unfortunate outcome could be corrected with concerted efforts to eradicate slavery practices that are independent of the transportation of the person.

The addition of the 'aggravated offence' to trafficking recognises that severity of trafficking is not the same at all times and that some situations may be graver than others. It is submitted that this approach is appropriate and that while victims of trafficking should not be judged on the basis of their own complicity or guilt in the matter, the offender should be charged more harshly according to their conduct. Of course, this is an analysis of the *Criminal Code* and therefore the raising of the charge from 'trafficking' to 'aggravated trafficking' may provide for harsher penalties to the perpetrator; but does not explain the ramification for the victim. That is, the Act does not provide for the victim, but the trafficker is viewed as a violator against the state, just like other violations of the *Criminal Code*.

While providing for levels of criminalisation based on the severity of the offence may be useful in distinguishing between various levels of culpability; the 'intention' of exploitation without *actual* exploitation should be reduced to a normal offence of trafficking and not aggravated. In this way, normal trafficking and aggravated trafficking can be examined in the contexts of human rights, slavery and labour. It is cruel, inhumane and degrading *treatment* and *conduct* giving rise to serious harm whether actual, or recklessness that changes the situation from exploitation of labour to conduct resembling slavery. Aggravated instances of trafficking should not be viewed in the same way as normal offences of trafficking, as they do not acknowledge the level of suffering of many victims. Intention should not fall within an aggravated offence because the exploitation should be the key of criminalisation offences.

It is important to remember that any protection that Australia chooses to offer victims of trafficking is limited. Australia made its position clear regarding trafficking victims and the granting of migration status on signing the Protocol by making the following reservation:

'The Government of Australia hereby declares that nothing in the Protocol shall be seen to be imposing obligations on Australia to admit or retain within its borders persons in respect of whom Australia would not otherwise have an obligation to admit or retain within its borders.'

The effect of this reservation is that Australia will not afford a victim of trafficking any additional merit to a claim 'or temporary or permanent residency as a 'legitimate' migrant or under refugee or asylum provisions'.⁴⁶⁷

Nevertheless, similarly to the American legislation, Australia has enacted a protective regime designed to protect victims of trafficking as witnesses, albeit it is limited and discretionary. A person who is identified by the Australian Federal Police (AFP) as being a person of interest in relation to a people trafficking matter may be able to remain in Australia for up to 30 days while the AFP or State or Territory police assess whether they wish to seek a Criminal Justice Stay Certificate (CJSC) for that person. This is possible with the introduction of the Bridging Visa F (BVF) introduced on 1 January 2004. If the agency decides that they require the person to stay longer in order to provide information to the prosecution, then the person will be issued a CJSC and they may be granted a Criminal Justice Stay Visa (CJSV). However if the agency believes that the person does not have any useful evidence to offer the prosecution, no further visas will be sought. Importantly, a victim acting as witness can only be granted a temporary Witness Protection (Trafficking) Visa (TWPTV) at the conclusion of the criminal proceedings while they hold a CJSV, meaning that the victim's protection may end at any moment.⁴⁶⁸ The victim must be invited to apply for a TWPTV which is a discretionary visa only granted after the Attorney-General has certified that the person has made a significant contribution to the proceedings; or the person is not the subject

⁴⁶⁷ See Paul Williams, 'Discord within Consensus: the UN Trafficking instruments' (Paper presented at People Trafficking, Human Security and Development Symposium, Canberra, Australia, 1 September 2004), 4.

⁴⁶⁸ Jennifer Burn, Sam Blay and Frances Simmon, 'Combating Human Trafficking: Australia's Responses to Modern Day Slavery', (2005) 79 *Australian Law Journal* 1, 8.

of any related proceedings; or the Minister is satisfied that the person would be in danger if they returned home. If, after two years the person continues to meet these criteria and continues to hold the visa; they may be granted a permanent Witness Protection (Trafficking) Visa (PWPTV).

Ultimately, as in the American legislation, the process has been criticised because assistance to victims is based on their suitability as a witness rather than 'their status as a victim'.⁴⁶⁹ On the other hand, victims under the American legislation are able to lodge their own application for a visa without waiting to be invited by the state.⁴⁷⁰ Further, the discretionary nature of the visa system means that most victims of trafficking will not benefit from it.⁴⁷¹ Considering the insecurity experienced by trafficking victims awaiting trial, it has been suggested that victims be permitted to apply for a TWPTV while in the process of assisting authorities.⁴⁷² Unfortunately, the decision to grant a victim a visa is not based on the level of suffering of the victim or on the needs of a particular victim but is solely decided on the victim as witness.

Ultimately, the Australian legislation based on crime control can be praised for providing for levels of severity of the offence because it acknowledges that certain conduct is especially aggravating and it provides punishment accordingly. However, this position can also be criticised because it does not follow that the victims is afforded any additional protective measures. In fact, the AFP has the discretion of not providing protection or assistance to the victim at all. It is odd that there is no meaningful assistance provided to protect those people who the system, by implication, views as victims of an aggravated offence, and the result is that the victim may still be viewed as an illegal immigrant.

As in the American legislation, there is no attempt to tackle the demand side of trafficking. This is especially important because without addressing these concerns, trafficking will most likely continue despite the punishment of offenders.

⁴⁶⁹ Jennifer Burn and Frances Simmons, "Rewarding Witnesses, ignoring victims: an evaluation of the new trafficking visa framework" (2005) 24 *Immigration Review* 6, 7.

⁴⁷⁰ *Ibid.*, 9.

⁴⁷¹ *Ibid.*, 8.

⁴⁷² *Ibid.*

5.2 Conclusion

When analysing the legislation above, it becomes apparent that states have some common basis for their definitions on trafficking while departing on other points. Overall, the Australian legislation with its criminalisation of the 'reckless' trafficker is appropriate, as is the division between normal trafficking offences and aggravated offences. Protection mechanisms found in US legislation are beneficial but limited to a small number of victims per year and in Australian legislation⁴⁷³ protection mechanisms are restricted to victims who act as witnesses. Protection efforts based on the victim's role as a witness indicates a lack of victim focus. Ultimately, the states adopt criminalisation because they view human trafficking as a problem of migration.

⁴⁷³ Australian legislation intended to assist victims of trafficking will be discussed in the chapter on Criminalisation however briefly, the introduction of Bridging Visa F on January 2004 allows a trafficking victim to be provided with certain visas where the Australian Federal Police deems the victim to be a 'person of interest' in trafficking investigations. Essentially, the person is given temporary relief in exchange for assistance to the prosecution.

PART II

THEORETICAL APPROACHES TO
COMBATING TRAFFICKING

6 CRIMINAL LAW THEORY AND VICTIM ORIENTED THEORY

6.1 Criminal Law Theory

State efforts to eradicate trafficking are virtually wholly based in formulating criminal law to criminalise the offender. This is evidenced in both the *Trafficking Protocol* and national legislation which purport to have other aims such as the prevention of trafficking and the protection and assistance of the victims. Nevertheless, these aims are tackled through the pursuit of the offender via criminalisation.

People trafficking is a crime in both international law and in the domestic law of most states. As noted earlier, in spite of the confluence between criminalisation and assistance to victims, states increasingly focus on the criminalisation element of trafficking. Indeed, the criminalisation element appears to be the central issue even in the *Trafficking Protocol* which notes the link between ‘transnational organised crime’ and trafficking; and the prevention, suppression and punishment of trafficking in persons. It is arguable that from the perspective of some states, the central issue in trafficking is crime. The focus on crime therefore determines their strategy and approach in dealing with traffickers and their victims. An understanding of criminal law theory is therefore fundamental in any analysis of trafficking. In this section the thesis analyses criminal law theory and uses it to assess the legitimacy of the crime-oriented strategies in dealing with trafficking.

6.1.1 The evolution of criminal law theory and the role of victims

Criminal law has changed fundamentally in the last two hundred years. Up until the early nineteenth century, an offence was considered to be a private matter between the offender and the victim, and it was the responsibility of the victim to bring the offender to justice.⁴⁷⁴ This system of justice was criticised by Cesara Beccaria in the mid-

⁴⁷⁴ Helen Fenwick, ‘Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal justice Process?’ (1997) 60(3) *The Modern Law Review* 317, 318.

eighteenth century who argued that the law should serve society's interest as opposed to the victim's.⁴⁷⁵ Up until that time, the system meant that only those with adequate means were able to hold offender's accountable.⁴⁷⁶ The inherent injustice in this system led to the development of the law where eventually, prosecution rested with the state. The reasoning behind this was that the prosecution took place as a matter of public interest on the basis that the private interests of the victim is subordinate to the public interest.⁴⁷⁷ For this reason, today, the accused is prosecuted by the state. Ultimately, an offence against an individual means that the public prosecutor through the criminal law, will act in order to protect the society from the threat represented by the accused as a primary concern, while also protecting the actual victim and witnesses.⁴⁷⁸

Jeremy Bentham expanded on Beccari's theory and negated the victim's formal role by explaining that as the prosecutor acts on behalf of all of society, the victim cannot play any role either in the initiation or conduct of proceedings.⁴⁷⁹ The victim's role was limited to the initial reporting of the crime and the provision of information to the persecutor. Any information received by the victim in relation to the proceedings is now at the discretion of the prosecutor.⁴⁸⁰ However, there is a moral duty for the victim, at least initially, in reporting the crime and a moral duty for the whole of society, through the prosecution, to ensure that the offender receives an appropriate

⁴⁷⁵ Emmanuel Gross, 'Shifting the Balance between the Rights of Victims and the Rights of Defendants in Criminal Proceedings: A Comparative Study of Israeli and American Law' (2000) (15) *Tel Aviv university Studies in Law* 199, 203.

⁴⁷⁶ *Ibid*, 220.

⁴⁷⁷ Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) (17) *University of New South Wales Law Journal* 595, 600.

⁴⁷⁸ Emmanuel Gross, 'Shifting the Balance between the Rights of Victims and the Rights of Defendants in Criminal Proceedings: A Comparative Study of Israeli and American Law' (2000) (15) *Tel Aviv university Studies in Law* 199, 200.

⁴⁷⁹ *Ibid*, 204.

⁴⁸⁰ Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) (17) *University of New South Wales Law Journal* 595, 597 – 598..

punishment.⁴⁸¹ The responsibility of the victim arises from a moral duty to protect society from the offender re-offending.⁴⁸²

The state therefore takes on the power of prosecution. In order for proceedings to commence, criminal law requires two elements to be fulfilled. The first of these is the intent or *mens rea*, which means that the perpetrator intended to commit the crime. The second is *actus reus*, which means that the perpetrator actually committed the crime. This has also been compared to the 'external and internal' sides of criminal behaviour. The requirement for the external and internal components of criminal behaviour was first articulated by Sir Edward Coke.⁴⁸³

The so called 'three-tiered structure' of criminal law comes from the combination of the act and mental element combined with a generally applicable defence that removes liability from the offender providing the offender with a level of protection.⁴⁸⁴ Through these requirements, along with the presumption of innocence and other principles, such as the requirement for an action by the accused and not merely an omission, criminal law is not just couched in state power but also reflects a moral system.⁴⁸⁵ The criminal law through criminal proceedings then; apprehends, charges and tries the suspect in accordance with its code.

The essence of criminal law lies in its remedy.⁴⁸⁶ Unlike the civil law, as a rule, the remedies in criminal law are not concerned with the victim. For the purposes of this thesis, the 'non-victim-centred' character of criminal law has important consequences for the international approach to dealing with trafficking. The remedies in criminal law

⁴⁸¹ Chris Corns, 'Criminal Proceedings: An Obligation or Choice for Crime Victims?' (1994) 13(2) *University of Tasmanian Law Review* 346, 350.

⁴⁸² *Ibid.*, 354.

⁴⁸³ George P Fletcher, 'Criminal Theory in the Twentieth Century' (2001) (2) *Theoretical Inquiries in Law* 265, 269.

⁴⁸⁴ Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) (64) *Modern Law Review* 350, 353.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Michael S Moore, 'A Theory of Criminal Law Theories' (1990) (10) *Tel Aviv University Studies in Law* 115, 134.

are measured against the function of the law in the community. The function falls into four major categories: incapacitation, deterrence, reform and retribution.⁴⁸⁷

6.1.2 Retributive Justice

Retributive justice is a simple cause and effect system which essentially aims for the punishment to fit the crime.⁴⁸⁸ Retribution is considered by many to be the most likely result of the criminal law as is evidenced by the importance of penal sanctions.⁴⁸⁹ Discussions of retribution often centre on the notion of 'desert'. That is, by doing wrong, the offender deserves blame and punishment.⁴⁹⁰ Their actions have placed them at an unfair advantage and retribution is intended to restore the balance.⁴⁹¹ The idea of retributive justice flows from the premise that by his or her very nature, the person is a responsible moral agent who deserves to be rewarded or punished in accordance with the way that they choose to conduct themselves.⁴⁹² Any other benefits that may flow from retribution such as deterrence of future crime play no role in justifying punishment in this model.⁴⁹³ As such, this is known as an 'absolute' theory in that it does not purport to serve any useful social purpose.⁴⁹⁴ On the other hand, such criticisms are harsh when considered more carefully. After all, retributive justice administers justice. Also, it recognises the reciprocal relationship between the parties of the law. Both of

⁴⁸⁷ Ibid.

⁴⁸⁸ S Owen-Conway, 'Crime and Punishment in Modern Society' (1975 – 1976) 9(2) *The University of Queensland Law Journal* 266, 268.

⁴⁸⁹ Patrick Fitzgerald, 'New Developments in Criminal Law: Implications for the International Scene' (1991(60) *Revsita Juridica UPR* 1271, 1281.

⁴⁹⁰ John H Bogart, 'Punishment and the Subordination of Law to Morality' (1987) 7(3) *Oxford Journal of Legal Studies* 421, 425.

⁴⁹¹ L Elaine Miller, 'Wrongful Action Answered: The Role of Retribution in Response to Crime' (2004) (29) *Australian Journal of Legal Philosophy* 70, 72.

⁴⁹² Joseph M P Weiler, 'Why do we punish? The Case for Retributive Justice' (1978) (12) *University of British Columbia Law Review* 295, 296.

⁴⁹³ L Elaine Miller, 'Wrongful Action Answered: The Role of Retribution in Response to Crime' (2004) (29) *Australian Journal of Legal Philosophy* 70, 70.

⁴⁹⁴ Dionysios Spinellis, 'Victims of Crime and the Criminal Process' (1997) 31(1-3) *Israel Law Review* 337, 347.

these outcomes are positive attributes.⁴⁹⁵ Further, the benefit of an absolute theory and in particular retributive justice is the restoration of peace and law and order.⁴⁹⁶

Retributive justice is praised for having clear and unequivocal aims.⁴⁹⁷ Other reasons for praise of this theory are based on criticism of the other aims. For example, it is considered that deterrence has limited efficacy.⁴⁹⁸ Further, it is argued if the other aims were truly at the core of criminal law, then the laws formed would be different to what they are.⁴⁹⁹ Moore uses the way that murder is legislated in the United States to illustrate his point.

Murder may be premeditated, voluntary manslaughter or where it is unprovoked, second degree murder.⁵⁰⁰ Moore suggests that the bigger the role of impulse in the killing, then for deterrence reasons, the higher the punishment should be. On the other hand, second degree murders, which typically occur within families, should be punished least, on the basis of incapacitation. Moore argues that this is not reflected in the law. On the other hand, the law has developed since 1990 in this regard as is evidenced by changes, particularly in Australia of the defence known as 'battered wife syndrome' or 'BWS'. BWS looks at the prior and ongoing treatment of the woman by her husband in order to reduce sentencing.

Instead, Moore supports retributive justice models. He argues that laws make more sense if they attempt to grade culpability: '[o]f the possible functions for criminal law, only the achievement of retributive justice is its actual function. Punishing those who deserve it is good and is the distinctive good that gives the essence, and defines the borders for criminal law as an area of law. Such functions demand that the subject of

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid, 348.

⁴⁹⁷ S Owen-Conway, 'Crime and Punishment in Modern Society' (1975 – 1976) 9(2) *The University of Queensland Law Journal* 266, 268.

⁴⁹⁸ Michael S, 'A Theory of Criminal Law Theories' (1990) (10) *Tel Aviv University Studies in Law* 115, 139.

⁴⁹⁹ Ibid.

⁵⁰⁰ See generally, Michael S Moore, 'A Theory of Criminal Law Theories' (1990) (10) *Tel Aviv University Studies in Law* 115, 139.

the punishment should: '(1) have done something morally wrong, and (2) did so in a culpable way.'⁵⁰¹

Retributive theory is not concerned with the future conduct of the offender. The basis is that the offender must be held responsible for their deeds, and such responsibility actually affirms the persons standing in the 'moral community'.⁵⁰² Nevertheless, it is argued that the criminal law system must make a difference because prohibition without altering people's behaviour cannot be justified. This is especially the case when there are other means of preventing the behaviour such as education. For these reasons, while retributive theory may be considered to be the most valuable theory in criminal law, other models are also important and may impart some benefit when used in combination.

In regards to trafficking, retribution plays an important role in punishing the offender for the crime that they have committed. However, retribution, while essential, does not go any further. That is, retribution does not assist or protect the victim and it is arguable if it has any significant impact on deterrence of future crime.

Certainly, retributive justice alone is insufficient to deal with trafficking because all it would serve to do would be to criminalise the offender without any reference to the victim. Retributive justice is also inefficient because it does not positively impact on the future of trafficking. That is, it does little to deter other potential offenders.

For the purposes of trafficking, the most significant flaw in retribution as an element of criminal legal theory is that it depends on the apprehension of the trafficker. Where the trafficker or offender is not apprehended, retributive justice hardly affords any opportunity for justice for the trafficked victim. By its very nature the retributive approach in criminal law overlooks the essential status of the traffickee as a victim who will usually require assistance.

⁵⁰¹ Ibid, 183.

⁵⁰² John H Bogart, 'Punishment and the Subordination of Law to Morality' (1987) 7(3) *Oxford Journal of Legal Studies* 421, 426.

6.1.3 Deterrence

Deterrence theorists oppose retributive justice that induces deliberate suffering or deprivation without proper results.⁵⁰³ However, they believe that if punishment deters the offender from future infractions of the law or prevents others from committing the offence, then retribution can be justified.⁵⁰⁴ This is because the deterrence theory has two aims. The first aim is that there be specific deterrence to the actual offender and the second aim is to provide a general deterrence to the community.⁵⁰⁵ Jurists such as Jeremy Bentham believe that all rules and doctrines must induce law abiding conduct in the future.⁵⁰⁶ Another expectation of the deterrence theory is that both the offender and the community will benefit.⁵⁰⁷

The emphasis of this model is on future conduct and not on the past offence.⁵⁰⁸ The assumption is that the human being is pleasure seeking and will not engage in conduct that may jeopardise their future with pain and punishment outweighing the benefits of crime.⁵⁰⁹ However, there is little evidence that deterrence actually works and that further crime is prevented.⁵¹⁰ It may also be difficult to ever make specific findings in this regard as it is difficult to quantify what deed has been prevented. Further, there is little evidence as to who is likely to commit crime and what their motivation may be.⁵¹¹

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ S Owen-Conway, 'Crime and Punishment in Modern Society' (1975 – 1976) 9(2) *The University of Queensland Law Journal* 266, 268.

⁵⁰⁶ George P Fletcher, 'Criminal Theory in the Twentieth Century' (2001) (2) *Theoretical Inquiries in Law* 265, 267.

⁵⁰⁷ Joseph M P Weiler, 'Why do we punish? The Case for Retributive Justice' (1978) (12) *University of British Columbia Law Review* 295, 297.

⁵⁰⁸ John H Bogart, 'Punishment and the Subordination of Law to Morality' (1987) 7(3) *Oxford Journal of Legal Studies* 421, 426.

⁵⁰⁹ Joseph M P Weiler, 'Why do we punish? The Case for Retributive Justice' (1978) (12) *University of British Columbia Law Review* 295, 296.

⁵¹⁰ S Owen-Conway, 'Crime and Punishment in Modern Society' (1975 – 1976) 9(2) *The University of Queensland Law Journal* 266, 268 – 269.

⁵¹¹ Ibid, 269.

This means that it is especially difficult to target particular people or groups who are likely to commit an offence. These remarks are quite important in any discussion on trafficking and criminal legal theory. Virtually all states in the Western world have criminalised trafficking. However there is not credible indication that this has deterred traffickers. Indeed if the statistics on trafficking in Europe are to be believed, trafficking has increased over the last decade in spite of the efforts to criminalise it. In any case, the reported high profits associated with trafficking may mean that deterrence is not a likely outcome of anti-trafficking efforts. It will be difficult to provide a regime for punishment that would counteract the apparent low risk and high profits associated with trafficking. The history of trafficking to date does not inspire confidence in the deterrence as an objective in dealing with trafficking.

6.1.4 Incapacitation

Incapacitation is the physical restraint of the offender.⁵¹² The aim with incapacitation is to prevent the offender from committing further crimes. This is justified by the prediction that the offender may have a tendency to commit further crimes and that their incapacitation will prevent them from doing so.⁵¹³ Incapacitation certainly fits within retributive justice in that it may be a form of punishment for the offender. Depending on the crime, incapacitation may also be relevant to deterrence theories if it provides a mechanism to prevent future crime. However, the value of incapacitation may best be measured within the context of the crime itself. If appropriate, it may also provide an opportunity for the reform of the offender.

Again, while serving to punish the offender and to prevent them from re-offending, incapacitation is unlikely to reduce future trafficking by other parties and does little (other than separating the trafficker from the victim) to protect or assist trafficking victims.

⁵¹² Ibid, 268.

⁵¹³ Ibid.

6.1.5 Reform

Reform theory is based on the expectation that by rehabilitating the offender, they will be prevented from committing crime in the future. That is, through a change in the offender's personality, they will follow the law in future.⁵¹⁴ This is thought to be part of an overall utilitarian view whose aim is not only the prevention of crime from that particular offender but also society as a whole.⁵¹⁵ Reformation of the offender may be possible on a small scale within a society with requisite resources but is extremely unlikely to impact on the global nature of the crime of trafficking.

Other theories become important to criminal law as is evidenced by the protection of the human rights of the offender through protections such as the presumption of innocence.⁵¹⁶ Further, other interests or theories such as feminist legal theory have also impacted on criminal law, such as the way that the law treats victims of sexual offences, for example, by removing the requirement of the female victim from bringing corroborating evidence to ensure conviction.⁵¹⁷ Other considerations are also taken into account. For example, crimes that involve people in continuing relationships tend to be decriminalised in order for the parties to continue their relationship.⁵¹⁸

Nevertheless, the criminal law must achieve a number of goals. It must be effective, economic and fair and so it is appropriate that a combination of the above theories be pursued.⁵¹⁹ International human trafficking involves numerous states,⁵²⁰ and people from culturally diverse backgrounds. Common ground must be found in order to punish current offenders, separate them from society at least for a period of time, deter future offenders and through education and other mechanisms; prevent the crime of trafficking occurring in the future. This has been somewhat achieved through the *Organised Crime*

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Patrick Fitzgerald, 'New Developments in Criminal Law: Implications for the International Scene' (1991(60) *Revisita Juridica UPR* 1271, 1279.

⁵¹⁷ Ibid, 1279 – 1280.

⁵¹⁸ Ibid, 1281.

⁵¹⁹ Joseph M P Weiler, 'Why do we punish? The Case for Retributive Justice' (1978) (12) *University of British Columbia Law Review* 295, 319.

⁵²⁰ Although domestic trafficking should not be dismissed.

Convention and Trafficking Protocol which saw a number of states come together to debate a common definition and strategy. However criminal theory alone will be insufficient to deal with trafficking if undertaken without reference to other issues such as the supply and demand aspects of trafficking and a reassessment of the role of the victim. Any efforts to eradicate trafficking require a multi disciplinary approach.

The change of the criminal law from being victim initiated to being a state concern has caused the victim as an individual to lose their rightful place in the proceedings. The aim of protecting society as a whole has been at the expense of the victim. In essence, criminalisation theories are offender rather than victim focused.⁵²¹ However, a combination of criminal law theory and victim oriented theory will lead to a better result both for the victim and for the aims of the law. Accordingly, a good resolution regarding the shortfalls of criminal law theory is to combine it with victim oriented theory.

6.2 Why a victim oriented approach? A look at Victim Oriented Theory

Usually, the victim of a crime has no special legal status and as far as the law is concerned, their role is confined to being a witness, with no rights of being informed about the prosecution.⁵²² This is also due in part to the separation of the civil and criminal law.⁵²³ That is, private law provides citizens with the ability to resolve certain disputes.⁵²⁴ This ultimately is an important difference in the two types of systems. Just like the criminal system does not step into civil disputes, the civil system has little

⁵²¹ Chris Corns, 'Criminal Proceedings: An Obligation or Choice for Crime Victims?' (1994) 13(2) *University of Tasmanian Law Review* 346, 360.

⁵²² John R Spencer, 'Improving the Position of the Victim in English Criminal Procedure' (1997) 31(1-3) *Israel Law Review* 286, 287.

⁵²³ However there are instances where individuals may institute proceedings against their trafficker within the civil system, and these will be discussed in a later chapter in the context of criminalisation.

⁵²⁴ Dionysios Spinellis, 'Victims of Crime and the Criminal Process' (1997) 31(1-3) *Israel Law Review* 337, 354.

access to criminal proceedings.⁵²⁵ The result is a tension between the state encouraging victims to act as witnesses and the negative experiences of victims who do.⁵²⁶

However, recent years have seen a change of focus to the victim. For example, the *UN Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power*⁵²⁷ provides the victim with access to justice and fair treatment⁵²⁸, compensation⁵²⁹ and assistance.⁵³⁰ The report of the Special Rapporteur, Cherif Bassiouni provided principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law in 2000.⁵³¹ A victim oriented approach allows the community at local, national and international levels to affirm 'its human solidarity and compassion with victims of violations of human rights and humanitarian law as with humanity at large'.⁵³² The guidelines provide that the victims have a right to remedies including access to justice, reparation for harm suffered and access to the factual information concerning the violations.⁵³³ The guidelines then go on to expand on these three remedies.

Victim rights were also incorporated into the Rules of Evidence at both the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal

⁵²⁵ Chris Corns, 'Criminal Proceedings: An Obligation or Choice for Crime Victims?' (1994) 13(2) *University of Tasmanian Law Review* 346, 357.

⁵²⁶ *Ibid*, 347.

⁵²⁷ *Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, UN Doc A/Res/40/34 (1985).

⁵²⁸ *Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, UN Doc A/Res/40/34 (1985) art 4 – 7.

⁵²⁹ *Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, UN Doc A/Res/40/34 (1985) art 8 – 11.

⁵³⁰ *Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, UN Doc A/Res/40/34 (1985) art 14 – 17.

⁵³¹ Cherif M Bassiouni, *Final Report of the Special Rapporteur, Civil and Political Rights, Including the Question of: Independence of the Judiciary, Administration of Justice, Impunity – The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc E/CN.4/2000/62 (2000).

⁵³² *Ibid*.

⁵³³ *Ibid*.

tribunal for Rwanda ('ICTR').⁵³⁴ The rules of the ICTY will be used as an example of protection mechanisms afforded to victims. Rule 69 for the ICTY provides for the protection of witnesses which allows for the identity of the victim to remain undisclosed in exceptional circumstances if the witness is in danger or until such time as the victim is brought under the protection of the tribunal. Privacy and protection of the victim and witnesses are also provided under rule 75 which allows the court to keep the identity of the victim away from public records (including under closed session) and also allows the court the power to control the manner of questioning in order to avoid harassment or intimidation. In instances of sexual assault, rule 96 provides for extra protection mechanisms such as special consideration of the victim, disallowing prior sexual conduct of the victim to be admitted into evidence and not requiring the corroboration of the victims' testimony in sexual cases. As per rule 106, victims are permitted to seek compensation from the accused in a national court or other competent body, while the judgment of the tribunal is held to be binding as to the criminal responsibility of the accused.⁵³⁵

Victims are also protected within the *Rome Statute*.⁵³⁶ Article 68 of the *Rome Statute* provides for the protection of victims and witnesses and their participation in proceedings. Art 68(1) directs the court to take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of victims and witness taking into account all relevant factors such as age, gender, health, nature of the crime; especially where the crime involves sexual or gender violence or violence against children. There are provisions allowing for the proceedings in camera or providing evidence through electronic means.⁵³⁷ Where the personal interests of the victims are affected, then the victim is permitted to present their concerns at an appropriate time and in accordance with the Rules of Procedure and Evidence.⁵³⁸ The *Rome Statute*

⁵³⁴ *International Criminal tribunal for the former Yugoslavia, Rules of Procedure and Evidence*, UN Doc IT/32/Rev.7 (1996) (entered into force 14 March 1994); and *International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence*, UN Doc ITR/3/Rev.1 (1995) (entered into force 29 June 1995).

⁵³⁵ This may be relevant in receiving compensation when the accused has been found to be guilty of the crime. That is, the tribunals decision is held to provide that proof.

⁵³⁶ *The Rome Statute of the International Criminal Court*, 2187 UNTS 90 (entered into force 1 July 2002).

⁵³⁷ *The Rome Statute of the International Criminal Court*, art 68(2)

⁵³⁸ *The Rome Statute of the International Criminal Court*, art 68(3)

states that it shall establish principles in respect to restitution, compensation and rehabilitation of victims and the Court has the power, upon request, to determine the scope and extent of any damage. Such reparations can be made through the Trust Fund as per article 79.⁵³⁹

The provisions above, especially those related to the victim as witness in the proceedings are especially important when procedural fairness is afforded to the accused.⁵⁴⁰ Cross examination may be a frightening experience and the alleviation of some of the stress on the victim will most likely assist the court. Protection of victims of sexually based crimes is especially important for victims who come from communities where virginity is considered a prerequisite for marriage.⁵⁴¹ These concerns are particularly relevant in relation to trafficking. The victim's primary role in the *Trafficking Protocol* is as witness to the prosecution. As such, the victim's cooperation will be best achieved through an empathetic approach of the court and prosecutor.

On the other hand, a victim focus should not automatically afford all victims rights, because certain crimes may not warrant these measures. For example petty crime should not afford the victim with the same levels of protection and assistance.⁵⁴² As states will be unable to implement change in their legislation without onerous financial repercussions; the extent of victim oriented law is likely to be carefully examined by the states before any changes are made to the existing law.⁵⁴³

Unfortunately, the fact remains that while victim protection is contained in international tribunals and courts such as the ICTY, ICTR and ICC, there has been a weak corresponding response from national legislation. As discussed, while American and

⁵³⁹ *The Rome Statute of the International Criminal Court*, art 75(1). Article 79 allows for a Trust Fund to be established for the benefit of victims of crimes within the jurisdiction of the court and of the families of the victims.

⁵⁴⁰ Jonathon Doak, 'The Victim and the Criminal Process: an analysis of recent trends in regional and international tribunals' 92003) 23(1) *Legal Studies* 1, 8.

⁵⁴¹ *Ibid*, 22.

⁵⁴² Chris Corns, 'Criminal Proceedings: An Obligation or Choice for Crime Victims?' (1994) 13(2) *University of Tasmanian Law Review* 346, 349.

⁵⁴³ *Ibid*, 367.

Australian legislation provides for the protection and assistance of trafficking victims, the protection and assistance is limited. Nevertheless, even if the legal basis for the provision of rights in other courts may be uncertain at present, the position of these international courts changes the position of the victim within the international criminal justice system.⁵⁴⁴ Further, modern ideas of the law have developed acknowledging that justice requires the criminal process to pay due regard to the victim.⁵⁴⁵

It is important to note that there are differences in opinion as to how the victim should be protected and what sort of rights they should be afforded.⁵⁴⁶ Regardless of this, *Trafficking Protocol* does not contain the same victim protection regime as the other international bodies discussed above and it is submitted that this negatively impacts on the success of the prosecution. That is, the lack of victim focus will translate to a lack of cooperation by the victim. This is further compounded by the fact that trafficking victims reluctantly approach police regarding trafficking and reluctantly act as witnesses. For the criminalisation of trafficking to be effective, victim support is required and without a better approach in integrating the victim into the proceedings, both the victim and the criminalisation process will suffer.

Generally in criminal proceedings, there are a number of reasons that a victim focus is important. Firstly, the exclusion of the victim from formal proceedings has added to the alienation of the victim with a result that victims are less likely to report crimes. In the alternative, where victims are involved in the proceedings, it has led to the so called 'second victimisation'.⁵⁴⁷ It is thought that second victimisation can be avoided by providing the victim with empathy and due consideration throughout the proceedings.⁵⁴⁸ Most importantly perhaps is that the victim, who is the actual person harmed by the act,

⁵⁴⁴ Helen Fenwick, 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal justice Process?' (1997) 60(3) *The Modern Law Review* 317, 318.

⁵⁴⁵ Jonathon Doak, 'The Victim and the Criminal Process: an analysis of recent trends in regional and international tribunals' 92003) 23(1) *Legal Studies* 1, 2.

⁵⁴⁶ Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) (17) *University of New South Wales Law Journal* 595, 606.

⁵⁴⁷ *Ibid*, 596.

⁵⁴⁸ Dionysios Spinellis, 'Victims of Crime and the Criminal Process' (1997) 31(1-3) *Israel Law Review* 337, 345.

deserves a role in proceedings.⁵⁴⁹ Of course, this participation should be limited to preventing the victim from exacting revenge from the accused. In any event, a model which brings in the victim provides a more holistic approach to crime control.⁵⁵⁰ All of these factors are relevant to trafficking victims.

For the above reasons, advocates argue in support of victim's participation in the proceedings. Suggestions include the victim as supplementary prosecutor; a possibility of the victims supplementing evidence or interrogating witnesses; as well as the provision by the victim of a Victim Impact Statement (VIS).⁵⁵¹ VIS's are intended to detail loss which may be in the form of physical or emotional harm with an aim of ultimately influencing sentencing.⁵⁵² Certainly a clear mechanism for victim participation is the provision of compensation by the offender to the victim on the basis that the compensation contributes to the victim's rehabilitation.⁵⁵³ Of course, even where the court is unable to provide the victim with monetary compensation, the victim still has an interest in the outcome.⁵⁵⁴ However a conviction of the offender may assist the victim in receiving compensation in other courts.⁵⁵⁵ Importantly, by providing the victim with a greater sense of justice, it may be easier for the prosecutor to apply a less punitive and more effective criminal policy.⁵⁵⁶

⁵⁴⁹ Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) (17) *University of New South Wales Law Journal* 595, 601.

⁵⁵⁰ Jonathon Doak, 'The Victim and the Criminal Process: an analysis of recent trends in regional and international tribunals' 92003) 23(1) *Legal Studies* 1, 5.

⁵⁵¹ Emmanuel Gross, 'Shifting the Balance between the Rights of Victims and the Rights of Defendants in Criminal Proceedings: A Comparative Study of Israeli and American Law' (2000) (15) *Tel Aviv university Studies in Law* 199, 210.

⁵⁵² Helen Fenwick, 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal justice Process?' (1997) 60(3) *The Modern Law Review* 317, 328 – 329.

⁵⁵³ Emmanuel Gross, 'Shifting the Balance between the Rights of Victims and the Rights of Defendants in Criminal Proceedings: A Comparative Study of Israeli and American Law' (2000) (15) *Tel Aviv university Studies in Law* 199, 230.

⁵⁵⁴ Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) (17) *University of New South Wales Law Journal* 595, 601.

⁵⁵⁵ Dionysios Spinellis, 'Victims of Crime and the Criminal Process' (1997) 31(1-3) *Israel Law Review* 337, 358.

⁵⁵⁶ *Ibid*, 338.

The interests of the victim are summarised by Garkawe. That is, victims have an interest in:⁵⁵⁷

- *Receiving information regarding the proceedings;*
- *Receiving compensation or recovering their property;*
- *The verdict of the court;*
- *Receiving protection from retaliation;*
- *Adequate punishment for the accused;*
- *Protecting their privacy*

Two methods have been suggested for achieving a victim focus. The first is what is called the 'services' model through the provision of civil services to take care of the victim and the other is the 'rights model' where the state assists the victim in receiving support from the offender.⁵⁵⁸ We now see certain provisions that make reference to the protection of the victim as well as certain jurisdictions that provide mechanisms for compensation. While there is some national legislation that allows for the victim to make a claim against the trafficker,⁵⁵⁹ a services model is more appropriate in trafficking because it allows for trafficking victims to access services and assistance as soon as it is required. Many victims may not have the time and resources to pursue the trafficker under the rights model. Other issues such as intimidation by the trafficker and uncertainty regarding legal procedure may also contribute to the victim's reluctance to pursue the trafficker.

Nevertheless, a victim focus must be found that does not take away from the rights of the accused.⁵⁶⁰ So, even if art 68 of the *Rome Statute* provides for certain protective

⁵⁵⁷ Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) (17) *University of New South Wales Law Journal* 595, 601 – 602.

⁵⁵⁸ Dionysios Spinellis, 'Victims of Crime and the Criminal Process' (1997) 31(1-3) *Israel Law Review* 337, 341.

⁵⁵⁹ For example, in the United States and Australia..

⁵⁶⁰ Chris Corns, 'Criminal Proceedings: An Obligation or Choice for Crime Victims?' (1994) 13(2) *University of Tasmanian Law Review* 346, 352.

measures for the victim, this should be balanced by provisions such as art 69(2) which provides that any measures must not prejudice or be inconsistent with the rights of the accused.⁵⁶¹ It has been suggested that this be achieved not by providing the victim with substantive rights; but in adequately structuring the victim's relationship with the prosecutor.⁵⁶² This is because the prosecutor is the only party at court that can represent the victim's interests.

6.3 Conclusion

The most important and effective theory in criminal law and specifically trafficking, is retributive theory. However retributive theory is only relevant when there is an offender to prosecute. While the victim no longer commences proceedings against the offender, they still play a crucial role in reporting the crime. It is most commonly through the reporting of the crime that the prosecution is able to commence proceedings at all. Without taking proper account of the victim, that is, through affording the victim adequate protection and support after approaching authorities, the victim will be far less likely to report the crime. Even if the prosecution is able to commence proceedings without the initial reporting of the victim, the victim can provide invaluable information to the prosecution as witness. As such, the victim is a crucial part of the successful criminalisation of the offender both in locating the offender in the first place and in providing evidence in proceedings. Accordingly, in order for the criminal process to be successful, a victim centred approach is crucial.

As discussed above in the national legislation section, this link has been identified by the governments of the United States and Australia by providing for a mechanism of support and protection for the victim who assist the prosecution. However as discussed, while these provisions are a step in the right direction, they are still inadequate in properly addressing the concerns of victims because assistance is often discretionary and limited.

⁵⁶¹ Jonathon Doak, 'The Victim and the Criminal Process: an analysis of recent trends in regional and international tribunals' 92003) 23(1) *Legal Studies* 1, 23.

⁵⁶² Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) (17) *University of New South Wales Law Journal* 595, 604.

Today, a change in focus to victim rights also carries with it a responsibility of crime avoidance. So the law may expect that the victim reduce the risk of being trafficked, through a culture of vigilance and avoidance. Indeed some authors argue that some victims place themselves in positions whereby they are likely to fall victim to crimes.⁵⁶³ This point may be relevant in trafficking in instances where the trafficking victim is sent home only to be re-trafficked. If re-trafficking of the same victim continues, questions may arise as to why the victim continues to place themselves in such a vulnerable situation. Indeed, it is argued that most consensual crime falls into the category of crimes where the participation of the victim as a willing agent is actually essential to the 'transaction' or offence: 'victim participation in crime is probably a good deal more subtle and pervasive than the highly visible acts of consent and provocation'.⁵⁶⁴ Again, this relates to consent theory and issues such as voluntariness.

⁵⁶³ See generally, D R Miers, 'Victim Participation in Criminal Behaviour' (1974) (3) *Anglo-American Law Review* 86.

⁵⁶⁴ *Ibid*, 86 – 87.

7 CONSENT THEORY

7.1 Consent in trafficking

One problem associated with trafficking, is that there is almost always, a degree of consent to the trafficking by the victim. Consent therefore plays a significant role in any discourse on trafficking. First, it helps with our understanding of the phenomenon either as a crime or as a business transaction. Second, it plays a crucial role in the attitude of states towards victims and their traffickers. Third and more important for the purposes of this thesis it informs the international regime for combating trafficking. In the construction of a theoretical frame work as the normative basis to combat trafficking, consent is therefore an appropriate primary starting point.

There is usually at least, some consent to the breaking of migration laws and collusion by the victim with their trafficker during the recruitment and transportation.⁵⁶⁵ While some people are undoubtedly abducted,⁵⁶⁶ cases of people, and in particular of women being drugged and kidnapped by an elusive and charismatic 'devil in disguise'⁵⁶⁷ confuses the reality of trafficking and paints a picture of a completely innocent and helpless victim. In fact, people may wilfully consent to their trafficking; '[r]eflective of a poor economy, much of this willingness is tied to the 'absence of alternatives' for women in 'societies that once guaranteed jobs, child care and health benefits.'⁵⁶⁸ Insisting on the alternative, that is, that trafficking victims are coerced, takes away from the legitimate pain and suffering endured by trafficking victims who suffer even though

⁵⁶⁵ Jyotti Sanghera, "Unpacking the Trafficking Discourse" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 14.

⁵⁶⁶ Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 32.

⁵⁶⁷ Susan Tiefenbaum, 'The Saga of Susannah a US Remedy for Sex Trafficking and Violence Protection Act of 2000', (2002) 1 *Utah Law Review*, 107, 109.

⁵⁶⁸ Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369, 387.

they play a role in their trafficking. Exaggerations do not help trafficking victims.⁵⁶⁹ The issue of consent poses problems for the debate in trafficking because it causes trafficking to be viewed as a migration and crime control issue as the community assesses the 'relative innocence' of the victim⁵⁷⁰ instead of acknowledging human rights abuses.

Perceiving trafficking victims as illegal migrants may mean that authorities assume at first instance that the person before them is a smuggled migrant until elements present themselves to re-evaluate the situation to one of trafficking. The response by receiving states is to close borders to people of other countries, with oftentimes racist or exclusionary immigration practices.⁵⁷¹ Racist policies do not help anti-trafficking strategies in any way and they must be set aside in order to bring perpetrators of trafficking to justice.⁵⁷² However this will always be problematic until consent in trafficking is reconsidered.

The issue of consent was an important one during the drafting of the *Trafficking Protocol* but from the outset, it was decided that the inclusion of the phrase 'irrespective of the consent of the person' would not form part of the Protocol even though it would ensure the prosecution of the traffickers. Apart from political motivations, it was argued that the non-contested parts of the definition necessarily involved 'consent-nullifying' behaviour such as force, abduction or other coercive practices.⁵⁷³ This has been misinterpreted by some who believe that the *Trafficking Protocol* takes the position that a person cannot consent to enslavement or forced labour of any kind.⁵⁷⁴

⁵⁶⁹ Alison Murray "Debt Bondage and Trafficking – Don't Believe the Hype" in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 57.

⁵⁷⁰ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1145.

⁵⁷¹ Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Addendum, Mission to Bangladesh, Nepal and India on the issue of trafficking of women and girls, Integration of the Human Rights of Women and the Gender Perspective- Violence against Women*, [11] UN Doc E/CN.4/2001/73/Add.2 (2001).

⁵⁷² Aiko Joshi, 'The Face of Human Trafficking', (2002) 13 *Hastings Women's Law Journal* 31 at 51.

⁵⁷³ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 985.

⁵⁷⁴ See Amy O'Neill Richard, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime', (DCI Exceptional Intelligence Analyst Program An

For example, in relation to consent and the *Trafficking Protocol*, Melissa Ditmore concludes that:

*'The definition of trafficking adopted in the protocol specifies that the threat or use of force or deception is a necessary component of trafficking persons into any situation. It goes on to make clear that consent is irrelevant when these means have been used. In other words, a person can consent to work but not to slavery or servitude.'*⁵⁷⁵

However this reasoning is inaccurate. The unfortunate reality is that a person can consent to work in slavery or servitude and where they do so without initial coercion; they will not be considered a victim of trafficking or be afforded any protection as a victim of trafficking. This is despite some authors believing otherwise. For example, Defeis believes that the compromise on the issue of consent in the *Trafficking Protocol* is that where consent may initially be raised as a defence, consent for the initial recruitment is not the same as consent to the entire course of trafficking.⁵⁷⁶ However this view cannot be found in the wording of the Protocol.

There is an assumption that the elements of coercion mean that, as Ditmore says above, a person cannot consent to slavery but this makes the assumption that an un-coerced person would not consent. In fact this is not true. For a variety of reasons, people may consent to otherwise unusual circumstances either because they have a great need; they feel that they have no better alternative; or because they do not believe that their circumstances will be quite as bad as has been explained or implied to them. For example, evidence shows that smuggling and even trafficking have led to the improvement of one's circumstances as trafficking victims are sometimes able to send money home and are able to improve the quality of the lives' of their families.⁵⁷⁷ This

Intelligence Monograph, November 1999), vi states that there cannot be consent to slavery however this is inconsistent with the *Trafficking Protocol* which allows one to consent to slavery but which then bars the victim from assistance.

⁵⁷⁵ Melissa Ditmore, "Trafficking in Lives – How Ideology Shapes Policy" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 115.

⁵⁷⁶ Elizabeth F Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach', (2004) 10 *ILSA Journal of International & Comparative Law* 485, 488.

⁵⁷⁷ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 486.

will lead to some people 'taking a risk' and agreeing to trafficking because they believe that they will have a good outcome. The preferred approach would have been to have left consent out of the definition altogether.

The basis of the problem in this regard is more properly assessed through *consent theory*. This is because there is often an absence of 'force, abduction or other coercive practices' and the *Trafficking Protocol* and national legislation have failed to properly account for victims of trafficking who have consented to exploitation because of a lack of alternative choices. Unfortunately, the law turns on the person's consent and not the exploitation.⁵⁷⁸

While consent played a role during the drafting of the *Trafficking Protocol*, debates on consent in the Vienna Process focused on whether a woman can really consent to prostitution, this took the attention away from the general discussion and legal consequences as to whether a person can consent to being trafficked.⁵⁷⁹

Consent theory questions consent that is not voluntary, or as will be discussed below, consent that is not given in the context of viable alternatives, agency etc. However, consent theory has not been used to explain trafficking and instead, the little debate that takes place on the matter is not backed by meaningful theory. Kara Abramson, who has undertaken excellent research into the issue of consent in trafficking believes that there are 'real problems with consent as preventing a definition of trafficking'. The reasons that Abramson gives for this proposition include that this attitude lends support to a trafficker who is abusing their exploited worker on the basis of consent. From a policy perspective, Abramson argues that a position that says that people cannot consent to exploitation may be more helpful.⁵⁸⁰ On the other hand, preventing people from choosing exploitative labour may limit their choices.⁵⁸¹

⁵⁷⁸ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 2996.

⁵⁷⁹ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 475.

⁵⁸⁰ *Ibid*, 493.

⁵⁸¹ *Ibid*, 494.

Abramson finds the two sides of the debate on trafficking as being equally problematic. The first side of the argument deems consent irrelevant when one considers a poor impoverished person, the other side of the argument which views the trafficked person as a free agent exercising choice in the free market place as ignoring the differences between 'rich and poor, male and female, and educated and uneducated.'⁵⁸²

The question of consent frequently arises in relation to trafficking for the purposes of prostitution. The concept of 'voluntariness' has been vigorously debated by feminists with strongly opposing views. One group believe that women should be given the ability to choose prostitution if they wish whereas, the opposing feminist group believe that there is no real voluntariness involved with choosing prostitution as a profession.⁵⁸³

In grappling with the problem of consent, the GAATW have attempted to find a solution that accepts that people will make the decision to enter into exploitative situations and that trafficking groups will exploit not only the labour of the victim but also the persons willingness to be exploited. Or to put it another way, trafficking groups will take advantage of the circumstances of the victim. While their solution is based on the role of consent to prostitution, the position can be applied to general exploitation. The GAATW believe that provided it is meaningful, women should be able to consent to abusive or exploitative conditions but that even when such meaningful consent is given, the trafficker remains liable for their abusive actions.⁵⁸⁴ That is, the GAATW allow the woman to meaningfully consent to exploitation but maintain that the trafficker should not be able to avoid punishment on the basis of the woman's consent. Rather, the trafficker should be punished on the basis of the exploitation. This may be a good basis on which to build a response to the issue of consent but it would require this to then flow to the protection of the victim.

In any event, consent in the *Trafficking Protocol* would have been better handled had it been underpinned by an application of an appropriate theory and an understanding of the role played by consent in slavery.

⁵⁸² Ibid, 475.

⁵⁸³ Both of these positions will be discussed in the chapter on Feminism.

⁵⁸⁴ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 488.

7.2 Consent Theory

The issue of consent is very important to this thesis for a number of reasons. Most importantly, as noted earlier, consent strikes at the core of the definition of trafficking affecting the status of trafficking victims. That is, if a person willingly consents to being exploited, then the law does not consider them to be a victim of trafficking. However, a study of the history of slavery will show that consensual slavery has never been a bar to the presence of slavery. That is, there are numerous examples of people who have consented to slavery in the past, whereas today, non-coercive consent is considered to negate the presence of slavery. This position is further supported through consent theory which looks beyond apparent consent to concepts such as voluntariness and choice.

Consent theory is derived from the work of John Locke and his work on the origin for the idea of 'the self'. Locke also wrote extensively on many matters including the theory of value and property, political theory and price theory.⁵⁸⁵

Locke traced political power to the law of nature. That is, all people have perfect freedom in their actions and within the bounds of nature, have the ability to act and dispose of their possessions without being answerable to anybody else.⁵⁸⁶ Nature theory was also used to explain the inherent equality between all people on the basis that all people are of the same species and rank.⁵⁸⁷ In speaking of equality, Locke is referring to equality in authority by prohibition of subordination or subjection by one person to another.⁵⁸⁸ Liberty however does not mean that the person has the right to destroy themselves, just like there is no right to take away someone else's life. This is central to Locke's theory and the combination of liberty and self destruction are found in his analysis of slavery:

⁵⁸⁵ Ibid.

⁵⁸⁶ John Locke, *Two Treatises of Government* (1689) in *The Works of John Locke* (1823) found at <http://socserv2.mcmaster.ca/~econ/ugcm/3ll3/locke/government.pdf> at 20 June 2007, 'Treatise II Concerning the True Original Extent and End of civil Government, Chapter I, 106, para 4.

⁵⁸⁷ Ibid.

⁵⁸⁸ Ibid.

*'The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule.'*⁵⁸⁹

Locke explains that people do not have absolute power over their own lives and cannot consent to enslaving themselves to another person nor can they put themselves under the absolute, arbitrary power of another person who may then take their life.⁵⁹⁰ Essentially, 'no man can by agreement pass over to another that which he hath not in himself – a power over his own life.'⁵⁹¹ This bar to slavery is not absolute because Locke goes on to use the example of the enslavement of the Jews and other peoples to illustrate his point. Locke explains that a person may seem to have sold themselves into slavery. However, if the situation is more carefully examined, then it may be seen that the person has sold themselves into 'drudgery'. Locke explains that what makes the situation one of slavery is the presence of s 'absolute, arbitrary, despotical power' by the master over the slave. Anything less than this, would only be 'drudgery' since the master did not have the power to kill the slave and is obliged at some point to liberate them.⁵⁹² In some ways this is similar to modern views about slavery. That is, people today commonly believe that slavery is present in examples of complete control of the master over the slave.⁵⁹³ However, throughout time, slaves have had certain rights but this did not mean that they were not considered to be slaves. Non-coercive consent also puts the presence of slavery into question.

Tacit consent was also formulated by Locke although it was done so in the context of government.⁵⁹⁴ Essentially, tacit consent is something less than actual consent. For

⁵⁸⁹ Ibid, para 21.

⁵⁹⁰ Ibid, para 22.

⁵⁹¹ Ibid, para 22.

⁵⁹² Ibid, para 23.

⁵⁹³ Slavery will be discussed in detail in this thesis.

⁵⁹⁴ For example, in relation to government, Locke writes that express consent to a society makes a person a perfect member of that society and a subject of that government. Presumably, Locke is referring to the person's express consent through their participation in elections. However, where express consent is not given, then Locke argues that tacit consent is evidenced by the individual's enjoyment of any parts of the 'dominion' of the government, during which time they are obliged to be obey that government, for as long as they remain in that place, see John Locke, *Two Treatises of Government* (1689) in *The Works of John Locke* (1823) found at <http://socserv2.mcmaster.ca/~econ/ugcm/3ll3/locke/government.pdf> at 20

example, tacit consent applies to concepts such as implied consent. A person may seem to have tacitly consented or consented by implication because of the way that they react to something. The person may for example, imply their consent by not reacting to an action, or to put in another way, by not objecting to an action. In this way, a person may imply their tacit consent to a certain action by seeming to accept it or by not choosing an alternative. In trafficking, tacit consent may be implied where a trafficking victim continues to work for their trafficker or where the victim does not actively look for a way to escape their situation. However, more recent debate regarding consent has concluded that binding consent must be given knowingly, intentionally and voluntarily.⁵⁹⁵ So, for a trafficking victim, this would mean that the victim's inaction or failure to flee not automatically be construed as consent or agreement to their situation.

Locke's work has had an important influence on many legal theorists who have been able to take what he has written and built upon it or questioned it. Arguably the leading theorist from recent years is Don Herzog who sums up consent theory as: 'any political, moral, legal, or social theory that casts society as a collection of free individuals and then seeks to explain or justify outcomes by appealing to their voluntary actions, especially choice and consent'.⁵⁹⁶ Herzog's work can be applied to the idea of consent of trafficking victims. Trafficking victims, while not necessarily coming from the poorest of the poor in their societies, are nevertheless disadvantaged. Accordingly taking a person in difficult circumstances with little choice as having meaningfully

June 2007, 'Treatise II Concerning the True Original Extent and End of civil Government, Chapter IV, 114, para 119.

This means, that a person gives their tacit consent to a government just by spending some time in the land of that government such as while visiting a place or even while in transit through it. The person gives their tacit consent to the government through their continued stay in that dominion rather than through any affirmative action. However, modern theorists believe that consent must be more than silence, or a failure to object, it must also be more than mere residence see Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 208.

Following from Locke's idea that the people consent to the government, the *American Declaration of Independence* asserts that the government derives its power through the consent of the people. Locke's theories have been developed and now some believe that there are few occasions that people can give their express consent to the actions of a government while others believe that tacit consent can be determined through the constitution of the state see A John Simmons, 'Consent, Free Choice and Democratic Government' (1984) (18) *Georgia Law Review* 791, 796 – 798.

⁵⁹⁵ A John Simmons, 'Consent, Free Choice and Democratic Government' (1984) (18) *Georgia Law Review* 791, 802.

⁵⁹⁶ Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 1.

consented to their predicament should be questioned. Modern theorists such as Herzog provide a basis from which to question this consent.

Locke's tacit consent is questioned by modern theorists who believe that tacit consent is something more than the failure to react to an action. Accordingly, concepts such as 'knowingly', 'intentionally' and 'voluntarily' become important. Simmons explains that 'knowingly' means that the person gives their consent with understanding and with awareness of its significance; 'intentionally' has a similar meaning in that it means that it is given with full awareness of its significance and 'voluntarily' means that the decision is made when the person has a genuine choice between possibilities.⁵⁹⁷

Herzog also questions whether Locke's tacit consent or 'grudging willingness' can truly be counted as consent.⁵⁹⁸ Herzog's idea of consent is related not the person's seeming acceptance of a situation but must be examined in the context of one's alternatives. Further, Herzog contends that consent must also generate an obligation.⁵⁹⁹ Herzog uses the paying of taxes as an example to describe voluntariness. That is, one has taxes imposed upon them and in a way, the person can be thought of as having a choice as to whether to pay the taxes because they can choose not to. But the choice not to pay taxes is not actually a real choice and so people must pay taxes. Herzog concludes that under these circumstances, the payment of taxes cannot be construed as a consensual act because the payment of taxes is an example of government where 'the government governs the people whether they like it or not.'⁶⁰⁰

Tacit consent, or 'grudging willingness' are relevant in trafficking because when coercive practices are not used to persuade the victim to be trafficked, the victim is treated as if they consented to the trafficking process and are therefore not viewed as a victim nor afforded any protection or assistance.

⁵⁹⁷ A John Simmons, 'Consent, Free Choice and Democratic Government' (1984) (18) *Georgia Law Review* 791, 803-810.

⁵⁹⁸ Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 183. Again, Herzog's questions arose in the context of government.

⁵⁹⁹ *Ibid*, 184.

⁶⁰⁰ *Ibid*, 200.

However, true consent is more complicated than that and involves various interrelated concepts relating to liberty and freedom.⁶⁰¹ Herzog suggests four concepts of liberty that are crucial to consent: negative liberty, freedom, ancient liberty and autonomy.

Negative liberty means the absence of coercion and freedom is when one faces a 'range of significant options'. Significant options refers to options that are real, that one is aware of and has access to, for example, a young talented child at school will only have liberty if it is aware of career choices and they are available to them. Not if the same child in those circumstances is not aware of the choices. Ancient liberty is the right to participate in elections, which identifies one as a full member of the community and self autonomy is the ability to control one's own actions. This becomes important when considering that another person can interfere with one's ability to control ones actions. All four concepts are important and involve consent theory but they may also conflict with each other.

Herzog gives three so called 'defences' of consent theory.⁶⁰² The first is to respect the choices that people make, the second is the question of voluntariness and the third is the question of agency. Agency means that one is able and free to make their own choices without other people's intrusions which translates to the ability to think about something, weigh the options and then choose a direction.

Consent means that one has the ability to withhold ones consent. In 'voluntary' terms, it means that there are real alternatives and these alternatives must be reasonable and without coercion. This is so even though coercion is not the only way of depriving one of alternatives.⁶⁰³ 'Reasonableness' then depends on the circumstances and the context. One should be careful then not to imply consent to someone's actions when they had no real alternative.

The concept of voluntariness is seen in opposite discussions in labour debates. Leftists view the sale of labour as wage slavery whereas the right believe that it is the exercise

⁶⁰¹ Ibid, 218 - 221.

⁶⁰² See generally Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 222- 224

⁶⁰³ See generally Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 225 - 227.

of free will.⁶⁰⁴ However, voluntariness in labour can be questioned throughout one's career, and is evidenced by the choice one has in where one works, in having to comply within certain working conditions and with the way one has to handle changing working conditions.

Voluntariness becomes problematic when one acknowledges that people make bad decisions even though they are well informed. Herzog gets around paternalistic responses to such situations by saying that the appropriate response is to say that 'this choice is so bad that we don't care if it was voluntary' instead of saying that 'this choice is so bad that it wasn't voluntary.'⁶⁰⁵

Importantly, Herzog uses the example of giving the slave a choice. Slaves may not be aware that they are being exploited, they may not have the dignity to know of their plight and they may be blissfully unaware of their situation. If the slave is then told of their situation, the slave may be disillusioned by their life or they may choose to continue with being a slave. How does one deal with this situation? Herzog responds by explaining that the changes suggested, that is, offering the slave their freedom and the slave choosing to remain in their servile status, were not really voluntary on the part of the slave. Instead, Herzog concludes that the slave did not have any real choice at all.⁶⁰⁶ Such concepts are very relevant to trafficking because trafficking usually involves victims with few available choices.

7.3 Consent, exploitation and slavery

The position of the *Trafficking Protocol* is to take a victim of trafficking, who bases their decision to enter into an exploitative situation on a 'very few miserable options' and to deem their decisions as 'consent'.⁶⁰⁷ The importance placed on consent in trafficking is fundamentally problematic because it does not take into account the realities of people's situations and the choices they have to make. It is through a framework of consent theory that the focus can shift from one of consent to

⁶⁰⁴ Ibid, 230

⁶⁰⁵ Ibid, 237

⁶⁰⁶ Ibid. 238.

⁶⁰⁷ Berta E Hernandez-Truyol and Jane E Larson 'Sexual Labor and Human Rights' (2006) *Columbia Human Rights Law Review* 391, 425.

exploitation. Slavery becomes important for two reasons. The first reason is that apart from questioning consent in trafficking through consent theory, historically, consent has never been a bar to the presence of slavery. Secondly, slavery is important in relation to exploitation.

Throughout history, consensual slavery was never considered as a separate category to forced slavery. This is because slavery was not determined by reference to consent but by reference to issues such as personal autonomy and proprietary rights. Trafficking instruments seem to have been drafted without regard to the theoretical issues of consent and the broader concepts of slavery. Accordingly, they fail to address modern slavery adequately.

While the prohibition of slavery may be covered under domestic legislation as well as international agreements, it is submitted that just like the offence of human trafficking that triggered the response to formulate the *Trafficking Protocol*, there is insufficient gravity attached to slavery, servitude and similar practices. Just like it was felt appropriate to draft a new agreement regarding trafficking, even though the slave trade is outlawed in the *Slavery Convention*, it is also appropriate that the *Slavery Convention* be re-assessed along with attitudes to modern slavery.

7.4 Conclusion

A re-assessment of consent would have an important impact on the issue of trafficking. This is important because with trafficking, if an act is not undertaken by coercive means then even intent to exploit will not fall within the *Trafficking Protocol*.⁶⁰⁸ Ultimately, the conditions of labour should form the basis of the state action in combating trafficking rather than victim consent.⁶⁰⁹ In this regard one can draw important lessons from the court's consideration of consent regarding peonage in *Clyatt v United States*.⁶¹⁰ In the case, the US Supreme Court declined to consider consent a defence to peonage

⁶⁰⁸ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 477.

⁶⁰⁹ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 2998.

⁶¹⁰ *Clyatt v United States*, 197 US 207 (1905).

because 'peonage, however created, is compulsory service, involuntary servitude'.⁶¹¹ The implication here is that a person cannot consent to compulsory or involuntary servitude. On this basis then, a person would not be able to consent to exploitation which includes forced labour, slavery, slavery like practices, servitude etc.

Taking all of the above into consideration, an appropriate theoretical framework regarding consent is not to question whether consent was obtained only through coercion but whether the person had other options and whether the person has the autonomy to make their own decisions without intrusion from other people. Most importantly, voluntariness is crucial because even when a person seems to have made a decision after weighing the options and alternatives; the circumstances of the person must be examined to determine whether the person really had any choice at all, as in Herzog's example of the slave. Again, when a 'bad decision' is made by a person, then it may be that the only alternative may be to say that 'the choice was so bad that it was no choice at all.'

Consent theory however questions this position also. So when a person makes a particularly bad decision such as to enter into a state of slavery, following from Herzog's work discussed above, the appropriate response would be to conclude that 'this choice is so bad that we don't care if it was voluntary' instead of saying that 'this choice is so bad that it wasn't voluntary.'⁶¹² That is, consent and other issues such as voluntariness should not even be examined on the basis that such a decision is ultimately a 'bad idea'.

It is inaccurate to say that 'no person can consent to slavery'⁶¹³ because people often make bad decisions voluntarily and are sometimes well informed. The unfortunate reality that is not acknowledged in the Protocol is that people are often willing to be

⁶¹¹ *Clyatt v United States*, 197 US 207, 215 (1905).

⁶¹² Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 237.

⁶¹³ Alison N Stewart, 'Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective' (1998) 20 (11) *Women's Rights Law Reporter* 11, 17.

trafficked even when they know the conditions that they will face upon arrival.⁶¹⁴ However, bad decisions should not be deemed to have been made by consent.

The result of the Protocol is a lack of victim focus. Protective mechanisms should be aimed at assisting people in need. Not only are the protective mechanisms in the Protocol closely linked to prosecution proceedings, but the element of exploitation is not at the heart of the Protocol either. If protection was at the heart of the Protocol, then issues such as intent, consent and coercion would not be a bar to assistance. Accordingly, considering the difficulties presented by coercion, the concept of consent should be removed from the *Trafficking Protocol* and national agreements and the focus should shift to the exploitation suffered by the victim.

Further, as suggested by the GATTW, the prosecution of traffickers should be independent of the consent of the victim because non-coercive consent should not be allowable as a defence to the crime of trafficking.

⁶¹⁴ See Charles R Chaiyarachta, 'El Monte is the Promised Land: Why do Asian Immigrants Continue to Risk Their Lives to Work for Substandard Wages and Conditions?' (1996) 19 *Loyola of Los Angeles International and Comparative Law Journal* 173, 173 who discusses that even those who knew that the illegal immigrants were working in 'less than human conditions' were still willing to make the Journey from Thailand to the United States to face similar conditions.

8 MIGRATION THEORY AND TRAFFICKING

There is a strong link between human trafficking and migration. Largely, human trafficking occurs because of a desire by the trafficking victim to leave their home and seek a better life elsewhere. Accordingly, migration plays an important role in trafficking. It has thus been argued that:

*Migration involves the movement of people. If one accepts that labour is a resource in the market place, then at a very fundamental level, migration as we see it today is a logical representation of free market principles. For the most part, migration is the result of movement of a resource towards the most profitable location. It is thus not surprising that most of the world's migrants live in the affluent states of Western Europe.*⁶¹⁵

For the purposes of trafficking, the logical extension of this view then is that trafficking is as much a migration issue as it is a labour issue. When applied to trafficking this view seeks to explain the phenomenon as an element of the 'free market principles' in which populations flow from 'people rich' nations in response to demands from profitable locations in affluent nations which are 'population poor.' Advocates of this view then would by default explain trafficking on the basis of migration theories.

Migration theories have relevance in trafficking. Migration theories are important because they provide a basis from which to analyse the movement of people. 'Push and pull' factors contribute both to the reasons that people choose to leave their homes and provide a sound basis analysing the choice of destination. On the other hand, 'pull reasons' are closely related to labour because without a demand or pull factors for trafficked people in the destination state, there would be little incentive for traffickers to operate.

⁶¹⁵ Sam, Blay, 'Restrictive Trends in Migration Flows: A post-card from Australia' (2006) 6(2) *Journal of Migration and Refugee Issues* 29.

This chapter evaluates the scope of relevance of migration theories in informing our understanding of trafficking and in designing a suitable framework for dealing with trafficking

8.1 Migration Theory

While little is seen in legal writings, theories regarding migration can be found in the social sciences. The International Organisation for Migration (IOM) criticises what they call the abundance of theories explaining migration for being created independently of each other and for failing to consider other dimensions and factors. They conclude by saying that there is no general theory for explaining migration.⁶¹⁶ Joaquin Arango, a leading social scientist in migration theories, believes that a cumulative approach to theory building of migration would have been more useful and appropriate.⁶¹⁷ Further criticisms include that the theories focus heavily on migration for employment purposes and ignore other types of migration.⁶¹⁸ Nevertheless, the IOM summarise migration theories into the following groups:

- The theory of development in a dual economy;
- The neo-classical theory;
- The dependency theory
- The dual labour market theory
- The world system theory
- The theory of the new economy of professional migration;
- The migration networks theory

⁶¹⁶ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 12.

⁶¹⁷ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 283.

⁶¹⁸ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 12.

These theories sprang up in response to the large numbers of people migrating after the end of World War II and as such reflect the social and cultural context of the periods when they were developed. While some of these theories were developed over fifty years ago, they still provide valuable insight into the different schools of thought. Further, both the IOM and Arango suggest that the best approach to understanding migration theory would be to combine these theories to come to a more relevant understanding of migration today.

8.1.1 A brief look at the various migration theories

The 'theory of development in a dual economy' came about in 1954. The theory refers to the importation of labour from agriculture, where productivity is limited to better employment in the modern sector. Because there is an 'unlimited supply' of labour to the modern sector, wages remain low and profits high, making this an economically viable model for industry.⁶¹⁹

Both the traditional agriculture sector and the modern sector seem to profit from this model because the modern sector has a continued demand for labour from the traditional sector which at any rate cannot support the number of workers that it has. The modern sector then has ties with the outside world where it is able to sell its produce.⁶²⁰ In relation to trafficking, the dual economy may explain domestic trafficking, where people are trafficked within one country to fulfil the market demands of the modern sector. 'Push' and 'pull' factors are apparent in this model. While push and pull or supply and demand will be discussed in detail in a later chapter, the concept refers mainly to the reasons that people wish to leave their situation and migrate elsewhere. That is, they are 'pushed' to migrate due to low wages, standard of living, or other reasons and 'pulled' to a place that has employment opportunities and better economic conditions. In this model, the push factor can be seen in rising unemployment within the agricultural sector coupled with growing demand for labour within the modern sector. However, the concept of 'push' and 'pull' was not articulated within the 1950s and so there is no reference to this terminology within this model. Indeed, the

⁶¹⁹ Ibid.

⁶²⁰ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 284.

modern understanding of push and pull can be applied to many of the early models even though they are not described in this way.

The 'neo-classical theory' of the 1960's refers to the 'rapid and sustained economic growth, the increasing decolonisation, and emergent processes of economic development in the Third World' that contributed to both internal and external migration.⁶²¹ This theory looks at two main factors. The first factor is the 'structural' determination of migration. Again, this is a study of push and pull factors. The second factor in this theory is the study of the individual's reasons for migration based on their voluntary reason for migrating.⁶²²

This theory has been praised for its versatility in taking so many factors into consideration, focusing on the uneven distribution of labour and capital.⁶²³ On the other hand, the theory has been criticised because it fails to explain why a lot more people did not migrate considering economic disparities and differing numbers of migrants in receiving countries. Arango goes on to say that the reason why the theory fails is because economic differences have never been sufficient in themselves to explain migration, cultural and other reasons also playing an important role.⁶²⁴ This is relevant to trafficking, because while trafficking victims are frequently exploited economic migrants, they are not exclusively so. For example, trafficking for forced marriage is one area that cannot be described as economic migration.⁶²⁵

The 'dependency theory' of the 1970's, similarly to the 1954 theory of development in a dual economy focused on rural migration to the industrialised cities. That is, people in rural areas experience growing inequality and disadvantages, and are continually hindered in their momentum and are drawn to the 'industrialised centre' which exploits

⁶²¹ Ibid.

⁶²² IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 12.

⁶²³ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 285.

⁶²⁴ Ibid, 286 – 287.

⁶²⁵ See generally Sigma Huda, *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children*, UN Doc A/HRC/4/23 (2007) on forced marriage.

them.⁶²⁶ The theory contains Marxist overtones linking capitalism to the core industrialised countries and peripheral agrarian ones in an uneven relationship.⁶²⁷ This refers to similar situations as the 1954 theory but explains migration in a different way. Criticisms of migration theories that seek to explain similar situations without reference to each other are apparent here because this theory could have been enhanced with further reference to the earlier theory of 1954.

The 'dual labour market theory' which was developed at the end of 1970's describes forces in the receiving countries that create a permanent demand for migrant labour. While there are a number of operative factors, 'dual labour' refers to the creation of unstable employment through the coexistence of a capital intensive primary sector and a labour intensive secondary sector but the theory itself does little to explain migration.⁶²⁸

A segmented labour regime exists in the country by having a labour market that domestic workers do not want to fill because of low pay, unstable and dangerous conditions, demeaning work, low prestige etc. The theory is praised for its analysis of why the dual economy exists. Namely: why there are low paying jobs in advanced economies; why those jobs are not filled by local workers; why this problem cannot be solved by normal means such as raising wages for those jobs; why foreign workers agree to work in these areas; and why these jobs can no longer be filled by local woman and teenagers as before.⁶²⁹ The theory is also praised for dispelling the myth that migrant workers take away jobs from local workers.⁶³⁰ However the theory is criticised for ignoring 'push' factors and for failing to explain why similar dual economies attract different levels of migrants at all.⁶³¹

⁶²⁶ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 12.

⁶²⁷ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 285.

⁶²⁸ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 12.

⁶²⁹ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 288 – 289. Note that the article goes on to explain these reasons in excellent detail.

⁶³⁰ This will be discussed in a later chapter.

⁶³¹ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 290.

Nevertheless, this theory is very relevant to trafficking. Its explanation as to why migrants are willing to work in areas that local workers refuse greatly enhances our understanding of the underlining forces at work. For example, the theory explains that because many migrants are socially isolated, they are more likely to be willingly engaged in work that may be considered demeaning because higher pay and distance from family and friends means that there is little chance of criticism. On the other hand, local workers are unwilling to engage in work that carries with it a social stigma because of the likelihood of criticism from their peers. For the same reasons, the theory explains that migrants are more likely to work in unfavourable conditions at the destination country even though they would not have taken such positions in their home country.

While the 'world system theory' of the 1980's also accepts that migrants take jobs that will not be filled by the local market, it also relates to the mobile labour force, primarily from failing agriculture sectors that move around the world in search of better opportunities.⁶³² The theory focuses on the dislocation brought about by capitalistic penetration into the less developed countries, creating conflict and tension.⁶³³ Some of the criticism of this theory includes that it is a theory of a 'historical generalisation', applicable only to the global level with migration as a 'by-product' also ignoring the diversification of migration flows.⁶³⁴

The 'theory of the new economy of professional migration' of the 1990's focuses on the causes of migration and specifically looks at the role of the migrant's family in their decision making. It places less importance on economic advantages to migration with a greater emphasis on social influences and helps to explain why the poorest people in a society are less likely to migrate than those with some resources.⁶³⁵ The role of poverty in migration will be discussed in the following chapter, however the theory is important to trafficking because it shows a broader understanding of migration that is not only

⁶³² IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 13.

⁶³³ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 290.

⁶³⁴ Ibid.

⁶³⁵ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 13.

economically based. The theory explains that family pressures often play an important role in trafficking.

Also from the 1990's, the 'migration networks theory' most closely relates to human trafficking. This theory describes the situation whereby migrants interact with family and friends and acquaintances in the country of origin. The family and friends then provide links of information such as employment opportunities, travelling routes, financial assistance etc, reducing the costs and risks of migration. These informal networks assist the migrant in many aspects of migration. However the structure has the potential to turn into smuggling or trafficking where the 'network' has the potential to exploit the would-be migrant.⁶³⁶

8.1.2 Migration and trafficking

The above formalised theories of migration are developed primarily by the social scientists, and involve far more complex issues than those described above; however it was found to be more appropriate to look at migration from a more general viewpoint. The IOM state that: '[t]he most obvious cause of migration is the disparity in income levels, employment possibilities and social well-being between the countryside and the city, between one region and another, and between one country and another.'⁶³⁷ Many of the above theories describe similar situations. For example, several of the theories seek to explain the movement of people from the agrarian sector to industrialised cities however do so in different ways. The most appropriate application of migration theories in trafficking is a combination of many of the above ideas. That is: a combination of push and pull factors; social and cultural reasons for migration; and increasingly restrictive migration policies, have contributed to the viability of migration networks that promote trafficking.

In their crime control efforts, states commonly view trafficking victims as illegal migrants and they respond by tightening border control.⁶³⁸ However, while migration is crucial to an understanding of trafficking, there is evidence to suggest that when the

⁶³⁶ Ibid.

⁶³⁷ Ibid, 15.

⁶³⁸ Tightening border control is also a response of the *Trafficking Protocol*.

state allows for more legitimate migration, trafficking is reduced.⁶³⁹ After all, stricter border control strengthens both smuggling and trafficking rings.⁶⁴⁰ This is because the role of the trafficker or smuggler becomes more involved when border security becomes more complicated. Then, the illegal migrant often needs continuing assistance after arrival at the destination.⁶⁴¹ Ironically, this has also led to migrants being less likely to return home⁶⁴² for fear of being captured at the border, or fear of not being able to return.

A more detailed analysis of trafficking and migration will now follow.

8.2 A closer look at the connection between migration and trafficking

Within migration theory, push and pull factors were explored by the neo-classical theorists⁶⁴³ while the pull factors were emphasised by the dual labour market theory.⁶⁴⁴ The 1990s theory of the new economy of professional migration⁶⁴⁵ explains the social reasons that people migrate and the migration networks theory brings trafficking and smuggling networks into discussion.⁶⁴⁶ Further, the dual labour market theory and the world system theory both explain that migrants do not take jobs away from the local market.⁶⁴⁷

⁶³⁹ Danailova-Trainor, Gergana; and Belser, Patrick, International Labour Office, Geneva 'Working Paper: Globalization and the illicit market for human trafficking: an empirical analysis of supply and demand' (InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, International Labour Office, Geneva, December 2006), 8.

⁶⁴⁰ Jennifer M Chacon, 'Misery and Myopia': Understanding the Failure of US Efforts to Stop Human Trafficking' (2006) 74 *Fordham Law Review* 2977, 3004.

⁶⁴¹ *Ibid*, 3010.

⁶⁴² *Ibid*.

⁶⁴³ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 12.

⁶⁴⁴ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 290.

⁶⁴⁵ IOM, *World Migration 2003: Managing Migration – Challenges and Responses for People on the Move* (2003), 13.

⁶⁴⁶ *Ibid*.

⁶⁴⁷ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 290.

Today, 1 in every 50 human beings is a migrant worker, a refugee or asylum seeker or an immigrant living in a foreign country⁶⁴⁸ and it is estimated that 191 million people live temporarily or permanently outside their countries of origin.⁶⁴⁹ Traditionally, migration has involved an individual or family unit moving for the purposes of permanent settlement or work. The government acts as a gatekeeper who is charged with deciding who is granted citizenship.⁶⁵⁰ More recently, state policy regarding migration has become more stringent as states close their borders to unskilled labour, demanding highly qualified migrants with the means to provide for themselves and their families. The change of migration policies from one of 'open arms' after World War II to the present situation of qualitative and quantity migration criteria can be interpreted as being fuelled by racism, domestic economic conditions and domestic resource limitations resulting in an inability to absorb new waves of immigrants.⁶⁵¹ When avenues for regular migration decline, with accompanying increased stringent controls on migration, people are more likely to enter the destination state illegally, seeking out dangerous and illegal immigration arrangements.⁶⁵²

Economic and political conditions play a big part in motivating people to leave their homes. For example, population growths in many countries are not accompanied by increased job opportunities, leading to deep dissatisfaction with home conditions.⁶⁵³ Increasing numbers of people wish to migrate due to globalisation and advances in

⁶⁴⁸ Note by the Secretary General, *Smuggling and trafficking in persons and the protection of their human rights*, UN GAOR, 57th sess, UN Doc E/CN.4/Sub.2/2001/26 (2001) para. 20.

⁶⁴⁹ Report of the Secretary General, 'International Migration and Development', UN GA, 6th Sess, UN Doc A/60/871 (2006), 6.

⁶⁵⁰ John Salt 'Trafficking and Human Smuggling: A European Perspective' in Reginald Appleyard, John Salt (eds) *Perspectives on Trafficking of Migrants* (2000) (Offprint of *International Migration* Vol.38(3) Special Issue 1/2000) 35.

⁶⁵¹ R Paul Faxon, 'Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem', (1984) 6 *Northwestern Journal of International Law & Business* 203, 203

⁶⁵² John Salt, Jennifer Hogarth 'Migrant Trafficking in Europe: A Literature Review and Bibliography' in Frank Laczko, David Thompson (eds) *Migrant Trafficking and Human Smuggling in Europe – A review of the evidenced with case studies from Hungary, Poland and Ukraine* (2000) 14. See also Note by the Secretary General, *Smuggling and Trafficking in persons and the protection of their human rights*, UN GAOR, 57th sess, UN Doc E/CN.4/Sub.2/2001/26 (2001) para 22.

⁶⁵³ Louise Shelley, 'Trafficking in Women: The Business Model Approach' (2003) 10(1) *The Brown Journal of World Affairs* 119, 122.

communications and transportation.⁶⁵⁴ Indeed, there are many reasons why people wish to migrate.

While state policy demands a more highly skilled labour force, there is a growing demand within the unregulated labour market for workers. That is, there is a demand for domestic servants and seasonal agricultural workers as well as unregulated construction workers in receiving countries. However, people who do not easily meet migration criteria tend to be uncertain as to how to best achieve their goals of migration and there is a growing demand for third party assistance in the migration process as a result of tightening migration rules.⁶⁵⁵ Would be migrants turn to migration networks to assist them in their transport and placement on arrival. However, migration networks often put the migrants into the hands of unscrupulous third parties making them more likely to fall victim to operators whose aim is exploitation.⁶⁵⁶ Tougher migration policies have led to an increase in trafficking also because families are split because they are unable to migrate together leading to an increase in exploitation.⁶⁵⁷

The traffickers therefore provide both a means to emigrate and a source of irregular workers. Traffickers work in that space between the numbers of people who wish to emigrate but are unable to do so on their own, and employers who seek irregular employees but cannot find them. While there is a demand for the irregular work force, and increasing migration restrictions, operators find a growing demand for their services from both the migrant and the employer.

The government in the receiving state is left with the problem of managing the influx of people. Through trafficking and smuggling, the government's role is undermined and

⁶⁵⁴ Report of the Secretary General, 'International Migration and Development', UN GA, 6th Sess, UN Doc A/60/871 (2006), 5.

⁶⁵⁵ See Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 977; Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective', (2002) 14 *International Journal of Refugee Law* 561, 577.

⁶⁵⁶ R Paul on, 'Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem', (1984) 6 *Northwestern Journal of International Law & Business* 203, 215.

⁶⁵⁷ Phil Marshall and Susu Thatun, 'Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region', in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 51.

networks of international crime are strengthened. Such networks have a vested interest in the growth of the trafficking industry and consequently have a vested interest in irregular migration. Hence, the *Trafficking Protocol* was enacted to provide an instrument rooted in crime and border control to deal with issues such as irregular migration. The *Trafficking Protocol* was intended to deal with the situations that involved exploitative irregular migration practices and the *Smuggling Protocol's* intention was to deal with normal irregular migration. The confusing result is that modern day slaves are viewed by the state and society as illegal immigrants who are granted some level of protection and assistance in exchange for providing evidence against the trafficker in criminal proceedings. So while migration is an integral factor in trafficking, it leads to unfortunate results when trafficking victims are viewed primarily as illegal migrants.

8.2.1 “Push and Pull” or “Supply and Demand”

Push and pull factors are crucial to any understanding and therefore fight against trafficking. Anti-trafficking measures that don't take the supply and demand side of trafficking into account are superficial because they do not deal with the essence of the problem. Both push and pull factors are very important. While some migration theories such as the dual labour market theory have focused on the pull side of migration, this has not impacted on human rights writers who tend to focus on the push factors, and the abuses suffered by victims that make them vulnerable to trafficking. While people emigrate for better opportunities in other countries, without strong pull factors, migrants would not enter the uncertain journey of migration. People migrate, and sometime fall victim to trafficking because they believe that they will find a better future. They do so not only because they may be desperate to leave; but because they have seen the positive experiences of other successful migrants. Therefore any anti trafficking measure must take both sides of the equation into consideration. That is, they must address both the reasons that people seek to migrate and the forces that demand irregular labour.

For example, it has been argued that reduction in poverty alone will not inhibit trafficking in places where the motivation for men to pay for sexual service has

increased.⁶⁵⁸ Further, it is not the poorest of the poor that seek migration and therefore fall prey to traffickers. So, alleviating absolute poverty may actually lead to an increase in trafficking.⁶⁵⁹ This does not mean that home conditions should not be improved. Certainly all governments should work towards bettering the lives of their citizens however these measures alone will not eradicate trafficking. Changing attitudes in the countries of destination regarding exploitative labour is also a key factor along with a reassessment of migration laws. That is, as there is a demand for unregulated workers within a state, the government should address the needs of the market in an appropriate way within domestic legislation.

The strong pull factors of unmet labour demands in the country of destination especially in the informal labour sector need to be acknowledged.⁶⁶⁰ Destination states *attract* smuggled and trafficked people, and should therefore be encouraged to review their immigration policies and to develop greater opportunities for lawful and mutually beneficial migration.⁶⁶¹ The complex reasons that come together to push a person into trafficking are also why an integrated approach is required in order to combat the phenomenon. Generally, the root causes of trafficking are poverty, inadequate systems of education and lack of developmental opportunities as well as inadequate remuneration.⁶⁶² However, there are many more reasons that motivate people to migrate.

⁶⁵⁸ Carolina Johansson Wennerholm, "Crossing Borders and Building Bridges: the Baltic Region Network Project" in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 13.

⁶⁵⁹ Phil Marshall and Susu Thatun, "Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region", in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 47.

⁶⁶⁰ *Report of the Secretary General, 'Integration of the human rights of women and a gender perspective: Traffic in Women and Girls*, UN ECSOR, 58th sess, [17] UN Doc. E/CN.4/2002/80 (2002).

⁶⁶¹ *Note by the Secretary General, Smuggling and Trafficking in persons and the protection of their human rights*, UN GAOR, 57th sess, [para 23] UN Doc E/CN.4/Sub.2/2001/26 (2001).

⁶⁶² *Report of the Secretary General, 'Integration of the human rights of women and a gender perspective: Traffic in Women and Girls*, UN ECSOR, 58th sess, [11] UN Doc. E/CN.4/2002/80 (2002).

8.3 Push factors in trafficking

The increase in human trafficking in recent years is due largely to the end of the cold war, the opening of borders and increase in the movement of people, compounded by rising organised crime and the expanding sex tourism industry.⁶⁶³ With the advent of AIDS, there has been an increase in the traffic of children for sexual exploitation to a growing market that demands virginity and innocence.⁶⁶⁴ Displacement of people created by civil war and natural disasters contribute to the movement of people and the development of industrialisation has had an effect on people's lives, because changes from an economic base of agriculture to market production and wage labour, impact on all workers and particularly women.⁶⁶⁵ Factors such as inequality lead to trafficking because people wish to migrate for better opportunities and for a better life, although people prefer to not go too far from home.⁶⁶⁶

Migration today is facilitated by easier international travel and the human urge to discover the world.⁶⁶⁷ While the trafficking of children is beyond the scope of this paper, parents may seek the assistance of a migration facilitator and therefore become vulnerable to trafficking because they believe that the migration of the child is in its best interests or in the best interests of the family as a whole. Unaccompanied minors entering a state often end up in juvenile correctional facilities, leading them to neglect and even to punitive punishment.⁶⁶⁸ Detention and criminalisation of unaccompanied minors have forced many parents to use the services of smugglers and traffickers to

⁶⁶³ Elizabeth F Defeis, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons- A New Approach', (2004) 10 *ILSA Journal of International & Comparative Law* 485, 486.

⁶⁶⁴ Nora V Demleitner, 'Forced Prostitution: Naming an International Offense', (1994) 18 *Fordham International Law Journal* 163, 163.

⁶⁶⁵ Aiko Joshi, 'The Face of Human Trafficking', (2002) 13 *Hastings Women's Law Journal* 31, 32 – 33.

⁶⁶⁶ Phil Marshall and Susu Thatun, "Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region", in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 48.

⁶⁶⁷ Ratna Kapur, "Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 27.

⁶⁶⁸ Jacqueline Bhabha, 'Lone Travellers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children', (2000) 7 *University of Chicago Law Roundtable* 269, 276.

facilitate the child.⁶⁶⁹ It can be seen therefore that there are many reasons why people seek to leave their homes for a life elsewhere and as the 1990's theory of the new economy of professional migration explains, these reasons are not always for economic migration but also involve complex family issues.

Instability of civil society and the weakening of the rule of law make countries of origin fertile ground for organised criminal groups.⁶⁷⁰ Such instability puts victims into closer contact with criminals such as traffickers and also encourages their interaction. People may also be pushed into trafficking by unwitting family and friends who pressure the person to seek irregular migration because of reports from others who have successfully started a new life in another country.⁶⁷¹

In other cases, countries actively encourage their citizens to emigrate, often to decrease the population and therefore the unemployment rates. Emigration stimulates the economy because people who emigrate typically send money back to their relatives.⁶⁷² In such circumstances, border officials may be more lax in their control of who is leaving the country. People may put their fate into the hands of traffickers because they believe that once they reach their destination, they will find employment.⁶⁷³ In fact, there is some truth in this because in the United States for example, 'the rate of unemployment of undocumented aliens ... is zero'.⁶⁷⁴ That is, irregular labour workers typically find work quite easily in the destination state because of market demands. Instances where the government 'turns a blind eye' to the exploitation of its citizens through migration networks may be in violation of their human rights obligations. As

⁶⁶⁹ Ibid, 275.

⁶⁷⁰ Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260, 265.

⁶⁷¹ Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 170.

⁶⁷² Andreas Schloenhardt 'Migrant Trafficking and Regional Security' (2001) *Forum for Applied Research and Public Policy* 83, 86.

⁶⁷³ This brings into question whether the state is in breach of its human rights obligations.

⁶⁷⁴ Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 170

such, feminist, migration and human rights concerns are all important to the movement of people and trafficking.

8.3.1 The role of poverty in trafficking

Typically, it is thought that states of origin are poorer countries, and that the victim is transferred through countries providing geographically expedient and relatively safe routes.⁶⁷⁵ It is believed that victims are trafficked from East to West Europe, from Africa, the Middle East and China to the countries of the European Union and the United States and from Central and South America to North America.⁶⁷⁶

However statistically, of the world's 191 million migrants, it is estimated that about a third have moved from one developing country to another, which is about the same as the number who have moved from the developing to developed world. This means that the number of people moving from 'south to south' is around the same as the number moving 'south to north'.⁶⁷⁷ This is important because typically, trafficking follows migration routes.

On the other hand, around 115 million migrants live in developed countries whereas 75 million live in developing countries.⁶⁷⁸ Accordingly, it is difficult to divide countries into clear points of origin or destination, as many countries can be both.⁶⁷⁹ For example, Thailand is both a place of origin and destination for trafficking.⁶⁸⁰ While this may at first seem odd, it can be partially explained by the dual labour market theory

⁶⁷⁵ Kristina Kangaspunta, 'Mapping the Inhuman Trade: Preliminary Findings on the Database on Trafficking in Human Beings', (2003) 3(1 & 2) *Forum on Crime and Society* 81, 100.

⁶⁷⁶ Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective', (2002) 14 *International Journal of Refugee Law* 561 at 571 referring to C. O'Cleary, 'Running from a World of Misery' at <http://www.ireland.com/special/humantrafficking/traffic2.htm>.

⁶⁷⁷ *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, [6] UN Doc A/60/871 (2006).

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, [6] UN Doc A/60/871 (2006)

⁶⁸⁰ Phil Marshall and Susu Thatun, "Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region", in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 48.

which explains why some migrants are willing to work in certain sectors abroad that they refuse in their home countries. As explained above, typically the reasons for this are that while resident in another country, the migrant may not feel as much pressure to work in a 'socially acceptable' industry. As such, the person may willingly migrate to another country to work within an exploitative industry. Despite statistics which support the notion that many people migrate from one developing country to another, overwhelmingly, the literature talks about people moving from the most disadvantaged areas to the most prosperous areas.

For example, there are different perspectives as to the role that poverty plays in trafficking. Most believe that not only are victims of trafficking from the most economically, socially and politically unstable nations, but that the victims themselves belong to the most disadvantaged social and ethnic groups in those states, falling easy prey to those offering them a better life.⁶⁸¹ There is evidence to support this notion also. Four of the most prominent source countries of trafficking in Europe: Albania, Moldavia, Romania and the Ukraine, are also the poorest countries in Europe.⁶⁸² More women from Southern Romania, the poorest part, are trafficked than women from Northern Romania and similarly, more women are trafficked from the small towns and villages in Ukraine than the more affluent areas.⁶⁸³ Countries that have risen in prosperity are also experiencing the reduction in trafficking of their citizens. For example, the recent social and economic development of Poland, Hungary and the Czech Republic has also seen a corresponding drop in trafficking.⁶⁸⁴

⁶⁸¹ Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 31.

⁶⁸² Ibid, 34.

⁶⁸³ Frank Laczko, Amanda Klekowski von Koppenfels and Jana Barthel, 'Trafficking in Women from central and eastern Europe: A review of statistical data' in Frank Laczko, Irene Stacher and Amanda Klekowski von Koppenfels (eds), *New Challenges for Migration Policy in Central and Eastern Europe* (2002) 153, 168.

⁶⁸⁴ Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 34.

As at the end of 1998, 46% of Moldova's population lived in 'absolute poverty', surviving on less than US \$220 per year.⁶⁸⁵ In a study conducted by UNICEF, it was found that of those surveyed, 90% of young people between the ages of 18 and 29 would like to leave Moldova, for some period of time, 37% would like to leave permanently, and 9% wished to stay.⁶⁸⁶ To many people living under very difficult circumstances, emigration seems to present opportunities that do not exist in their home country. Indeed, while the problem of poverty, creating stifling political, economic and social climates remains, smuggling and trafficking will exist.⁶⁸⁷

The emergence of the 'welfare state' whereby more affluent states guarantee citizen's security and prosperity and demonstrate stability and competence to implement social policies, is a great motivator for people wishing to emigrate.⁶⁸⁸

The above is not contrary to the findings of the Secretary General however more resources have been expended by organisations studying trafficking from poorer nations and corresponding data showing migration within developing nations is poor. The Secretary General merely asserts that migration, and by extension trafficking, while mainly from poorer countries to richer countries, also occurs the other way round.

While trafficking is not simply a migration issue, people fall victim to trafficking because they are seeking ways to emigrate and for various reasons, either because they do not meet migration criteria or they are uncertain as to how to emigrate, they seek assistance and therefore become vulnerable to trafficking. There is evidence that such people are not from the very poorest part of the society. This is because it is usually

⁶⁸⁵ Frank Laczko, Amanda Klekowski von Koppenfels and Jana Barthel, 'Trafficking in Women from central and eastern Europe: A review of statistical data' in Frank Laczko, Irene Stacher and Amanda Klekowski von Koppenfels (ed), *New Challengers for Migration Policy in Central and Eastern Europe* (2002), 153, 168.

⁶⁸⁶ Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260, 260.

⁶⁸⁷ Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective', (2002) 14 *International Journal of Refugee Law* 561, 570.

⁶⁸⁸ Aninia Nadig and John Morrison, 'Human Smuggling and Refugee Protection in the European Union: Myths and Realities', in Joanne van Selms et al (ed) *The Refugee Convention at fifty: a view from forced migration studies* (2003) 161, 162.

those from slightly better financial backgrounds that have heard stories of successful migration or who consider migration for other reasons. That is, while trafficking victims are usually poor, it is probable that they are not always from the most impoverished parts of the society and therefore extreme levels of poverty may not play as significant role as thought.

8.3.2 Conclusion to push factors

The alleviation of poverty and gender bias coupled with improved social welfare should be at the heart of any anti-trafficking effort. The United State legislation, the TVPA allows for international monitoring and sanctions provisions and also establishes mandatory restitution from traffickers for countries that do not meet minimum standards.⁶⁸⁹ An understanding of the pull factors associated with trafficking has not been met by a concerted effort to address these issues in national policies. While a rights based approach would be at the basis of preventing people being pushed into trafficking, it is doubtful that countries will improve their social services in an attempt to prevent the trafficking of their citizens.

However, push factors may contribute to trafficking but do not cause it. That is, people may become vulnerable to trafficking because of a lack of livelihood options, armed conflict and inequality however; this potential supply of migrants requires demand from particular sectors of receiving countries or a demand for exploitative labour.⁶⁹⁰ Most importantly trafficking is a demand driven phenomenon.⁶⁹¹

⁶⁸⁹ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 4, 73.

⁶⁹⁰ Jyoti Sanghera, "Unpacking the Trafficking Discourse" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 7.

⁶⁹¹ *Ibid*, 8.

8.4 Pull Factors in Trafficking

Arguably the best way to eliminate trafficking is to remove the demand aspect⁶⁹² as traffickers could not operate if there was not a considerable demand for exploitative labour.⁶⁹³ The main pull in destination countries is a demand for cheap labour that is not met by the local market or by current policies. That is, local factors in the country of destination provide the informal economy⁶⁹⁴ with a demand for trafficked people. Those factors include the economy, the legal system and immigration policy.⁶⁹⁵ Trafficking is facilitated by the low costs of international travel that allow traffickers to easily commute between countries of origin and destination.⁶⁹⁶ There is demand for many types of exploitative labour however, being an illegal activity, it is extremely difficult to gain accurate statistics as to the numbers of people trafficked for various purposes. Due to the pull factor of trafficking, people living in destination countries⁶⁹⁷ often fear that those working in the informal economy, whether they are trafficking victims or simply illegal migrants, are taking local jobs from the legitimate work force.

The perception that trafficking victims take away legitimate job opportunities from the local market is largely misplaced as the local work force is often unwilling to do certain jobs or to work under particular conditions.⁶⁹⁸ This is well understood by migration theories that explain that the type of work undertaken by unskilled migrants is typically of the type that the local workforce is unwilling to engage in including low pay and low

⁶⁹² Khalid Koser 'Reconciling control and compassion? Human smuggling and the right to asylum', in Edward Newman and Joanne van Selm (eds), *Refugees and Forced Displacement* (2003) 181, 192.

⁶⁹³ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 61.

⁶⁹⁴ States differ in their opinions as to what constitutes an "informal economy" and ILO definitions are complex, blending various aspects.

⁶⁹⁵ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 56.

⁶⁹⁶ Ann D Jordan "Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings" in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 28.

⁶⁹⁷ Even if countries can be categorised as both countries of origin and destination.

⁶⁹⁸ R Paul Faxon, 'Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem', (1984) 6 *Northwestern Journal of International Law & Business* 203, 205.

prestige. For example, the dual labour market theory explains that raising salaries at the bottom end of the market to encourage local workers would require a corresponding rise of wages at the other echelons creating structural inflation.⁶⁹⁹ However, low wages are acceptable to migrant workers because they are usually higher than what they would earn back home. Furthermore, migrants are not affected by the status and prestige of a job in the destination country. Typically migrants are not affected by status and prestige in the destination country because they are away from their social structure.⁷⁰⁰ Further, where the youth of the country would typically fill these positions of work, raising education levels has effectively removed many youths from the unskilled workforce.

Migration may lead to higher unemployment among low skilled workers, however usually, most migrants complement the skills of domestic workers, allowing citizens to perform other more productive and better paid jobs.⁷⁰¹ Accordingly, restrictive migration policies coupled with domestic demand for unauthorised foreign workers denote a certain level of 'intellectual [dis]honesty'.⁷⁰²

This disparity and cause of trafficking is strengthening because of a growing pull from the informal economy. It has been reported that the future work force in developed countries will be even more educated than what is today and accordingly, will be even less willing to work in low paid and physically demanding jobs thereby increasing the demand for low skilled workers from overseas.⁷⁰³ There is evidence of this today in the agriculture, construction and leisure sectors.⁷⁰⁴

⁶⁹⁹ Joaquin Arango, 'Explaining Migration: A Critical View' (2000) 52 *International Social Science Journal* 283, 290.

⁷⁰⁰ *Ibid.*, 290.

⁷⁰¹ *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, [12 – 13] UN Doc A/60/871 (2006).

⁷⁰² Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 176.

⁷⁰³ *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, [22] UN Doc A/60/871 (2006).

⁷⁰⁴ *Ibid.*

States are unwilling to accept what market forces are demanding, possibly in the fear that if they accommodate the demand for the informal labour market, further illegal migration will occur. Certainly local union forces play a large role. The result is a gap between what the market is demanding and legislation that refuses to accept these market forces. 'Ultimately, laws and regulations that go against market forces of demand and supply will likely be ineffective in controlling the labour market. When there is a legitimate need for workers, providing a legal avenue for their employment and ensuring their labour rights are protected produces the best results for all'.⁷⁰⁵ The current regime makes it very difficult to regulate trafficking where there is a demand for illegal immigrants.⁷⁰⁶ Currently, the workers irregular migration status means that workers can easily be exploited because they are unlikely to seek redress.⁷⁰⁷ Ultimately, it is crucial that the demand for exploitative services be reduced⁷⁰⁸ but it is also important that receiving states recognise the role that they play in trafficking.

As will be discussed in the chapter on gender and trafficking, an assessment of some of the sectors that demand irregular labour may assist in properly addressing the feminist angle of trafficking and also will provide a better understanding of the role that industries play in trafficking.

8.4.1 Domestic service

Feminist issues play a dominant role in both the push of women into domestic service and the pull. As women's rights and work opportunities improve, demand for domestic assistance in high income economies in both developed and developing countries grows.⁷⁰⁹ Middle class women in the First World are now working longer hours with

⁷⁰⁵ Ibid, [72].

⁷⁰⁶ Gabriela Rodriguez Pizarro *Report of the Special Rapporteur on Specific Groups and Individuals 'Migrant Workers'* [para 37] UN Doc E/CN.4/2002/94 (2002).

⁷⁰⁷ *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, [71] UN Doc A/60/871 (2006).

⁷⁰⁸ Ibid, [76].

⁷⁰⁹ Ibid [22].

fewer holidays than in the past.⁷¹⁰ At the same time, there is a failure by governments in affluent countries whose female population is returning to work in large numbers, to provide adequate services for child care and care for the elderly.⁷¹¹ Where a newly married couple may not initially require assistance in the home, many couples seek a cleaner after the birth of their first child to avert gender arguments over domestic work.⁷¹²

Today, a 'care industry' is stepping in to carry out the role traditionally held by the woman of the house.⁷¹³ Accordingly, where the western woman puts in extended hours at the office, her domestic help is required to provide around the clock help at home.⁷¹⁴ Demand for cheap, exploitative household help, lack of legal protections and the absence of monitoring of work conditions all contribute to the demand for illicit domestic service.⁷¹⁵

There is much scope for abuse and exploitation of the domestic worker because they are usually paid little money and therefore cannot afford to return home. They may not speak the local language and they often have fears of deportation. Often, exploitation of the worker occurs under the guise that the worker is 'one of the family' and is engaged in a 'labour of love', thereby disguising the employer-employee relationship.⁷¹⁶

⁷¹⁰ Arlie Russell Hochschild 'Love and Gold' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 19. Although this is also the case for the middle classes within the developing world.

⁷¹¹ Barbara Ehrenreich and Arlie Russell Hochschild, 'Introduction' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 8 – 9.

⁷¹² Bridget Anderson 'Just Another Job? The Commodification of Domestic Labour' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 106.

⁷¹³ Arlie Russell Hochschild 'Love and Gold' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 20.

⁷¹⁴ This also includes middle class professional women from the developing world, as domestic servitude is also a cheap form of labour in those countries.

⁷¹⁵ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 61.

⁷¹⁶ Mary Romero, 'Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"' (1999) 53 *University of Miami Law Review* 1045, 1047.

Domestic workers are especially vulnerable because they may not speak the local language and may not have a support group. In such circumstances, the domestic worker may initially welcome a domestic placement that makes them feel as 'one of the family'. Long working hours coupled with accommodation may appear to provide good protection from deportation.⁷¹⁷ However, the domestic servant's vulnerability lends them to the possibility of abuse. Becoming 'one of the family' may lead to an expectation by the family that the worker take gifts in lieu of pay.⁷¹⁸ This obviously does not meet the needs of the migrant who entered domestic service in order to provide for their own family back home.

*'The disadvantages of being 'one of the family' far outweigh the advantages. Wages tend to be lower and erratically paid on the premise that the maid would 'understand' their financial situation. Incorporating a domestic worker into the family circle is usually, although not always, a sure way of depressing wages and possibly even hiding the most discreet forms of exploitation involved in the employer – employee relationship.'*⁷¹⁹

Employers will often give domestic help gifts instead of wages or benefits. The employer may justify the abuse of the domestic for many reasons, for example by assisting the domestic with social mobility through allowing them time to learn the language.⁷²⁰ The abuse of the domestic worker also stems from the way that they are seen by the community. The domestic worker is not thought of in the same light as 'legitimate' workers such as secretaries or waitresses and therefore they are not considered to have similar rights.⁷²¹ However, domestic servants are expected to work

⁷¹⁷ Bridget Anderson 'Just Another Job? The Commodification of Domestic Labour' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 107.

⁷¹⁸ Ibid, 111.

⁷¹⁹ Bridget Anderson 'Just Another Job? The Commodification of Domestic Labour' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 112, quoting Miranda Miles, "Working in the City: The Case of Migrant Women in Swaziland's Domestic Service Sector," in *gender, Migration and Domestic Service* ed. Janet Momsen (London: Routledge, 1999)

⁷²⁰ Mary Romero, 'Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"' (1999) 53 *University of Miami Law Review* 1045, 1048.

⁷²¹ Ibid.

under extreme conditions. Romero describes a situation whereby the domestic was made to work 18 hour days, in a household for 5 adults and 3 children, and was responsible for all of the cooking, cleaning, washing and child care, 6 days a week for \$100 a week.⁷²²

Domestic workers are also expected to provide love to a child and take care of family members as if they were their own. However if the family chooses to terminate the services of a domestic worker, any close ties established between the servant and family members is severed and the domestic will have no rights of seeing children that they have raised and spent more time with than their own children.⁷²³

As child care becomes more expensive and less accessible, and economic demands force more women back into the workforce, the need for exploitative domestic labour will increase. Around the world, fewer men are able to be the sole breadwinner of the family, requiring women in both rich and poor countries to enter the workforce to supplement the family income.⁷²⁴ Meanwhile global wage inequalities mean that it is often more profitable for women from poorer countries to work in the west as domestic help than as professionals in their own countries. For example, a Filipina woman can earn 15 times more working as a domestic servant in Hong Kong than what she can earn as a school teacher back home.⁷²⁵ Domestic workers from the developing world, being given the opportunity to formally work in the more affluent countries seems to be a solution to western families that require assistance and women from poorer countries. However, to avoid exploitation, domestic service must be viewed as any other normal employment with its requisite rights and obligations, not just by the servant but also the employer.⁷²⁶

⁷²² Ibid, 1061

⁷²³ Bridget Anderson 'Just Another Job? The Commodification of Domestic Labour' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 112.

⁷²⁴ Barbara Ehrenreich and Arlie Russell Hochschild, 'Introduction' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 3.

⁷²⁵ Bridget Anderson 'Just Another Job? The Commodification of Domestic Labour' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 112.

⁷²⁶ Ibid, 114.

The role for women in the informal sector generates large state, private and criminal revenue but the worker herself works cheaply, not claiming rights to legal or social protection.⁷²⁷ The growing demand for domestic workers as more women enter the workforce is an obligation that rightfully belongs to the society as a whole. Accordingly, where the state cannot provide home assistance for children and the elderly, mechanisms should be developed to allow for migrant workers to legally fulfil the role.

The changing role of the women is a global phenomenon affecting women in all cultures and societies and there is a valuable role that feminist legal theory can play in explaining these changes and offering solutions. These are issues particularly relevant to gender that have contributed to both sides of the push and pull. That is, the reasons why many women must migrate to supplement their income; and the reasons why other women require assistance to fulfil traditionally female roles. The protection of the domestic can only be achieved through the application of a labour framework informed by feminist theory. Such a framework could assist in the regulation of the industry and the prevention of the exploitation of migrant workers. This is especially important in the area of domestic service where both the push and pull factors are likely to take on added importance and the problem is likely to increase.

While not of immediate concern, the mail order bride industry and inter-country adoptions are potential areas of trafficking for women and children and therefore should be addressed.

8.4.2 Inter-country adoptions and mail order brides – the ‘completion of Western families’,⁷²⁸

Mail order brides are a possible area for trafficking because of the role played by marriage in migration. The complexity of the situation and the potential for trafficking

⁷²⁷ Marjan Wijers ‘Women, Labor, and Migration – The Position of Trafficked Women and Strategies for Support’ in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 71.

⁷²⁸ See generally Ryiah Lilith, ‘Buying a Wife but Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoptions’ (2000 – 2001) 9 *Buffalo Women’s Law Journal* 225.

for mail order brides is often overlooked when comparisons are made to prostitution.⁷²⁹ However this is an area where more attention should be focused in order to prevent potential problems.

Out of the people 20 years of age and older who enter the United States annually for migration, about 40% of all women and 25% of all men enter as marriage migrants, making marriage the primary reason that people migrate to the United States, while mail-order brides make up 4% of all marriage migrants.⁷³⁰ With such large numbers, marriage and therefore the mail order bride industry is a potential problem area for trafficking. While mail order brides are seen by some human rights advocates to already be a major area of human trafficking this is not supported by quantitative evidence.⁷³¹ However modern day systems have the potential to exploit women by providing 'insidious camouflage' for sexual involuntary servitude.⁷³²

Similarly, while there is no evidence to suggest that inter-country adoptions are a growing area for trafficking, there is potential with the growing demand for babies, for improper practices to develop to meet demands.⁷³³ Declining birth rates in the western world and increasing infertility have created a demand for inter-country adoptions⁷³⁴ while informal fostering of children has also contributed to their vulnerability.⁷³⁵ Additionally, 'false marriages' and 'false adoptions' were specifically mentioned in

⁷²⁹ Ibid, 250.

⁷³⁰ Hung Cam Thai 'Clashing Dreams: Highly Educated Overseas Brides and Low Wage US Husbands' in Barbara Ehrenreich and Arlie Russell Hochschild (eds) *Global Woman – Nannies, Maids and Sex Workers in the New Economy* (2002), 231.

⁷³¹ See for example, Kathryn A Lloyd, 'Wives for Sale, the Modern International Mail-Order Bride Industry', (2000) 20 *Northwestern Journal of International Law & Business* 341.

⁷³² Suzanne H Jackson, 'To Honour and Obey: Trafficking in "Mail-Order Brides"', (2002) 70 *George Washington Law Review* 475, 560.

⁷³³ See Holly C Kennard, 'Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions' (1994) 14(4) *University of Pennsylvania Journal of International Economic Law* 623, 628 – 629 who says that children are sometimes abducted and there are also reports of orphanages and maternity wards as well as women who are coerced and bribed to turn over children for adoption.

⁷³⁴ Ibid, 625

⁷³⁵ *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, UN Doc A/60/871 (2006), 76.

early definitions of trafficking in persons by the United Nations as being areas of potential interest to trafficking.⁷³⁶

Numerous feminists believe that the mail order bride industry has great scope to be used as a vehicle to sell women and girls into private prostitution, slavery or domestic servants⁷³⁷ because of the operation of unscrupulous marriage brokers who are in the position to traffic women for the purpose of servile marriages.⁷³⁸ Early century mail order brides were arranged by families, and the man had to save for the woman's safe passage while today women are offered in large numbers from weak economic countries to western men.⁷³⁹ Today the process is handled by agencies that may have questionable practices and operate under financial gain. As such, these agencies may not be motivated by the best interests of the parties.

The mail order bride industry introduces women, usually from developing or poorer countries to men who are seeking marriage. Women who register with the organisation are usually required to provide photographs and personal information such as physical measurements and personal interests. Men then review the information provided by the women and both the men and women pay a fee for the service. Usually, the male chooses a number of women with whom to commence correspondence after which a selection is made and a marriage is arranged.⁷⁴⁰ The 'bride' is usually poor and entering a different culture where she may not speak the language. Indeed, the bride's poverty is a necessary element in the equation.⁷⁴¹ Most likely the bride is economically dependent

⁷³⁶ Anne Kielland and Ibrahim Sanogo, 'Burkina Faso: Child Labor Migrations from Rural Areas – The Magnitude and the Determinants' (Analysis of findings, with incorporated comments, from the workshop of Interpretation and Validation in Ouagadougou, July 16 – 17, 2002), 5

⁷³⁷ Suzanne H Jackson, 'To Honour and Obey: Trafficking in "Mail-Order Brides"', (2002) 70 *George Washington Law Review* 475, 480.

⁷³⁸ Ann D Jordan 'Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 28.

⁷³⁹ Suzanne H Jackson, 'To Honour and Obey: Trafficking in "Mail-Order Brides"', (2002) 70 *George Washington Law Review* 475, 493.

⁷⁴⁰ See generally Kate O'Rourke, 'To Have and to Hold: A Postmodern Feminist Response to the Mail-Order Bride Industry' (2002) 30(4) *Denver Journal of International Law and Policy* 476.

⁷⁴¹ *Ibid*, 480.

on her new groom and has little recourse if she discovers that the situation is not what she expected.⁷⁴²

The process can lead to general misunderstandings because of the motivations of the parties, with participants resorting to one dimensional generalisations about each other.⁷⁴³ Usually, the male is motivated to find a foreign wife because of frustration with western women who are perceived to be too liberated and aggressive. They believe that a woman from a developing country will be more loyal and devoted.⁷⁴⁴ Similarly, the women are often dissatisfied with the men within their own cultures. They believe that Western men will treat their wives better and be faithful, their fantasies based on images of western men gained from the movies.⁷⁴⁵ Both parties can then be disappointed with the outcome.

Usually mail order brides are permitted to divorce subject to the laws of the land and will usually retain their immigration status. But at other times, the woman loses her immigration status if she divorces prior to a certain period of time, making the women particularly vulnerable at the beginning of the marriage. Conversely, there is no study to show that women married under such circumstances have an increased chance of being in a violent or abusive relationship when compared to women married under more conventional means. Nevertheless, an industry that matches up men from the western world with women from impoverished countries has the potential of abuse and of creating a source of women that are brought into the country for exploitation.

Lilith draws comparisons between the practice of mail order brides and inter-country adoptions, whereby the potential groom 'purchases' a bride and the potential parents

⁷⁴² Kathryn A Lloyd, 'Wives for Sale, the Modern International Mail-Order Bride Industry', (2000) 20 *Northwestern Journal of International Law & Business* 341, 353.

⁷⁴³ Suzanne H Jackson, 'To Honour and Obey: Trafficking in "Mail-Order Brides"', (2002) 70 *George Washington Law Review* 475, 496.

⁷⁴⁴ Kate O'Rourke, 'To Have and to Hold: A Postmodern Feminist Response to the Mail-Order Bride Industry' (2002) 30(4) *Denver Journal of International Law and Policy* 476, 479.

⁷⁴⁵ *Ibid.*

make a 'donation' for the acquisition of the child, both being for the purchase of third world citizens to complete Western families.⁷⁴⁶

To prevent potential problems in the mail order bride industry, Lilith suggests that the mail order bride industry be regulated in the same way as inter-country adoptions⁷⁴⁷ because prohibition of the practice will lead to its continuation underground opening greater potential for abuse and exploitation of the women.⁷⁴⁸ The power dynamic and vulnerability of the mail order bride may bring her within the protection of the *Trafficking Protocol*.⁷⁴⁹ However, mail order brides still have to fall within the Protocol to qualify as trafficking offences and again, the same constraints of consent and intent will prove pivotal. That is, it would have to be proved that the husband used coercive means to achieve the women's consent to marriage because otherwise, the women would have the normal recourse to exploitation within marriage under divorce proceedings. A close eye should be kept on this industry because of its potential for abuse.

Just like certain areas of work have traditionally attracted women, there are also areas that are generally more suitable to men. Typically, these areas are industries that require a higher level of physical strength. Accordingly, agriculture and construction are two clear examples with far higher numbers of men than women. Agriculture and construction are also large industries with high profits that influence the economy. While these industries may employ large numbers of legal workers there are also reasons why irregular migrants are also suitable and often demanded. The scale of these industries also highlights the potential magnitude of trafficked people that they may attract as the demand grows for unregulated workers.

⁷⁴⁶ See generally, Ryah Lilith, 'Buying a Wife but Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoptions' (2000 – 2001) 9 *Buffalo Women's Law Journal* 225. Lilith argues that both bride purchasing and inter-country adoption are by-products of Western and US colonial and imperial activities.

⁷⁴⁷ *Ibid*, 256.

⁷⁴⁸ *Ibid*.

⁷⁴⁹ Kate O'Rourke, 'To Have and to Hold: A Postmodern Feminist Response to the Mail-Order Bride Industry' (2002) 30(4) *Denver Journal of International Law and Policy* 476, 484.

8.4.3 Agriculture

There are particular factors within the agriculture industry that makes agriculture an area of growth in its demand for unregulated workers. Due to its very nature, agriculture has seasonal needs. That is, different crops require attention at different times and there are times when a lot of labour is required to carry out the work, followed by periods when there is little if any need for labour. That is, farmers require workers according to seasonal demands and the nature of their crops. Trafficking rings provide seasonal workers to the farmer and when the work is complete, the workers are then moved to the subsequent agricultural activity on another farm.⁷⁵⁰ Factors that contribute to this demand are the uncertainty by the farmer in the number of workers required and the duration that they will be required, because crops are so often uncertain. This uncertainty leads to legitimate workers either refusing to do the work, or alternatively, to their demands of higher wages that may make agriculture unviable. In these circumstances, farmers may consider the informal labour market. As they are probably unable to support a group of employees, whether legal or illegal as they are only required for a short amount of time, traffickers have the opportunity to move illegal migrants as required to different locations.

These unusual requirements, that is, the need for numerous workers on a particular farm for a short period cannot always be met by local labour requirements in the particular state. For example, while seasonal workers constitute the majority of temporary workers in continental Europe; Australia,⁷⁵¹ Japan, New Zealand and the Republic of Korea, do not have a seasonal category for migration and only a low proportion of temporary workers to United Kingdom and the United States are admitted for seasonal

⁷⁵⁰ Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003, 33.

⁷⁵¹ Australia has a working holiday visa for people between 18 and 30 years of age with no dependants that come from countries with which Australia has a reciprocal working holiday arrangement and who seek to enter or remain in Australia as genuine visitor under which the holidaymaker may only work for 3 months. However this is not a true seasonal work visa as it intended to link holidaying and work. See Australian Government, Department of Immigration and Citizenship, *Legislation Change – 1 November 2005: Amendments relating to the Working Holiday Maker visa program* http://www.immi.gov.au/legislation/amendments/lc01112005_8.htm at 5 July 2007. A similar program exists in New Zealand.

work.⁷⁵² Migration criteria set up by the state do not adequately meet the needs of this industry. Accordingly, people are trafficked in order to provide services in the seasonal labour force of agriculture.⁷⁵³ Indeed, in the United States, the number of cases of traffickers involved in the agriculture industry and sweatshops outnumber prosecutions in trafficking for sexual exploitation.⁷⁵⁴

Further factors also contribute to the ability of the agriculture industry to exploit workers. In the United States for example, agriculture wages are stagnant and working conditions are poor; legal protections for agricultural workers are weak and there is little monitoring of work conditions.⁷⁵⁵ These conditions provide a fertile ground for the exploitation of labour and trafficking. The combination of the demand for cheap farm labour and depressed wages, poor working conditions and lack of protection of workers leads to the potential of forced labour.⁷⁵⁶ The size of the industry is also indicative of the potential that it has for exploitation.

8.4.4 Construction industry and the unskilled labour market

Trafficked people often work in the construction industry and unskilled labour markets where employers can avoid various taxation and union constraints and can exploit the labour of trafficked people. Again, there is often a level of consent as workers are aware from the outset that they are illegal workers and that various malpractices are common in the area of work that they will be engaged in.⁷⁵⁷

⁷⁵² *Report of the Secretary General, 'International Migration and Development'*, UN GA, 6th Sess, UN Doc A/60/871 (2006), 36.

⁷⁵³ Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 33.

⁷⁵⁴ Martina Vandenberg, 'Complicity, Corruption and Human Rights: Trafficking in Human Beings', (2002) 34 *Case Western Reserve Journal of International Law* 323, 325.

⁷⁵⁵ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 62.

⁷⁵⁶ *Ibid*, 63.

⁷⁵⁷ Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 33.

Of course, there are many areas that demand both men and women such as sweatshops and factories. However as an illustration, only sweatshops will be discussed.

8.4.5 Sweatshops

Competitive pressures on local manufacturers lead manufacturers to use the informal sector in order to evade monitoring and enforcement of labour laws.⁷⁵⁸ Sweatshops are described as businesses that regularly violate wage or child labour laws and safety or health regulations.⁷⁵⁹ While sweatshops are most commonly associated with developing countries, worldwide growing demand for locally made products is providing a growing market for locally based sweatshops as manufacturers compete against the international market.⁷⁶⁰ For example, it is estimated that 75% of all New York apparel manufacturing firms are sweatshops⁷⁶¹ which is contrary to the perception of sweatshops being a third world phenomenon.

Sweatshop workers are seen by some as slaves but are also perceived as illegal workers who are prepared to work for substandard wages thereby affecting the local industry that employ legitimate workers at proper wage levels. In these instances sweatshop workers are regarded as negatively impacting on the market and as taking the jobs of the local work force. This is due to a misconception by the community that wrongly

⁷⁵⁸ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 65.

⁷⁵⁹ Charles R Chaiyarachta, 'El Monte is the Promised Land: Why do Asian Immigrants Continue to Risk Their Lives to Work for Substandard Wages and Conditions?' (1996) 19 *Loyola of Los Angeles International and Comparative Law Journal* 173, 174.

⁷⁶⁰ See for example Charles R Chaiyarachta, 'El Monte is the Promised Land: Why do Asian Immigrants Continue to Risk Their Lives to Work for Substandard Wages and Conditions?' (1996) 19 *Loyola of Los Angeles International and Comparative Law Journal* 173, 190 – 193: Chaiyarachta breaks down the cost of a \$120 skirt as \$25 profit for the manufacturer and \$10 for the contractor of which \$2.40 goes to the worker. Manufacturers encourage contractors to compete against each other for work and contractors are then compelled to lower their prices enabling the sweatshop only to make a profit by paying workers sub-minimal wages. Manufacturers calculate production costs based on a 'time-and-motion study'. The study is based on the amount of time it takes the sample-makers who are working under optimal conditions to produce the item, making no accommodation for the poor working conditions endured by the sweatshop including, poor machinery, little or no supervision and frequently changing designs

⁷⁶¹ Kevin Bales, Laura E Fletcher, Eric Sotver et al, *Free the Slaves*, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 66 citing Ellen Israel Rosen, 'Making Sweatshops: The globalization of the US Apparel Industry', 3, 137 (2002).

perceives slaves, whether trafficked or not, as illegal migrants. The community more commonly accepts sweatshop workers as slaves when they envisage people working in developing countries however there is less understanding of the practice taking place in the developed world.

There are other areas of trafficking that are perhaps not well documented in the literature but which deserve attention.

8.4.6 Harvesting of organs

The *Trafficking Protocol* includes trafficking for the purposes of organ ‘donations’. Occasionally, sensational media articles refer to stories of street children and even tourists travelling in exotic destination as being abducted and having their organs removed. Actual evidence of this practice at least in the European Union, is almost non-existent.⁷⁶² Nevertheless, the potential for this practice to develop into area of trafficking exists and is specifically mentioned in the *Trafficking Protocol*.

As at 19 May 2007, there were 96,570 candidates waiting for organ transplant in the United States⁷⁶³ and while in August 2004 there were 86,000 patients in the United States waiting for organ transplants, fewer than 26,000 organ transplants occurred in 2003.⁷⁶⁴ As there are more people on waiting lists for organ transplants than actual number of transplants, there is a potential for exploitative practices especially for those who may be ineligible for an organ transplant in the country that they reside in.⁷⁶⁵ The following table illustrates the number of people on waiting lists in the United States for organ transplant and the survival rates for patients. The statistics clearly show excellent survival rates for patients and illustrates why transplants play such an important role in the survival of recipient patients and why there may be a potential for trafficking in this area.

⁷⁶² Martti Lehti, ‘Trafficking in women and children in Europe’, (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 33.

⁷⁶³ United Network for Organ Sharing <http://www.unos.org/> at 4 June 2007

⁷⁶⁴ Mark J Cherry *Kidney for sale by Owner – Human Organs, Transportation and the Market* (2005), 1.

⁷⁶⁵ Factors include age of the recipient and likelihood of success of the operation.

Waiting List Candidates (Active and Inactive Combined), 2004-2005				Unadjusted One- and Five-Year Patient Survival by Organ		
Organs	End of Year		Percent Change	Organ Transplanted	1-Year Survival	5-Year Survival
	2004	2005				
Total	85,610	89,884	5.0%			
Kidney	57,389	62,294	8.5%	<i>Kidney</i>		
PTA	502	521	3.8%	Deceased donor	94.7%	80.7%
PAK	971	977	0.6%	Living donor	98.0%	90.4%
Kidney-pancreas	2,381	2,474	3.9%	Pancreas alone	94.9%	90.2%
Liver	16,967	17,168	1.2%	Pancreas after kidney	95.5%	83.6%
Intestine	191	202	5.8%	Kidney-pancreas	95.1%	85.8%
Heart	3,210	2,970	-7.5%	<i>Liver</i>		
Lung	3,828	3,139	-18.0%	Deceased donor	86.9%	73.4%
Heart-lung	171	139	-18.7%	Living donor	91.2%	76.8%
				Intestine	87.5%	50.2%
				Heart	88.1%	73.7%
				Lung	84.9%	51.6%

Source: 2006 OPTN/SRTR Annual Report, Table 1.3. PTA: Pancreas transplant alone. PAK: Pancreas after kidney.⁷⁶⁶

Source: 2006 OPTN/SRTR Annual Report, Table 1.13.⁷⁶⁷

Further, some writers question the right of governments to regulate the use and sale of body parts.⁷⁶⁸ With the great demand for organ donations coupled with the lack of available donors and increasing advancements in medical science especially in the developed world, it was appropriate that the *Trafficking Protocol* specifically include the harvesting of organs as an offence of human trafficking. Again consent in this area will be an issue when the donor is impoverished and feels that the sale of their organs is

⁷⁶⁶ 2006 Annual Report of the U.S. Organ Procurement and Transplantation Network and the Scientific Registry of Transplant Recipients: Transplant Data 1996-2005. Health Resources and Services Administration, Healthcare Systems Bureau, Division of Transplantation, Rockville, MD, *Chapter I: Trends in Organ Donation and Transplantation in the United States* http://www.optn.org/AR2006/chapter_i_AR_cd.htm at 4 June 2007.

⁷⁶⁷ Ibid.

⁷⁶⁸ See generally, Mark J Cherry *Kidney for sale by Owner – Human Organs, Transportation and the Market* (2005).

an appropriate way of supporting their family. Further research is required in this area because it may be found that the *sale* of organs even with consent is an illegal activity. Again, this issue can be best dealt within under consent theory which questions the true voluntariness behind a person's consent.

Another unusual area of trafficking but one that is specifically mentioned in the United States 2005 'Trafficking in Persons Report' is the trafficking of children for the purposes of camel racing. Camel racing has been chosen as an example of trafficking in this paper because it illustrates the wide range of areas that trafficking has had an impact on.

8.4.7 Camel racing

While this paper does not examine the special case of the traffic of children, the example of the camel racing is used to illustrate that while the attention is usually given to the traffic of children for the purposes of prostitution, children are exploited for a wide variety of reasons. One such area is that of camel racing. Camel racing is a sport that predominately takes place in the Sudan, Pakistan, Bangladesh, India, Nepal and Sri Lanka into the United Arab Emirates, Saudi Arabia and other Gulf States. Camel racing was traditionally a Bedouin sports pastime that has grown to be a multi-million dollar sport.⁷⁶⁹ While Saudi Arabia passed legislation in 2003 requiring that camel jockeys attain the age of 18 years and must weigh at least 52 kilograms,⁷⁷⁰ children are preferred as camel jockeys because of their small size. Indeed, once the child surpasses 37 pounds, they are not considered suitable for the sport, leading to the trafficking of very small children who are often discarded once they surpass 7 years of age.⁷⁷¹ The children live under very poor conditions and suffer from malnutrition in an effort to keep them small. While many die by being trampled by camels, those that survive to

⁷⁶⁹ Department of State, United States of America, 'Trafficking in Persons Report', 2005, 12.

⁷⁷⁰ Mohamed Y. Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The scope of the problem and the appropriate legislative responses' (2003) 26(3) *Fordham International Law Journal* 721, 757.

⁷⁷¹ *Ibid.*

teenage years are left with physical and psychological scars and often live destitute lives.⁷⁷²

8.5 Conclusion

An examination of the many reasons why both men and women are trafficked clearly demonstrates that there are many industries that demand unregulated workers. The industries include domestic service, agriculture, construction and sweatshops, etc. There is therefore no doubt that trafficking is a migration issue. However, it is inappropriate to view trafficking victims as illegal migrants. To view the victims as illegal migrants distorts an appropriate victim centred solution to the problem, leaving the victims with hardly any remedies while the traffickers escape any sanctions.

Unfortunately, this perception is usually the norm and at first instance, trafficked people are characterised by the receiving states as illegal migrants. In the domestic law of many countries, this leads to the detention of the trafficking victim as a violator of migration law. The detention of trafficking victims shows a lack of understanding of the situation faced by trafficking victims. Victims are perceived as wrongdoers while traffickers frequently escape prosecution and are charged with minor offences such as the facilitation of illegal immigration.⁷⁷³ In other instances, the traffickers are not even charged because of a lack of evidence.

One tragic example of the consequences of characterising a trafficking victim as an illegal migrant occurred in Australia. On 23 September 2001, Phuongtong Simaplee,⁷⁷⁴ a woman in her early twenties, was detained as an illegal migrant, after she was found to be without papers following a raid on a brothel in Riley Street at Surry Hills, Sydney Australia. Ms Simaplee was transferred to Villawood detention centre where she told authorities that she had been trafficked to Australia from Thailand when she was a round 12 years old and had been forced to work as a prostitute since she arrived. On entering detention, it was noticed that Ms Simaplee was grossly underweight and

⁷⁷² Department of State, United States of America, 'Trafficking in Persons Report', 2005, 12.

⁷⁷³ Helga Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13(3) *Helsinki Monitor* 260 at 266.

⁷⁷⁴ Aka "Simaplee."

addicted to heroin. She died three days after arriving at Villawood detention centre, in a pool of vomit weighing 38 kilograms.⁷⁷⁵ The NSW coroner, Carl Milovanovich concluded that Ms Simaplee died from the direct consequences of narcotic withdrawal and the antecedent causes being malnutrition and early acute phenomenon. It had been the position of the Australian Correctional Management staff, that a re-nourishment program should be commenced after withdrawal symptoms had subsided.⁷⁷⁶ The tragic case of Ms Simaplee led to some changes in the way that Australia deals with trafficking victims, but the changes do not go far enough.

Trafficking is largely a result of people wishing to migrate but being unable to do so without assistance. This assistance is given by corrupt groups or individuals who exploit the labour of the person at the place of destination through an industry that demands informal labour.

Evidence shows that restrictive migration policies do not actually reduce illegal migration but in fact fuel organised, irregular migration leading to both smuggling and trafficking.⁷⁷⁷ Additionally, there is a link between trafficking and restrictive asylum policies.⁷⁷⁸ It is valid to say that trafficking and smuggling is a consequence of a 'global failure to manage migration'.⁷⁷⁹ Indeed, as countries go to even greater lengths to tighten border control, criminal groups are finding that they have more potential customers wanting to leave their current situation but who cannot find a legitimate way to do so. To put it another way, organised crime is said to flourish in areas where authorities have failed to provide the required services, and in the case of trafficking, where they have failed to provide adequate legal migration and asylum systems.⁷⁸⁰

⁷⁷⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 May 2003, 1053 (Sandra Nori)

⁷⁷⁶ Commonwealth, *Parliamentary Debates*, Senate, 16 June 2003, 11539 – 41 (Senator Ellison)

⁷⁷⁷ Anne Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties' 12 FMR 25, 28.

⁷⁷⁸ Khalid Koser 'Reconciling control and compassion? Human smuggling and the right to asylum', in Edward Newman and Joanne van Selm (ed), *Refugees and Forced Displacement* (2003) 181, 184.

⁷⁷⁹ Anne Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties' 12 FMR 25, 28.

⁷⁸⁰ Paul Roger, 'Organised Crime' (Lecture presented to the students of the Department of Anthropology and Sociology, University of Queensland, 7 May 1998).

The demand for workers from the informal labour market coupled with the large numbers of unskilled people who wish to migrate but have no legal means of doing so, means that victims can easily fall prey to trafficking as they are forced to rely on others to facilitate their migration.⁷⁸¹ On the other hand, widening migration criteria so that more people are able to migrate legally, will not completely alleviate the problem as there will always be people who are ineligible for admission.⁷⁸² Migration policy must be rethought to take into account market forces while protecting human rights. 'For its own sake, the industry and its attorneys must join the search for an immigration policy fostering both our economy and our humanity, both our safety and our prized freedoms and liberties'.⁷⁸³

Secondly, as trafficking could not exist without market demands, labour agreements must be made to take account of what clearly appears to be a growing work force. The *1999 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*,⁷⁸⁴ may be a good place to begin as it prohibits all forms of slavery or practices similar to slavery, and could be amended to reflect slavery or similar practices as including the trafficking of people, debt bondage and serfdom and forced or compulsory labour.

The consent of the person to seek a better life should not be an excuse by industry for exploitation. Similarly, while intimately related to migration, a trafficked person is not simply an illegal migrant when their exploitation resembles slavery.

Unfortunately, states have focused their attention on crime control, possibly in the hope of using the law as a deterrent. National legislation was enacted after the *Trafficking Protocol* and therefore the Protocol is an important instrument because it forms the basis of the international understanding of the phenomenon by governments. The role

⁷⁸¹ Marjan Wijers "Women, Labor, and Migration – The Position of Trafficked Women and Strategies for Support" in Kamala Kempadoo and Jo Doezema (ed) *Global Sex Workers – Rights, Resistance and Redefinition* (1998),72.

⁷⁸² Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 180.

⁷⁸³ Marvin H. Morse and Lucy M. Moran, 'Troubling the Waters: Human Cargos' (2002) 33(1) *Journal of Maritime Law and Commerce* 1 ; 35.

⁷⁸⁴ This was discussed in the chapter on recent efforts to eradicate slavery.

that governments and traffickers play in trafficking may be understood when viewed from within a human rights framework.

While sexual exploitation is a significant part of trafficking, the issue seems to overwhelm the debate, leaving other exploitation such as slavery, servitude and the removal of organs largely unexplored. Feminist debate is largely responsible for this because dominance theory feminists have taken a very active stance regarding prostitution. Indeed, the debate has even largely omitted the trafficking of women in other industries. Removing the particular reference to prostitution would have served the Protocol better, capturing exploitative prostitution rather than confusing the issue. After all 'not all trafficking victims are prostitutes nor have all prostitutes been trafficked'.⁷⁸⁵

While trafficking is considered by many as a gender issue taking place almost exclusively in the area of prostitution, it is clear that trafficking takes place in a variety of industries and its victims are both male and female. A strong focus on sexual exploitation means that forced and exploitative labour largely continues to remain unexamined.⁷⁸⁶ It is crucial that exploitation in every form be fought, not just that within the sex industry.⁷⁸⁷ Any study of human trafficking necessitates a discussion of the role played by gender because feminists groups have expended much energy on feminising the debate.

⁷⁸⁵ Alison N Stewart, 'Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective' (1998) 20 (11) *Women's Rights Law Reporter* 11, 15.

⁷⁸⁶ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking,' (2004) 40 *Stanford Journal of International Law* 1, 14.

⁷⁸⁷ Jo Bindman 'An International Perspective on Slavery in the Sex Industry' in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 68.

9 FEMINIST LEGAL THEORY – GENDER AND TRAFFICKING

The close ties between human trafficking and gender issues make trafficking an area of interest for feminist legal theory. Feminist legal theory seeks to change women's subordinate status through a new approach to the law which takes gender into consideration. Feminist legal theory and practice have had an important impact on each other. That is, practice has shaped theory which has then affected practice which in turn influences theory again.⁷⁸⁸ The result is an area of theoretical law that arguably has impacted social change.⁷⁸⁹ This does not mean however that all feminist groups deal with feminist legal theory in the same way. What it means is that the various legal theories that have developed have assisted in the understanding of the complex relationship between gender and the law.⁷⁹⁰ Feminist international law examines international law to discover how women are incorporated in it.⁷⁹¹

Indeed, there are a number of feminist legal theories that inform the debate however only the four main theories will be discussed here. They are: the liberal equality model; the sexual difference model; the dominance model and the post-modern or anti-essential model. It is perhaps the first two of these theories that have caused the most debate and are described as the sameness/ difference controversy.

Despite criticism of the different feminist theories to be discussed below, all of them ultimately seek to achieve parity between men and women.⁷⁹² Indeed, the term *feminism*

⁷⁸⁸ Cynthia Grant Bowman and Elizabeth M Schneider, 'Feminist Legal Theory, Feminist Lawmaking and the Legal Profession' (1998 – 1999) (67) *Fordham Law Review* 249, 249.

⁷⁸⁹ *Ibid.*

⁷⁹⁰ *Ibid.*, 254.

⁷⁹¹ Hilary Charlesworth, 'Feminist Critique of International Law and their Critics' (1994 – 1995) *Third World Legal Studies* 1, 1.

⁷⁹² Archana Parashar, 'Essentialism or Pluralism: The Future of Legal Feminism' (1993) (6) *Canadian Journal for Woman and Law* 328, 333.

is intended to refer to those who oppose female subordination.⁷⁹³ Feminist groups dealing with trafficking do not always identify from which theoretical school they belong however some understanding of the main groups of legal theory may help to explain some of the underlining perspectives of the feminist debate.

9.1.1 Feminist legal theory: the liberal equality model

The 'sameness' theory or the liberal equality model takes as its premise that women are equal to men and the legal system should treat them equally.⁷⁹⁴ The liberal equality model takes the common humanity shared by men and women and addresses differences through analogy.⁷⁹⁵ It was thought that an understanding of the woman's position and the dominance of patriarchal systems which subordinate women would work in correcting inequalities between men and women.⁷⁹⁶ As government was used as a common theme in discussions regarding consent theory, maternity leave provisions have also taken on significance in feminist debates.

For example, the 'sameness' proponents argued that pregnancy can be compared to other experiences creating similar needs and problems and should be handled on the same basis as provisions regarding other physical conditions of employees.⁷⁹⁷ This argument is furthered also on the basis that to single out pregnancy as a separate issue is to imply that pregnancy is solely women's responsibility.⁷⁹⁸ The model is based on the premise that once the legal system ceases to discriminate against women, by granting them formal rights, women will be in a position to overcome their oppression.⁷⁹⁹

⁷⁹³ Esther Vicente, 'Feminist Legal Theories: My Own View from a Window in the Caribbean' (1997) 66(2) *Revsita Juridica UPR* 211, 212.

⁷⁹⁴ See for example, Jenny Morgan, 'Feminist Theory as Legal Theory' (1988) (16) *Melbourne University Law Review* 743, 744.

⁷⁹⁵ Esther Vicente, 'Feminist Legal Theories: My Own View from a Window in the Caribbean' (1997) 66(2) *Revsita Juridica UPR* 211, 219.

⁷⁹⁶ Marija Urlich, 'A Short Topology of Feminist Legal Theory' (1992 – 1995) (7) *Auckland University Law Review* 483

⁷⁹⁷ Jenny Morgan, 'Feminist Theory as Legal Theory' (1988) (16) *Melbourne University Law Review* 743, 744.

⁷⁹⁸ *Ibid*, 745.

⁷⁹⁹ Archana Parashar, 'Essentialism or Pluralism: The Future of Legal Feminism' (1993) (6) *Canadian Journal for Woman and Law* 328, 330.

However the model has been criticised for not providing most women with a perceptible change in position.⁸⁰⁰ It is argued that the subordination of women in the law can also be traced to the laws inability to see and correct social disadvantages caused by historical discrimination.⁸⁰¹

The liberal equality model has been vigorously defended by the regulationist school in trafficking that wants to see prostitution treated as a normal labour issue. Discussions on 'sameness' logically led to debates regarding the 'difference' between men and women.

9.1.2 Feminist legal theory: the sexual difference or cultural feminism model

The 'difference' theory or the sexual difference model takes on issues such as pregnancy and argues that pregnancy is unique and should be handled differently to other physical disabilities. Comparing again the way that pregnancy is treated, the difference model criticises the equality model for treating men as the norm and ignoring the special nature of pregnancy.⁸⁰² Carol Gilligan, the main supporter of this model emphasises that women reason differently to men. Gilligan argues that the difference is that women's way of communicating does not bring about a lesser form of communication to men but should be considered alongside the male.⁸⁰³ This model suggests that the law should recognise the way that women interact with the world and embody these elements of nurture and empathy.⁸⁰⁴ This theory has been criticised on the basis that the differences between men and women should be handled in a way that

⁸⁰⁰ Ibid.

⁸⁰¹ Esther Vicente, 'Feminist Legal Theories: My Own View from a Window in the Caribbean' (1997) 66(2) *Revsita Juridica UPR* 211, 219.

⁸⁰² Jenny Morgan, 'Feminist Theory as Legal Theory' (1988) (16) *Melbourne University Law Review* 743, 745.

⁸⁰³ Marija Urlich, 'A Short Topology of Feminist Legal Theory' (1992 – 1995) (7) *Auckland University Law Review* 483, 485.

⁸⁰⁴ Archana Parashar, 'Essentialism or Pluralism: The Future of Legal Feminism' (1993) (6) *Canadian Journal for Woman and Law* 328, 332.

does not bring them into comparison with a general male norm because the historical disadvantages of women places them in a subordinate position.⁸⁰⁵

In some ways, the difference model is apparent in trafficking by groups who emphasise the importance of gender in trafficking. These theorists believe that as the majority of trafficking victims are women, women must be given special attention within the *Trafficking Protocol*. Indeed, while there are no mandatory provisions for the protection of female trafficking victims in the Protocol, there are various provisions that emphasise the role of women now. From this perspective therefore, sexual difference theorists have had some impact on the *Trafficking Protocol* and therefore this model is relevant to trafficking.

However there are other feminist models that are also applicable to trafficking.

9.1.3 Feminist legal theory: the dominance model

Catharine MacKinnon, the leading voice for the dominance model criticised both the sameness and difference debate arguing instead that both models accept men as the norm and the stance should be, whether a particular practice subordinates women.⁸⁰⁶ MacKinnon argues that many examples of prejudice against women were justified by emphasising women's 'special character'.⁸⁰⁷ The previous model that highlights differences is criticised for viewing women as inherently different and therefore less capable than men.⁸⁰⁸

MacKinnon urges feminists to identify dominance, which is the distribution of power between men and women built through the social construction of gender in patriarchal

⁸⁰⁵ Esther Vicente, 'Feminist Legal Theories: My Own View from a Window in the Caribbean' (1997) 66(2) *Revisita Juridica UPR* 211, 220.

⁸⁰⁶ Jenny Morgan, 'Feminist Theory as Legal Theory' (1988) (16) *Melbourne University Law Review* 743, 749.

⁸⁰⁷ Archana Parashar, 'Essentialism or Pluralism: The Future of Legal Feminism' (1993) (6) *Canadian Journal for Woman and Law* 328, 332.

⁸⁰⁸ Jenny Morgan, 'Feminist Theory as Legal Theory' (1988) (16) *Melbourne University Law Review* 743, 749.

societies.⁸⁰⁹ Sexual objectification is identified as playing the most significant role in dominance theory and hence in women's oppression.

Within trafficking, the dominance model seems to have been adopted by the feminist group in support of the abolition of prostitution. Indeed, the abolitionist group has taken on a very active stance in trafficking debate, in a similar way to the sameness theorists who have also participated in trafficking discourse both historically and today. The abolitionist group see all prostitution as analogous to slavery and reject any notion that a woman's participation in prostitution can ever be consensual. Indeed, this argument has in many ways overshadowed many other issues regarding trafficking due to the vigorous actions by the abolitionist feminist groups.

Nevertheless, the dominance model and its emphasis on sexual objectification is criticised by the post-modern theorists who argue that sexual objectification plays a very insignificant role for third world women arguing instead that there are other considerations that should be taken into account.⁸¹⁰

9.1.4 Feminist legal theory: the post-modern or anti-essential model

The post-modern theory looks at sexual harassment and comes to the conclusion that it may not play as significant role as many believe. For example, the post-modern feminist groups argue that many women are more affected by other feminist problems such as economic dependence.⁸¹¹ The post-modern model questions how feminist legal theory can accommodate the different perspectives of women worldwide.⁸¹² Further, the post-modern group argue that even when looking at common problems faced by women worldwide such as violence, other feminist theories do not accommodate different perspectives on violence by women. That is, other models do not allow for the possibility that some practices may constitute violence for some women but not for

⁸⁰⁹ Esther Vicente, 'Feminist Legal Theories: My Own View from a Window in the Caribbean' (1997) 66(2) *Revisita Juridica UPR* 211, 222.

⁸¹⁰ Archana Parashar, 'Essentialism or Pluralism: The Future of Legal Feminism' (1993) (6) *Canadian Journal for Woman and Law* 328, 340.

⁸¹¹ *Ibid*, 341 – 342.

⁸¹² Hilary Charlesworth, 'Feminist Critique of International Law and their Critics' (1994 – 1995) *Third World Legal Studies* 1, 10.

others. Accordingly, there may be division as to appropriate methods to combat the violence.⁸¹³

Postmodernists argue that for the most part, feminist legal theory is concerned with white, middle class mainstream women.⁸¹⁴ However, these women are the ones involved with drafting the law and inevitably have a voice in affecting the lives of women everywhere. Postmodernists argue that women are affected not just by gender issues but also by class, ethnicity, minority status as well as religion and other factors.⁸¹⁵ In challenging the idea of a unitary truth, postmodernists consider that concepts such as 'woman' and gender are in need of feminist reconstruction because there is no single truth through which a vision of equality could benefit all women.⁸¹⁶ However there has been strong criticism of post-modern feminist theory for posing more problems than it solves. Its limitations in providing a basis for combating oppression has been criticised alongside with its depoliticising of the women's movement.⁸¹⁷

Nevertheless, post-modern feminist theory provides a valuable perspective in trafficking and in particular to prostitution. It is possible that through the post-modern model, the current debates regarding prostitution can be advanced or examined at a deeper level. That is, instead of viewing prostitution as a legitimate form of work such as in the sameness theory or viewing prostitution as completely exploitative as in the dominance model, proper representation from post-modern feminist groups including women from different ethnic backgrounds may pose an alternative position. Of course this does not provide us with any concrete answer, nor does it equate to a position that the women from the third world find prostitution acceptable but nevertheless, it is worth considering that feminist theory from a cultural viewpoint would be valuable.

⁸¹³ Ibid.

⁸¹⁴ Archana Parashar, 'Essentialism or Pluralism: The Future of Legal Feminism' (1993) (6) *Canadian Journal for Woman and Law* 328, 342.

⁸¹⁵ Ibid, 343.

⁸¹⁶ Esther Vicente, 'Feminist Legal Theories: My Own View form a Window in the Caribbean' (1997) 66(2) *Revsita Juridica UPR* 211, 225.

⁸¹⁷ Ibid, 226.

The post-modern model also provides valuable insight into the importance of gender in other areas of trafficking. For example, by looking at the changing role of women in the third world, the post-modern model can assist in our understanding as to why women are pushed into other areas of trafficking such as domestic service.

Feminist groups have taken a particular interest in issues surrounding trafficking and have played a key role in lobbying their views during the drafting of the *Trafficking Protocol*, however the groups were not united and indeed the differing voices of feminist legal theory can be heard in the debates and even final drafting provisions. Gender is especially important in an analysis of trafficking considering the role that many believe prostitution to play within the context of trafficking. The importance of gender can even be found in the aims of the *Trafficking Protocol* which makes special mention of the protection of women. These issues will be discussed in order to analyse the actual role of gender in trafficking.

However, even within gender issues, such as trafficking for the purpose of prostitution, gender theory alone may be insufficient. In cases of exploitation of the prostitute, analogies to slavery may assist in determining a better solution to trafficking and will link all victims of trafficking in a common solution.

9.2 Trafficking and Gender

Historically, trafficking has been seen as a crime not only against women but more specifically as a crime that has resulted in the trafficking of women for the purposes of prostitution.⁸¹⁸ Initially, the current *Trafficking Protocol* was to be titled 'Trafficking in Women and Children' but this was later changed to include all genders of trafficking.⁸¹⁹ Today, the *Trafficking Protocol* focuses on trafficking as an organised crime which circumvents national immigration policies⁸²⁰ but continues to carry a gender bias as can

⁸¹⁸ See for example the earlier chapter on early efforts to combat trafficking, and in particular the 1904 Agreement, 1910 Convention, 1921 Convention, 1933 Convention, and the 1950 Convention.

⁸¹⁹ Melissa Ditmore, 'Trafficking in Lives – How Ideology Shapes Policy' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 109.

⁸²⁰ Kamal Kempadoo, 'Introduction – From Moral Panic to Global Justice: Changing Perspectives on Trafficking' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), xiii.

be seen from article 2(a) which states that the purpose of the Protocol is to ‘prevent and combat trafficking in persons, paying particular attention to *women and children*’.⁸²¹

Prostitution itself continues to play an important role in trafficking as is evidenced by the great attention paid to prostitution in the drafting process and the inclusion in article 3(a) of the words ‘exploitation of prostitution or other forms of sexual exploitation’ followed by ‘forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’. As will be discussed below, the words ‘exploitation of prostitution’ were used because consensus could not be reached between nations. This is because some nations have a regulated sex industry whereas others vehemently oppose prostitution. If specific mention of prostitution had been omitted from the definition, exploitative prostitution would have been covered under the latter offences including forced labour or services and slavery. Its specific inclusion as the first listed offence illustrates the role that gender and in particular prostitution plays in the perception of trafficking. This is the case despite a lack of real evidence to that effect ‘[d]ata on prostitution and trafficking area produced from a variety of sources and are of variable and sometimes also doubtful quality.’⁸²²

Feminist groups have taken a very active role in debates regarding trafficking and in so doing have reflected the feminist ideologies that motivate them. While feminist NGOs all wanted a human rights framework to be incorporated into the *Trafficking Protocol*, one group argued from a liberal equality standpoint.⁸²³ That is, that women have the right to choose prostitution and accordingly prostitution should be treated in the same way as other forms of labour within the Protocol.

⁸²¹ My emphasis.

⁸²² Danailova-Trainor, Gergana; and Belser, Patrick, International Labour Office, Geneva ‘Working Paper: Globalization and the illicit market for human trafficking: an empirical analysis of supply and demand’ (InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, International Labour Office, Geneva, December 2006), 10.

⁸²³ This group will be referred to as the Liberal Equality Feminist Group and banded under a coalition calling themselves the Human Rights Caucus (HRC). The coalition was mainly headed by the Global Alliance against Traffic in Women (GATW), the International Human Rights Law Group as well as (but not limited to) Human Rights Watch, Global Survival Network (GSN), Foundation for Trafficking in Women (STV), La Strada, Fundacion Esperanza, Foundation for Women, Foundation Against Trafficking in Women (STV, the Netherlands); Asian Women’s Human Rights Council (AWHRC, Philippines, India); La Strada (Poland, Ukraine, Czech Republic); Fundacion Esperanza (Colombia, Netherlands, Spain); Ban-Ying (Germany); Foundation for Women (Thailand); KOK-NGO Network Against Trafficking in Women (Germany); and Women’s Consortium of Nigeria, Women, Law and Development in Africa (Nigeria).

The other feminist group appears to have argued from a dominance model⁸²⁴ that views prostitution as the sexual objectification of the women⁸²⁵ wishing to see the abolition of all prostitution. The delegates who negotiated the *Trafficking Protocol* mainly came from a law enforcement background and most likely were 'mystified by the passionate disagreements' between these two feminist groups.⁸²⁶

The hotly debated topic of consent to prostitution during the Vienna Process left the bigger picture of whether a person can consent to exploitation or slavery, in an unsatisfactory state with unfortunate results for all trafficking victims including those trafficked for prostitution. Another problem with the gender perspective in trafficking is that it neglected other feminist issues such as the reasons why women are exploited in other areas of trafficking. Furthermore, the feminist perspective has dominated debates in trafficking and has neglected the role that men have played as victims. The previous analysis of the many areas that people are trafficking into will illustrate the broader picture of trafficking.

⁸²⁴ This group will be referred to as the Dominance Feminist Group and during the Vienna Conference formed a coalition of like minded NGOs calling themselves The International Human Rights Network ("IHRN"). The main body behind the IHRN is the Coalition against Trafficking in Women (CATW) as well as (but not limited to) Añ-O-Unnayan Sangstha and the Institute for Law and Development (ILD); Asocion Civil Buen Pastor, Venezuela; Asamblea Raquel Liberman, Argentina; Association des Femmes de l'Europe Méridionale (AFEM); Article Premier (Network of 24 Human Rights NGOs including International Federation of Human Rights; Amnesty International France; Comité Contre L'Esclavage Moderne (CCEM); Médecins du Monde, Terre des Hommes, France); Association pour le Progrès et la Défense des Droits des Femmes Maliennes; Bangladeshi National Women's Lawyers Association; Center for Responsible Tourism; Center of Research and Action for Peace; Centro Feminista Latinoamericano de Estudios Interdisciplinarios (CELEIN); CERSO, Chile; Asia-Pacific, Africa, Latin America, North America, Australia, Europe Congregation of the Sisters of the Good Shepherd; Congregacion Hermanas Adoratrices, Venezuela ; DANA, Ukraine; Equality Now, USA; European Women's Lobby Feminist Group Ottar, Norway; Feminist Majority Foundation, USA; Greek League for Women's Rights; International Abolitionist Federation; Investigacion de Malos Tratos a Mujeres, Spain; International Council of Women, USA; MiraMed Institute Movement for the Abolition of Prostitution and Pornography, France; National Council of Greek Women; National Organization of Women (NOW), USA; Network North, Finland, Norway and Russia; Non-Aligned Women's Movement, Greece; Puerta Abierta, Argentina; Planned Parenthood, USA; ROKS, Sweden; SALUDARTE, Venezuela; Congregacion Oblatas el Santimos Redentor, Venezuela; SANLAAP; SHANI; Sisterhood is Global Institute; Sisters of Loretto; Soroptimists International; Training in Communication (TIC); Union Against Trafficking in Human Beings, France; Third World Movement Against Exploitation (TW-MAE); Women's Front, Norway; World Association of Girl Guides and Girl Scouts and World Federation for Mental Health. See Coalition Against Trafficking of Women website <http://www.catwinternational.org/about/index.php>, accessed 19 April 2006.

⁸²⁵ See generally Esther Vicente, 'Feminist Legal Theories: My Own View from a Window in the Caribbean' (1997) 66(2) *Revsita Juridica UPR* 211, 222 describing the theory of Catharine MacKinnon.

⁸²⁶ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1153.

9.2.1 Feminism and prostitution

While trafficked women for the purposes of prostitution are usually informed about the character of the activity for which they have been recruited,⁸²⁷ feminists disagreed about the role that consent plays in sex work.

During the ad hoc committee's deliberations on the drafting of the *Trafficking Protocol*, NGOs were invited to make submissions. Prostitution is viewed by these two groups as either a form of slavery or as the exercise of the right to work, two views that essentially sit at polar ends of each other on the coercion/consent framework.⁸²⁸ The Dominance Feminist Group or IHRN equate sex work with slavery and view prostitution as the denial of the woman's humanness and dignity while the Liberal Equality Feminist Group sees the right to work as including the right to sell oneself for sexual labour. The dichotomy between the two theories is criticised on the basis that it denies the complex social reality.⁸²⁹

The Liberal Equality Feminist Group or HRC's argument for the legitimisation of sex work strongly opposes any argument that voluntary prostitution does not constitute consent. The HRC lobbied for 3 main points: a definition of trafficking that covered all trafficking into forced labour, slavery and servitude, irrespective of the nature of the work; human rights protection for victims of trafficking and an anti-discrimination clause to protect trafficking victims from discriminatory conduct.⁸³⁰

The HRC view women as empowered individuals with the ability to choose to work in the sex industry. Negating consent effectively leads to the perception of women as victims who are unable to control their lives. Similarly, the caucus lobbied for the use of the term 'trafficked person' instead of 'trafficked women' arguing that the former lends itself to the empowerment of the trafficked person who has rights under law while

⁸²⁷ Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 9.

⁸²⁸ Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391, 391.

⁸²⁹ *Ibid*, 405 – 406.

⁸³⁰ Melissa Ditmore; and Marjan Wijers, members of the Human Rights Caucus, 'Moving the focus from morality to actual conditions – The negotiations on the UN Protocol on Trafficking in Persons' (2002) 79 at 81 <http://www.nswp.org/pdf/NEMESIS.PDF> at 4 June 2007.

the latter implies a person in need of protection, a stance that denies the complexity of the issue.⁸³¹ The HRC argued that trafficked people are likely to be the risk takers in their community, seeking to migrate for a better life by whichever means.

The IHRN made a joint submission regarding trafficking and smuggling to the Committee.⁸³² CATW's philosophy is that all prostitution⁸³³ exploits women, despite the woman's consent⁸³⁴ and that all forms of sexual exploitation⁸³⁵ violate the human rights of anyone subjected to it. The IHRN took the abolitionist view preserving the terms of the 1949 Convention.⁸³⁶ Essentially, they believe that poor, naïve and unempowered women of the third world are unable to make un-coerced decisions to work in the sex industry.⁸³⁷ The IHRN specifically wanted un-coerced prostitution to be considered trafficking.⁸³⁸ This is because including the elements of deception and coercion, in the Protocol in effect means that there is an understanding that some prostitution can be voluntary.⁸³⁹ This concern can be seen to arise from a deep understanding of consent theory and underlining values of voluntariness and choice.

⁸³¹ Ibid, 83.

⁸³² International Human Rights Network, NGO Joint Submissions on Protocol against the Smuggling of Migrants by Land, Air and Sea AND Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Eighth Session, Vienna, 21 February - 3 March 2000, Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime <http://www.december18.net/web/general/page.php?pageID=161&menuID=36&lang=EN> at 4 June 2007.

⁸³³ CATW believe that prostitution includes casual, brothel, escort agency or military prostitution, sex tourism, mail order bride selling and trafficking in women.

⁸³⁴ Coalition Against Trafficking in Women, *An Introduction to CATW* <http://www.catwinternational.org/about/index.php> at 4 June 2007

⁸³⁵ Sexual exploitation for the CATW includes harassment, rape, incest, battering, pornography and prostitution.

⁸³⁶ Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975, 1002.

⁸³⁷ Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23, 37.

⁸³⁸ Melissa Ditmore, "Trafficking in Lives – How Ideology Shapes Policy" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 110.

⁸³⁹ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: the Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking', (2003) 24 *Michigan Journal of International Law* 1143, 1153.

Indeed, the two groups have both tackled the notion of consent within a theoretical consent perspective. In 1999, the HRC put forward the following:

'Obviously, by definition, no one consents to abduction or forced labour, but an adult woman is able to consent to engage in an illicit activity (such as prostitution, where this is illegal or illegal for migrants). If no one is forcing her to engage in such an activity, then trafficking does not exist. (...) The Protocol should distinguish between adults, especially women, and children. It should also avoid adopting a patronising stance that reduces women to the level of children, in the name of 'protecting' women. Such a stance historically has 'protected' women from the ability to exercise their human rights'.⁸⁴⁰

The HRC is incorrect in saying that 'no one consent to ... forced labour' because there are instances of people choosing to be enslaved because they feel that that is a good option for them. In fact, the HRC argued that consent should be eliminated from the definition of trafficking because as trafficking is an exploitative activity, then no person can truly 'consent to their plight'.⁸⁴¹ What the HRC should have said was that consent to forced labour is a 'bad idea', as was put forward by Herzog.⁸⁴²

When one looks at the feminist discussions through a consent theory framework, this may be the point that the IHRN is trying to make. Within a consent framework, the views of the Dominance Feminist Group can be reworded to say that prostitution cannot possibly be for the benefit of the woman so her choice to become a prostitute is a 'bad idea' and therefore any consent is negated. It seems that both the HRC and the IHRN agree generally on this 'bad idea' point. That is, the HRC can be said to believe that consent is a 'bad idea' in forced labour and the IHRN can be said to believe that consent is a 'bad idea' in relation to prostitution. This argument then becomes circulatory because it centres on the question of whether prostitution is a 'good' or 'bad' idea.

⁸⁴⁰ Melissa Ditmore; and Marjan Wijers, members of the Human Rights Caucus, 'Moving the focus from morality to actual conditions – The negotiations on the UN Protocol on Trafficking in Persons' (2002) 79 at 83 <http://www.nswp.org/pdf/NEMESIS.PDF> at 4 June 2007; also quoted at Jo Doezema, *Who gets to choose? Coercion, Consent and the UN Trafficking Protocol* (9 October 2002) Commercial Sex Information Service <http://www.walnet.org/csis/papers/doezema-choose.html> 4 June 2007.

⁸⁴¹ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 485.

⁸⁴² Don Herzog, *Happy Slaves – A Critique of Consent Theory* (1989), 237, although Herzog was not superficially describing forced labour.

The result is that the two groups are ideologically opposed and will not agree on this point and consent theory is difficult to apply to prostitution because of these opposing views. Unfortunately, this does not lead to a clear conclusion regarding the role that prostitution should play within trafficking because both groups have convincing arguments.

Whether legalised or not, there is a demand for prostitution in virtually all countries and prostitution has often been the best means by which a woman has been able to support herself and her family.⁸⁴³ Prohibition of prostitution and restrictive migration policies attract organised crime and make women particularly prone to falling victim to trafficking.⁸⁴⁴ Therefore quick solutions such as the prohibition of prostitution will not work towards the elimination of trafficking in women as the role that gender plays in trafficking is more complex than that. This issue is best dealt with in efforts removing gender inequality. Further, female migration needs to be more adequately addressed in migration law.⁸⁴⁵

One solution is to recognise that prostitution is a profession for many women whose labour conditions can only be ameliorated by its perception as a legitimate form of work. Because women usually choose to work within the sex industry because of economic necessity, parallels can be drawn between sexual labour and wage labour.⁸⁴⁶ As such, in applying labour rights as human rights, moral frameworks, and legal tools may come to the conclusion that certain work, and in particular prostitution 'are forms of work that endanger or exploit the worker, that recreate relationships of bondage, and that endanger the interest of labor and of women as a political class'.⁸⁴⁷ Hernandez-Truyol and Larson conclude that while the labour framework may be the appropriate

⁸⁴³ Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391, 440.

⁸⁴⁴ Alison Murray "Debt Bondage and Trafficking – Don't Believe the Hype" in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 60.

⁸⁴⁵ Ratna Kapur, "Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 35.

⁸⁴⁶ Jane E Larson, 'Prostitution, Labor and Human Rights, (2004) 37(3) *UC Davis Law Review* 673, 681.

⁸⁴⁷ Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391, 444.

perspective from which to study prostitution, this does not necessarily lead to the conclusion that prostitution should be considered a legitimate form of work.⁸⁴⁸

Ultimately, despite neither perspective being clearly better than the other, the post-modern voice of feminism is missing from the debate and it would be fitting to hear the views held by women in the third world who could reflect their views on prostitution from a cultural background. In the meantime, if one accepts that there are many women engaged in the sex industry world-wide, one must embrace a model which will ultimately provide the sex worker with the best protection possible. Accordingly, as feminist theory is unable to solve the prostitution question, a labour framework should be adopted to review working conditions for the prostitution while at the same time acknowledging that practices analogous to slavery must never be permitted to continue even if the slavery was undertaken voluntarily.

9.2.2 The effect of the debate on negotiations of the *Trafficking Protocol*

Unfortunately, while both groups were seeking to ensure the adequate protection and assistance for trafficked people within the Protocol, their division made them ill-equipped to counter state focus on law enforcement.⁸⁴⁹ Human rights concerns were deflected by passionate debates on the consent element in prostitution. Given the protracted debate on the definition of trafficking, little time was left to persuade governments to provide additional protection to witnesses independently of their assistance to the prosecution. Moreover, considering that the Convention and Protocols were drafted in Vienna, many delegates came from a law enforcement and legal background rather than a human rights perspective and protracted arguments regarding consent to prostitution were not well understood by many of the participants.

While the result was unacceptable for the IHRN, the terms 'exploitation of the prostitution of others' and 'other forms of sexual exploitation' along with the accompanying one year debate were unnecessary because involuntary sex work is

⁸⁴⁸ See generally, Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391.

⁸⁴⁹ Melissa Ditmoreen and Marjan Wijers, Coalition Against Trafficking in Women, *An Introduction to CATW* 79 at 80, <http://www.catwinternational.org/about/index.php> at 4 June 2007

covered by the *Trafficking Protocol* in its prohibition of trafficking for 'forced labour or services' and voluntary sex work is covered by the *Smuggling Protocol*.⁸⁵⁰

It has been argued that debates about free will and informed consent have taken away from the gravity of the offence of trafficking because the only way to rid society of the horror of trafficking is if the victim has indeed been victimised. The victim is not a victim simply because they are involved in a lifestyle that some deem to be amoral.⁸⁵¹

When the key is not exploitation but initial consent, then there is an implication that people who consented to their situation deserve the consequences. In the example of prostitution, prostitutes who are trafficked for sex work often receive little sympathy from the community because of their consent to the work, and their consent to be transported to another place in order to work as a prostitute. However, it is not the consent to the sex work that should be emphasised but the exploitation. Questions as to the consent of the person to engage in sex work have been compared to questioning why a battered wife continues to stay with an abusive husband⁸⁵² and questions to victims of rape as to why they trusted their rapist.⁸⁵³ In the trafficking example, the victim is seen as a person that should be brought to justice⁸⁵⁴ but consent to sex work should not be consent to exploitation. This is also closely linked to initial consent. Initial consent should not mean that exploitation is acceptable and a proper appreciation of the complex issues surrounding consent could be reached through an understanding of consent theory.

Further, the separate listing of prostitution is also problematic. The distinction of prostitution from legitimate areas of work perpetuates the prostitute's exclusion from

⁸⁵⁰ Ann D Jordan "Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings" in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 31.

⁸⁵¹ Fara Gold, 'Redefining the Slave Trade: The Current Trends in the International Trafficking of Women' (2003) 11 *University of Miami International and Comparative Law Review* 99, 107.

⁸⁵² Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369, 388 also compares trafficked women to battered women.

⁸⁵³ Fara Gold, 'Redefining the Slave Trade: The Current Trends in the International Trafficking of Women' (2003) 11 *University of Miami International and Comparative Law Review* 99, 113.

⁸⁵⁴ *Ibid*, 121.

ordinary rights held by other workers.⁸⁵⁵ Prevailing attitudes towards prostitutes means that prostitutes usually do not want others aware of the work that they are in.⁸⁵⁶ Prejudice regarding prostitution means that where the prostitute does not have the appearance of what the judge or community perceive to be a stereotypical 'victim', she is viewed and treated harshly.⁸⁵⁷ A consenting prostitute will not receive the sympathy from the community that a non consenting prostitute would receive even if the former faces abuse, debt bondage and slavery like conditions.⁸⁵⁸ Where the prostitute is viewed harshly and found not to fit the mould of the 'victim', the criminal can then be viewed in a positive light⁸⁵⁹ because traffickers benefit from the perception of the victim as an illegal immigrant as opposed to a victim of abuse.⁸⁶⁰

Nevertheless, the result of the Trafficking Protocol's handling of prostitution means that states will have the ability to translate provisions into their national legislation in ways that are either repressive or emancipatory.⁸⁶¹ Some even believe that by adopting such language, the *Trafficking Protocol* essentially adopts the position that people can meaningfully choose to work in the sex industry.⁸⁶² Nevertheless, a person should have

⁸⁵⁵ Jo Bindman "An International Perspective on Slavery in the Sex Industry" in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 65.

⁸⁵⁶ Marjan Wijers "Women, Labor, and Migration – The Position of Trafficked Women and Strategies for Support" in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 77.

⁸⁵⁷ Ibid.

⁸⁵⁸ Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391, 427.

⁸⁵⁹ Marjan Wijers "Women, Labor, and Migration – The Position of Trafficked Women and Strategies for Support" in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 77.

⁸⁶⁰ Stephanie Richard, 'State Legislation and Human Trafficking: Helpful or Harmful?' (2005) 38 *University of Michigan Journal of Law Reform* 447, 452.

⁸⁶¹ Suzanne Williams and Rachel Masika, "Editorial" in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 4.

⁸⁶² Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1143, 1153.

the right to be protected from exploitation whether they consented to work in the sex industry or not.⁸⁶³

9.2.3 An anomalous result – how an abolitionist state integrated prostitution into their national legislation

The *Trafficking Protocol* allows states to follow their position regarding prostitution. For example, Australia, Germany, the Netherlands and New Zealand amongst others refused to sign the protocol if it required that they outlawed prostitution while Iran, Iraq, the US and the Vatican refused to sign the Protocol if they were required to legalise prostitution.⁸⁶⁴

As discussed earlier, the TVPA of the United States has two levels of victims of trafficking. The first is a ‘victim of sex trafficking’ which refers to consensual sex work and is defined as the ‘recruitment, harbouring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act’.⁸⁶⁵

A victim of sex trafficking is different to a ‘victim of a severe form of trafficking’⁸⁶⁶ not because one includes exploitation and the other does not but because a ‘normal’ victim of sex trafficking consents. As per sub paragraph 103(8)(B), a person is characterised as a victim of severe trafficking if there has been the recruitment, harbouring, transportation, provision, or obtaining of that person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

In having two offences, of trafficking and severe trafficking, the legislation acknowledges that prostitution within the United States is illegal. However, where a

⁸⁶³ Elizabeth M Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking,’ (2004) 40 *Stanford Journal of International Law* 1, 32.

⁸⁶⁴ Melissa Ditmore, “Trafficking in Lives – How Ideology Shapes Policy” in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005) p. 115.

⁸⁶⁵ *Trafficking Victims Protection Act of 2000* s. 103(9). A “commercial sex act” is any sex act on account of which anything of value is given to or received by any person, see *Trafficking Victims Protection Act of 2000* s. 103(3).

⁸⁶⁶ *Trafficking Victims Protection Act of 2000* s. 103(8).

person is found to have consented to work in the commercial sex industry, then 'B' is given the title of 'victim of trafficking' but is not afforded any protection. This approach is somewhat in line with feminist groups that believe that a person cannot truly consent to prostitution. Unfortunately, the consent of 'B' is a bar to assistance from the state despite any ensuing exploitation. The reason that commercial sex was listed separately was to emphasise the role of prostitution in trafficking, making reference to the belief that most human trafficking involves the trafficking of women and children for the sex industry. It is arguable that a special sub category of sex trafficking is unnecessary in that the elements of force, fraud and coercion are common to both sex trafficking and trafficking for the purpose of involuntary servitude, slavery, peonage and debt bondage. It would have been preferable to include 'commercial sex act' by implication within the other four offences, without the need to list it specifically.

Posing consent and not exploitation as the key in a state that prohibits prostitution results in an unusual outcome. The United States holds the abolitionist position regarding prostitution however does not protect an exploited prostitute where there is found to be initial consent. The abolitionist argument that voluntary prostitution is trafficking is therefore reflected in the United States legislation but not in a meaningful way because it does not provide the person with any protection. The result is most unusual because the United States while not allowing for the regulation of the sex industry, will nevertheless not afford protection to an exploited prostitute because of initial consent.

9.3 The general relevance of feminism in trafficking

The intense interest by feminist groups involved in trafficking has caused not only a raised awareness of the role of women in trafficking but also has reduced the perception of the role of men. While it is acknowledged that both men and women migrate, the overwhelmingly assumption is that women are trafficking victims whereas men are illegal immigrants and are more likely to fall within the *Smuggling Protocol* as opposed to the *Trafficking Protocol*.⁸⁶⁷ After all, the *Trafficking Protocol* initially was intended to be titled 'Trafficking in Women and Children' and even in its final form makes

⁸⁶⁷ Jyoti Sanghera, 'Unpacking the Trafficking Discourse' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 12.

special mention of the protection of women and children whereas the *Smuggling Protocol* does not refer to either gender.⁸⁶⁸ The gender distinction follows long standing prejudices of women as hapless duped victims and men as illegal migrants.⁸⁶⁹ However there is a lack of qualitative and quantitative data that can illustrate whether this bias towards women and children as forming the largest groups of trafficking victims is accurate. Most information is gathered through small scale studies.⁸⁷⁰

For example, a study conducted by Free the Slaves, a Washington based NGO found that forced labour in the United States was found to be broken up in the following ways: 46% prostitution and sex services; 27% domestic service; 10% agriculture; 5% sweatshop; and 4% restaurant and hotel work.⁸⁷¹ While the statistics may appear accurate or may appear to confirm suspicions regarding the breakdown of roles played by trafficked people, the study was conducted by telephone survey of only 49 service providers who have worked with or who have expertise in forced labour cases and a press survey of 131 incidents of forced labour and 8 cases of forced labour in the United States. The great majority of the workers were from outside of the United States and a small number were American citizens.⁸⁷² Such statistics are often cited in later publications even though the scale of the study may be too small to be indicative of the 'bigger picture'.

As discussed, the main area of gender bias within the *Trafficking Protocol* is that trafficking overwhelmingly takes place for the purposes of prostitution. There is less focus on gender issues that go beyond prostitution to encompass other types of work

⁸⁶⁸ Melissa Ditmore, 'Trafficking in Lives – How Ideology Shapes Policy' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 109.

⁸⁶⁹ Ibid.

⁸⁷⁰ Ratna Kapur, 'Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 29.

⁸⁷¹ Kevin Bales, Laura E Fletcher, Eric Sotver et al, Free the Slaves, Washington DC and the Human Rights Center of the University of California, Berkeley, 'Hidden Slaves: Forced Labor in the United States', (2005) 23 *Berkeley Journal of International Law* 47, 47.

⁸⁷² Ibid, 47.

typically carried out by women such as domestic labour.⁸⁷³ Further, there is perhaps even less acknowledgment of the trafficking of men. Without acknowledgment of the wider context of human trafficking, victims other than prostitutes cannot be offered adequate or appropriate protection.

Many feminists groups argue that the overwhelming majority of trafficking is for the trafficking of women and girls, particularly for the purposes of prostitution, because of gender discrimination against women in the household, family and community, making them vulnerable to traffickers and especially to sexual violence.⁸⁷⁴ It is argued that gender discrimination means that young women in particular are in demand because 'they are considered to be more compliant and detail-oriented and less likely to rebel against the conditions of forced labour'.⁸⁷⁵ Most likely such views are held by the Sexual Difference feminist groups whereas the Liberal Equality feminists recognise that trafficking also affects men, especially in the fields of construction, industry and agriculture.⁸⁷⁶

In any event, associations of trafficking and prostitution are simplistic, resulting in a 'dead-end scenario' or a pro and against position.⁸⁷⁷ While trafficking for prostitution forms the basis of activities for many anti-trafficking interventions, the *Trafficking Protocol* even though emphasising women and prostitution, has been praised for not being confined to just prostitution or sex work.⁸⁷⁸

⁸⁷³ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol', (2003) 44(2) *Harvard International Law Journal* 473, 474.

⁸⁷⁴ Suzanne Williams and Rachel Masika, 'Editorial' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 6.

⁸⁷⁵ Ann D Jordan 'Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 28.

⁸⁷⁶ Jo Doezema, 'Who gets to Choose? Coercion, Consent and the UN Trafficking Protocol' in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 20.

⁸⁷⁷ Jyotti Sanghera, 'Unpacking the Trafficking Discourse' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 4.

⁸⁷⁸ Ratna Kapur, 'Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 30.

Women fall into the informal and unregulated market and their roles extend beyond prostitution to include the entertainment industry, domestic service and marriage.⁸⁷⁹ It is thought that migration policies are biased against women because work commonly undertaken by women does not correspond to good labour protection.⁸⁸⁰ Because there are few legal ways for women to migrate under these categories of work, they often have to rely on an agency to assist them and therefore become vulnerable to trafficking.⁸⁸¹ Women also tend to suffer more in poverty than men because of lower education and lack of ownership of land and capital.⁸⁸² For example, from 1999 to 2001, 80% of Ukrainian women lost their jobs.⁸⁸³ Prostitution plays a big role in trafficking and while many other women do not agree to work in prostitution, they may accept a position in a related industry such as night club dancing.⁸⁸⁴ Accordingly, feminist legal theory works to address the underlining issues that affect women and makes them prone to trafficking.

Some efforts to support women and redress the balance of inequality have hindered rather than advanced the rights of women. Cultural tendencies that purport to protect women from changing conditions have removed many women from night shift work, and other areas preventing women from gaining technical experience that would enable

⁸⁷⁹ Marjan Wijers 'Women, Labor, and Migration – The Position of Trafficked Women and Strategies for Support' in Kamala Kempadoo and Jo Doezema (eds) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 71.

⁸⁸⁰ Phil Marshall and Susu Thatun, 'Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region', in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 52.

⁸⁸¹ Marjan Wijers 'Women, Labor, and Migration – The Position of Trafficked Women and Strategies for Support' in Kamala Kempadoo and Jo Doezema (ed) *Global Sex Workers – Rights, Resistance and Redefinition* (1998), 71.

⁸⁸² Aiko Joshi, 'The Face of Human Trafficking', (2002) 13 *Hastings Women's Law Journal* 31, 38.

⁸⁸³ Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 174.

⁸⁸⁴ *Ibid.*

them to earn higher wages.⁸⁸⁵ Plagued by poverty, many women find it worthwhile paying a large price to 'try their luck' and end up in the hands of traffickers.⁸⁸⁶

In relation to the trafficking of women, instead of being viewed as a simple problem of gender inequalities or poverty eradication, trafficking should be viewed in the broader context of globalisation and the increase in female immigration of women from the third world.⁸⁸⁷

Feminist legal theory can explain why women choose to migrate as well as being able to explain the reasons that women are pulled into certain areas of work. However this leaves out a similar analysis of why men are trafficked. An analysis of some of these broader categories may help to illustrate that prostitution, whilst very important is only one area of trafficking. Therefore, while gender issues may be relevant in explaining women's role within trafficking, feminist theory cannot explain trafficking as a whole. A human rights approach on the other hand would have assisted all victims of trafficking, including women.

⁸⁸⁵ Aiko Joshi, 'The Face of Human Trafficking', (2002) 13 *Hastings Women's Law Journal* 31, 34.

⁸⁸⁶ Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369, 388.

⁸⁸⁷ Ratna Kapur, "Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 30.

10 TRAFFICKING AS A VIOLATION OF HUMAN RIGHTS

10.1 Human rights theory

Human rights in international law developed in response to World War II and the actions of the Nazis.⁸⁸⁸ It was thought that had there existed an effective international system for the protection of human rights, then some of the gross violations that occurred in World War II could have been avoided.⁸⁸⁹ The result was the drafting of the *Universal Declaration of Human Rights* in 1948⁸⁹⁰ which together with the later *Covenant on Economic, Social and Cultural Rights*⁸⁹¹ and the *Covenant on Civil and Political Rights*,⁸⁹² came to be known as the International Bill of Rights.⁸⁹³ The drafting of these instruments was possible due to 'unparalleled international cooperation'.⁸⁹⁴ The human rights contained within these instruments were thought to be represented in universal terms with general applicability.⁸⁹⁵

While the *Universal Declaration of Human Rights* has no force in law and proclaims the rights enshrined in the latter two instruments, it is suggested that it may embody customary international law due to the widespread acceptance of the declaration and

⁸⁸⁸ Louis B Sohn, 'The International Law of Human Rights: A Reply to Recent Criticisms' (1981) (9) *Hofstra Law Review* 347, 347.

⁸⁸⁹ George N Barrie, 'International human rights conventions: public international law applicable to the protection of rights' (1995) *Journal of South African Law* 66, 68.

⁸⁹⁰ *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, G.A. Res. 217A (III).

⁸⁹¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966, 999 UNTS 3 (entered into force 3 January 1976). For state parties, see figure 4 of the appendix.

⁸⁹² *International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966, 999 UNTS 171 (entered into force 23 March 1976): For state parties, see figure 4 of the appendix.

⁸⁹³ See also the *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966, 999 UNTS 302 (entered into force 23 March 1976); and the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, adopted 15 Dec. 1989, 1642 UNTS 414 (entered into force 11 July 1991).

⁸⁹⁴ Ruti Teitel, 'Human Rights Genealogy' (1997) (66) *Fordham Law Review* 301, 304

⁸⁹⁵ *Ibid*, 309.

potentially contains international human rights standards.⁸⁹⁶ However as will be explained below, there are serious questions as to the acceptance of any particular view of human rights as being generally applicable worldwide. While the drafting of the Declaration occurred in an atmosphere of cooperation and concern for the future, with time, the two Covenants were required because it was not possible to reach general agreement on what constituted rights. In order to achieve consensus, the rights were divided over two covenants allowing states the flexibility to sign the instrument that they could agree with.⁸⁹⁷ It is also argued that the latter covenants attempted to limit the application of the Declaration by using terminology relating to protection couched in terms such as 'prescribed in law' or 'in accordance with law'.⁸⁹⁸

The differences between the two Covenants are quite apparent, both in the rights that they seek to protect and in their implementation. The *International Covenant on Economic, Social and Cultural Rights* allows for the right to self determination,⁸⁹⁹ the right to work,⁹⁰⁰ the right of everyone to the enjoyment of just and favourable conditions of work,⁹⁰¹ the right to form and join trade unions,⁹⁰² the right to social security and social insurance,⁹⁰³ wide protection and assistance to the family including a reasonable period of protection before and after childbirth and protection and assistance to all children,⁹⁰⁴ the right to an adequate standard of living including adequate food, clothing and housing, and continuous improvement of living conditions,⁹⁰⁵ the right to

⁸⁹⁶ George N Barrie, 'International human rights conventions: public international law applicable to the protection of rights' (1995) *Journal of South African Law* 66, 70 - 73.

⁸⁹⁷ *Ibid*, 71.

⁸⁹⁸ Maurice Cranston, *What are Human Rights?* 1973, 79.

⁸⁹⁹ *International Covenant on Economic, Social and Cultural Rights*, art. 1(1).

⁹⁰⁰ *International Covenant on Economic, Social and Cultural Rights*, art. 6.

⁹⁰¹ *International Covenant on Economic, Social and Cultural Rights*, art. 7.

⁹⁰² *International Covenant on Economic, Social and Cultural Rights*, art. 8.

⁹⁰³ *International Covenant on Economic, Social and Cultural Rights*, art. 9.

⁹⁰⁴ *International Covenant on Economic, Social and Cultural Rights*, art. 10.

⁹⁰⁵ *International Covenant on Economic, Social and Cultural Rights*, art. 11.

the enjoyment of the highest attainable standard of physical and mental health,⁹⁰⁶ the right to education⁹⁰⁷ and the right to take part in cultural life.⁹⁰⁸ The implementation of the above rights are dictated by article 2 which directs state parties to take steps both individually and through international assistance and cooperation, with a view to achieving progressively the full realisation of the rights without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In essence, for the realisation of the rights contained within this Covenant, the state must take positive steps towards implementation.

The *International Covenant on Civil and Political Rights* allows for the right of self-determination,⁹⁰⁹ equality between men and women,⁹¹⁰ recognising the inherent right to life, and calls for states who have not already abolished the death penalty to use it only for the most serious of crimes.⁹¹¹ The *International Covenant on Civil and Political Rights* protects people from: torture, cruel, inhuman or degrading treatment or punishment,⁹¹² slavery, servitude or forced or compulsory labour,⁹¹³ the right to liberty and security without being subjected to arbitrary arrest or detention,⁹¹⁴ those deprived of their liberty are to be treated with humanity and dignity,⁹¹⁵ protection from imprisonment for contractual wrongs,⁹¹⁶ the right of liberty of movement to everyone who is lawfully within a territory,⁹¹⁷ the expulsion of aliens only in accordance with the

⁹⁰⁶ *International Covenant on Economic, Social and Cultural Rights*, art. 12.

⁹⁰⁷ *International Covenant on Economic, Social and Cultural Rights*, art. 13 – 14.

⁹⁰⁸ *International Covenant on Economic, Social and Cultural Rights*, art. 15.

⁹⁰⁹ *International Covenant on Civil and Political Rights*, art. 1.

⁹¹⁰ *International Covenant on Civil and Political Rights*, art. 2.

⁹¹¹ *International Covenant on Civil and Political Rights*, art. 6.

⁹¹² *International Covenant on Civil and Political Rights*, art. 7.

⁹¹³ *International Covenant on Civil and Political Rights*, art. 8.

⁹¹⁴ *International Covenant on Civil and Political Rights*, art. 9.

⁹¹⁵ *International Covenant on Civil and Political Rights*, art. 10.

⁹¹⁶ *International Covenant on Civil and Political Rights*, art. 11.

⁹¹⁷ *International Covenant on Civil and Political Rights*, art. 12.

law,⁹¹⁸ the equality of all people before the law,⁹¹⁹ the protection of the person from being found guilty of a retrospective offence,⁹²⁰ the right to recognition before the law,⁹²¹ the right to be free of arbitrary or unlawful interference with their privacy, family, home or correspondence,⁹²² the freedom of thought, conscience and religion,⁹²³ the right to hold opinions without interference,⁹²⁴ the prohibition of war propaganda,⁹²⁵ the right to peaceful assembly,⁹²⁶ the right of freedom of association with others including the right to join trade unions,⁹²⁷ protection of the family,⁹²⁸ the right of all children to be protected as minors,⁹²⁹ the right to take part in public affairs,⁹³⁰ equal protection before the law⁹³¹ and the enjoyment of cultural practices.⁹³² The difference in implementation of the *Covenant on Economic, Social and Cultural Rights* is that article 2(2) of the *Covenant on Civil and Political Rights* only requires states to adopt such laws or other measures as may be necessary to give effect to the rights of the Covenant.⁹³³ This means that the implementation of this latter instrument is far easier because the protection of the rights enshrined therein requires few economic resources

⁹¹⁸ *International Covenant on Civil and Political Rights*, art. 13.

⁹¹⁹ *International Covenant on Civil and Political Rights*, art. 14.

⁹²⁰ *International Covenant on Civil and Political Rights*, art. 15.

⁹²¹ *International Covenant on Civil and Political Rights*, art. 16.

⁹²² *International Covenant on Civil and Political Rights*, art. 17.

⁹²³ *International Covenant on Civil and Political Rights*, art. 18.

⁹²⁴ *International Covenant on Civil and Political Rights*, art. 19.

⁹²⁵ *International Covenant on Civil and Political Rights*, art. 20.

⁹²⁶ *International Covenant on Civil and Political Rights*, art. 21.

⁹²⁷ *International Covenant on Civil and Political Rights*, art. 22.

⁹²⁸ *International Covenant on Civil and Political Rights*, art. 23.

⁹²⁹ *International Covenant on Civil and Political Rights*, art. 24.

⁹³⁰ *International Covenant on Civil and Political Rights*, art. 25.

⁹³¹ *International Covenant on Civil and Political Rights*, art. 26.

⁹³² *International Covenant on Civil and Political Rights*, art. 27.

whereas economic, social and cultural rights require education, planning and other means.⁹³⁴

One example of a theorist with strong views as to the important differences between the human rights relating to the two Covenants is Maurice Cranston. Cranston wrote that '[a] human right is something of which no one may be deprived without grave affront to justice. There are certain deeds which should never be done, certain freedoms which should never be invaded, some things which are supremely sacred'.⁹³⁵ Accordingly, Maurice believes that human rights should be confined to a declaration of moral rights, and, while economic, social and cultural rights may be useful, they cannot be considered to be moral rights.⁹³⁶ Further, human rights must be tied to universal duties which is not the case with economic, social and cultural rights as many states may not be able to implement them.⁹³⁷ Cranston puts such rights beyond the realm of human rights because economic, social and cultural rights are rights that may never be implemented and so may never be enjoyed by anyone. If something is beyond enjoyment because there is no real way that all people can have access to it, then Cranston believes that it is more of an ideal than a moral right.

Today, while states may recognise that they owe all individuals what is referred to as 'fundamental human rights'⁹³⁸ the lack of consensus as to what constitutes human rights, and what rights should be protected continues.⁹³⁹ This is due to theoretical differences between the two Covenants. The differences can be summarised as a difference in positive rights in relation to social, cultural and economic rights or

⁹³³ Where there national law does not already have existing legislation or other measures

⁹³⁴ George N Barrie, 'International human rights conventions: public international law applicable to the protection of rights' (1995) *Journal of South African Law* 66, 73.

⁹³⁵ Maurice Cranston, *What are Human Rights?* 1973, 68.

⁹³⁶ *Ibid.*

⁹³⁷ Maurice Cranston, *What are Human Rights?* 1973, 69.

⁹³⁸ George N Barrie, 'International human rights conventions: public international law applicable to the protection of rights' (1995) *Journal of South African Law* 66, 66.

⁹³⁹ Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 18.

negative rights in relation to civil and political rights.⁹⁴⁰ The differences between positive and negative rights are at the centre of Cranston's theory. References to positive and negative rights do not describe the source of rights as may be applicable to terms such as natural and positive rights; but concerns the 'character' of the rights, without reference to their source.⁹⁴¹ The reason for this difference in reference can be traced to the implementation requirements. That is, economic, social and cultural rights are rights which require positive action by the state; whereas civil and political rights may be more relevant in terms of what actions a state should *not* take. That is, they suggest what a government should 'forebear' from interfering with.⁹⁴² Another question related to theory is whether human rights should be considered to be natural rights, also known as universal rights, or whether they are part of positive rights. In any event, whatever rights are chosen to fall within the ambit of human rights will reflect political or philosophical choices.⁹⁴³

The World Conference on Human Rights, held in Vienna in June 1993 attempted to deal with the disparities that existed between the two instruments by essentially affirming that all human rights are equal. The World Conference reaffirmed the commitment of states to fulfil their obligations to promote universal respect for, and observance and protection of all human rights and fundamental freedoms in accordance with the Charter of the United Nations, other instruments relating to human rights and international law.⁹⁴⁴ Further, the Conference adopted by acclamation the position that all human rights are universal, indivisible, interdependent and interrelated.⁹⁴⁵ Unfortunately, this does not change the fact that many states continue to commit and allow massive

⁹⁴⁰ Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 19.

⁹⁴¹ Michael P Zuckert, 'Do Natural Rights Derive from Natural Law?' (1997) (20) *Harvard Journal of Law and Public Policy* 695, 701.

⁹⁴² *Ibid*, 702.

⁹⁴³ Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 19.

⁹⁴⁴ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, [part 1, para. 1] UN Doc A/CONF.157/23 (1993).

⁹⁴⁵ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, [part 1, para. 5] UN Doc A/CONF.157/23 (1993).

violations of human rights, indicating that drafting laws and implementing them is complex. Despite the World Conference, there is still division over human rights.

If one believes that human rights are derived from the particular choices of a community, say through political means, then human rights may be more difficult to enforce because they do not necessarily hold any more privilege than any other laws. On the other hand, human rights that are chosen by the people through a process of democracy reflect the fundamental values of that community and should be protected.⁹⁴⁶ Indeed, discussions regarding the benefits of having a Bill of Rights are centred on this idea of a 'common solution', which means that in order to come to a finite decision as to what rights are human rights, differences in opinion as to what human rights are will have to be settled.⁹⁴⁷

Given the problems posed by differing views as to what should constitute human rights, the best solution, may be to adopt those rights that a community believes are important at a particular time.⁹⁴⁸ After all, the birth of human rights following World War II, also occurred in response to social conditions of the time.⁹⁴⁹ Today, human rights should be understood in the realisation that human rights do not represent objective truths 'human rights... are products of social consensus and they are protected via a judicial interpretation as to their 'weight' (and consequent applicability) in different factual circumstances'.⁹⁵⁰

Apart from a lack of consensus as to the substance of human rights, the main problem with human rights at this time is that they do not correspond with judicial rights and remedies.⁹⁵¹ Taking the view that the society is perhaps the best body to decide which

⁹⁴⁶ Ibid, 23.

⁹⁴⁷ Ibid, 25.

⁹⁴⁸ Adjei calls this 'social constructivist' theory which is the dominant theory, as opposed to the idea of 'natural rights', see Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 28 – 29.

⁹⁴⁹ Ruti Teitel, 'Human Rights Genealogy' (1997) (66) *Fordham Law Review* 301, 302.

⁹⁵⁰ Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 29 – 30.

⁹⁵¹ Ruti Teitel, 'Human Rights Genealogy' (1997) (66) *Fordham Law Review* 301, 305.

human rights it seeks to protect, it may be appropriate to examine the values that most people believe to be worthy of protection and then draft the law accordingly. Human rights should be incorporated into the law and they must then be implemented.⁹⁵²

However, there are certain theorists, such as Martha Nussbaum who believe that a universal set of human rights can be defined. However Nussbaum prefers to look at 'capabilities' rather than rights. 'The language of rights has a moral resonance that makes it hard to avoid in contemporary political discourse'.⁹⁵³ The term 'rights' can be criticised because it implies, amongst other things, universality and uniformity. For example, a woman may have a legal right to work outside the home but her circumstances may forbid her to seek such employment. Nussbaum therefore says that is better to define rights as capabilities. That is, the things which all people should have the capacity to do, even if they choose not to do them. Nussbaum articulates ten components of central importance. Nussbaum views these capabilities as of 'special importance because they both organise and suffuse all other capabilities, making their pursuit truly human'.⁹⁵⁴ Capabilities are those things that all people should have access to, or be capable of attaining, and are largely related to a person's standards of living. Nussbaum sees the list as providing a universal list of minimum standards. These capabilities are:

1. Life
2. Bodily Health
3. Bodily Integrity
4. Senses, Imagination and Thought
5. Emotions
6. Practical Reason
7. Affiliation

⁹⁵² See Patrick Fitzgerald, 'New Developments in Criminal Law: Implications for the International Scene' (1991(60) *Revisita Juridica UPR* 1271, 1276; George N Barrie, 'International human rights conventions: public international law applicable to the protection of rights' (1995) *Journal of South African Law* 66, 80.

⁹⁵³ Martha C Nussbaum, 'Symposium: Human Rights on the Eve of the Next Century: Beyond Vienna and Beijing: Human Rights Theory: Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273, 273.

⁹⁵⁴ *Ibid*, 288.

- a. Friendship
- b. Respect
- 8. Other Species
- 9. Play
- 10. Control Over One's Environment
 - a. Political
 - b. Material

But Nussbaum is quick to point out that capabilities are more important than function. That is, the person must have the ability to exercise any of the 'capabilities', but should not be obligated to do so. The society should seek to build the capacity to allow its citizens to aim for capability and then leave the individual free to choose whether to adopt the capability or not. She uses the example of celibacy and says that where a person should be given the capability to enjoy sexual freedom, they should also be free to choose celibacy.⁹⁵⁵ The key is that the individual makes a decision not based on limited choices.

While there may be an argument that universal standards are paternalistic, Nussbaum argues that universal values are 'badly needed'.⁹⁵⁶ Nevertheless, Nussbaum sees the capabilities as being closely related to so called 'human rights'. Capabilities cover both political and civil liberties and economic and social rights.⁹⁵⁷ Nussbaum criticizes the term 'rights' in that it implies an illusion of agreement as to what rights are universal when in actual fact there is disagreement. Instead, Nussbaum believes that capabilities should form the basic minimum level for all world citizens, making them universal.⁹⁵⁸

Trafficking contains elements that may be thought of as 'human rights' and also to 'capabilities'. Nussbaum's understanding of human rights comes from a deep understanding of both the law and its shortcomings, however people's understanding of

⁹⁵⁵ Martha C Nussbaum, 'Sherman J Bellwood Lecture: In Defense of Universal Values' (2000) 36 *Idaho Law Review* 379, 427.

⁹⁵⁶ *Ibid*, 402.

⁹⁵⁷ *Ibid*, 435.

⁹⁵⁸ Martha C Nussbaum, 'Twentieth Anniversary Reflections: Human Rights and Human Capabilities' (2007) 20 *Harvard Human Rights Journal* 21, 21.

human rights still spring from the international agreements. Accordingly, for consistency, the language in this thesis will refer mainly to 'human rights'.

Trafficking and human rights are difficult to link not because there is a lack of consensus as to whether the offences suffered by trafficking victims have a human rights character, but because human rights and capabilities are owed by states and not trafficking groups operating for private financial gain.

In relation to human trafficking, human rights theories are difficult in their application because of the way that human rights are enforced. As the law currently stands, human rights are rights that are provided in a so called 'vertical' fashion. That is, they are obligations of the state to the individual. The question then arises, as will be discussed in detail below, as to how human rights can apply in trafficking which takes place between victims and offenders in a 'horizontal' relationship.⁹⁵⁹ The answer may be that while traffickers do not owe human rights, the state is under an obligation to prevent crime and therefore to reduce human rights violations.⁹⁶⁰ While universal agreement should not necessarily be expected, discussions on the topic may lead to solutions as to protection mechanisms.⁹⁶¹

10.2 Human rights and human trafficking

Human rights are a critical issue in human trafficking because the violations committed against the victims in human trafficking impact in a fundamental way on the victims life. Most importantly, human trafficking is related to the deprivation of liberty and freedom of the victim. The deprivation of liberty and freedom are related to both push and pull factors in trafficking. That is, at the push level, the person's lack of life choices due to poverty, gender inequality, civil unrest, unemployment etc lead the person to consent to be trafficked. This is related to consent theory which questions the persons voluntariness in consenting to a certain course when they have few alternatives.

⁹⁵⁹ Jonathon Doak, 'The Victim and the Criminal Process: an analysis of recent trends in regional and international tribunals' (2003) 23(1) *Legal Studies* 1, 4.

⁹⁶⁰ *Ibid*, 15.

⁹⁶¹ Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 27.

Liberty and freedom are also important to the trafficking victim at the place of destination because of the impacts of exploitation.

Human rights also relate to the treatment of the trafficking victim by the receiving state especially during criminal proceedings against the trafficker. This is evident in the way that most states instigate criminal proceedings against the trafficker for wrongs committed against the victim however do not apply a victim focus leaving the victim with little if any protection in most cases.

From this breakdown we can see that there are three main areas of potential interest for trafficking. The first is the state of origin. Human rights regarding the state of origin are largely related to a lack of implementation of economic, social and cultural rights and also civil and political rights. Human rights may also be relevant to states of origin when it becomes apparent that the state is 'turning a blind eye' to the trafficking of its citizens or when it actively encourages emigration despite knowledge that it is an important source country for trafficking.

The second main area of human rights and trafficking relates to the role played by the traffickers. This relates to the violations committed by the traffickers against the victim. These violations may include sexual and other physical abuses of the victim while in transit and the exploitation of the victim on arrival through the use of slavery like practices.

The last area of human rights and trafficking is the conduct of the receiving state. The receiving state may be implicated in human rights violations if they are aware that they attract trafficking and do not respond with programs to curb the practice. For example, the state may be aware of certain labour sectors that are particularly prone to using trafficking victims and yet the state does not take any action. Receiving states also may be in breach of certain human rights in their treatment towards trafficking victims.

Broadly speaking, these human rights violations can be analysed from two main perspectives: human rights violations by non-state actors, that is, by the traffickers, and secondly, human rights violations committed by states including both the state of origin and the state of destination.

The importance of characterising a crime as a ‘human rights violation’ is that such crimes denote a level of gravity. Claiming that an act is a violation of human rights carries with it more seriousness than pointing to the various crimes that go together to form a trafficking offence. For example, exploitative labour charges do not sound as important as the same behaviour being characterised as a human rights violation. The same may be said of other related crimes such as abduction or false imprisonment. Viewing the crimes involved in trafficking as human rights violations is an important way to change perceptions regarding the crime. Indeed, the purpose of the *Organised Crime Convention* and *Trafficking Protocol* is to properly categorise all trafficking that falls within the definition whether they satisfy all criminal elements or not, so long as they satisfy the overall requirements of the Protocol.

Prior to the *Trafficking Protocol*, traffickers were charged with a specific crime, say for example with false imprisonment. The problem that arose was that it was possible for the trafficker to be acquitted because not all of the elements of false imprisonment could be proven. This may have been because the false imprisonment took place within the wider context of trafficking. Trafficking was not an ordinary crime of false imprisonment so loopholes allowed for the acquittal of the offender. The *Trafficking Protocol* recognises that human trafficking involves more complex issues and it is intended to prosecute the ‘broad’ crime of trafficking, which does not always fall neatly into national criminal legislation. That is because the crime of trafficking is different to the sum of its parts.⁹⁶²

While characterising human trafficking as a violation of human rights would be beneficial because it would help create a different understanding of trafficking, this could only occur if the various actors could be held accountable for violations of human rights.

10.3 Human rights violations by non-state actors

‘Traffickers abuse virtually the entire spectrum of rights protected in the Universal Declaration of Human Rights. By their acts, traffickers deny that all persons are born free and

⁹⁶² Alison N Stewart, ‘Report from the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective’ (1998) 20 (11) *Women’s Rights Law Reporter* 11 at 14.

*equal in dignity and rights; they deny their victims freedom of movement, freedom of association, and the most basic freedom: to have a childhood. Traffickers profit from arbitrary detention, slavery, rape, and cruel, inhuman and degrading treatment. They regularly violate any human right that gets in the way of profit. Most fundamentally, traffickers do not respect any of these rights, because they view their victims as objects, chattel to be bought and sold as needed.*⁹⁶³

Such sentiments are frequently expressed in relation to trafficking however while it is true that the offence of trafficking contains various human rights abuses, the application of human rights as a legal concept is more complicated when one looks at the role played by traffickers. Human rights violations committed by non-state actors in trafficking are those rights most of us think of when we talk of trafficking. They are mainly related to the abuses suffered by the victim during their transportation and the exploitation they face on arrival at the destination state.

Human rights violations on transportation are related to the conditions upon which the victim is made to travel.⁹⁶⁴ For example, there are accounts of victims who are locked in transportation vehicles in order to cross borders but who suffocate en route. Many women are reported as being sexually assaulted during their journey and a great many victims have their identity papers taken from them by their traffickers and are therefore denied the ability to travel freely. More importantly, the exploitation of the victim once they reach their destination plays a more significant role. This is because while in transit, the trafficker will likely need to rely on the victim's cooperation in order to enter the destination state without alerting customs to any irregularities. Accordingly, there is a higher chance for exploitation of the victim after the victim arrives at the destination.

⁹⁶³ LeRoy G. Potts, 'Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons', (2003) 35(1) *The George Washington International Law Review* 227, 228 – 229, quoting Harold Hongju Koh, former Assistant Secretary of State, for Democracy, Human Rights and Labour, before the House Committee on International Relations *The Global Problem of trafficking in Persons: Breaking the Vicious Cycle on "Trafficking of Women and Children in the International Sex Trade"*, Before the House Comm. On Int'l Relations, 106th Cong. 2 (1999) (testimony of Harold Hogju Koh, Assistance Secretary of State), 2.

⁹⁶⁴ See generally, Baher Azmy, 'Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda' (2002) 71 *Fordham Law Review* 981, 997.

On arrival, trafficked people are exploited by being made to work under slavery like conditions. They may suffer beatings and humiliation and may be denied access to adequate food and water. Victims may suffer from such abuses at any stage of their trafficking, and all of these abuses occur because of the actions of individuals or groups who act for their own benefit. As such, the trafficker's actions, even those traffickers who are corrupt officials, are not actions sanctioned by the state. Nevertheless, it is often said that the above actions, as well as many other alleged abuses are violations of human rights.

However traditionally, under international law, individuals can only be held accountable for human rights violations when they carry out an act that is part of state policy. For example, the Nuremberg tribunals indicted war criminals for acts that the individuals committed as part of Hitler's scheme but did not criminalise the actions of individuals acting of their own accord.⁹⁶⁵ When an individual commits a human rights violation that is not conduct undertaken under the authority of a state, then that individual is charged with a criminal offence as per that state's criminal code. That is, for an offence to be categorised as a human rights offence, it has to be state sanctioned. That is because the law protects citizens from the abuse of power from the state.⁹⁶⁶ So, an individual can carry out acts that are violations of human rights, however, those actions are not called human rights violations per se. To put it another way, the actions may be human rights violations however the perpetrator is not held accountable for human rights breaches as such. More commonly, they will be accused of having committed a crime.

Under the *Trafficking Protocol*, the person may be charged with having committed a trafficking offence. The person may also be charged with having committed some other offence, which may sound like a human rights violation, such as false imprisonment, sexual assault or depravity. Under some jurisdictions, for example, in the United States, the person may even be held accountable by the victim themselves under provisions in

⁹⁶⁵ See David Luban, 'A Theory of Crimes Against Humanity', (2004) 29 *Yale Journal of International Law* 85 at 95 – 96 who explains that anti-Semetics who carried out genocidal actions against Jews could not be tried under the Nuremberg trials as the actions must be by state actors or "high placed civilians embroiled with state actors" in order to qualify.

⁹⁶⁶ August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed) *Non-State Actors and Human Rights* (2005), 38.

the civil law.⁹⁶⁷ A victim in Australia may have recourse against the trafficker under tort law.

Therefore, it remains that where traffickers are not acting under the direction of the state, they are not charged with human rights violations, but instead are charged under domestic legislation with the offence of trafficking as a breach of the criminal law. In some cases they may even be charged under the civil law. Nevertheless, 'human rights' are relevant to trafficking because the abuses suffered by trafficking victims have a 'human rights quality' about them.

Further, while it is true to say that human rights violations can only be committed as part of a state-sponsored conduct, it remains that human rights as an area of law may develop to hold non-state actors accountable. In time, human rights should be seen within a broader perspective because taking a limited view of human rights may miss the point of what human rights are. The law is not static, but is intended to reflect the system in which it is operating. After all, the ideal way to deal with trafficking is to develop the law from within theoretical frameworks that reflect what *ought* to be.

Human rights violations should remain as human rights violations, no matter who commits the crimes. This expansive view of human rights would greatly enhance the effectiveness of strategies adopted to combat trafficking. This new theoretical approach would lead to good law, and as said in the introduction to this thesis, 'good theory is practical and ... good practice is informed by theory'.⁹⁶⁸ For the moment, this thinking is not reflected in the law and when academics speak of expanding human rights protections to include the actions of non-state actors, they are usually speaking of expanding the law to include not just the state but 'powerful non-state actors'.⁹⁶⁹

This is because the relevant non-state actors are those that due to a number of factors including: privatisation of arrangements such as welfare systems, prisons, schools etc; capital mobilisation; trade liberalisation and other reasons have expanded the roles

⁹⁶⁷ See for example, the *Victims of Trafficking and Violence Protection Act of 2000* s 111.

⁹⁶⁸ Stephen Wizner, 'The Law School Clinic: Legal Education in the Interests of Justice' (2001 -2002) (70) *Fordham Law Review* 1929, 1932, describing the 'legal realist' theory advanced by the Yale Law School in 1930s.

⁹⁶⁹ August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed) *Non-State Actors and Human Rights* (2005) 38.

played by non-state actors to include de facto roles within national and international affairs.⁹⁷⁰ Accordingly, the idea of holding non-state actors accountable for human rights violations at this time is probably limited to a discussion of holding transnational corporations and other business enterprises accountable.⁹⁷¹

This is an important development in the law because transnational corporations, particularly those engaged in the manufacture of goods, tend to establish subsidiaries in countries that are more flexible in their adherence to international human rights norms and whose conditions are therefore favourable to the head company.⁹⁷² Further, these companies are usually facilitated by the state which may be reluctant to take action against the multinational company because of fear of losing foreign investment.⁹⁷³ This may be relevant to trafficking where trafficking victims are exploited by large transnational companies, or where transnational companies use products made by smaller operators, the role of human rights may be more significant. However, the importance of human rights at this stage of the law may be seen to be moral rather than legal in character.⁹⁷⁴

To this end, the media can play an important role by raising awareness within the general public of the gravity of a particular crime. For example, if the public is informed by radio, television or newspaper that a particular crime such as rape can be considered to be a war crime and perpetrators of the crime will be indicted by a war crime tribunal, then the public can be educated about the gravity of the crime of rape in similar circumstances, and general awareness can be raised.⁹⁷⁵ Indeed targeted media coverage of a particular story has been known to make an important impact because

⁹⁷⁰ Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Philip Alston (ed) *Non-State Actors and Human Rights* (2005), 17 – 19.

⁹⁷¹ See generally Philip Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed) *Non-State Actors and Human Rights* (2005), 25.

⁹⁷² Celia Wells and Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed) *Non-State Actors and Human Rights* (2005), 144.

⁹⁷³ Ibid.

⁹⁷⁴ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective – Towards a Holistic Approach* (2006), 131.

⁹⁷⁵ Anna Husarska, ' "Conscience Trigger": The Press and Human Rights' in Samantha Power and Graham Allison (eds) *Realizing Human Rights – Moving from Inspiration to Impact* (2000), 339.

when a story is considered to have large potential for interest, no expense is spared in covering it.⁹⁷⁶ Consumers are also shown to pay premium for goods that they have some assurance are not produced in violation of workers or communities rights.⁹⁷⁷

Accordingly, while human rights may not hold non-state actors accountable in international law, media pressure may be applied to create moral duties in multinational companies creating consumer demands for human rights compliance assurances. However, in the cases of trafficking by smaller groups, it is difficult to see the relevance of human rights because in the great majority of cases, the traffickers will not be able to be held accountable under current human rights law. The criminal and civil law will be the only mechanisms with which to hold traffickers accountable. While human rights should develop to include violations irrespective of the perpetrator, this has not occurred yet. Trafficking as a human rights violation remains 'state-centred'.

10.4 Human rights violations by the state

People may fall victim to trafficking because of a range of actions or indeed inaction by the state but in many instances, it is difficult to judge inaction. Ideally, states should be held accountable for providing their citizens with certain minimum standards and quality of living and where the state has the means to do so, this should translate to a positive obligation. In Nussbaum's terminology, it may be that states in enhancing the capabilities of all people, must take an active role in preventing trafficking because trafficking fundamentally interferes with a person's capabilities.

The role of the state of origin in human rights violations and trafficking also comes into question in instances where it is aware that it is an important source country for trafficking and yet takes no action to help prevent the trafficking of its citizens. Indeed, in an effort to alleviate some of its internal problems, the state of origin may actively encourage its citizens to migrate and may even go so far as to be lax in border control in order to facilitate migration.⁹⁷⁸ In this respect, the state may be passively encouraging

⁹⁷⁶ Ibid, 340.

⁹⁷⁷ Ralph G Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*' in Philip Alston (ed) *Non-State Actors and Human Rights* (2005), 181.

⁹⁷⁸ Andreas Schloenhardt 'Migrant Trafficking and Regional Security' (2001) *Forum for Applied Research and Public Policy* 83, 86.

trafficking (by not taking action to prevent it) and may be more active in encouraging trafficking, by allowing or directing border officials to 'turn a blind eye' to potential cases. In these instances, international pressure seems to view such conduct as a violation of human rights. For example, the United States has a policy to adopt sanctions against countries with inadequate systems to deal with trafficking.

The other important way that human rights are related to trafficking, is in the relationship between human rights violations and push and pull factors. Push and pull factors are closely linked to the action or inaction of the destination and receiving states.

Typically, human rights are rights that can be claimed against a state. As such, human rights create obligations that the state must comply with. That is, there are certain minimum standards by which a state can be judged. The difficulties in determining universal human rights have already been discussed. However for the purposes of the argument, whichever rights are chosen to represent human rights, they will reflect the fundamental values of the community.⁹⁷⁹ As a starting point therefore, one should accept that human rights at a minimum are those that a community believes are important at the time (and as such do not represent objective truth).⁹⁸⁰ What a community values at any point in time is reflected in the legislation in place at that time.

When looked at in this sense, we find that human rights that are commonly (and currently) protected in national legislation include gender based non discrimination laws. While some states also legislate to protect their citizens' access to welfare, it is difficult to find a right in existing international law to 'not be poor'.⁹⁸¹ The issue of poverty is an important one because people who suffer from poverty are usually deprived of 'basic capabilities' rather than just suffering from a low income.⁹⁸² As discussed above, capabilities are linked to standards of living which affect poverty by leading to low nutritional standards, lack of access to education and housing, lack of

⁹⁷⁹ Cyril Adjei, 'Human rights Theory and the Bill of Rights Debate' (1995) 58 *Modern Law Review* 17, 23.

⁹⁸⁰ *Ibid*, 28 – 30.

⁹⁸¹ Sigurn I Skogly, 'Is There a Right Not to be Poor?' (2002) 2(1) *Human Rights Law* 59, 73.

⁹⁸² *Ibid*, 62 referring to Sen, *Development as Freedom* (1999), 89 – 90.

medical access etc.⁹⁸³ In trafficking, these and other factors such as high unemployment, armed conflict, civil unrest, and gender inequality motivate people to migrate for better opportunities and at the same time, push many people into trafficking. While it may be clear that laws which prevent women or religious minorities from access to employment and social services are violations of human rights, it is less clear to what extent states can be held accountable for contributing to push factors.⁹⁸⁴ For example, while welfare may be an important factor, a welfare system requires action by the state that may be beyond its ability.

While capabilities have a normative nature, the community is most familiar with the rights enshrined in the Bill of Rights. Further, it is not the intention of Nussbaum⁹⁸⁵ to disregard the international agreements, and the list of capabilities encompasses the rights in the agreements just mentioned. These instruments contain rights that the community views as important and as such, should serve as the ideal as to what should be implemented in each state and provide for a minimum standard. Perhaps, these 'rights' should be implemented in order to facilitate capacity building. Furthermore, while these instruments contain the various violations suffered by human trafficking victims, they also contain provisions that relate to trafficking. International agreements and treaties are designed to protect the citizen from their own government and therefore they can indicate the level of obligation that a state has towards its citizens. It is possible also that international agreements may require that the state protect its citizens from trafficking. An analysis of various international agreements is therefore relevant.

10.4.1 Human rights agreements in international law

There are a number of relevant international agreements that are relevant to home conditions and human rights, as well as a number of agreements that specifically attempt to protect trafficking victims. Certain human rights treaties deal with aspects of trafficking conduct, for example the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, touch on the prohibition of slavery while the *International Covenant on Economic, Social and Cultural Rights* addressed

⁹⁸³ Ibid, 65.

⁹⁸⁴ Although it is important to note that not all push factors can be linked to violations against the victim.

⁹⁸⁵ Or other show refer to capabilities, such as Amartya Sen.

favourable work conditions. The *Convention on the Rights of the Child*⁹⁸⁶ also addresses trafficking as well as exploitation of children, work conditions and sexual exploitation while allowing for the labour of children within certain parameters. However, trafficking does not appear in other very important Treaties such as the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁹⁸⁷ Prior to the *Trafficking Protocol*, trafficking was generally confined to gender specific groups where it was discussed primarily in the context of sexual exploitation.⁹⁸⁸

Slavery and the slave trade in all their forms are prohibited under article 4 of the *Universal Declaration of Human Rights*, which also provides that no one shall be held in slavery or servitude. As such, the *Slavery Convention*⁹⁸⁹ is particularly important in trafficking and it can be questioned why this agreement was not further developed in relation to trafficking. That is, as states were concerned with human trafficking, the *Slavery Convention* was an agreement that was already in place to deal with trafficking and so attention shown to trafficking within organised crime, should have been matched by efforts to strengthen and develop the *Slavery Convention*.

In relation to human trafficking as a labour issue, labour becomes an issue of human rights within article 23 of the *Universal Declaration of Human Rights* which protects the rights of workers. This is done by ensuring the free choice of employment, just and favourable conditions of work, equal pay for equal work and a right to just and favourable remuneration that is supplemented if necessary by other means of social protection. Everyone also has the right to join a trade union and pursuant to article 24, everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. These are rights not enjoyed by trafficking victims usually at the state of origin (and hence they seek to migrate) and nor are they

⁹⁸⁶ *Convention on the Rights of the Child*, opened for signature 20 Nov. 1989, 1577 UNTS 44 (entered into force 20 Sept. 1990).

⁹⁸⁷ *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). For state parties to this instrument, see figure 4 of the appendix.

⁹⁸⁸ Elizabeth M Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking, (2004) 40 *Stanford Journal of International Law* 1 at 34.

⁹⁸⁹ *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, opened for signature 1925 September 1926, 60 LNTS 253 (entered into force 9 March 1927) (the '*Slavery Convention*').

rights enjoyed by trafficking victims at the destination state. However, the labour protections in the *Universal Declaration of Human Rights* relate to the obligations of the state not in enforcing general labour laws but in guiding states in their role as the employer. This is because the *Universal Declaration of Human Rights* is not directly relevant to non state actors.

Like the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* makes provisions protecting the citizen from state violations. Article 8 provides that no one shall be held in slavery and that slavery and the slave trade in all of their forms are to be prohibited, further, no one is to be held in servitude and no one shall be required to performed forced or compulsory labour. Again, as in the *Universal Declaration of Human Rights*, the Covenant guides the actions of states not as individuals. For example, articles 3(b) and (c) discuss forced or compulsory labour in the context of penal punishment or detention, military work or work that is required in emergency cases as part of civil obligations.⁹⁹⁰ These exceptions to the prohibition on slavery indicate again, an interest in state over individual actions.

The *International Covenant on Economic, Social and Cultural Rights*⁹⁹¹ does not address slavery but more peripherally to trafficking addresses work conditions. Article 6 of the Covenant states that everyone has the right to work and that everyone has the right to freely choose or accept their work. Under the *International Covenant on Economic, Social and Cultural Rights*, the rights of workers are also recognised. Article 7 ensures just and favourable conditions of work, in particular:⁹⁹² minimum remuneration, fair wages and equal remuneration, a decent living for the worker and their family; safe and healthy working conditions; equal opportunity for promotion; and rest, leisure and reasonable limitation of working hours and periodic holidays with pay,

⁹⁹⁰ However, Articles 3(b) and (c) permits forced or compulsory labour: in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court. Further, forced or compulsory labour does not include work normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors; any service exacted in cases of emergency or calamity threatening the life or well-being of the community; and any work or service which forms part of normal civil obligations.

⁹⁹¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966, 999 UNTS 3 (entered into force 3 January 1976).

⁹⁹² The Covenant makes further provisions for workers, such as the right to join a trade union in article 8.

as well as remuneration for public holidays. This Covenant is different to the *International Covenant on Civil and Political Rights* and the *Universal Declaration of Human Rights* because it does not just state rights to the citizen by the state. The state is not usually the sole employer of all workers, so the Covenant seeks to ensure that states properly govern the behaviour of employers in order to ensure the rights of workers in accordance with it. This means that the state may be held accountable for not implementing laws that protect workers who work for private institutions. As such, states of origin and destination states may have obligations towards the trafficking victim.

Clearly, the trafficking victim can only be exploited if there is a need for the type of services that they are providing.⁹⁹³ Just like the United States calls on states of origin to take measures to prevent trafficking out of their countries, there should be similar efforts to prevent the exploitation of trafficking victims on arrival at the destination country as well. As the exploitation is closely linked with labour, the state should have an obligation to ensure industry compliance with acceptable labour norms. States should also analyse the role that trafficking plays in their country and take appropriate action in this regard. Especially when the state attracts a large number of trafficking victims, not addressing the conditions may be a breach of the states human rights obligations. The importance of the *International Covenant on Economic, Social and Cultural Rights* should not be underestimated and the relevance of trafficking to economic migration coupled with the demand side of trafficking are important factors in applying the Covenant. Of course the drawback is that trafficking victims are commonly irregular migrants so the Covenant may not apply to non citizens, however it is an important agreement that could be applied by receiving states that acknowledge the demand of irregular labour.

Only the *CEDAW Convention*⁹⁹⁴ specifically addresses trafficking. Article 6 of the *CEDAW Convention* calls for state parties to take all appropriate measures, including

⁹⁹³ See for example Friedrich Heckmann, Tania Wunderlich, Susan F Martin and Kelly McGrath, 'Transatlantic Workshop on Smuggling' (2001) 15 *Georgetown Immigration Law Journal* 167, 170, who states that 'the rate of unemployment of undocumented aliens in the US is zero'.

⁹⁹⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 Dec. 1979, 1249 UNTS 13 (entered into force 3 September 1981) ("*CEDAW Convention*"). See figure 4 of the appendix for a list of state parties to this instrument.

legislative, to suppress: all forms of traffic in women and exploitation of prostitution of women. That is, the Convention obligates states, albeit with weak enforcement provisions, to suppress trafficking, even if the trafficking is undertaken by an individual and not a state party. As such, the *CEDAW Convention* is the only agreement that directly deals with trafficking, and is also the only human rights agreement that deals with trafficking as carried out for financial gain by an individual or group. The *CEDAW Convention* if integrated into domestic legislation, could provide a mechanism with which to hold non-state actors accountable for trafficking of women. In this way, the Covenant is similar to the *CEDAW Convention* in that both instruments indirectly assist trafficking of people, the *CEDAW Convention* more directly, and the Covenant through workers rights. More directly relevant to the various elements of trafficking is the *Convention on the Rights of the Child*.⁹⁹⁵

Article 11 of the *Convention on the Rights of the Child* provides that state parties are to take measures to combat the illicit and non-return of children abroad. While the *Convention on the Rights of the Child* allows children to work, it protects the child from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. State parties are directed to take legislative, administrative, social and educational measures to ensure the implementation of the article providing a minimum age for admission to employment; appropriate regulation of the hours and conditions of employment; and appropriate penalties or other sanctions to ensure the effective enforcement of the provisions.⁹⁹⁶ Article 34 protects children from all forms of sexual exploitation and sexual abuse and article 35 provides for the prevention, abduction, sale or traffic in children for any purpose or in any form. Again, state parties are left to self-report, providing another weak response to trafficking.

While the *Convention on the Rights of the Child* addresses trafficking, it does not allow for state to state confrontation nor individual remedies, with a major focus on education

⁹⁹⁵ *Convention on the Rights of the Child*, opened for signature 20 Nov. 1989, 1577 UNTS 44 (entered into force 20 Sept. 1990).

⁹⁹⁶ *Convention on the Rights of the Child*, art. 32.

and cooperation, no relief is truly available.⁹⁹⁷ However, interestingly, the *Convention on the Rights of the Child* deals with the human rights of trafficked children from within a labour framework,⁹⁹⁸ through a minimum age for admission to employment, appropriate regulation of the hours and conditions of employment, and appropriate penalties or other sanctions to ensure the effective enforcement of the provisions. It further protects the child from hazardous work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. These additional safeguards to the labour framework represent a comprehensive yet simple base from which to further develop the crime of trafficking within a rights based instrument.

It is interesting to note also that when first addressing the General Assembly regarding strengthening efforts to prevent trafficking of children, Argentina was attempting to address trafficking within the *Convention on the Rights of the Child*.⁹⁹⁹ Unfortunately they were not successful in raising interest and so the *Trafficking Protocol* was drafted instead. It is interesting to question why this was the case as development of the *Convention of the Rights of the Child* would seem to be a logical place to start in addressing the trafficking of the most vulnerable group, being children. One reason for this may be that the international community were reluctant to strengthen rights of trafficking victims, even when the victims are children, preferring to focus instead on the criminalisation of trafficking. This is a further reason that the purported aim of the *Trafficking Protocol*, that is, the protection of victims can be questioned. If states were truly concerned about the protection of victims, this concern should first have been illustrated through tackling trafficking within the *Convention on the Rights of the Child*.

⁹⁹⁷ Roffman, Rachel M, 'The Forced Prostitution of Girls into the Child Sex Tourism Industry' (1997) *New England International and Comparative Law Annual* www.nesl.edu/intljournal/vol13/childsex.htm at 4 June 2007

⁹⁹⁸ Except for in the case of sexual exploitation or abuse.

⁹⁹⁹ Argentina's efforts and history behind the drafting of the *Trafficking Protocol* were discussed above.

Nevertheless, the preamble of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*¹⁰⁰⁰, expressly mentions trafficking:

*'Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking in children...'*¹⁰⁰¹

Article 1 of the Optional Protocol prohibits the sale of children, child prostitution and child pornography. Sale of children is defined in article 2 as any act or transaction whereby a child is transferred for remuneration or other consideration. Child prostitution is defined as the use of a child in sexual activities again for remuneration or other consideration. Finally, child pornography is defined as any representation and by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. Each state must ensure that national laws are applied in relation to any of the above offences that take into account their grave nature.

In the context of the sale of children, article 3(a) stipulates that offering, delivering or accepting, by whatever means a child for the purpose of sexual exploitation, transfer of organs of the child for profit or engaging the child in forced labour are offences that must be covered under criminal or penal law. Further, articles 3(b) and (c) make it an offence to offer, obtain, procure or provide a child for child prostitution and that producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography are also punishable by appropriate penalties. As the Optional Protocol entered into force fairly recently, on 18 January

¹⁰⁰⁰ *Optional Protocol to the Convention on the Rights of the Child and Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, by GA Res A/RES/54/263, (entered into force 18 January 2002) will be referred to as the 'Optional Protocol' in this part of the thesis. See figure 4 of the appendix for a list of state parties to this instrument.

¹⁰⁰¹ My emphasis.

2002, time will tell how effective it will be in curbing trafficking. However, without mechanisms and explicit rights for children who are trafficking victims, it is questionable how helpful this instrument will be. Presumably, Argentina wished to strengthen this instrument further.

The *Convention on the Rights of the Child* and the Optional Protocol contain the clearest prohibition on trafficking found within human rights instruments. However, their effectiveness is questionable. Unfortunately, as with the *Trafficking Protocol*, provisions related to the criminalisation of the offence of trafficking are mandatory whereas protection articles are qualified by provisions that call on states to adopt 'appropriate measures'. This result is very unfortunate as the most ratified Convention in UN history¹⁰⁰² looks questionable when such a universally abhorred crime such as trafficking cannot be adequately addressed.

Trafficking of children is dealt with somewhat better in the *African Charter on the Rights and Welfare of the Child*.¹⁰⁰³ The Charter specifically addresses trafficking of children in article 29. The article provides that state parties to the charter 'shall' take appropriate measures to prevent, 'the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child'. Sexual exploitation of children is protected within article 27 that requires state parties to protect children from all forms of sexual exploitation and sexual abuse and requires them to take measures to prevent: the inducement, coercion or encouragement of a child to engage in any sexual activity; the use of children in prostitution or other sexual practices; and the use of children in pornographic activities, performances and materials. Nevertheless, while the instrument is appropriately worded, its effectiveness cannot be adequately addressed, due to the lack of quantitative and qualitative analysis of trafficking figures.¹⁰⁰⁴

¹⁰⁰² That is, the *Convention on the Rights of the Child*.

¹⁰⁰³ *African Charter on the Rights of the Welfare of the Child*, adopted in 1990, OAU Doc. CAB/LEG/24.9/49 (1990), (entered into force 29 November 1999).

¹⁰⁰⁴ See for example, Alison Murray "Debt Bondage and Trafficking – Don't Believe the Hype" in Kamala Kempadoo and Jo Doezema (ed) *Global Sex Workers – Rights, Resistance and Redefinition* (1998) p. 55, Report of the Secretary General, *International Migration and Development*, UN GA, 6th Sess, [15] UN Doc A/60/871 (2006), Martti Lehti, 'Trafficking in women and children in Europe', (HEUNI Paper No. 18, The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2003), 7.

From 1963 to 1981, African leaders debated the terms of an African Convention of Human Rights that would give full effect to the Charter of the United Nations and the *Universal Declaration of Human Rights*. The result is the *African [Banjul] Charter on Human and Peoples' Rights*¹⁰⁰⁵ that covers economic, social and cultural rights as well as civil and political rights. The *Banjul Charter* creates three 'generations' of rights: civil and political rights, economic, social and cultural rights and group or people's rights. Unusually, the Charter imposes duties on the individual linking concepts of human rights, people's rights and individual and state duties.¹⁰⁰⁶

In relation to trafficking, article 5 prohibits all forms of exploitation and degradation of people particularly slavery, the slave trade, torture, cruel, inhuman or degrading punishment and treatment. Article 15 provides that every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work. Enforcement mechanisms are weak as the system calls for information collection and educational programs. State complaints are taken at the African Commission on Human Rights who can then only make non binding recommendations based on complaints.¹⁰⁰⁷

Nevertheless, unlike the *Universal Declaration of Human Rights*, the *Banjul Charter* specifically addresses trafficking.¹⁰⁰⁸ On the other hand the *Banjul Charter* has been criticised for containing 'clawback' provisions allowing African states to qualify or limit the protections as set out under the Charter by using clauses such as 'except for reasons and conditions previously laid down by law', 'subject to law and order' etc.¹⁰⁰⁹

¹⁰⁰⁵ *The African Charter on Human and Peoples' Rights*, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force on 21 October 1986) (the '*Banjul Charter*').

¹⁰⁰⁶ Makau Mutua "The Construction of the African Human Rights System: Prospects and Pitfalls" in Samantha Power and Graham Allison (eds) *Realizing Human Rights – Moving from Inspiration to Impact* (2000), 146.

¹⁰⁰⁷ Roffman, Rachel M, 'The Forced Prostitution of Girls into the Child Sex Tourism Industry' (1997) *New England International and Comparative Law Annual* www.nesl.edu/intljournal/vol3/childsex.htm at 4 June 2007.

¹⁰⁰⁸ Which it refers to as the 'slave trade' under article 5.

¹⁰⁰⁹ Makau Mutua "The Construction of the African Human Rights System: Prospects and Pitfalls" in Samantha Power and Graham Allison (eds) *Realizing Human Rights – Moving from Inspiration to Impact* (2000,) 146.

Human rights violations that contribute to the reasons why people fall victim to trafficking are difficult to prove conclusively. Accordingly, it is difficult to hold states accountable for their actions in contributing to trafficking. Some human rights agreements such as the *CEDAW Covenant* and the Optional Protocol may seek to protect at least women and children from trafficking. However, their enforcement and protection provisions are weak and therefore their effectiveness is questionable.

10.5 Conclusion

The *Trafficking Protocol* is not a human rights instrument but is intended to fight a host of human rights abuses.¹⁰¹⁰ While trafficking may be touted by some writers as ‘the human rights issue of the ... century’¹⁰¹¹ and while human rights violations may be central to the sufferings of human rights victims, the lack of accountability of traffickers in international law puts into question the importance of human rights in trafficking. Human rights may be more important in the cases where it can be shown that trafficking victims are being exploited by multinational companies and even where they cannot be held legally accountable, outside pressure through media and product boycotting may contribute to the improvement of the victims’ conditions.

It is unlikely that general human rights agreements could put sufficient pressure on governments to improve home conditions to prevent trafficking. There are however certain agreements that can assist trafficking victims. These include the various agreements of the ILO because they protect the rights of workers.

However, the law should change to hold all who commit violations of human rights accountable and not only should the state be obligated to protect the exploitation of trafficking victims through agreements such as the *International Covenant on Economic, Social and Cultural Rights*, the state must also be held accountable in its role in encouraging trafficking. Indeed this position is already reflected in the international arena. For example, the European Union has stated that states that condone human trafficking or do not take effective measures to curb it, are in breach of human rights

¹⁰¹⁰ Kara Abramson, ‘Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol’, (2003) 44(2) *Harvard International Law Journal* 473, 496.

¹⁰¹¹ Ivy C Lee and Mie Lewis, ‘Human Trafficking from a Legal Advocate’s Perspective: History, Legal Framework and Current Anti-Trafficking Efforts’, (2003) 10 *U.C. Davis Journal of International Law and Policy* 169, 170.

obligations.¹⁰¹² A similar stance is taken by the sanction provisions of the United States against states who fail to meet adequate standards in relation to trafficking. Equally important is the role played by receiving states who do not take effective measures in curbing the exploitation of trafficking victims. As the exploitation is most often linked to labour, it is submitted that the most effective way to redress exploitative work conditions is through a labour framework and migration policy that acknowledges the community need for irregular labour.

Further, through an examination of the slavery aspect of trafficking, a migration or labour framework may provide a basis from which certain practices can be found to be outside of allowable norms. That is, when exploitation reaches a level analogous to slavery, the application of labour laws, even to irregular migrants will find that those practices are contrary to acceptable practices. This is reminiscent of Hernandez-Truyol and Larson who conclude that while the labour framework may be the appropriate perspective from which to study prostitution, it does not necessarily follow that prostitution should be automatically legalised because prostitution may not fit within acceptable labour practices.¹⁰¹³ This may also be applied to other criteria. For example, through the application of a labour framework to an aspect of trafficking, one may conclude that that aspect is contrary to acceptable practices. A labour framework would not work to legalise all types of work but it would provide a review mechanism. In any event, quite apart from the general human rights issue, trafficking also raises the question of slavery.

¹⁰¹² Communication from the Commission to the European Parliament and the Council, '*Fighting trafficking in human beings – an integrated approach and proposals for an action plan*' COM 92005) 514 final, (Brussels, 18 October 2005), 3-5 referring to various international agreements including European Union agreements, ILO agreements and the Rome Statute.

¹⁰¹³ See generally, Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391.

11 THE RELEVANCE OF SLAVERY IN TRAFFICKING

11.1 Introduction

People trafficking is frequently described as ‘modern day slavery’. It is also frequently linked with ‘debt-bondage,’ ‘forced labour’ and ‘slavery-like conditions’. As noted earlier, the *Trafficking Protocol* states that exploitation (for the purposes of trafficking) includes ‘... forced labour or services, slavery or practices similar to slavery, servitude...’. Such references seek to liken trafficking to slavery and the slave trade with the trafficked victim as the slave. To the extent that slavery is outlawed in both customary and conventional international law and its abolition is arguably part of *jus cogens*, the link between trafficking and slavery is very significant. More importantly for the purposes of this thesis, it raises the relevance of a ‘slave theory’ as the basis for appreciating and ultimately dealing with trafficking. The purpose of this chapter is to assess slave theory by analysing the use of associate terminology; the concept of slavery from its historical evolution, international prescriptions against slavery and the implications and link between slavery, servitude, forced labour and trafficking.

It is difficult to come to terms with slavery in modern times as many consider slavery to be a ‘peculiar but extinguished institution’.¹⁰¹⁴ Its ‘peculiarity’ stems from the juxtaposition of the ‘normality’ of slavery, particularly its prevalence in ancient times, when compared with the recognition that slavery is contrary to nature.¹⁰¹⁵ One cannot help but be struck by how slavery takes a person and treats them as a ‘thing’.¹⁰¹⁶ The perception of the person as an ambiguous creature, human but also ‘thing’ enables the

¹⁰¹⁴ Baher Azmy, ‘Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda’ (2002) 71 *Fordham Law Review* 981. 982.

¹⁰¹⁵ Arnaldo Momigliano, ‘Moser Finley on Slavery: A Personal Note’ in Moser I Finley (ed), *Classical Slavery* (1987) 1, 1.

¹⁰¹⁶ David Brion Davis, *The Problem of Slavery in Western Culture*, (1966), . 58. See also David Brion Davis, *Slavery and Human Progress* (1984), . 13 who points out the striking difference in antiquity with the concept of the person as “property” who can be owned, bought, sold or otherwise disposed of as if they were a domestic animal while still considering the slave sufficiently responsible to be punished for various crimes, be rewarded by positions of trust, manumission and perhaps even eventual assimilation in to the family.

master to use their enormous power over the slave in whatever way they wish, and throughout history, the master has chosen to treat the slave harshly.¹⁰¹⁷

Historically, the word trafficking has meant the trade in illegal goods, and usually the term 'trafficking' has referred to drugs.¹⁰¹⁸ But the current use of the term trafficking is in the context of people and as such relates to the slave trade. More accurately, people trafficking can be traced back to the slave trade when the slave trade first became outlawed.¹⁰¹⁹

11.2 Terminology regarding slavery and the importance of metaphorical usage

*'The word for slaves has been applied to captives held for ceremonial sacrifice; to household servants who were part of a familia and under the domination of a paterfamilias; to the concubines and eunuchs of a harem; to children held as pawns for their parents' debts; to female children sold as brides; and, by analogy to subject or conquered populations; to the industrial proletariat; to the victims of racial or political tyranny; and to the men or women supposedly dominated by drugs, alcohol, sexual passion, mental disease, or sin.'*¹⁰²⁰

The term 'slave' has its roots in early slavery. From the tenth to sixteenth centuries, the Slavic lands furnished many of the slaves for the Viking and Italian slave traders.¹⁰²¹ The term 'Slav' eventually came to mean 'slave'. But the meaning of the word 'slave' has been blurred by metaphorical usage¹⁰²² as it has been used figuratively as a comparative description to describe not the institution of slavery but as an analogy to other concepts and in particular as a symbol of 'constraint, dishonor, exploitation, or

¹⁰¹⁷ Peter Garnsey, *Ideas of slavery from Aristotle to Augustine*, (1996), 93.

¹⁰¹⁸ Tiffany St. Claire King, 'The Modern Slave Trade' (2002) 8 *University of California Davis Journal of International Law and Policy* 293, 293.

¹⁰¹⁹ As for the majority of the time that the slave trade existed, it was a legal activity while the modern concept of human trafficking has never been considered a legal activity.

¹⁰²⁰ David Brion Davis, *Slavery and Human Progress* (1984), 10.

¹⁰²¹ Robin Blackburn, *The Making of New World Slavery – From the Baroque to the Modern 1492 – 1800*, (1997), 54.

¹⁰²² David Brion Davis, *The Problem of Slavery in Western Culture*, (1966), 35.

even socialization of mankind's please-seeking instincts.'¹⁰²³ Bishop Athanasios of Alexandria in the first half of the fourth century wrote: 'being by nature slaves, we address the Father as Lord' thereby using the metaphor of slavery to describe the relationship of humankind to God.¹⁰²⁴ A well renowned writer on slavery, David Brion Davis, illustrates metaphorical imagery by referring to various Shakespearean quotes including: 'Purpose is but the slave to memory',¹⁰²⁵ and 'Let me be a slave, t'achieve that maid'.¹⁰²⁶ Shakespeare also wrote: 'but thought's the slave of life, and life time's fool',¹⁰²⁷ and came to the conclusion that even such figurative descriptions of slavery 'suggest that men have always recognized slavery as a kind of ultimate limit in dependence and loss of natural freedom, as that condition in which man most closely approximates the status of a thing.'¹⁰²⁸

These metaphors describe slavery not as a concept of ownership as in the *Slavery Convention* but as a limitation of freedom. The modern expression 'slave to work' does not describe work as the owner of the person but rather the person's limitation of freedom due to work commitments. This metaphorical usage is a good illustration of the underlying meaning of the term slavery rather than simply as a definition describing proprietary relationships. It is suggested that this analogy of slavery to the limitation of personal freedom be the preferred approach to a normative definition of trafficking. More importantly, an analysis of the historical evolution of slavery supports the limitation of personal freedom as a more accurate basis of understanding slavery. This in turn provides a better rationale for linking slavery with trafficking.

¹⁰²³ David Brion Davis, *Slavery and Human Progress* (1984), 19.

¹⁰²⁴ See Peter Garnsey, *Ideas of slavery from Aristotle to Augustine*, (1996), 16 who explains that the philosophy of describing the relationship between humans and God as slavery is present even in Antiquity and dates writings of this nature to the time of Plato.

¹⁰²⁵ William Shakespeare, *Hamlet*, Act 3, Scene 2, line 124.

¹⁰²⁶ William Shakespeare, *The Taming of the Shrew*, Act 1, Scene 1, line 220.

¹⁰²⁷ William Shakespeare, *Henry IV Part 1*, Act 5, Scene 4, line

¹⁰²⁸ David Brion Davis, *The Problem of Slavery in Western Culture*, (1966), 35

11.3 The slave trade: A brief history

During the early days of agriculture, people fed their families with the food that they were able to grow and the animals they were able to kill. However, they were not able to produce any reserves as each family fended for itself. When tribes went to war, any prisoners captured were put to death, not only to prevent future conflict but also because there was no way of feeding them. With the advancement of agriculture, people were able to cultivate fields and they found that they were able to produce far more food than what was required. It was recognised that captured prisoners could be made to work in farming and it is widely believed that slavery originated just after this advancement in agriculture. Delay of the execution of war captives and warfare and war like activities such as piracy and slave trading were the main sources of slaves.¹⁰²⁹ Indeed the enslavement of captured people was considered to be humanitarian because it permitted the person to live.¹⁰³⁰ Scholars of the 18th and 19th Centuries justified the development of slavery in the ancient world in terms of progress both from a moral and economic viewpoint when compared to the execution of prisoners.¹⁰³¹ Then, once slavery was in place, the slave trade was as a natural progression. Prisoners of war were often geographically close to their home land and the possibility of escape made the sale of the prisoner for slavery a viable and better option.¹⁰³²

Before a society was at a stage to support slavery, a number of factors were first required: the society must have advanced to beyond the most primitive of levels; there must have been the presence of social differentiation; economic surplus; perceived labour shortages; free land or open resources and centralised governmental institutions willing to enforce laws against slaves.¹⁰³³ Other dominant factors included an

¹⁰²⁹ Richard Hellie, *Slavery in Russia 1450 – 1725* (1982), 354.

¹⁰³⁰ Renee Collette Redman, 'Beyond the United States, the League of Nations and the Right to be free from Enslavement, the First Human Right to be recognised as customary international law', (1994) 70 *Chicago-Kent Law Review* 759, 767.

¹⁰³¹ Yvon Garlan, 'War, Piracy and Slavery in the Greek World' in Moser I Finley (ed), *Classical Slavery* (1987), 9.

¹⁰³² Edward Reynolds, *Stand the Storm – A History of the Atlantic Slave Trade*, (1985), 6.

¹⁰³³ Richard Hellie, *Slavery in Russia 1450 – 1725* (1982), 18 – 19.

important market economy at the national and international levels with slave labour as an important factor in that production.¹⁰³⁴

With time, slavery adapted to the culture and its needs. Of course, as time went on, the need for slaves increased and so the trade in slave labour was the 'natural' outcome. Trafficking of slaves became one of the earliest forms of commerce¹⁰³⁵ and piracy was used to meet demands.

11.3.1 Abolition of slavery¹⁰³⁶

¹⁰³⁴ Herbert S Klein, *African Slavery in Latin America and the Caribbean* (1986), 3.

¹⁰³⁵ Milton Meltzer, *Slavery, a World History* (Updated ed. 1993), 3.

¹⁰³⁶ Early efforts to eradicate the slave trade can be dated back to the Berlin Conference (See also *General Act for the repression of the African slave trade*, opened for signature 2 July 1890 (entered into force 31 August 1891) typically known as the "The General Act of the Brussels Conference and Declaration") which took place from 15 November 1884 to 26 February 1885. The German Chancellor, Otto von Bismarck, called on representatives from Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, (Sweden and Norway were united between the years 1814 and 1905). Turkey and the United States to work out policy regarding the freedom of trade in the Congo (modern day Zaire), the slave trade, neutrality of the territories in the basin of the Congo, Navigation of the Congo and of the Niger and rules for future occupation on the Coast of the African Continent. The Conference ended with the signing of the *General Act of the Berlin Conference*. The Conference itself is commonly known as the Congo Conference and the Act is known as the Congo Act. The purpose of the Act was to suppress the African slave trade and limit the importation of ammunition and liquor into Africa.

The Conference was held out as promoting the control of the slave trade and humanitarian idealism however, the real purpose of the Conference was to provide for a more orderly division of Africa by and for the European powers, who all saw opportunities in Africa for raw materials and investment. The Conference "demonstrated the agreement of the Powers with regard to the general principles which should guide their commercial and civilising action in the little-known or inadequately organised regions of a continent where slavery and the slave trade still flourished" (see *Convention revising the General Act of Berlin of 26 February 1885 and the General Act and Declaration of Brussels of 2 July 1890*, opened for signature 10 September 1919, Australian Treaty Series 1920 No 17 (entered into force 31 July 1920), preamble). The Conference took 3 months and succeeded in dividing over one thousand indigenous cultures and regions of Africa into 50 irregular countries ignoring cultural groups (Matt Rosenberg, *Berlin Conference of 1884 - 1885 to Divide Africa*, Geography <http://geography.about.com/cs/politicalgeog/a/berlinconferenc.htm> at 4 June 2007. The division of Africa was completed at around 1914.. Prior to the Conference, 80% of Africa was under traditional and local control, and only the coastal areas were colonised by European powers, however, at the time of the conference, European powers negotiated to take control and divide the interior of the continent. Article IX of the Act declared that in conformity with the principles of international law as recognized by the Signatory Powers, the trade in slaves is forbidden and that land or sea operations, furnishing slaves to trade, ought likewise to be "regarded" as forbidden. The territories forming the Conventional basin of the Congo, were no longer to serve as a market or means of transit for the trade in slaves, regardless of what race the slaves may be. The Article concluded by binding the state parties to employ all the means at their disposal for putting an end to the slave trade and for punishing those who engaged in it. The result was that King Leopold II of Belgium undertook personal administration of the Congo area and forced the local people to produce rubber for Europe. Those who refused had their hands cut off and their houses burned and pillaged. The ensuing "Red Rubber" campaign headed by E.D. Morel sought to put an end to slavery in the Congo which succeeded around 1909.

Slavery was supported as an institution for thousands of years. Justifying slavery on the basis of not only just punishment but also as an institution beneficial to both slave and owner alike, can be traced back from the time of Aristotle¹⁰³⁷ to assertions by American Southerners thousands of years later.¹⁰³⁸ American Southerners defended their theory regarding the inherent inferiority of Africans and also referred to ancient writings on the natural state of slavery as well as showing how great civilisations were built on societies based on slavery. Nevertheless, the institution of slavery was questioned leading to its eventual abolition.

Fredrik VI of Denmark issued an edict on 16 March 1792, abolishing the slave trade in the name of his father King Christian VII.¹⁰³⁹ The edict came into effect on 1 January 1803 making Denmark the first Sovereign state prohibiting the slave trade. However, Vermont was the first state to make slavery itself illegal in 1777.¹⁰⁴⁰ The abolition of slavery had wide consequences. The end of the slave trade for Britain and the

The Convention Revising the General Accord of Berlin, February 26, 1885 and the General Act and Declaration of Brussels, July 2, 1890 was signed at Saint-Germain-en-Laye, on 10 September 1919. Article 11 provided that the signatory powers exercising sovereign rights in African territories were to continue to watch over the preservation of the native populations and to supervise the improvement of the conditions of their moral and material well being, and in particular, to endeavour to secure the complete suppression of slavery in all of its forms and of the slave trade by land and sea.

While various countries outlawed the practice of slavery, the principle of state sovereignty meant that states did not consider the transport of slaves on the high seas to be a violation of the law of nations. As murder was considered to be punishable as a law of nations, the offence of murder gave the right to stop and search ships. Further, while many states outlawed the slave trade, during the period from around 1808 and 1862, approximately one-fifth of the whole slave trade of Africa entered the United States illegally (see generally Renee Collette Redman, 'Beyond the United States, the League of Nations and the Right to be free from Enslavement, the First Human Right to be recognised as customary international law', (1994) 70 *Chicago-Kent Law Review* 759, 769 – 772).

¹⁰³⁷ See Seymour Drescher "Moral Issues" in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), p. 283 who describes Aristotle as offering the most extensive surviving writings on the justification of slavery. Aristotle, while acknowledging that there was a contemporary opinion asserting that slavery was not natural but conventional, argued that the institution of slavery was natural and just and that "[t]he properties of ruling and subordination belonged to the system of nature itself: some people were naturally slaves, and for them, the institution was both beneficial and just."

¹⁰³⁸ David Brion Davis, *Slavery and Human Progress* (1984), 23.

¹⁰³⁹ Fredrik VI was acting as Regent as his father was suffering a mental illness.

¹⁰⁴⁰ Anti Slavery Society, *Prohibition of Danish Slave Trade*, (2003) <http://www.anti-slaverysociety.addr.com/hda-danmark.htm> at 4 June 2007.

emancipation of slaves in the United States 'marked profound turns in political identity'.¹⁰⁴¹

The League of Nations established the right to be free from enslavement as a fundamental freedom under customary international law - the first recognised human right.¹⁰⁴² The international legal position on the abolition of slavery has evolved since then in both international agreements and in customary international law as represented by the practice or legislation in the domestic laws of states.

11.3.2 International conventions on slavery

The most important modern agreement on slavery is the *Slavery Convention*. The preamble of the *Slavery Convention* states that it is necessary to prevent forced labour from developing into conditions analogous to slavery. Slavery is defined in article 1(a) as being:

the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised . (emphasis added)

'All powers' referred to in Article 1(a) includes:

all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves'.¹⁰⁴³

The intention of the *Slavery Convention*¹⁰⁴⁴ was to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of

¹⁰⁴¹ Jane E Larson, 'Prostitution, Labor and Human Rights, (2004) 37(3) *UC Davis Law Review* 673, 683. Though note below that while Britain spearheaded the anti slavery movement, it brought back indentured servitude to cultivate land in the West Indies.

¹⁰⁴² Renee Collette Redman, 'Beyond the United States, the League of Nations and the Right to be free from Enslavement, the First Human Right to be recognised as customary international law', (1994) 70 *Chicago-Kent Law Review* 759, 760.

¹⁰⁴³ My emphasis.

¹⁰⁴⁴ Australia signed the Slavery Convention 1926 on 9 Dec 1953 but has not ratified it to date. See figure 4 of the appendix for state parties to the following two instruments: *Protocol amending the Slavery*

slavery in all its forms.¹⁰⁴⁵ However, just like the *Forced Labour Convention 1930*,¹⁰⁴⁶ the *Slavery Convention* permits:

- military service;
- work or service that forms part of the normal civic obligations;
- work or service that is required of that person as a consequence of a conviction of law;
- any work or service required in the case of emergency,
 - that is a natural emergency or war,
 - that would endanger the existence or the well-being of the whole or part of the population;
- and minor community services.

Forced or compulsory labour is permitted in the *Slavery Conventions* when exacted for public purposes and under certain conditions.¹⁰⁴⁷

The *Slavery Convention* requires states to ‘undertake to adopt all appropriate measures with a view to preventing and suppressing the *embarkation, disembarkation and transport of slaves* in their territorial waters and upon all vessels flying their respective flag’.¹⁰⁴⁸ Therefore the *Slavery Convention* required states to take action against individuals found to be engaged in the slave trade. As human trafficking (that is analogous to slavery) used to be referred to as the slave trade, it is confusing as to why the *Slavery Convention* has not put pressure on states to eradicate trafficking and why it was ignored when drafting the *Trafficking Protocol*.

Convention signed at Geneva on 25 September 1926 opened for signature 1953, 182 UNTS 51 (entered into force 7 December 1953); and *Slavery Convention signed at Geneva on 25 September 1926 and amended by the Protocol done at the headquarters of the United Nations, New York on 7 December 1953* 212 UNTS 17 (entered into force 7 July 1955).

¹⁰⁴⁵ *Slavery Convention 1926*, art.2.

¹⁰⁴⁶ See *Forced Labour Convention 1930*, art. 2

¹⁰⁴⁷ That is, that such labour be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence, see *Slavery Convention 1926*, Article 5(2)

¹⁰⁴⁸ *Slavery Convention 1926*, article 3 (my emphasis).

The *Supplementary Convention on the Abolition of Slavery the Slave Trade, and Institutions and Practices Similar to Slavery, 1956*¹⁰⁴⁹ extended the definition of slavery by including debt bondage and serfdom. Under the *Supplementary Convention on the Abolition of Slavery 1956*,¹⁰⁵⁰ ‘debt bondage’ arises when a person is indebted to another person by their personal services (or by another person’s personal services who is under their control) as security for a debt where the reasonable value of those services is not applied to the repayment of the debt or where the length and nature of the services that are to repay the debt are not limited and defined.¹⁰⁵¹ ‘Serfdom’ arises when a tenant, whether by law, custom or agreement is bound to live and labour on land that is owned by another person and is bound to render that other person some service, whether they are to receive reward or not but is not free to change their status.¹⁰⁵² The *Supplementary Convention on the Abolition of Slavery 1956* therefore provides for the complete abolition of debt bondage and serfdom.

The *Supplementary Convention on the Abolition of Slavery 1956* also sought to abolish all institutions or practices that essentially ‘sold’ women into marriage. That is, it abolished the practice whereby a woman is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group, without the right to refuse; where a woman’s husband or his family or clan has the right to transfer her to another person for value received or otherwise; or where a woman, on the death of her husband is liable to be inherited by another person. This provision is also important in today’s trafficking practices in relation to forced marriage.

Importantly, the *Supplementary Convention on the Abolition of Slavery 1956* specifically addressed the slave trade. Article 3, criminalises the act of conveying or attempting to convey slaves from one country to another by whatever means of

¹⁰⁴⁹ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957) (the ‘*Supplementary Convention on the Abolition of Slavery 1956*’). For state parties to this instrument, see figure 4 of the appendix.

¹⁰⁵⁰ Australia signed the *Supplementary Convention on the Abolition of 1956* on 7 September 1956 and ratified it on 6 January 1958. As at 28 May 2007, there were 38 signatories and 119 parties to the *Supplementary Convention*.

¹⁰⁵¹ The *Supplementary Convention on the Abolition of Slavery*, art. 1.

¹⁰⁵² The *Supplementary Convention on the Abolition of Slavery*, art 1.

transport and requires that state parties enact legislation making such an offence criminal, with severe penalties for persons convicted of the offence. Article 3 goes on to require state parties to take all effective measures; to prevent ships and aircraft authorised to fly their flags from conveying slaves and to punish persons guilty of such acts or of using national flags for that purpose; and to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

'Slave Trade' is defined under article 7(c) as including 'all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance'.¹⁰⁵³ Accordingly, there is a positive obligation on states to eradicate human trafficking.¹⁰⁵⁴ Unfortunately, these agreements have failed to protect trafficking victims or to reduce trafficking.

The *Slavery Convention* did not eradicate slavery. While the instrument enshrined a duty on states to progressively eradicate slavery and the slave trade, it did not contain an actual human right for the abolition of slavery as such.¹⁰⁵⁵ This can be compared to the *Trafficking Protocol* that forbids trafficking on the basis that it is 'greater than the sum of its parts'¹⁰⁵⁶ but adds no further weight to the illegality of slavery, which must surely be a purpose behind trafficking.

¹⁰⁵³ Australia signed the Slavery Convention 1926 on 9 Dec 1953 but has not ratified it to date.

¹⁰⁵⁴ Similarly, the *Convention for the Protection of Human Rights and Fundamental Freedoms*, ("European Convention on Human Rights") was signed in Rome on 4 November 1950 by member States of the Council of Europe. After 10 countries had ratified it, the Convention entered into force on 3 September 1953. Article 4 provides that no person is to be held in slavery or servitude and that no person shall be required to perform forced or compulsory labour. However, article 4(3) provides that for the purposes of the Convention, "forced or compulsory labour" does not include: work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of the Convention or during conditional release from such detention; any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; any service exacted in case of an emergency or calamity threatening the life or well-being of the community; or any work or service which forms part of normal civic obligations.

¹⁰⁵⁵ Renee Collette Redman, 'Beyond the United States, the League of Nations and the Right to be free from Enslavement, the First Human Right to be recognised as customary international law', (1994) 70 *Chicago-Kent Law Review* 759, 764.

¹⁰⁵⁶ Alison N Stewart, 'Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective' (1998) 20 (11) *Women's Rights Law Reporter* 11, 14.

It has always been difficult to abolish slavery due to the number of people who benefit materially from the trade and who therefore defend it on the basis of its being legitimate and natural.¹⁰⁵⁷ Self interest may be why we continue to have problems with accepting slavery today: '[n]o country on Earth admits to the legality of slavery today – but large numbers tolerate it'.¹⁰⁵⁸ This is evidenced today through the small role played by exploitation in trafficking as opposed to consent. The international community is implying an acceptance of consensual slavery. The time has come therefore to expand the definition of slavery to reflect modern slavery practices and to make a concerted effort to eradicate it.

In tackling this feat, three approaches are required: to re-evaluate the definition of slavery; while re-evaluating the definition it is appropriate to tackle the concept of consent; and finally examine the appropriateness of expanding the scope of slavery as was done in 1956.¹⁰⁵⁹

Tackling trafficking by re-evaluating the definition of slavery will be an effective way of ensuring that victims of trafficking are viewed by the community and by the law as victims of the crime of slavery. Hopefully, this status will eventually lead to more appropriate responses in their protection and assistance. Tragically, many trafficking victims have been incorrectly characterised as illegal migrants.

11.4 Problems with the conventional definition of slavery: The issue of consent and indentured service

The *Supplementary Convention on the Abolition of Slavery 1956* extended the definition of slavery by including debt bondage and serfdom. It is the position of this paper that the definition be expanded further particularly into the area of consensual slavery.

While perhaps only accounting for a small percentage of slavery,¹⁰⁶⁰ free people without the means of supporting themselves have throughout time volunteered themselves into

¹⁰⁵⁷ Humphrey J Fisher, *Slavery in the History of Muslim Black Africa*, (2001), 332.

¹⁰⁵⁸ James Walvin, *Atlas of Slavery*, (2006), 132.

¹⁰⁵⁹ When the Slavery Convention was supplemented in order to include debt bondage and serfdom as well as certain marriage issues that have not been examined in this paper.

¹⁰⁶⁰ Paul E Lovejoy, *Transformations in Slavery – A History of Slavery in Africa*, (Second ed, 2000), 4.

slavery.¹⁰⁶¹ This is no different to the ‘consent’ people purportedly give today in agreeing to be trafficked and exploited. Slavery, albeit exploitative and degrading, often gave the slave a more secure and economically better life than the free poor who had irregular, low grade and badly paid employment.¹⁰⁶² For example, around the 18th Century BC the Hebrews found refuge in Egypt, offering their services in exchange for their lives.¹⁰⁶³ In many civilisations, people volunteered to slavery for a variety of reasons. Usually people volunteered for slavery because of economic need, particularly during times of famine and or natural disasters.¹⁰⁶⁴ Others in Roman times volunteered themselves into slavery in order to take up better positions of ‘employment’ such as positions of responsibility in private households.¹⁰⁶⁵ In a similar way, people consent to exploitation and specifically trafficking today, because of a belief that no matter how difficult, the trafficking may provide for better long term opportunities than their current status. These practices closely relate to consent theory which accepts that throughout time people have made decisions based on very few and often miserable options.

There are other forms of servitude also. While debt bondage and serfdom have already been added to the *Slavery Convention* and have already been defined, it is still useful to discuss these practices because debt bondage is a common practice in trafficking. The definition of debt bondage in the *Supplementary Convention on the Abolition of Slavery 1956* is found in article 1(a). Debt bondage is when an employee owes their employer a debt that they pay off by providing their employer with labour. However, the system of debt bondage is unlike a normal mortgage or loan, because under debt bondage, the employee is unlikely to ever be able to repay the debt. The labour of that person, and oftentimes, the labour of their whole family is simply held collateral against the debt and until the debt is repaid, the employer essentially owns the employee, their family and everything that they produce.¹⁰⁶⁶ Sometimes, the employer owns all of the output

¹⁰⁶¹ Richard Hellie, *Slavery in Russia 1450 – 1725* (1982) 20.

¹⁰⁶² Peter Garnsey, *Ideas of slavery from Aristotle to Augustine*, (1996), 5. Garnsey points out that this “unusual paradox” was not the case for all slaves, and particularly makes reference to skilled slaves who worked in the mines but had a very low standard of living.

¹⁰⁶³ Milton Meltzer, *Slavery, a World History* (Updated ed. 1993), 3.

¹⁰⁶⁴ Edward Reynolds, *Stand the Storm – A History of the Atlantic Slave Trade*, (1985), 6.

¹⁰⁶⁵ Peter Garnsey, *Ideas of slavery from Aristotle to Augustine*, (1996), 98

¹⁰⁶⁶ Kevin Bales, *Understanding Global Slavery, A Reader*, (2005), 2.

of the family. Say for example, the family works on a farm, all of the produce on that farm is owned by the employer. This means that the family will never be able to repay the debt because what they produce is not theirs anyway. Also, the employee and their family, likely live on the farm and are given food by the employer, further adding to their ultimate inability to ever repay the debt. In this way, the debt may be passed on from husband to wife and from generation to generation. Some argue that it differs to slavery, in that the master owns the labour of the worker, not the individual person, but this distinction is meaningless in real terms as the person is bound to provide service to the master in a similar way to slavery.¹⁰⁶⁷ The *Supplementary Convention on the Abolition of Slavery 1956* was probably expanded to include debt bondage because it does not fit within ideas of chattel slavery and therefore could not be applied within the *Slavery Convention*. In a similar way, serfdom was included.

During the Middle Ages,¹⁰⁶⁸ more effective means were found to cultivate the land and there was a shift away from slavery towards serfdom. It is difficult to say how serfdom came about but it has been suggested that the breakdown of state law and order enabled landlords to not only make demands of rent but also to demand personal service from their tenants.¹⁰⁶⁹ Further, traditional slavery was in the decline because of the weakening of urban markets, increasing self sufficiency of agriculture and the breakdown of long distance trade making slavery more useful in household and domestic tasks.¹⁰⁷⁰ Nonetheless, slavery in its traditional sense, and serfdom, often coexisted and overlapped.¹⁰⁷¹

¹⁰⁶⁷ Orlando Patterson, *Slavery and Social Death*, (1982), 9.

¹⁰⁶⁸ Although this was not confined to the Middle Ages.

¹⁰⁶⁹ C.R. Whittaker, 'Circe's Pigs: From Slavery to Serfdom in the Later Roman World' in Moser I Finley (ed), *Classical Slavery* (1987) 111, 142.

¹⁰⁷⁰ Herbert S Klein, *African Slavery in Latin America and the Caribbean* (1986), 7.

¹⁰⁷¹ David Brion Davis, *The Problem of Slavery in Western Culture*, (1966), 33. Indeed, serfdom and slavery shared many characteristics. See Rosemary Brana-Shute "Manumission" in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 260 who discusses how Serfs, like slaves, were at times manumitted. During the Middle Ages, Serfs were occasionally manumitted by a bishop or lord by being formally released from labour and other traditional obligations. See also Peter Garnsey, *Ideas of slavery from Aristotle to Augustine*, (1996), 100, who discusses how others manumitted slaves in order to avoid supporting them especially when the Church accepted some commitment to provide for the freed slave.

The inclusion of serfdom and debt bondage as forms of slavery is debated. Some writers argue against debt bondage and serfdom as being a form of slavery because they do not believe that these other conditions are as grave: '[s]lavery is only one form of coerced labor, but the extreme powers of the slave-owner and the rightlessness of the slave have made it the most abhorrent social status of all'.¹⁰⁷² This is because some writers continue to draw distinctions between slavery and other similar practices. Nevertheless, many social scientists and the international community, through the *Supplementary Convention on the Abolition of Slavery 1956* view serfdom and debt bondage as slave labour. Furthermore, there are many other practices that are also relevant to slavery.

While many writers believe that slavery was abolished in the Northern part of Western Europe, from the late Middle Ages to the 19th centuries, penal slavery flourished in France, England and the Netherlands, developing as an alternative to the death penalty to accommodate rising numbers of offenders.¹⁰⁷³ Between 1788 and 1868, about one hundred and sixty three thousand convicts were shipped to Australia and were assigned to work for private employers or chain gangs, those committing further offences were then sent to penal settlements to places like Port Arthur.¹⁰⁷⁴ Convicts were enticed to good behaviour by being offered the eventual freedom to work for themselves.¹⁰⁷⁵

In America, the majority of the labour force during the seventeenth century was not carried out by slaves but by indentured servants.¹⁰⁷⁶ Before the American War of Independence, some convicts were shipped from the penal colonies of Britain auctioned off as indentured servants upon arrival because there were no established penal colonies.¹⁰⁷⁷ These ex-convicts then became indistinguishable from other indentured

¹⁰⁷² David Eltis, "Slave Trade – Trans-Atlantic Trade" in Seymour Drescher and Stanley L Engerman (eds), *A Historical Guide to World Slavery* (1998), 370.

¹⁰⁷³ Orlando Patterson, *Slavery and Social Death*, (1982), 44.

¹⁰⁷⁴ Ralph Shlomowitz, 'Forced Labor – An Overview' in Seymour Drescher and Stanley L Engerman (eds), *A Historical Guide to World Slavery* (1998), 206.

¹⁰⁷⁵ *Ibid*, 207.

¹⁰⁷⁶ Peter Kolchin, *American Slavery 1619 – 1877*, (Rev. ed 2003),. 8.

¹⁰⁷⁷ Ralph Shlomowitz, "Forced Labor – An Overview" in Seymour Drescher and Stanley L Engerman (eds), *A Historical Guide to World Slavery* (1998), 207.

servants.¹⁰⁷⁸ Non-convict indentured servitude in the Americas functioned as a result of people wishing to travel and settle in the colonies but not having sufficient funds to do so. In return for passage to the colonies, the migrants would sign 'indentures' which were essentially contracts, enabling the migrant to repay the costs of their debt through labour for a fixed number of years.¹⁰⁷⁹ Usually the servant would not receive pay for their work but on completion of their contract would receive 'freedom dues' which would be in the form of seed, farming implements or other commodities.¹⁰⁸⁰

While experiences of indentured servants varied on a case by case basis, depending largely on the attitude of their masters,¹⁰⁸¹ there is evidence to suggest that conditions were so harsh that almost half of all indentured servants died while under servitude in mid-seventeenth century Chesapeake colonies.¹⁰⁸² Servitude was extended for criminal behaviour and other 'bad behaviour' such as disobedience and childbirth.¹⁰⁸³ For all intents and purposes, indentured servants were slaves for the period of their employment, having little if any rights and liable to suffer corporal punishment from their masters.¹⁰⁸⁴

The need for labourers started to outstrip the supply of indentured servants, and slavery was turned to as a solution in the New World. Another reason for the decline of indentured servitude in the Americas was that many people who had sold themselves to indenture found that their treatment was very harsh, home conditions were improving and providing better opportunities and they found it difficult to find suitable land at the

¹⁰⁷⁸ *Ibid*, 207.

¹⁰⁷⁹ Usually five to seven years, see James Oakes, 'Indentured Servitude' in Seymour Drescher and Stanley L Engerman (eds), *A Historical Guide to World Slavery* (1998), 239.

¹⁰⁸⁰ Ralph Shlomowitz "Forced Labor: An Overview" in Seymour Drescher and Stanley L Engerman (eds), *A Historical Guide to World Slavery* (1998), 205

¹⁰⁸¹ James Oakes, "Indentured Servitude" in Seymour Drescher and Stanley L Engerman (eds), *A Historical Guide to World Slavery* (1998), 241.

¹⁰⁸² Peter Kolchin, *American Slavery 1619 – 1877*, (Rev. ed 2003), 10.

¹⁰⁸³ *Ibid*, 9.

¹⁰⁸⁴ *Ibid*, 9.

end of their service.¹⁰⁸⁵ On the other hand, the abolition of slavery in the British West Indies in the 1830s produced the opposite effect of that in the United States by renewing the demand for indentured labour.¹⁰⁸⁶ Where the first examples of indenture involved the movement of Europeans to British America (usually on a permanent basis); subsequent indenture involved Asians, mainly from India, China and then Japan to the Americas with significant rates of repatriation.¹⁰⁸⁷ This second group agreed to indentured servitude for the prospects of earning money and eventually returning to their homelands. This differed to earlier indenture which was undertaken primarily for migration purposes. It is disappointing to note that by the time that indenture was ended after World War I, Britain, the country that had heralded the anti slavery movement had shipped 1.5 million Indians to its colonies.¹⁰⁸⁸

‘In short, indentured servitude provided the emerging colonial gentry relatively cheap labour, more land, and the honour that accrued to those with authority over other humans...To labourers, servitude held out an equally alluring attraction: the chance to escape hardship – poverty, hunger, unemployment, overpopulation, prison, or political turmoil – and to start anew in a distant, wonderful land’.¹⁰⁸⁹ This does not sound very different to push and pull factors that contribute to trafficking today. Basically, there is a push for people to pursue a better life coupled with a pull for cheap labour. In these situations, a person in desperate enough circumstances may freely volunteer themselves into modern day indenture.

Indenture brings into question the concept of consent. While it may legitimately be argued that a person should have the right to volunteer themselves for exploitation there should be a point where the exploitation is so abusive as to apply consent theory and conclude that because the decision to agree to exploitation is ‘so bad’, it is irrelevant that there was consent. This has been discussed at length in the context of consent

¹⁰⁸⁵ Hugh Thomas, *The Slave Trade – The Story of the Atlantic Slave Trade: 1440 – 1870*, (1997), 178. Thomas also points out that slave labour was cheaper in transportation and general costs and that slaves were more resistant to disease.

¹⁰⁸⁶ James Oakes, “Indentured Servitude” in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 239.

¹⁰⁸⁷ Ibid.

¹⁰⁸⁸ James Walvin, *Atlas of Slavery*, (2006), 122.

¹⁰⁸⁹ Peter Kolchin, *American Slavery 1619 – 1877*, (Rev. ed 2003), 9.

theory. Of course there are inherent problems with identifying where that point may be, but the individual should be protected from being deemed to having consented to enslavement. Disadvantaged people with few life choices, make decisions based on a 'very few miserable options' and their choice is taken to be deemed 'consent'.¹⁰⁹⁰ The law should protect people from this level of exploitation. According to classical liberal political thinking, '[o]ne may not alienate the entirety of one's own body and personality through enslavement, even if the enslaved consents freely to the subjection'.¹⁰⁹¹

Conversely, there is the argument that indentured servitude differs from traditional slavery because the terms of service of indentured servitude, although often extended, remains legally finite, whereas there is an impression that slaves are chattels for life.¹⁰⁹² However, while manumission¹⁰⁹³ was never a legal right to slaves, its frequent practise indicates that the termination of slavery does not negate the presence of slavery in the first place. Accordingly, it seems appropriate that indentured servitude be added to the definition of slavery.

Indenture is an important issue in relation to trafficking because it has an even bigger connection to trafficking than debt bondage. Trafficking victims are likely to volunteer to a certain period of exploitation in exchange for passage to a new land. This is likely to be the case in prostitution where the employer does not wish to have the services of the prostitute indefinitely anyway. Women may then consent to being trafficked for the purposes of exploitative prostitution in exchange for freedom after a number of years. However, this practice should not be acceptable when the exploitation of the prostitute resembles slavery. Therefore the consent of the prostitute under such circumstances should be viewed as a type of indenture and therefore as a form of slavery. In all cases,

¹⁰⁹⁰ Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391, 425.

¹⁰⁹¹ Ibid.

¹⁰⁹² Marina Carter, *Voices from Indenture – Experiences of Indian Migrants in the British Empire* (1996), 2 – 3. Carter writes on indentured servitude, particularly on the experience of Indian indenture experience to Mauritius and argues that many Indians were able to return to their homeland or continued a life in Mauritius with family contact back home, comparing the situation to one of voluntary migration very different to that of slavery especially since the natal alienation which strikes at the core of slave diasporas does not have the same force in indentured servitude.

¹⁰⁹³ Manumission is the process by which the slave is freed.

the exploitation should be the key to resolving the question as to whether a particular person would fall under the definition of slavery.

Forced labour is another practice that has much in common with slavery. Forced labour is where a person is forced to work for another without giving their consent. When the person gives their consent, forced labour is present when the worker is unable to leave the employment without threat or physical punishment.¹⁰⁹⁴ Physical punishment,¹⁰⁹⁵ also known as ‘penal sanction’ could include violence, incarceration, the withdrawal of privileges and being ordered to perform unpleasant tasks.¹⁰⁹⁶ While indentured servitude commences with the consent of the person, the indenture is also enforced through penal sanctions.¹⁰⁹⁷ The application of consent in forced labour should also be amended to reflect consent theory. That is, voluntariness should form the test of consent in relation to ‘forced’ and the labour aspect should be tested against the level of exploitation.

There is a good argument that definitions of slavery should not be blurred by the fusion of other concepts. One argument is that merging forced labour and slavery ‘furthers a myth’ and terminology such as ‘slavery-like practices’ should be preferred.¹⁰⁹⁸ Indeed, history shows that there are differences between some of these practices.

For example, it is difficult to compare indenture in the America’s to the Trans-Atlantic slave trade with its high rate of mortality and its unparalleled harsh conditions. Nevertheless, while not equal in gravity, indentured servitude also carried with it a risk of death and bad conditions, making it similar to the Trans-Atlantic slavery. But slavery was not always extremely harsh. The lives of slaves depended on time and place and on individual circumstances. Accordingly, it is preferable to reach some broader

¹⁰⁹⁴ Ralph Shlomowitz ‘Forced Labor: An Overview’ in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 205.

¹⁰⁹⁵ As military service and prison work would also fit the definition they would specifically need to be excluded.

¹⁰⁹⁶ Ralph Shlomowitz “Forced Labor: An Overview” in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 207.

¹⁰⁹⁷ *Ibid*, 205.

¹⁰⁹⁸ Kamal Kempadoo, “Introduction – From Moral Panic to Global Justice: Changing Perspectives on Trafficking” in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), xx.

understanding of what slavery is today, even if that definition broadens the definition of slavery.

It is undesirable to form a definition of slavery that is based on the level of degradation and exploitation of the Trans-Atlantic slave trade. Having a definition that is so extreme will be unlikely to help anyone because very few victims will fall within its definition. Further, such a definition may unwittingly make all other forms of slavery acceptable. In a similar way, as will be discussed below, crimes against humanity have had to be expanded since World War II because it will be unlikely to find instances of crimes against humanity that will match the events of Nazi Germany. Using Nazi Germany in crimes against humanity or the Trans-Atlantic slave trade in slavery as yardsticks will only serve to hinder the development of human rights law. Slavery should not be allowed to advance again to the level of the Trans-Atlantic slave trade and Nazi Germany must never be permitted to be repeated. The best way that this can be achieved is to prohibit not just that behaviour but also similar behaviour of lesser severity.

Distinctions between slavery, indenture, forced labour, peonage¹⁰⁹⁹ and debt bondage are confusing but some believe that it is possible to distinguish slavery from other forms of exploitation.¹¹⁰⁰ However, while some of these practices may not appear to be as severe as the slave trade,¹¹⁰¹ they should be dealt with in a way that will prevent the harshest of conditions in history being repeated.

Just like there are numerous examples of slaves who have possessed honoured posts¹¹⁰² there are also numerous examples of 'nominally free' workers who have also travelled across the sea to encounter systematic debasement; dishonour; discrimination; corporal

¹⁰⁹⁹ See Ralph Shlomowitz "Forced Labor: An Overview" in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), p. 205 where debt peonage is described as where a person receives credit and undertakes to work for the creditor until the debt is paid. The debt is usually voluntary but sometimes the person is unable to repay the debt, often because of coercive practices of the creditor such as the imposition of fines. The debt is also able to be transferred to another creditor.

¹¹⁰⁰ Paul E Lovejoy, *Transformations in Slavery – A History of Slavery in Africa*, (Second ed, 2000), 8 – 9.

¹¹⁰¹ See for example, David Eltis, "Slave Trade – Trans-Atlantic Trade" in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 375.

¹¹⁰² See above, and in particular See Orlando Patterson, *Slavery and Social Death*, (1982), p. 79; Humphrey J Fisher, *Slavery in the History of Muslim Black Africa*, (2001), 231 – 237; David Brion Davis, *Slavery and Human Progress* (1984), 10.

punishment; been stripped of civil rights; denied the opportunity for a family life and whose children while born free have had little opportunity for a better life.¹¹⁰³ It is usually a ‘desperation born of absent opportunity’¹¹⁰⁴ that can account for practices such as consensual slavery, but while blending the definition of slavery to include various other practices may be technically inaccurate,¹¹⁰⁵ the loss of some accuracy for the sake of justice may be an instance of the ends justifying the means.

This puts into question the importance of consent in current slavery interpretations. Now, consent to slavery that is not achieved by coercive means eliminates that person’s perception as a slave. The person is then usually viewed as an illegal immigrant taking jobs from the local population. While so many other practices such as debt bondage, peonage and indenture also eliminate the freedom of the person in a similar way to slavery, it is contended that since slavery carries with it a serious connotation of gravity, that the definition of slavery be extended to include:

*Indentured Servitude, Peonage, Forced Labour and Similar Practices that Limit the Person’s Autonomy*¹¹⁰⁶

11.5 The need for a new definition of slavery

While the definition of slavery itself does not contain a consent or non-coercive consent requirement, this alone has been insufficient to properly describe its practice. Instead, the non-coercive consent requirement has found its way into other instruments such as the *Trafficking Protocol*¹¹⁰⁷ in combination with the definition of the *Slavery Convention* and these are intended to be read together. Therefore, the consent

¹¹⁰³ David Brion Davis, *Slavery and Human Progress* (1984), 10.

¹¹⁰⁴ Peter Kolchin, *American Slavery 1619 – 1877*, (Rev. ed 2003), 9.

¹¹⁰⁵ See for example David Brion Davis, *The Problem of Slavery in Western Culture*, (1966), 34, who believes that terms have become confused.

¹¹⁰⁶ “Indentured servitude”, “peonage” and “forced labour” would need to be redefined within the slavery convention.

¹¹⁰⁷ Which negates the presence of exploitation.

requirement should explicitly be excluded as a bar to slavery from the *Slavery Convention* and should also be removed from the *Trafficking Protocol*.

Consent has already been excluded as a bar to slavery in debt bondage and serfdom, because both conditions can be entered into voluntarily without coercion, through their inclusion in the *Slavery Convention* due to the *Supplementary Convention on the Abolition of Slavery 1956*.¹¹⁰⁸ However, in recognition of the misunderstood role of consent in trafficking and in order to allow protective mechanisms to flow to the victim, non-coercive consent must be explicitly excluded from the *Slavery Convention*.

It is the position of this thesis that as lawyers, we must re-evaluate the definition of slavery centred on the ownership of the person as found in the *Slavery Convention* in order to be more relevant to current thinking in the social sciences. A historical analysis will show that a definition based on the restriction of personal autonomy is a better solution than proprietary rights.

It is important that slavery as a term be more commonly used in trafficking discussions, because the term itself carries with it a strong abhorrence by the modern world. After all, the abolition of slavery and the slave trade was the earliest established international human rights norm.¹¹⁰⁹ As the term 'slavery' carries with it a connotation of gravity, it is time that the definition be expanded in order to capture the unacceptable practices today, punish the perpetrators appropriately and protect the victims. While it is widely accepted that slavery has shaped the Western world,¹¹¹⁰ it is important that every effort be made to prevent this situation from continuing. It is contended that the expansion of the definition is especially relevant when considering the variations of slavery throughout time.

11.5.1 The problem with misunderstanding slavery

¹¹⁰⁸ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957)

¹¹⁰⁹ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking' (2003) 24 *Michigan Journal of International Law*, 1143.

¹¹¹⁰ James Walvin, *Atlas of Slavery*, (2006), 137.

Contradictions regarding slavery abound. An ancient irony is how slavery in Ancient Greece increased during the growth in democracy as slaves gave citizens the freedom to take part in civic duties.¹¹¹¹ More recently we have come to question how Thomas Jefferson, a principal author of the American Declaration of Independence and in particular the words ‘all men are created equal’, held 150 slaves.¹¹¹² Indeed, seven of the first twelve presidents of the United States owned slaves.¹¹¹³

It is modern perceptions of these realities as contradictions that indicate how we, as a modern society struggle to understand this long standing phenomenon. Today, when faced with what we see as a contradiction regarding slavery, as lawyers we tend to use the contradiction to eliminate its presence. For example, the *Trafficking Protocol* dismisses the notion that one can consent without coercion from the master, to slavery. Yet we have numerous examples from the past of consensual slavery.¹¹¹⁴

Misunderstandings regarding slavery have been carried through to various international instruments.¹¹¹⁵ A better understanding of slavery in the past may assist us to view slavery today as a complex issue not well covered in current definitions in international legal instruments. It is misunderstandings that stem from the core of the problem that have carried through to inappropriate responses. Historians and social scientists continue to study in depth this topic which lawyers have summarised into one sentence, being the definition of slavery in article 1(a) of the United Nations *Slavery Convention* as:

‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’

¹¹¹¹ James Walvin, *Atlas of Slavery*, (2006), 15. See also Peter Garnsey, *Ideas of slavery from Aristotle to Augustine*, (1996), 4, who explains that slavery developed in Athens because of legal reform by Solon in the sixth century BC which outlawed debt-bondage and other dependant labour because it affected the Athenian citizens of their rights. Slavery was then turned to in order to allow a work force to enter and service the Athenians.

¹¹¹² James Oliver Horton and Lois e Horton (ed), *Slavery and Public History* (2006), vii.

¹¹¹³ Peter Kolchin, *American Slavery 1619 – 1877*, (Rev. ed 2003), 3

¹¹¹⁴ Consensual slavery will be discussed below.

¹¹¹⁵ For example, the Slavery Convention contains the definition of slavery from 1926 and modern agreements such as the *Trafficking Protocol* simply refer back to the definition of slavery without recent analysis of the term.

A definition that ends in one sentence and yet is intended to refer to all slavery everywhere should be questioned because this definition forms the basis of assistance to victims in many international agreements. Indeed, a critic of the *Rome Statute* argues that article 7 of the *Rome Statute* follows the definition of slavery within the *Slavery Convention*. Clark's view and the position of this thesis is that the definition of slavery should be focused on the exercise of power of one person over another and not on proprietary rights¹¹¹⁶ which may in any event be outmoded and therefore unhelpful. Questions of power and personal autonomy have always been and continue to be more relevant to modern discourse on the topic.

Before a proper analysis of slavery and its connection to trafficking can be made, a clarification of some of these contradictions as well as a better understanding of slavery is required. Slavery's past is an important element in dealing with slavery in the future. In discussing slavery, Levin writes: 'only an accurate understanding of history makes it possible to deal intelligently with the future'.¹¹¹⁷

11.6 Deconstructing the consent and proprietary relations basis of "slavery"

Authors have attempted to define slavery by finding what they perceive to be common elements running throughout time. Most commonly, slavery has been seen as 'a mode of production or an 'industrial system' created by certain economic or political conditions and sentenced to extinction by the laws of human progress'.¹¹¹⁸ However, as Davis goes on to point out, such views are inaccurate. Misconceptions of slavery have tended to cloud the reality.

Today, we have a blurred understanding of slavery as slavery is often disguised as a legitimate activity such as employment or contractual agreement: '[r]eligious justification, "willing" participation, token payments, the apparent signing of a contract, and any number of other layers of meaning, rationalisation, or explanation can be used

¹¹¹⁶ Roger S Clark, 'Crimes Against Humanity and the Rome Statute of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (ed), *The Rome Statute of the International Criminal Court – A challenge to impunity* (2001), 83.

¹¹¹⁷ Bruce Levin, "In Search of a Usable Past" in James Oliver Horton and Lois e Horton (ed), *Slavery and Public History* (2006), 211.

¹¹¹⁸ See David Brion Davis, *Slavery and Human Progress* (1984), 8 – 9. Note that this is not the position of Davis.

as part of the way a community explains and rationalizes slavery in its mist'.¹¹¹⁹ Similarly, trafficking has been disguised by issues such as consent and intent.

There are many instances where labour closely resembles slavery, and that is where one transfers their energy, body, will and time to another. Even when such transfers are limited say by contract and time, it is possible that the worker will have to transfer such rights to their employer continuously, making the wage labour very similar to bondage.¹¹²⁰ To a certain extent, all wage earners 'sell their labor' to support themselves.¹¹²¹ Such arguments regarding 'wage labour' have never really been accepted however they do challenge the idea of free contract.¹¹²²

Commonly, slavery is viewed as the exploitation of the slave through the theft of their labour for economic gain.¹¹²³ But it is incorrect to speak of slavery as entirely for the purposes of economic exploitation because many slave societies did not depend on the production of the slave. For example, some slaves in Islamic slavery societies did not produce anything, and they were economically dependent on their masters or their master's non-slave dependants.¹¹²⁴ Some slave owners acquired slaves only to display a sense of honour¹¹²⁵ and others for human sacrifice.¹¹²⁶ Certainly slaves have largely been used by paying them, usually in food, accommodation etc, less than what they contribute to production. However, a contrasting example is indentured servitude where the indentured servant was implicitly repaying the employer for their passage by

¹¹¹⁹ Kevin Bales, *Understanding Global Slavery, A Reader*, (2005), 9.

¹¹²⁰ Berta E Hernandez-Truyol and Jane E Larson "Sexual Labor and Human Rights" (2006) *Columbia Human Rights Law Review* 391, 420.

¹¹²¹ Ibid, 425 citing Martha C Nussbaum, "Whether from Reason or Prejudice" Taking Money for Bodily Service" (1986) *Journal of Legal Studies* 693, 693 – 694.

¹¹²² Ibid, 420.

¹¹²³ Kevin Bales, *Understanding Global Slavery, A Reader*, (2005),8.

¹¹²⁴ Orlando Patterson, *Slavery and Social Death*, (1982), 11.

¹¹²⁵ See generally Orlando Patterson, *Slavery and Social Death*, (1982); Humphrey J Fisher, *Slavery in the History of Muslim Black Africa*, (2001), 231 – 237. David Brion Davis, *Slavery and Human Progress* (1984), 10.

¹¹²⁶ Edward Reynolds, *Stand the Storm – A History of the Atlantic Slave Trade*, (1985), 6.

accepting a 'lower level of consumption' in return.¹¹²⁷ So exploitation of the slave's labour or service has not always been at the root of slavery or slavery like practices.

Indeed, it is difficult to find one definition of slavery to apply in different contexts. When looking at various definitions of slavery that would describe Muscovite slavery, Hellie finds that none on its own is sufficient.¹¹²⁸ Slavery is many things and a definitive definition may serve to disprove slavery at different times. While slaves may have a questionable position under the law, for example, the person may be an illegal migrant; it is not accurate to describe the slave as someone who has no legal personality, as slaves hold legal and moral responsibility.¹¹²⁹ Another erroneous point of distinction is that slaves do not have power over their ownership and the power to terminate their services to their master as opposed to free people who do have that power. Patterson¹¹³⁰ points out that this is not a useful distinction when a slave is compared to other bonded workers, not only including serfs, indentured servants, peons and debt bondsmen but also other forms of workers such as contracted professional athletes, especially in the United States prior to 1975.¹¹³¹

The proprietary nature of slavery has been most prevalent in definitions of slavery. The concept of the slave as the 'property' of the master is evident from the First Testament:¹¹³²

44. 'And as for your male and female slaves whom you may have – from the nations that are around you, from them you may buy male and female slaves.'

¹¹²⁷ Ralph Shlomowitz "Forced Labor – An Overview" in Seymour Drescher and Stanley L Engerman (eds), *A Historical Guide to World Slavery* (1998), 208 – 209.

¹¹²⁸ See Richard Hellie, *Slavery in Russia 1450 – 1725* (1982), 20 – 21. Hellie says that while each of the following may be true, none of them satisfies the definition of slavery: slavery as dependant labour; slaves have less legal rights than their masters including also participation in social activities as well; slavery is the alienation of the rights and rewards of labour; the control of the physical reproduction of the slave; the slave as property of the master; the slave is deprived of the right of personal liberty; the slave is an outsider to society and marginalised.

¹¹²⁹ Orlando Patterson, *Slavery and Social Death* (1982), 22.

¹¹³⁰ A leading historian and comparative scientist, having written extensively in the field of slavery.

¹¹³¹ Orlando Patterson, *Slavery and Social Death* (1982), 25 – 26.

¹¹³² Leviticus 25:44-46.

45. 'Moreover you may buy the children of the strangers who dwell among you, which they beget in your land: and they shall become your property.'

46. 'And you may take them as an inheritance for your children after you, to inherent them as a possession; they shall be your permanent slaves. But regarding your brethren, the children of Israel, you shall not rule over one another with rigor.'

Later in Roman times, Justinian's *Digest* of Roman Law defined the meaning of slavery for law students, again within the context of property:¹¹³³

'Being free (libertas) is the natural ability to do whatever anyone pleases, unless one is prevented from doing it either by force or by law.'

*(1) Slavery is an institution of the common law of peoples (ius gentium) by which a person is put into the ownership (dominium) of somebody else, contrary to the natural order.'*¹¹³⁴

During Anglo Saxon times, a female slave who was sexually assaulted by an Anglo-Saxon, would be compensated according to the rank of her master, with the money being paid directly to him as compensation for abuse to his property.¹¹³⁵ Essentially, it was not the slave's honour that had been attacked, but the slave as property of the owner. Following the end of the Civil War in the United States, slave-owners who had been forced to give up their slaves called for compensation for the loss of their 'property'.¹¹³⁶ Ultimately it has been believed that 'the slave's person is the property of another man, and his will is subject to his owner's authority'.¹¹³⁷

The slave as property persists to modern times. Article 1(a) of the United Nations *Slavery Convention*, defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. Slaves are

¹¹³³ Thomas Wiedemann, *Greek and Roman Slavery*, (1981), 15 quoting *Digest* 1, 5: 'On the Status of Persons'; 4: Florentinus, from *Institutes*, book 9.

¹¹³⁴ My emphasis.

¹¹³⁵ Orlando Patterson, *Slavery and Social Death*, (1982), 82.

¹¹³⁶ Kevin Bales, *Understanding Global Slavery, A Reader*, (2005), 6.

¹¹³⁷ Richard Hellie, *Slavery in Russia 1450 – 1725* (1982), 19.

the property of their owners, and there is evidence of possession of slaves conferring status on their owner.¹¹³⁸ The concept of 'ownership' runs through many other modern agreements relating to slavery. The 6th Committee of the League of Nations described the intention of the *Slavery Convention* as intending to bring about the 'disappearance from written legislation or from the customs of the country of everything which admits the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things'.¹¹³⁹ This implies a reference of slavery as a concept of ownership of chattels which though may be accurate to describe some or even most situations, does not describe all.

Patterson criticises definitions on slavery that are centred around the concept of property as the defining factor on the basis that proprietary claims are made with respect to many individuals who are not slaves.¹¹⁴⁰ Indeed, legal codes on slavery do not explain the social practice.¹¹⁴¹ Patterson uses the example of marriage to illustrate the point. Husbands and wives have legal rights: claims, privileges and powers, over each other, a point best illustrated during divorce proceedings, even though conventionally these relationships are not viewed as proprietary in nature.¹¹⁴² On this basis, while the slave owner may own the slave, ownership alone is insufficient to describe slavery. For example, while slaves in ancient times were thought of as property and chattel, they still had certain moral rights.¹¹⁴³ Accordingly, the definition of slavery as ownership does not confer the complexity of the relationship. Patterson defines slavery in a way that omits references to property, services or labour.¹¹⁴⁴

Modern attempts to analyse slavery within individual societies implies a study not only of degrees of slavery within those societies but also 'degrees and varieties of

¹¹³⁸ Thomas Wiedemann, *Greek and Roman Slavery*, (1981), 5.

¹¹³⁹ Renee Collette Redman, 'Beyond the United States, the League of Nations and the Right to be free from Enslavement, the First Human Right to be recognised as customary international law', (1994) 70 *Chicago-Kent Law Review* 759, 780, quoting from *Slavery Convention – Report Presented to the Assembly by the Sixth Committee*, League of Nations Doc. A104 1926 VI.B.5, at 2 (1926).

¹¹⁴⁰ Orlando Patterson, *Slavery and Social Death*, (1982), 21.

¹¹⁴¹ J Albert Harrill, *The Manumission of Slaves in Early Christianity*, (2nd ed. 1998), 14.

¹¹⁴² Orlando Patterson, *Slavery and Social Death*, (1982), 22.

¹¹⁴³ Thomas Wiedemann, *Greek and Roman Slavery*, (1981), 15.

¹¹⁴⁴ David Brion Davis, *Slavery and Human Progress* (1984), 11.

freedom.’¹¹⁴⁵ We see discourse regarding freedom and slavery even in Shakespeare’s Sonnets. The following sonnet does not describe slavery such as in a form of trafficking but illustrates slavery from an analysis of freedom. It is the analogy of slavery to freedom that offers the best resolution in defining slavery. Freedom is closely linked to personal honour.

*‘Being your slave, what should I do but tend
Upon the hours and times of your desire?
I have no precious time at all to spend,
Nor services to do, till you require.
Nor dare I chide the world-without-end hour,
Whilst I (my sovereign) watch the clock for you,
Nor think the bitterness of absence sour,
When you have bid your servant once adieu;
Nor dare I question with my jealous thought
Where you may be, or your affairs suppose,
But like a sad slave stay and think of nought
Save where you are, how happy you make those.
So true a fool is love, that in your Will,
Though you do any thing, he thinks no ill.’¹¹⁴⁶*

11.6.1 Violence and domination as elements in slavery

On the level of personal relations, Patterson, defines slavery as ‘the permanent, violent domination of natively alienated¹¹⁴⁷ and generally dishonoured persons’.¹¹⁴⁸ Slavery is

¹¹⁴⁵ Arnaldo Momigliano, ‘Moser Finley on Slavery: A Personal Note’ in Moser I Finley (ed), *Classical Slavery* (1987) 1, 6.

¹¹⁴⁶ William Shakespeare, *Sonnet 57*.

¹¹⁴⁷ Since Patterson, many writers on slavery discuss the concept of natal alienation. See for example, Seymour Drescher “Moral Issues” in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 282.

¹¹⁴⁸ Orlando Patterson, *Slavery and Social Death*, (1982), 13.

described in terms of dishonour, alienation and 'social death'.¹¹⁴⁹ That is, because of their alienation from kin who the slave would otherwise have belonged to and been protected by, the slave suffers a social and cultural 'death'.¹¹⁵⁰ One example of this is the description of slavery in Roman times where slavery is described as a state of absolute subjugation, where the slave has no kin, has no right of marriage and whose identity is imposed on them by their owner.¹¹⁵¹ Manumission acts to restore honour and by extension of the 'social death', to also restore life, even if it is within perpetual gratitude to their owner.¹¹⁵²

'[F]irst, in all slave societies the slave was considered a degraded person; second, the honour of the master was enhanced by the subjugation of his slave; and third, wherever slavery became structurally very important, the whole tone of the slaveholders' culture tended to be highly honorific. (In many societies the sole reason for keeping slaves was in fact their honorific value)'.¹¹⁵³ Patterson views honour as personal autonomy with honour being present in all societies.¹¹⁵⁴ Slaves are regarded by their community as people without honour.¹¹⁵⁵ Conversely, the slave owner themselves receives honour by virtue of the honour that is accrued 'to those with authority over other humans'.¹¹⁵⁶ In situations where the slave's purpose is honorific in nature, that is, where the slave's role is essentially one in which they are intended to enhance the master's honour or their

¹¹⁴⁹ James Albert Harrill, *The Manumission of Slaves in Early Christianity*, (2nd ed. 1998), 15.

¹¹⁵⁰ Rosemary Brana-Shute, "Manumission" in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 263.

¹¹⁵¹ Thomas Wiedemann, *Greek and Roman Slavery*, (1981), 1.

¹¹⁵² Rosemary Brana-Shute, "Manumission" in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 263.

¹¹⁵³ See Orlando Patterson, *Slavery and Social Death*, (1982), 79; Humphrey J Fisher, *Slavery in the History of Muslim Black Africa*, (2001), pp. 231 – 237. Fisher discusses the use of "luxury slaves" in the Islamic world whose frivolous rather than serious functions included slaves on foot in attendance to mounted riders; David Brion Davis, *Slavery and Human Progress* (1984), 10.

¹¹⁵⁴ Orlando Patterson, *Slavery and Social Death*, (1982), 80 – 81.

¹¹⁵⁵ *Ibid*, 81.

¹¹⁵⁶ Peter Kolchin, *American Slavery 1619 – 1877*, (Rev. ed 2003), 9.

purpose is honorific honour, then the slave receives ritualistic and symbolic dishonour.¹¹⁵⁷

That being the case, where a particular insult made from one member of the society to another member could result in a duel to the death, the same insult made by a slave, could be laughed off by the freeman without loss of honour because the words of the slave hold no value.¹¹⁵⁸ Age was most respected in traditional African society, and nowhere is the lack of honour more apparent than when an aged African slave was not given the honour that should have been afforded them due to their slave status.¹¹⁵⁹

The lack of honour and use of violence, have often been interrelated, '[t]he typical slave in the Roman view was a "vocal instrument," a non-person to be used sexually, disciplined with the whip, and questioned in court under torture since his word was utterly without honour'.¹¹⁶⁰ The one common factor in all examples of slavery is the violent control of one person over another, whether that is violence, or the threat of violence.¹¹⁶¹ The reality of violence within slavery was reaffirmed by Christian teachings which instructed slaves to obey their masters 'with fear and trembling'.¹¹⁶²

The dynamics of this relationship were recognised by Thomas Jefferson on his speech on 'Master and Slave':¹¹⁶³

'The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it'.

¹¹⁵⁷ David Brion Davis, *Slavery and Human Progress* (1984), 11. Davis points out that Patterson's analyses will be scrutinised in time when further work is done in the areas of ancient, medieval, Asian, African and pre-colonial American history are undertaken.

¹¹⁵⁸ Orlando Patterson, *Slavery and Social Death*, (1982), 81 – 82.

¹¹⁵⁹ *Ibid*, 83.

¹¹⁶⁰ *Ibid*, 92.

¹¹⁶¹ Kevin Bales, *Understanding Global Slavery, A Reader*, (2005), 9.

¹¹⁶² Keith Bradley, "Europe – Ancient World", in Seymour Drescher and Stanley L Engerman (ed), *A Historical Guide to World Slavery* (1998), 195.

¹¹⁶³ Thomas Jefferson on "Master and Slave". But see other references to Thomas Jefferson, earlier in the chapter regarding his personal ownership of slaves.

The current international definition of slavery which is focused on proprietary relations is far from satisfactory. First it fails to take account of the historical evolution of the phenomenon of slavery, and second, it ignores the reality of the predicament of the 'modern day' slave with important adverse implications for trafficked victims. It is the view in this thesis that there is a need for the development of a new approach to the definition of slavery to reflect the conditions of the modern slave victims consistent with the history of slavery as a phenomenon.

11.7 A normative definition of slavery: domination, forced labour and servitude

Slavery is a crucial part of trafficking because it refers to the exploitation of the victim. Of course, exploitation of trafficking victims does not only take place in the labour arena as is evidenced by the role of forced marriage, however forced labour and exploitation such as forced marriage are linked to slavery practices. While it may be true that not all exploitation amounts to slavery or slavery like practices,¹¹⁶⁴ it is submitted that in the cases where the exploitation reaches that level of abuse, then protection should be guaranteed to the victim. The *Trafficking Protocol* should be concerned with exploitation amounting to slavery like practices because it will be very difficult and inappropriate to assist all victims of exploitation with the same solution. Further, it would be unlikely that the international community could achieve consensus on such a broad instrument. In any event, those suffering most should be given the first assistance, and assistance to victims in slavery like situations must be mandatory. It is also appropriate to expand the scope of slavery to include modern practices.

Although any definition will be in itself inadequate as there may always be cases of slavery that do not fit within it, honour being linked to personal autonomy, is perhaps a better definition of slavery, than those centred around the slave as property. As slavery is protected by the violent control of one person over another, slavery is better defined as the condition whereby the person's personal autonomy is held by another, whether this was originally given consensually or not and retained through violence or the threat

¹¹⁶⁴ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective – Towards a Holistic Approach* (2006), 135.

of violence. It is difficult to understand slavery as proprietary in nature in the modern context because chattel slavery is seldom seen today in its true form.

However, the idea of a restriction of freedom is a concept that is familiar to the modern world. One of the core beliefs of human rights is the belief in freedom or personal autonomy and so this would be the best description of slavery today. Accordingly, the definition of slavery should read:

'THE STATUS OR CONDITION OF A PERSON OVER WHOM ANY OR ALL OF THE POWERS ATTACHING TO THE RIGHT OF OWNERSHIP ARE EXERCISED OR WHOSE PERSONAL AUTONOMY IS LIMITED FOR WHATEVER PURPOSE WHETHER OR NOT THEY ENTERED INTO SLAVERY WITH CONSENT.'

Trafficking should be thought of as a sub branch of slavery and compared to the slave trade. The reason why there is little attention paid to the link between trafficking and slavery is that modern society does not have a good understanding of slavery and misconceptions about slavery have camouflaged trafficking into being seen as a migration or labour issue. While migration and labour are both important tools in combating trafficking, such frameworks can only be appropriately applied in the context of trafficking as modern day slavery.

Unfortunately, efforts to eradicate trafficking have not focused on the exploitation but have become confused by concepts such as consent and even intent.¹¹⁶⁵ As discussed throughout this thesis, the consent of the person to their exploitation has stood as a bar to the protection of the victim. As lawyers, we must re-evaluate the definition of slavery centred on the ownership of the person as found in the *Slavery Convention* in order to be more relevant to current thinking in the social sciences.

11.8 Conclusion

¹¹⁶⁵ Intent is important in that the *Trafficking Protocol* requires the trafficker to be acting with intent, without which the trafficker cannot be charged (even though this is not the case with all national legislation). Protection and assistance mechanisms are closely linked with the victim acting as witness in criminal proceedings.

To the extent that the 'slave theory' as in the *Slavery Convention* is focused on the proprietary relationship basis of slavery, it and the element of consent, distorts the concept of slavery and offers little assistance in our understanding of trafficking and our efforts to combat it. However this is not to dismiss the slave theory as a good normative basis for understanding trafficking. The theory is helpful if one adopts a more realistic definition of slavery consistent with its historical development and the actual situation of victims who find themselves in a combined environment of violent domination, servitude and forced labour.

Slavery based on proprietary rights confuses our understanding of trafficking because chattel slavery is fairly uncommon. This does not mean however that exploitation does not take place. Defining a crime in a way that does not reflect common situations creates problems. For example, in the early 1900s, trafficking was described in such a way as to leave little room for the detection of victims. That is, descriptions of trafficking victims were so extreme that few victims could be found to match. This did not mean that victims did not exist but that perhaps the fault lay with the parameters in which victims were identified.

This definitional problems created by the recent handling of trafficking, and indeed all slavery must not continue. It is time that we use lessons learnt in the past to create law that adequately deals with modern practices so that victims can be assisted and protected from exploitation.

12 CONCLUDING REMARKS: A VICTIM – CENTRED APPROACH

As noted in the introduction to this thesis, human trafficking is the largest manifestation of contemporary slavery in the world.¹¹⁶⁶ As a phenomenon which is arguably one of the fastest growing international crimes believed to generate profits only second to arms trafficking, human trafficking is an issue that involves a complex mix of crime, labour standards, human rights and immigration regulations.

‘Human trafficking is a multifaceted phenomenon, which has been analysed from a variety of perspectives.’¹¹⁶⁷ It has been described by various authors as slavery or a form of slavery; and as the human rights issue of the century. Whichever way one looks at it, at the centre of trafficking as a phenomenon is the trafficked victim. Indeed it is the victim as such in trafficking which focuses our attention to the phenomenon irrespective of whatever theory one adopts to deal with or to understand trafficking. The questions posed at the commencement of this thesis were:

In the fight against trafficking what should be the international agenda? Should the focus be on crime prevention or should it be on victim protection? Should human rights be the essential basis that underpins state action in dealing with trafficking or should border control and principles of immigration be the central basis for dealing with the problem?

Certainly, perspectives regarding trafficking reveal political, legal and philosophical differences. It is the proposition of this thesis that any sustainable international agenda to deal with trafficking must be based on *victim protection* as the primary aim. The

¹¹⁶⁶ United States *Trafficking Victims Protection Act of 2000*, sec. 102(a). See also, *Resolution on Improving the Coordination of Efforts against Trafficking in Persons*, UN GAOR, 61st sess, [1] UN Doc A/Res/61/180 (2007) which refers to trafficking ‘*and other contemporary forms of slavery*’ (my emphasis).

¹¹⁶⁷ Gergana Danailova-Trainor and Patrick Belser, International Labour Office, Geneva “Working Paper: Globalization and the illicit market for human trafficking: an empirical analysis of supply and demand” (InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, International Labour Office, Geneva, December 2006), 3.

international agenda must thus be 'victim-centred'. Such a victim-centred approach must in turn inform or underpin state action in the fight against trafficking.

Appropriate law reforms are most likely to occur once a theoretical framework is established. However, law reform cannot be achieved solely through legislative reform. It requires political change and ideologies that are set in values, attitudes and beliefs with appropriate responses to victims and offenders.¹¹⁶⁸ As with the problems of the disjunction of human rights, between theory and realisation, theory generally must not be allowed to 'spiral away' from political structures.¹¹⁶⁹ That is, theory must be based in practice and be firmly footed in reality. The reality of trafficking is that it is a crime that impacts most harshly on the victim. However, responses in dealing with trafficking have not placed the victim of trafficking at the centre and while this remains the case, efforts to eradicate trafficking will remain ineffective.

12.1 "Victim" as a concept

In spite of the seminal importance of the *Trafficking Protocol*, the instrument does not define the concept of a 'victim' of trafficking. One is therefore left to look for a generic meaning of the concept elsewhere. The United Nations Declaration of the Basic Principles of Justice for Victims of Crime of 1985,¹¹⁷⁰ provides that: Victims are

'persons who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of the criminal laws operative within member states'

It is argued by some jurists that the 'status' of a person as 'victim', may lead to a 'learned helplessness' resulting in their disempowerment.¹¹⁷¹ Classifying the person as

¹¹⁶⁸ Chris Corns, 'Criminal Proceedings: An Obligation or Choice for Crime Victims?' (1994) 13(2) *University of Tasmanian Law Review* 346, 366.

¹¹⁶⁹ Ruti Teitel, 'Human Rights Genealogy' (1997) (66) *Fordham Law Review* 301, 305 – 307.

¹¹⁷⁰ *Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, UN Doc A/Res/40/34 (1985).

¹¹⁷¹ Monika Smit, Senior Researcher at the Bureau of the National Rapporteur in Trafficking in Human Beings, The Netherlands, OSCE Office for Democratic Institutions and Human Rights, 'Conference Report' (Europe Conference Against Trafficking in Persons Berlin 15 – 16 October 2001), 35.

a 'victim' leads to prejudice whereby there is a perception by the public of a 'timid, demure, suffering' person; when the victim does not fit this image, it may be difficult to convince the court and community that an injury has occurred.¹¹⁷²

Commonly, trafficked people are not the helpless victims they are often portrayed to be and have frequently been described as the 'go-getters' of their community.¹¹⁷³ Trafficked people while often faced with bleak prospects if they remain in their places of origin are also likely to be strong, risk-taking individuals who have made the choice to immigrate but end up being trafficked.¹¹⁷⁴ Worldwide evidence shows that the poorest of the poor and the least educated are not the people that are most likely to seek migration because they are not likely to have any resources at all to even consider migration and those with low education usually lack the confidence to migrate.¹¹⁷⁵ Conversely, trafficking victims are thought to be amongst the most industrious of their community, seeking a better future.

This does not mean that trafficking victims meaningfully consent to being trafficked but that faced with few if any meaningful choices, they elect to 'try their luck'¹¹⁷⁶ at facilitated migration and end up being exploited. Problems arise because there is an expectation by the community that trafficking victims appear as weak and suffering individuals. An example of the prejudiced expectations of the community is in relation to trafficking for the purposes of prostitution. The woman is either a victim that needs

¹¹⁷² Monika Smit, Senior Researcher at the Bureau of the National Rapporteur in Trafficking in Human Beings, The Netherlands, OSCE Office for Democratic Institutions and Human Rights, 'Conference Report' (Europe Conference Against Trafficking in Persons Berlin 15 – 16 October 2001), 35.

¹¹⁷³ See Melissa Ditmore, "Trafficking in Lives – How Ideology Shapes Policy" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 110.

¹¹⁷⁴ Ann D Jordan "Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings" in Rachel Masika (ed) *Gender, Trafficking and Slavery* (2002), 30.

¹¹⁷⁵ Phil Marshall and Susu Thatun, "Miles Away – The Trouble with Prevention in the Greater Mekong Sub-region", in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 46 – 47.

¹¹⁷⁶ Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369, 388.

to be protected or a criminal 'having exposed the porosity of national borders'.¹¹⁷⁷ Accordingly, where a prostitute or other person, consents to being exploited, then they are not considered to be a victim. The solution of the *Trafficking Protocol* raises further problems.

Basing protection mechanisms on the victims consent or innocence is an attempt to separate the innocent victim who needs protection from the 'bad' victim who needs to be punished.¹¹⁷⁸ Further, breaking down trafficking into victims and villains reduces a complex phenomenon to simple causes and clear-cut solutions.¹¹⁷⁹

'The effect of these motifs of deception, abduction, youth/virginity, and violence is to render the victim unquestionably "innocent". Desperately poor, deceived or abducted, drugged or beaten into compliance, with a blameless sexual past, she could not have 'chosen' to be a prostitute.'¹¹⁸⁰

If the victim does not fit into the 'mould' of what is perceived as a victim, then the state can proceed to act with them as if they pose a threat. Kapur describes this process as 'Demonizing the Other':

*'there is the legal response that promotes incarceration, detention, even annihilation or elimination. In these contexts, the migrant is cast as a transgressor, incomprehensible, and existing completely outside of the framework of liberal democracy, and is defined as a threat to the nation-state and as backward, uncivilised and dangerous.'*¹¹⁸¹

Nevertheless, the use of the term 'victim' to describe trafficked people and its inclusion throughout the Protocol denotes at least a basic acknowledgment that the person has

¹¹⁷⁷ Ratna Kapur, "Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 36.

¹¹⁷⁸ Jo Doezema 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18(1) *Gender Issues* 23, 24.

¹¹⁷⁹ *Ibid*, 45.

¹¹⁸⁰ *Ibid*, 36.

¹¹⁸¹ Ratna Kapur, "Cross-Border Movements and the Law – Renegotiating the Boundaries of Difference" in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (ed) *Trafficking and Prostitution Reconsidered – New Perspectives on Migration, Sex Work and Human Rights* (2005), 33.

suffered.¹¹⁸² The term victim is also used in this thesis to refer to trafficked people in order to better link protection mechanisms. The term victim allows the trafficked person to be viewed from a human rights perspective rather than as a law breaking immigrant. The use of the term therefore is not intended to refer to the victim's innocence or guilt in the process of the trafficking but rather refers to the exploitation that the victim has been subjected to.

12.2 Understanding a victim-centred approach

A victim-centred system is a change in strategy from a 'case focus' to a victim focus. The essence of a victim-centred strategy fundamentally involves an awareness of the centrality of victim and their needs; to the development of a solution or solutions to deal with the problem at hand. This strategy may be likened to the situation which is commonly adopted by a corporate body in dealing with clients or customers. The client may not set the company's policies, but good corporate policy is routinely developed with the customer or client in mind. Indeed the essence of effective corporate strategy is ultimately the needs of the customer. A victim-centred approach in dealing with trafficking is thus one in which considerations of what is in the victim's best interests overrides competing concerns of migration and the criminal justice system.

A victim-centred approach takes account of the interests and concerns of the victim at every stage of the process in developing and implementing solutions for the problem. This process therefore becomes more meaningful to the victim. The victim in such circumstances is less inclined to feel alienated from the system and more confident that the state machinery will be used to assist them. This involves an essential mutual benefit: a confident victim who has trust in the state machinery is more likely to be strong and committed to the prosecution process. It can be seen therefore that a victim centred approach has multi faceted benefits. The commitment of the victim to the prosecution process helps to deal with traffickers; the arrest of traffickers in turn improves outcomes for victims and results in less re-victimisation of victims. This provides an effective foundation for sustainable solutions.

¹¹⁸² Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers' (2002) 14(2 & 3) *International Journal of Refugee Law* 263, 266.

On the other hand, where the victim is treated solely as a witness for the prosecution, the proceedings can turn against the witness, resulting in the victims' 'second victimisation'. It is thought that second victimisation can be avoided by providing the victim with empathy and due consideration throughout the proceedings.¹¹⁸³ Empathy and due consideration can best be applied to a victim when the victim is understood by all parties to be of pivotal importance because they have been exploited, not because they may be the main witness.

There is an obvious relationship between the criminal legal theory which underpins criminal legal process and the victim centred approach. A central element of the criminal justice is that outcome indicators are usually stated in terms of 'performance' as reflected in arrests, indictments, convictions and statistics. Typically the well being of the victim as such is not an issue in developing strategies for the case centred approach in the criminal justice system. The offender is the focus. This approach is evidenced in criminal legal theory and retributive theory in particular, whose aim is to punish the perpetrator of a crime. In essence, criminalisation theories are offender rather than victim focused.¹¹⁸⁴

12.3 Why have states failed to adopt a victim centred approach?

Considering the apparent concern of the international community to tackle trafficking, the question arises as to why states have not already adopted a victim centred framework. There are probably many varied reasons for this.

Probably a large part of the answer lies in the interconnection between migration and trafficking. While trafficking victims are not merely irregular migrants, victims are mainly trafficked during the migration process. Primarily, the victim is influenced by push and pull factors, and in their quest for a better life elsewhere, falls victim to trafficking. As stated throughout this thesis, the trafficking victim almost always has a level of consent to the trafficking process. They at least consent to the transportation part, where they usually work with the trafficker to arrive at the destination state. I

¹¹⁸³ Dionysios Spinellis, 'Victims of Crime and the Criminal Process' (1997) 31(1-3) *Israel Law Review* 337, 345.

¹¹⁸⁴ Chris Corns, 'Criminal Proceedings: An Obligation or Choice for Crime Victims?' (1994) 13(2) *University of Tasmanian Law Review* 346, 360.

believe that it is this consent and more importantly, willing consent to circumvent migration laws, that motivates states to primarily see trafficking as closely related to migration. Consent means that the victim is judged by the state as being part of the problem. That is why states often provide support to victims only in conjunction with their assistance to the prosecution process.

Indeed, this is as far as states may see their responsibility towards the victim. Perhaps because they feel that if the victim has truly been exploited, then all the victim would want is to return home. If the victim does not want to return home, it casts doubt on the innocence of the victim and further re-enforces to the state that the victim is an irregular migrant. That a large part of the solution to trafficking victims is that they are given residency in the country of destination makes it appear as if victims will use their suffering as a migration tool. Ultimately, assistance to victims of trafficking is an expensive exercise and states are mindful of creating policy that will further stimulate irregular migration into their borders. That is why up to now; requirements to protect victims and provide them with relief are weak. If states adopted a victim centred approach, they may feel like they are losing control of deciding who enters their country and under what circumstances.

Instead, states view trafficking as a crime. Accordingly, the *Trafficking Protocol* focuses on organised crime creating a 'treaty framework' to combat transnational organised crime and deter unlawful migration. The true driving force behind the drafting of the *Organised Crime Convention* and the two relevant Protocols is the concern by member states over sovereignty and security issues surrounding trafficking and smuggling.

This thesis however disagrees with this view. It is the position of this thesis that a victim centred framework would work to reduce trafficking generally. A victim centred framework has multiple benefits because in reducing trafficking, irregular migration will also be reduced as well as organised crime. These would satisfy the state's main concerns in relation to trafficking. It is also the proper way to deal with victims of exploitation, or to put it more accurately, it is the proper way to deal with modern day slaves. The current criminal law perspective is insufficient in tackling trafficking as it currently stands. It is encouraging to note however that some states are adopting different approaches that view are more in line with a victim-centred approach.

12.4 Why a victim centred approach?

To the extent that the victim has an interest in the trafficker's arrest, conviction and sentencing, the criminal justice system needs the active cooperation of the trafficked victim to build a stronger case to convict the trafficker. A victim centred approach and the criminal justice system as reflected in criminal legal theory are therefore mutually supportive. Cooperation between victims and law enforcement is likely to lead to more successful prosecutions of traffickers.

The recognition of the trafficked person as a victim of a crime requires the application of the principle of non-criminalisation of the acts of the victim of trafficking. Thus for instance where a victim is found to be engaged in prostitution or in apparent breach of labour or migration laws, an appropriate victim centred approach should avoid criminalising the conduct. In the case of prostitution for instance, an approach adopted by the January 1, 1999 law of Sweden makes buying sex a crime that may subject the customer to 6 months imprisonment. In the Former Yugoslav Republic of Macedonia, article 41 of the Criminal Code provides for a penalty of 6 months to 5 years imprisonment for anyone who buys sex from a person for whom they know is a victim of trafficking.

It is also necessary to 'de-sex' trafficking in any victim centred approach. Indeed, many feminist groups see trafficking as another form of exploitative prostitution. As was demonstrated in the feminist legal theory's approach to the issue of trafficking, there is an undue focus on prostitution in trafficking. While there is no doubt that prostitution is a major issue and a legitimate target in anti trafficking efforts, limiting trafficking for the purpose of prostitution, has two flaws: first, sex trafficking is not limited to trafficking for commercial sex. Non-commercial sex, as for instance in the case of forced marriages, may constitute a form of exploitation that gives rise to trafficking. Trafficking could also arise in the area of child sex tourism.

A victim centred approach in dealing with human trafficking involves some fundamental elements. Namely:

- victims' safety
- housing for victims

- medical and psychiatric needs
- normalizing their immigration status

The US TVPA makes adult victims of severe forms of trafficking who have been certified by the US Department of Health and Human Services eligible for benefits and services to the same extent as refugees. Victims of severe forms of trafficking who are under 18 years of age also are eligible for benefits to the same extent as refugees but do not need to be certified. This is a welcome victim centred approach that needs to be encouraged in the international community generally.

There are positive developments that give cause for optimism in the fight against trafficking. In India for instance, the Suppression of Immoral Traffic in Women and Girls Act of 1986 provides, under Article 21, that the government may establish 'protective homes', and 'institutions...in which women and girls, who are in need of care and protection, may be kept'.¹¹⁸⁵ A better understanding of the need for a victim centred approach would lead more states to adopt the Indian approach.

An appropriate victim centred approach must also involve the appropriate preventive measures to warn prospective victims of the dangers of prostitution, or more appropriately, of the dangers of trafficking.

Despite these other areas of sex trafficking, a gender focus on trafficking fails to recognise the many other areas of trafficking. Primarily, it fails to recognise the trafficking of men. For example, there is a great demand for trafficked people in areas including construction, sweatshops as well as domestic service. These in turn bring up many other issues, not captured by the feminist debate such as state responsibility for trafficking from the receiving state. Action and perhaps even inaction by receiving states that have knowledge of being a destination state for trafficking victims may in time be viewed as having violated human rights if they take no steps to address demand factors that contribute to trafficking. Again, this can best be addressed through a victim centred approach that looks to the exploitation suffered by the victim in order to come to a proper response in dealing with trafficking. In time, states may be required to

¹¹⁸⁵ Mohamed Y Mattar, 'A Victim Centred Approach to the Immoral Traffic Prevention Act: A Call for a New Anti-Trafficking Law' (Conference on 'Next Steps in Path Breaking Strategies in the Global Fight Against Sex Trafficking', Mumbai, India, January 27 – 28, 2004).

address trafficking from the perspective that trafficking interferes with 'capabilities' of the victim.

A focus on exploitation of the victim will eliminate inappropriate responses to trafficking victims such as an undue focus on the victim's consent to some part of the trafficking or exploitative focus. A victim focus should also shift attention away from the legal status of the victim in the state of destination. For example, as mentioned above regarding state responses to trafficking, the recognition of the trafficked person as a victim of a crime requires the application of the principle of non-criminalisation of the acts of the victim of trafficking. Ultimately, a focus on the victim should bring the attention of the international community to all forms of exploitation analogous to slavery, and trafficking should be viewed as a sub category of slavery. Both slavery and trafficking should be viewed with the same degree of gravity. Focusing efforts on trafficking but not slavery seems to be a nonsensical approach.

Unfortunately, while the *Trafficking Protocol* is a relatively recent agreement, it contains inherent problems that will limit its usefulness. A victim centred approach with the prevention of exploitation at its heart would have been much more effective in reducing the crime. Unfortunately, the instrument was not informed by good theory.

There is scope and it is appropriate that international treaties be concerned with what should be rather than what is. This would have the effect of holding human welfare as the higher and ultimate purpose of the international legal system. Doing so will ultimately reflect our own values. Through the creation of normative theory, our values will make a visible statement about ourselves which will be evident even within the abstract. What we believe about issues such as slavery and human rights will be evident in our handling of issues such as human trafficking. Accordingly, it is important that as a society, we carefully consider what values we reveal about ourselves to future generations through our efforts to protect victims of slavery today.

Figure 1: Diagrammatical representation of the United Nations *Trafficking Protocol*

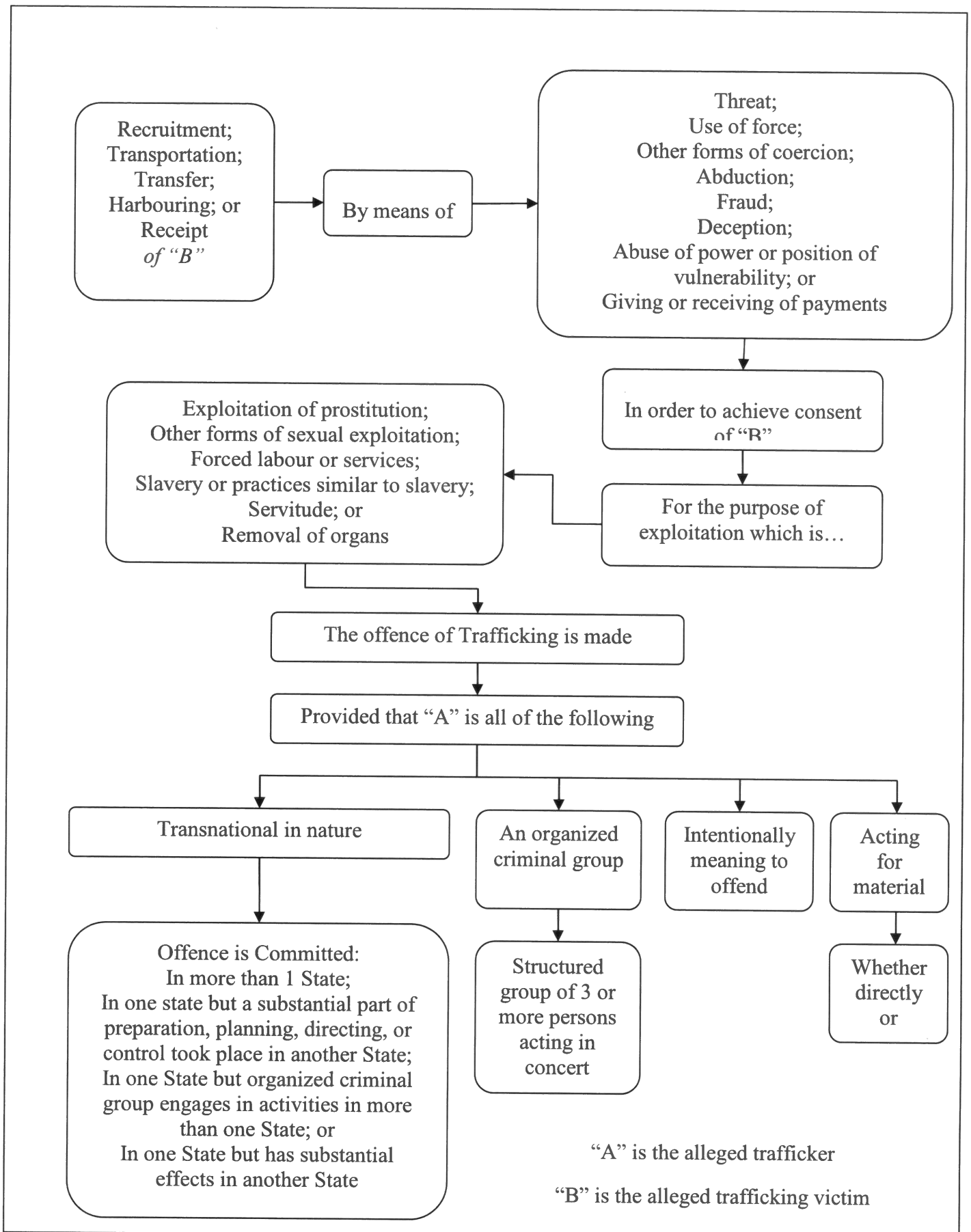


Figure 2: Diagrammatical representation of the United States *Victims Protection Act*

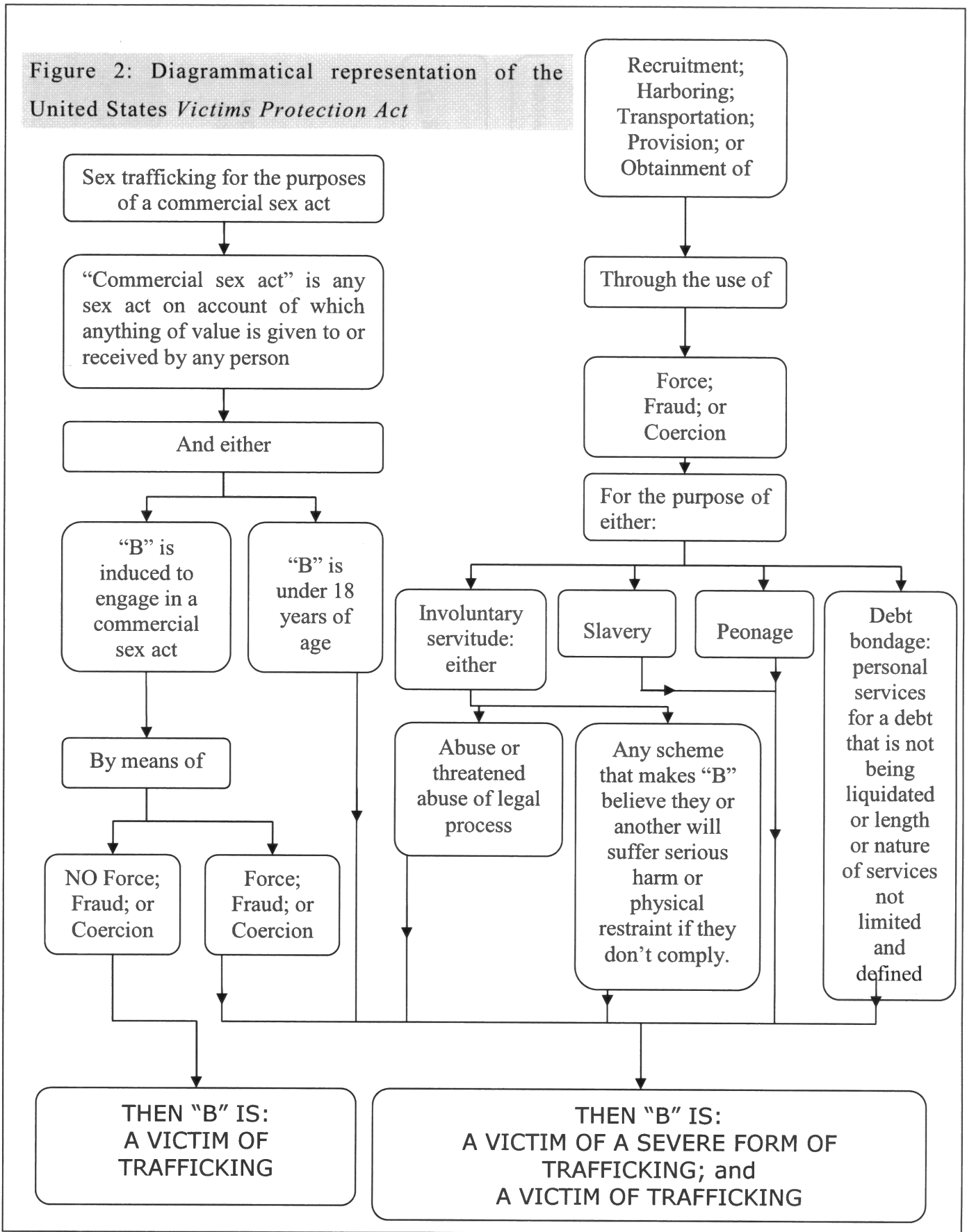


Figure 3: Diagrammatic representation of the Australian: Criminal Code Amendment (Trafficking in Persons) Act 2005

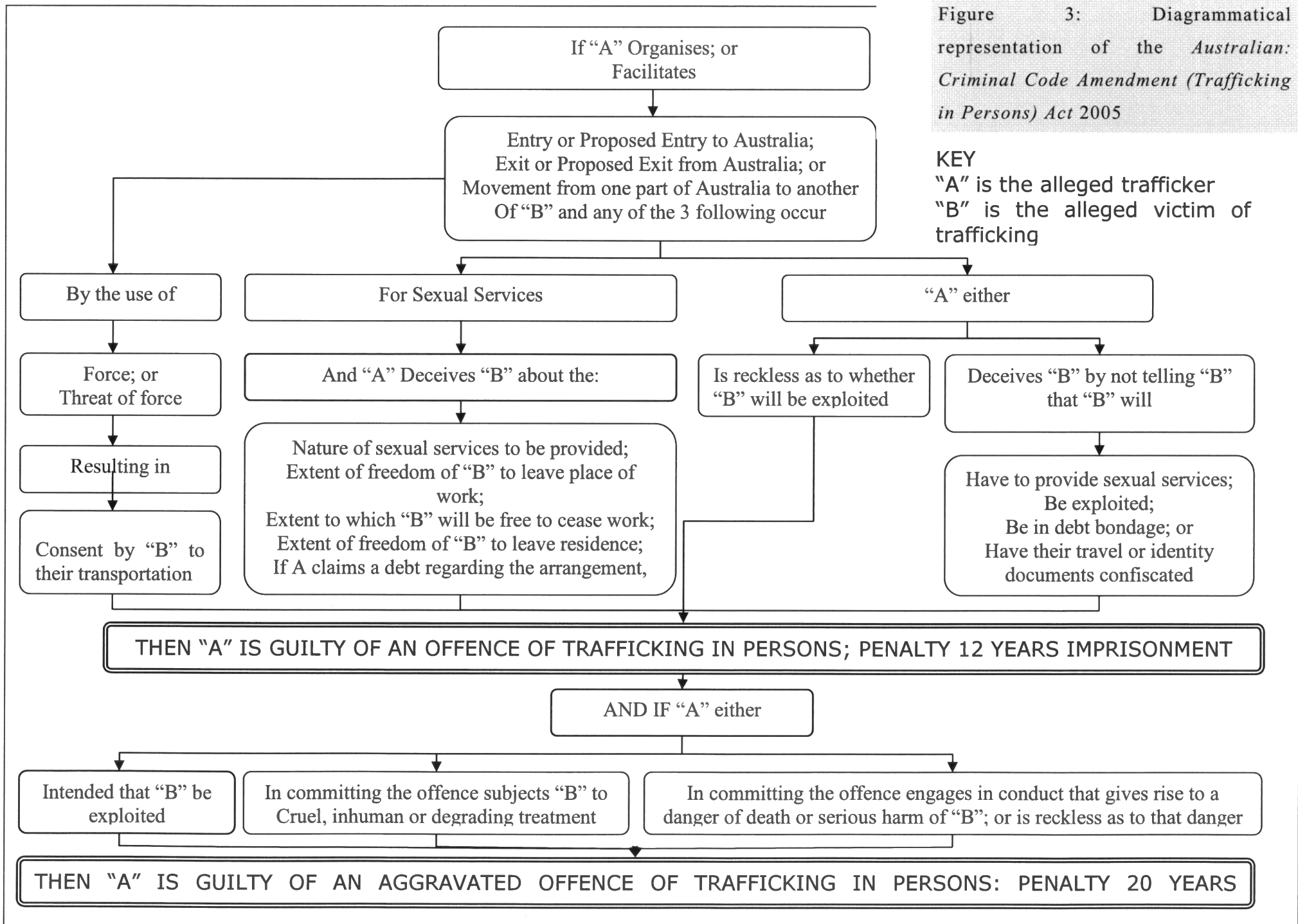


Figure 4: State Parties to Relevant Instruments, as at 31 May 2007*¹¹⁸⁶

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC	ILO 182	ILO 29	ILO 105
Afghanistan	X			X	X	X	X		X	X	X	X	X			X
Albania	X	X	X	X	X	X		X	X	X	X	X		X	X	X
Algeria	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Andorra					X	X					X	X	X			
Angola				X	X						X	X	X	X	X	X
Antigua and Barbuda	X					X	X		X		X	X	X	X	X	X
Argentina	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Armenia	X	X	X	X	X	X					X	X	X	X	X	X
Australia	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Austria	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Azerbaijan	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Bahamas						X	X		X		X	X		X	X	X

¹¹⁸⁶ For the first 3 instruments see: United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist.html> at 10 July 2008; United Nations Office on Drugs and Crime, *Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> at 10 July 2008; United Nations Office on Drugs and Crime, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html> at 10 July 2008. For the rest of the table see: Vladimir Volodin, 'Human Rights: Major International Instruments, Status as at 31 May 2007' UNESCO (2007).

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC	ILO 182	ILO 29	ILO 105
Bahrain	X	X	X		X	X		X	X		X	X	X	X	X	X
Bangladesh				X	X	X	X		X	X	X	X	X	X	X	X
Barbados				X	X	X	X		X		X	X		X	X	X
Belarus	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Belgium	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Belize	X	X	X		X	X					X	X	X	X	X	X
Benin	X	X	X	X	X	X					X	X	X	X	X	X
Bhutan											X	X				
Bolivia	X	X		X	X	X	X		X	X	X	X	X	X	X	X
Bosnia and Herzegovina	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Botswana	X	X	X		X	X					X	X	X	X	X	X
Brazil	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Brunei Darussalam	X										X	X	X			
Bulgaria	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Burkina Faso	X	X	X	X	X	X				X	X	X	X	X	X	X
Burundi				X	X	X					X	X		X	X	X
Cambodia	X	X	X	X	X	X			X		X	X	X	X	X	X
Cameroon	X	X	X	X	X	X	X		X	X	X	X		X	X	X
Canada	X	X	X	X	X	X	X		X		X	X		X		X
Cape Verde	X	X	X	X	X	X					X	X	X	X	X	X
Central African Republic	X	X	X	X	X	X			X	X	X	X		X	X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC	ILO 182	ILO 29	ILO 105
Chad				X	X	X					X	X	X	X	X	X
Chile	X	X	X	X	X	X	X		X		X	X	X	X	X	X
China	X			X		X					X	X	X	X		
Colombia	X	X		X	X	X					X	X	X	X	X	X
Comoros	X					X					X	X	X	X	X	X
Congo				X	X	X			X	X	X	X		X	X	X
Cook Islands	X										X	X				
Costa Rica	X	X	X	X	X	X					X	X	X	X	X	X
Cote d'Ivoire				X	X	X			X	X	X	X		X	X	X
Croatia	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Cuba	X					X	X		X	X	X	X	X		X	X
Cyprus	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Czech Republic				X	X	X			X	X	X	X		X	X	X
Dem. People's Republic of Korea				X	X						X	X				
Dem. Rep. Of the Congo	X	X	X	X	X	X			X		X	X	X	X	X	X
Denmark	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Djibouti	X	X	X	X	X				X	X	X	X		X	X	X
Dominica				X	X		X		X		X	X	X	X	X	X
Dominican Republic	X	X	X	X	X	X			X		X	X	X	X	X	X
Ecuador	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC SC	ILO 182	ILO 29	ILO 105
Egypt	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
El Salvador	X	X	X	X	X	X					X	X	X	X	X	X
Equatorial Guinea	X	X		X	X	X					X	X	X	X	X	X
Eritrea				X	X	X					X	X	X	X	X	X
Estonia	X	X	X	X	X	X					X	X	X	X	X	X
Ethiopia	X			X	X	X		X	X	X	X	X		X	X	X
Fed. States of Micronesia											X	X				
Fiji						X	X		X		X	X		X	X	X
Finland	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
France	X	X	X	X	X	X	X		X	X	X	X		X	X	X
Gabon	X			X	X	X					X	X		X	X	X
Gambia	X	X	X	X	X	X					X	X		X	X	X
Georgia	X	X	X	X	X	X					X	X	X	X	X	X
Germany	X	X	X	X	X	X	X		X		X	X		X	X	X
Ghana				X	X	X			X		X	X		X	X	X
Greece				X	X	X	X		X		X	X		X	X	X
Grenada	X	X	X	X	X						X	X		X	X	X
Guatemala	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Guinea	X	X	X	X	X	X	X		X	X	X	X		X	X	X
Guinea-Bissau	X	X		X							X	X			X	X
Guyana	X	X	X	X	X	X					X	X		X	X	X
Haiti					X	X			X	X	X	X			X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC	ILO 182	ILO 29	ILO 105
Honduras	X	X		X	X	X				X	X	X	X	X	X	X
Hungary	X	X	X	X	X	X	X		X	X	X	X		X	X	X
Iceland				X	X	X			X		X	X	X	X	X	X
India				X	X	X	X		X	X	X	X	X		X	X
Indonesia				X	X	X					X	X		X	X	X
Iran (Islamic Rep. Of)				X	X	X			X			X		X	X	X
Iraq	X			X	X	X	X		X	X	X	X		X	X	X
Ireland				X	X	X	X		X		X	X		X	X	X
Israel	X			X	X	X	X		X	X	X	X		X	X	X
Italy	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Jamaica	X	X	X	X	X	X		X	X		X	X		X	X	X
Japan				X	X	X				X	X	X	X	X	X	
Jordan				X	X	X		X	X	X	X	X	X	X	X	X
Kazakhstan				X	X	X				X	X	X	X	X	X	X
Kenya	X	X	X	X	X	X					X	X		X	X	X
Kiribati	X	X	X								X	X			X	X
Kuwait	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Kyrgyzstan	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Lao, People's Dem. Rep.	X	X	X	X		X			X	X	X	X	X	X	X	
Latvia	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Lebanon	X	X	X	X	X	X					X	X	X	X	X	X
Lesotho	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Liberia	X	X	X	X	X	X	X				X	X		X	X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC	ILO 182	ILO 29	ILO 105
Libyan Arab Jamahiriya	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Liechtenstein	X	X	X	X	X	X					X	X				
Lithuania	X	X	X	X	X	X					X	X	X	X	X	X
Luxemburg	X			X	X	X			X	X	X	X		X	X	X
Madagascar	X	X	X	X	X	X		X	X		X	X	X	X	X	X
Malawi	X	X	X	X	X	X		X	X	X	X	X		X	X	X
Malaysia	X								X		X	X		X	X	
Maldives				X	X	X					X	X	X			
Mali	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Malta	X	X	X	X	X	X		X	X		X	X		X	X	X
Marshall Islands											X	X				
Mauritania	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Mauritius	X	X	X	X	X	X		X	X		X	X		X	X	X
Mexico	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Moldova (Rep. Of)	X	X	X	X	X	X					X	X		X	X	X
Monaco	X	X	X	X	X	X	X				X	X				
Mongolia				X	X	X		X		X	X	X	X	X	X	X
Montenegro	X	X	X	X	X	X		X	X	X	X	X	X			
Morocco	X			X	X	X	X		X	X	X	X	X	X	X	X
Mozambique	X	X	X		X	X					X	X	X	X	X	X
Myanmar	X	X	X				X		X	X	X	X		X	X	X
Namibia	X	X	X	X	X	X					X	X	X	X	X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP	ILO 182	ILO 29	ILO 105
								AMEND	SC				CRC SC			
Nauru												X				
Nepal				X	X	X		X	X	X	X	X	X	X	X	
Netherlands	X	X	X	X	X	X	X		X		X	X		X	X	X
New Zealand	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Nicaragua	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Niger	X	X		X	X	X	X		X	X	X	X		X	X	X
Nigeria	X	X	X	X	X	X		X	X		X	X		X	X	X
Norway	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Oman	X	X	X			X					X	X	X	X	X	X
Pakistan						X		X	X	X	X	X		X	X	X
Palau												X				
Panama	X	X	X	X	X	X					X	X	X	X	X	X
Papa New Guinea			X			X		X			X	X		X	X	X
Paraguay	X	X		X	X	X					X	X	X	X	X	X
Peru	X	X	X	X	X	X					X	X	X	X	X	X
Philippines	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Poland	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Portugal	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Qatar	X					X						X	X	X	X	X
Republic of Korea				X	X	X				X	X	X	X	X		
Romania	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Russian Federation	X	X	X	X	X	X		X	X	X	X	X		X	X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC	ILO 182	ILO 29	ILO 105
Rwanda	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Saint Kitts and Nevis	X	X	X			X					X	X		X	X	X
Saint Lucia						X	X		X		X	X		X	X	X
St. Vincent and the Grenadines				X	X	X	X	X	X		X	X		X	X	X
Samoa										X		X				
San Marino				X	X	X			X		X	X		X	X	X
Sao Tome and Principe	X	X	X								X	X		X	X	X
Saudi Arabia	X	X	X			X		X	X		X	X		X	X	X
Senegal	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Serbia	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Seychelles	X	X	X	X	X	X			X	X	X	X		X	X	X
Sierra Leone		X		X	X	X		X	X		X	X	X		X	X
Singapore	X								X	X	X	X		X	X	
Slovak Republic	X			X	X	X			X	X	X	X	X	X	X	X
Slovenia	X	X		X	X	X			X	X	X	X	X	X	X	X
Solomon Islands				X		X	X		X		X	X			X	
Somalia				X	X	X									X	X
South Africa	X	X	X		X	X	X			X	X	X	X	X	X	X
Spain	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP			
								AMEND	SC				CRC	ILO 182	ILO 29	ILO 105
Sri Lanka	X			X	X	X		X	X	X	X	X	X	X	X	X
Sudan	X			X	X	X		X	X			X	X	X	X	X
Suriname	X	X	X	X	X	X			X		X	X		X	X	X
Swaziland				X	X	X					X	X		X	X	X
Sweden	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Switzerland	X	X	X	X	X	X	X		X		X	X	X	X	X	X
Syrian Arab Republic				X	X	X	X		X	X	X	X	X	X	X	X
Tajikistan	X	X	X	X	X	X				X	X	X	X	X	X	X
Thailand				X	X	X					X	X	X	X	X	X
The Former Yugoslav Republic of Macedonia	X	X	X	X	X	X			X	X	X	X	X	X	X	X
Timor-leste				X	X	X					X	X	X			
Togo	X			X	X	X			X	X	X	X	X	X	X	X
Tonga						X						X				
Trinidad and Tobago	X	X	X	X	X	X		X	X		X	X		X	X	X
Tunisia	X	X	X	X	X	X		X	X		X	X	X	X	X	X
Turkey	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Turkmenistan	X	X	X	X	X	X	X		X		X	X	X		X	X
Tuvalu											X	X				
Uganda	X			X	X	X		X	X		X	X	X	X	X	X
Ukraine	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X

State	OCC**	TP**	SP**	CECSR	CCPR	CERD	PASC	SC		CSTP	CEDAW	CRC	OP	ILO 182	ILO 29	ILO 105
								AMEND	SC				CRC SC			
United Arab Emirates	X					X					X	X		X	X	X
United Kingdom	X	X	X	X	X	X	X		X		X	X		X	X	X
United Rep. Of Tanzania	X	X	X	X	X	X		X	X		X	X	X	X	X	X
United States of America	X	X	X		X	X	X		X				X	X		X
Uruguay	X	X	X	X	X	X		X	X		X	X	X	X	X	X
Uzbekistan	X			X	X	X				X	X	X			X	X
Vanuatu	X										X	X	X	X	X	X
Venezuela	X	X	X	X	X	X				X	X	X	X	X	X	X
Viet Nam				X	X	X		X			X	X	X	X	X	
Yemen				X	X	X		X		X	X	X	X	X	X	X
Zambia	X	X	X	X	X	X		X	X		X	X		X	X	X
Zimbabwe	X			X	X	X			X	X	X	X		X	X	X

* OCC, TP AND SP ARE CORRECT AS AT 10 JULY 2008

** THE EUROPEAN COMMUNITY IS A PARTY TO THESE 3 INSTRUMENTS

Key to abbreviations used above:

- OCC *United Nations Convention against Transnational Organised Crime*, adopted 15 November 2000, 40 ILM 335 (2001) (entered into force 29 September 2003)
- TP *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime* adopted 15 November 2000, 40 ILM 377 (2001) (entered into force 25 December 2003)
- SP *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* adopted 15 November 2000, 40 ILM 384 (entered into force 28 January 2004)
- CECSR *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966, 999 UNTS 3 (entered into force 3 January 1976)
- CCPR *International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966, 999 UNTS 171 (entered into force 23 March 1976)
- CERD *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)
- PASC *Protocol amending the Slavery Convention signed at Geneva on 25 September 1926* opened for signature 1953, 182 UNTS 51 (entered into force 7 December 1953)

- SC AMEND *Slavery Convention signed at Geneva on 25 September 1926 and amended by the Protocol done at the headquarters of the United Nations, New York on 7 December 1953* 212 UNTS 17 (entered into force 7 July 1955)
- SUPP SC *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957)
- CSTP *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 21 March 1950, 1342 UNTS, (entered into force 25 July 1951)
- CEDAW *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 Dec. 1979, 1249 UNTS 13 (entered into force 3 September 1981).
- CRC *Convention on the Rights of the Child*, opened for signature 20 Nov. 1989, 1577 UNTS 44 (entered into force 20 Sept. 1990)
- OP CRC SC *Optional Protocol to the Convention on the Rights of the Child and Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, by GA Res A/RES/54/263, (entered into force 18 January 2002)
- ILO 182 *ILO Convention No. 182: Concerning Worst Forms of Child Labour*, adopted 17 June 1999, 38 ILM 1207 (entered into force 19 November 2000)
- ILO 29 *ILO Convention No. 29: Concerning Forced or Compulsory Labour*, adopted 10 June 1930, 39 UNTS 55 (entered into force 1 May 1932)

ILO 105 *ILO Convention No. 105: Concerning the Abolition of Forced Labour*, adopted 5 June 1957, 320 UNTS 291 (entered into force 17 January 1959) (the 'Abolition of Forced Labour Convention, 1957')

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International Agreement for the Suppression of the "White Slave Traffic" opened for signature 18 May 1904, 1 LNTS 83 (entered into force 18 July 1905)

International Convention for the Suppression of the "White Slave Traffic", opened for signature 4 May 1910, 211 Consol. TS. 45, (entered into force 4 May 1949)

International Convention for the Suppression of the Traffic in Women and Children, opened for signature 30 September 1921 9 LNTS 415 (entered into force 15 June 1922)

International Convention for the Suppression of the Traffic in Women of Full Age, opened for signature 11 October 1933, 150 LNTS 431 (entered into force 24 August 1934)

International Convention on the Elimination of All Forms of Racial Discrimination opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)

International Convention on the Protection of the Rights of All Migrant Workers and Their Families, adopted 18 Dec. 1990, G.A. Res. 45/158 (annex), 30 ILM 1521 (entered into force 1 July 2003)

International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 Dec. 1966, 999 UNTS 3 (entered into force 3 January 1976)

Optional Protocol to the Convention on the Rights of the Child and Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, by GA Res A/RES/54/263, (entered into force 18 January 2002)

Optional Protocol to the International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, 999 UNTS 302 (entered into force 23 March 1976)

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime adopted 31 May 2001, UN Doc A/55/255 (entered into force 3 July 2005)

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime adopted 15 November 2000, 40 ILM 384 (entered into force 28 January 2004)

Protocol amending the Slavery Convention signed at Geneva on 25 September 1926 opened for signature 1953, 182 UNTS 51 (entered into force 7 December 1953)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted 15 November 2000, 40 ILM 377 (2001) (entered into force 25 December 2003)

Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, adopted 15 Dec. 1989, 1642 UNTS 414 (entered into force 11 July 1991)

Slavery Convention signed at Geneva on 25 September 1926 and amended by the Protocol done at the headquarters of the United Nations, New York on 7 December 1953 212 UNTS 17 (entered into force 7 July 1955)

Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) (the 'Slavery Convention')

South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, opened for signature 5 January 2002

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957)

The African [Banjul] Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982) (entered into force 21 October 1986)

The Rome Statute of the International Criminal Court, 2187 UNTS 90 (entered into force 1 July 2002)

United Nations Convention Against Transnational Organised Crime, adopted 15 November 2000, 40 ILM 335 (2001) (entered into force 29 September 2003)

Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III)