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The Subjectivity of Consent:
A Comparison of the Trafficking Protocol
and Slavery Convention

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Summary

The aim of this research paper is to evaluate the extent to which the definition of slavery, exemplified through the 1926 Slavery Convention, offers a viable alternative to the definition of human trafficking under the 2000 Trafficking Protocol. The focus of the comparison centres on the role of consent on behalf of trafficked or enslaved persons, embedded in the respective definitions, and the function of these constructions in the constitution of subjectivity. The role of consent, and the powers that influence it, are examined through a Foucauldian perspective of the subject and related to a critical view of human rights subjectivity. Through examining the legal formulation of the trafficking definition, its broader legal context, and the discourse in which it is embedded, the human trafficking framework is found to present a problematic construction of consent from the view of the analytical tools provided. Under the slavery framework, the definition (based on the exercise of powers of ownership) is developed on an abstract level that indicates both its efficacy and its preferable accommodation of consent and subjectivity. Two cases are selected from Sweden (*B-982-05 / B-626-06*) and Australia (*R v. Tang*) to give examples of the trafficking and slavery frameworks respectively. In conclusion, the research finds the Slavery Convention definition to provide a viable alternative to the trafficking framework, in packaging a favourable accommodation of consent, a broader understanding of power and culpability and the opportunity for a critical constitution of subjectivity that permits an on-going critique on the boundaries of freedom and exploitation.

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Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Convention of Human and People's Rights
AUD	Australian dollars
ECHR	European Convention of Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labour Organisation
IOM	International Organisation for Migration
SEK	Swedish krona
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
USA	United States of America
VoT	Victims of Trafficking

1 Introduction

1.1 Problem Statement

Human trafficking presents a compact of challenging concerns for legislators. Laws on human trafficking may address an aggregation of some of the most controversial issues in contemporary politics, including undocumented migration, globalised labour markets, global poverty, transnational crime and the moralities of sex work. Popular concern for human trafficking is evident in mainstream media, reflecting the flurry of international political activity in the past 12 years, as states clamber to demonstrate that they are “doing something” about trafficking. A highpoint of the renewed international efforts to combat human trafficking has been the 2000 United Nations (UN) *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*¹ (the “Trafficking Protocol”).

The Trafficking Protocol defines trafficking in persons as the recruitment, transportation, transfer, harbour or receipt of persons by certain coercive means, for the purpose of the person’s exploitation.² This three tier definition (movement; means; exploitative purpose) has been lauded by many whilst being castigated by others who point out, *inter alia*, the difficulties in applying the definition in a criminal prosecution context, and the operation that the role of *consent* of the trafficked person plays as a hinge on the door between protection and victimhood on one side and expulsion and criminality on the other.

An alternative legal construction to the Trafficking Protocol’s definition exists in much older international law concerning the prohibition on slavery. On a rhetorical level, the reference is familiar, with popular discourse frequently referring to trafficking as “modern slavery”. The 1926 League of Nations *Convention to Suppress the Slave Trade and Slavery*³ (the “Slavery Convention”) has provided a common international definition for 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.⁴ Despite how well established the slavery prohibition has been in international human rights law, the normative content of the definition itself is relatively underdeveloped. As such, there are significant gaps to be filled to determine what the application of a slavery-based definition entails as an alternative to

¹ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

² *ibid*, Article 3(a).

³ League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414.

⁴ *ibid*, Article 1(1).

the Trafficking Protocol's approach: how does it construct the potential consent of a "trafficked" person, and indeed what this entails from a human rights perspective?

1.2 Research Question

This research paper seeks to explore these two legal frameworks as alternatives to the redress of the problem of "human trafficking", with a particular focus on the role of the trafficked or enslaved person's consent. As such, the principal research question is: How do the definitions, embedded in the trafficking and slavery frameworks respectively, construct the role of the victim's consent? The hypothesis underlying the research question is that the Slavery Convention definition offers a viable alternative that, from a human rights perspective, better deals with the issue of consent than that of the Trafficking Protocol definition.

The framing of the research question addresses some relevant gaps in the current literature on human trafficking. While a strong critical voice is emerging with respect to the Trafficking Protocol⁵, a *legal* analysis of the definition, in contrast with an alternative in the Slavery Convention, is underdeveloped in the current literature. In particular, while the role of consent has been problematized with respect to the Trafficking Protocol⁶, its normative structure within the Trafficking Framework has not been developed extensively. Furthermore, while recent works have sought to revitalise and give normative content to the Slavery Convention definition⁷, much remains to be done in this respect, in particularly in developing what the definition entails with regards to consent. A recent invocation of the slavery prohibition in the European Court of Human Rights (ECtHR), in *Rantsev v Cyprus and Russia*⁸, has further illustrated conceptual and legal confusion between trafficking and slavery, indicating the utility in developing these two frameworks, that while legislating comparable phenomena, remain legally distinct. Finally, the research seeks to provide an analysis from a critical perspective of human rights law - a contribution that is largely absent in the contemporary literature on both trafficking and slavery law.

⁵ See, for example, K Kempadoo *et al* (eds.), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights*, Paradigm Publishers, Boulder, 2005; and J Doezema, *Sex Slaves and Discourse Masters: the Construction of Trafficking*, Zed, London, 2010.

⁶ See, for example, J Doezema, "Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol", *Gender and Development*, vol. 10. No. 1, 2002, pp. 20 – 27.

⁷ See, for example, J Allain (ed), *The Legal Understanding of Slavery: The Historical to the Contemporary*, 2012, Oxford: Oxford University Press. (Forthcoming).

⁸ *Rantsev v. Cyprus and Russia*, Council of Europe: European Court of Human Rights, Application no. 25965/04, Judgment of 7 January 2010.

1.3 Delimitations

It must be specified, particularly in framing the relevance of consent, that the present research does not deal with the problem of trafficking in children. “Human trafficking” here is taken exclusively in reference to trafficking of *adult* human beings, without gender-based exclusion.

This research also seeks to take a critical view of ways in which human trafficking has been structured in international law. It is important to note that this critique by no means seeks to undermine any condemnation of the horrors that these processes entail but rather seeks to develop a legal argument that accommodates more nuanced understandings of human subjectivity and human rights - with the aim of advancing human dignity and freedom, not undermining the “fight against human trafficking.”

1.4 Methodology and Structure

Following this introductory chapter, an analytical framework must first be provided, in Chapter 2, to lay the foundations to examine consent. The notion of consent is developed on a theoretical level, structured according to the work of John Kleinig. Thereafter, some of the complexities in the theoretical debates on the human capacity to consent, on subjectivity, subjectivization and power are explored to reach an understanding of what role consent and human agency might play in the context of human rights law. These ideas are developed from the perspective of Michel Foucault’s later work on the human subject and power, together with a pragmatic construction of the utility of human rights law taken with Jacques Rancière’s view of rights in the context of political action.

In Chapter 3, the legal framework on trafficking, as developed through the Trafficking Protocol, is analysed. The Protocol itself, doctrine and academic texts are analysed to indicate the scope and prevalence of trafficking persons; the obligations embodied under the Protocol; and importantly, a detailed examination of what the definition of trafficking under the Protocol entails, especially on the question of consent. This section concludes by exploring some criticism of the trafficking framework through the examination of academic texts, in particular through the method of discourse analysis employed by Jo Doezema.

Chapter 4 proceeds to explore the Slavery Framework as an alternative legal tool in the field of human trafficking. It commences with an examination of the various sources of international law, in which a prohibition on slavery is contained, in order to justify the use of the Slavery Convention definition. It follows to explore a few key concepts in the definition based on powers of ownership. In particular, the distinctions between *de facto* and *de jure* slavery, the concepts of “lessor servitudes” and the notion of “powers” in the sense developed by Wesley Hohfeld are examined. From this point of departure, the definition of slavery is analysed further through different

constructions of ownership viewed by Robin Hickey and John Penner. Hereafter the view of ownership as developed by James Harris is explored as a preferred construction. The analysis seeks to uncover what idea of ownership in relation to slavery these various constructions contain, and, thereby, what vision of consent they imply. The fifth chapter draws together these two frameworks to provide a brief overview of how they might be compared on an abstract legal level.

The sixth chapter follows to examine two domestic cases in which these respective definitions are applied in order to test and give examples of the analysis. Cases are selected on the basis of relevant applications of comparable definitions, and the extent to which each case presents an interesting example of complicated consent. The cases will be examined to see how the respective courts applied the provisions and how they dealt with consent. Some reflections are given as to what the application of the “other” legal framework might have implied in either case in terms of culpability and the outcomes on consent.

Conclusions made in the final chapter of this paper aim to reflect upon the initial hypothesis of whether and to what extent the slavery framework offers a superior alternative to the trafficking framework, in particular with respect to either’s vision of consent.

2 Consent: An Analytical Framework

2.1 What is Consent?

In order to uncover how either legal framework deals with the question of a victim's consent, it is necessary to establish to what the concept of "consent" refers. Most legal definitions employ consent to indicate a form of affirmation, compliance, permission or approval. On the other hand, the word's Latin origin (*con sentire*, meaning to "feel together")⁹ implies consent as embodying a form of agreement. In most legal contexts where consent is relevant, the validity of consent is typically dependent on it being freely given by a person of sufficient competence, in the absence of duress or deception.

For greater analytical clarity, it serves to move beyond these traditional recitations on consent. In the first place, it is useful to distinguish between those understandings of consent framed as primarily a subjective mental state, and those that see consent as an act first and foremost. John Kleinig describes consent as primarily a communicative act: a transaction to do something, given by one agent to another.¹⁰ While the willingness of the consenting party is certainly present, Kleinig prefers to describe consent as a form of agreement *to* something that, through signification, is morally transformative of the relationship between the consenter and consentee.¹¹ For example, if A consents to travel in B's vehicle from his/her home state to another state (signified through payment and a request to join the journey), the consent morally transforms the act from what might otherwise be an act of kidnapping. According to Kleinig, determining that consent has moral force in a given situation need not be overriding or determinative of the morality (never mind legality) of the relation between A and B. To return to the example, if B obtains A's consent through exploiting the fact that A's economic desperation makes him or her more susceptible to undertaking the risk of the journey, we might say A's consent remains valid, but the consent itself may not be sufficiently morally transformative for one to consider the relationship between A and B acceptable in a given moral community.

Of course, such an understanding is premised on the assumption that A meets certain conditions to allow for him/her to be held responsible for the consent. Kleinig mentions that to consent one must be an *agent* who has reached a certain level of maturity. In addition, Kleinig's model requires

⁹ A Maclean, "Autonomy, Consent and Persuasion", *European Journal of Health Law*, vol. 13, no. 4, 2008, pp. 321 – 338, p. 323.

¹⁰ J Kleinig, 'The Nature of Consent', In Miller, F and Wertheimer, A (eds.), *The Ethics of Consent*, Oxford University Press, Oxford, 2009, p. 4 - 5.

¹¹ *ibid.*, p. 10.

three conditions be met. Firstly, the consent must be voluntary in the sense of being free from coercion.¹² Signified agreement to something in the absence of voluntariness can be considered as non-consensual “assent”: an act that lacks consent’s morally transformative force. Determining what is coercion in this context remains hotly disputed. Physical threats and force are usually unproblematically considered to be coercive but to what extent does coercion include moral and social pressure?

Returning to the example, if one deems that economic pressure of a certain degree is sufficiently coercive, an agreement to something in which that pressure occurs is non-consensual. In this case, if the economic pressure that A faces is considered coercive, this would result in many an act of agreement to a course of action being non-consensual. Unless one considers that particular economic pressure to render *involuntary* the act of A, the consent remains valid, albeit the relation morally problematic on other grounds. The second condition under Kleining’s model requires knowledge in order for one to be responsible for consent. If the consent is to be unqualified, the consenter must be informed.¹³ The third condition is that the consenter acts intentionally.

In sum, consent is stipulated here as primarily signifying conduct of morally transformative force, by an agent to another, agreeing to something to which one is held responsible on the condition of voluntariness, knowledge and intention. Clearly many of these elements can be problematized and for the purposes of the legal analysis and critique to follow, some further analytical foundations are laid in order to engage in the ethical implications of either legal framework’s conception of consent.

2.2 Situating the Debate

The question of consent in relation to trafficked persons has hotly been debated throughout the development of the trafficking framework. A great deal of diversity of arguments on consent has informed the debate, but two dominant trends emerge in the tensions between the “autonomy camp” and the “protectionist camp” that will be discussed here to animate the ethical tensions in consent.

Traditional liberal arguments that frame the value of the consenting capacity of trafficked adults tend to appeal to notions of individual autonomy and arguments emphasising the rational capacity and free will of human beings. Arguments in this line may draw upon rights to privacy, equal protection, freedom of contract, and frequently inform a pro-sex work perspective within the trafficking debate.¹⁴ This line of thought, which may be placed within the “autonomy camp” in the context of trafficking, prioritises

¹² *ibid.*, p. 13.

¹³ *ibid.*, p. 16.

¹⁴ K Abramson, “Beyond consent, toward safeguarding human rights: Implementing the United National Trafficking Protocol”, *Harvard International Law Journal*, vol. 44, Summer 2003, pp. 473 – 504, p.483.

empowerment over protection and paternalism, and has at times advocated for the elimination of the question of consent entirely in the framing of “trafficking” by focussing instead on exploitation.¹⁵ In a sense, this view might be said to uphold the voluntariness requirement of a person who, for example, living in conditions of destitution, makes an informed decision to move to another state to undertake poorly paid or dangerous work to better his or her prospects. Upholding the consent in recognising the autonomy of the person would thus entail that any moral resistance to the relationship between the consenter and consentee be located in a concern external to the consent – in the case of trafficking, possibly in the exploitation itself. As such, while one may be morally resistant to the exploitative circumstances in which the person works, that person’s consent to do that work remains valid. In other formulations within the autonomy camp, consent is sought to be upheld insofar as voluntarism is not destroyed through physical force, extortion or duress. In these sets of arguments, consent remained a valid consideration but it was argued that the definition of trafficking ought only to apply to those who did not consent, with a narrow construction of coercion to largely physical coercion. Broadly summarised, the autonomy camp includes both views that seek to abandon the question of consent entirely in the legal definition, and those who seek to retain the relevance of consent with a limited conception of what coercion entails.

On the other hand, the “protectionist camp” is typically a meeting place for a diversity of arguments grounded in the anti-prostitution discourse.¹⁶ From such a perspective, a focus on the coercive means of traffickers and disempowered circumstances of the trafficked deems agreement to a course of action involuntary and therefore non-consensual. The disproportionate structural impact of these phenomena on women frequently frames the impetus of this side of the debate. From the radical feminist perspective within the protectionist camp, agreement to a course of action, particularly in respect of sexual relations, is frequently seen to be a meaningless marker between autonomy and coercion.¹⁷ The presence or absence of consent in this perspective is thus typically deemed to be a valid consideration, however, the boundaries of voluntariness are narrowly conceived in the inclusion of a wider range of social, economic and political pressures as coercion so as to broaden the possibility to declare a particular agreement as “non-consensual”.

It is argued here that either side of the debate fails to capture the complexities of consent and subjectivity that inform the realities of the diversity of forms in which “trafficking” is experienced. It is thus sought to follow to explore accounts of human autonomy that engage in a more balanced way with structural power.

¹⁵ *ibid.*, p. 484. See, for example, the perspective of the Human Rights Caucus lobby group

¹⁶ *ibid.*, p. 489.

¹⁷ R. West, “Sex, Law and Consent”, In F. Miller and A. Wertheimer (eds.), *The Ethics of Consent*, Oxford University Press, Oxford, 2009, p. 225.

2.3 Power, Subjectivity and Consent

If one is to give content to the boundaries of voluntarism and coercion in a practical sense, and to relate this to what sorts of contexts will thereby allow agreement to have a morally transformative force, it is required to reach some understanding of the consenting *subject*, the limits of the subject's agency and the nature of power relations between and around the consenter and consentee. This is of course a question which bears no easy answers but one which demands some engagement if the ethics of consent in the context of trafficking are to be dealt with in an honest fashion. While no attempt is made here to define the subject universally or to make any meta-prescription as to how these relations ought to be constructed, it rather is sought to at least broaden the discussion on the relationship of consent with the powers that influence it.

A starting point may be to examine the nature of the subject from the Foucauldian assumption that our societies develop “strange and complex relationships... between individuality, discourse, truth and coercion.”¹⁸ Within the debate on trafficking, it is somewhat universally acknowledged that a person's thoughts, preferences and indeed their consent can fatally be influenced by “techniques of domination”¹⁹ – through force, extortion and threats of harm, for example. More complex politics inform the extent to which actors and institutions are willing to recognise the thoughts, preferences and consent of persons in the field of the “techniques of self” (those techniques that permit individuals to perform by their *own* means operations on their own bodies, thoughts and conduct) and where such techniques overlap with techniques of domination or are “integrated into structures of coercion or domination.”²⁰ In the context of human trafficking, we may assume that any instance in which a person agrees to any particular part of the process, that their agreement is the product of a variety of modes of objectification²¹ that transforms the person into a subject of particular forms of power.

Power may be conceived as a way of acting upon an acting subject: “the total structure of actions brought to bear upon possible actions”.²² Foucault claims that slavery is not a power relationship when a person is in chains; power is exercised over free subjects only insofar as they are free.²³ It is perhaps with this in mind that the idea of consent becomes interesting in the context of those practices often called “modern-day slavery.” While legal enslavement through enforceable juridical ownership over persons no longer endures, much of the public concern with contemporary practices called “human trafficking” involve persons not bound by physical chains but those

¹⁸ M Foucault, *The Politics of Truth*, 2007, Los Angeles: Semiotext(e), p.148.

¹⁹ *ibid.*, p. 154.

²⁰ *ibid.*

²¹ M Foucault, “The Subject and Power”, *Critical Inquiry*, vol. 8, no. 4, 1982, pp. 777 – 795, p 777 – 778.

²² *ibid.*, p. 789.

²³ *ibid.*, p. 790.

whose self-subjectification to exploitation frequently occurs in context of metaphorical constraints and violence. It is perhaps in the example of those labelled as victims of trafficking (VoT) that we see so exemplified “the recalcitrance of will and intransigence of freedom”²⁴ that lies at the heart of power relations. It follows that we may view the capacity to practice freedom as in itself an effect of power relations.²⁵

In exercising consent, the measures of voluntariness (or freedom) a person exerts in relation to coercive pressures (or power) are inseparable, existing in a state of “agonism”.²⁶ If we are then to concern ourselves with a claim as to the importance of decisions being made “freely”, then the nature of the subject and her subjectivization, and the mechanisms of resistance, are of central concern. If we are to presume that the subject is neither determinate nor static, the process of their subjectivization, and thus their exercise of freedom, is similarly indeterminate.

The concern might be to promote “new forms of subjectivity” through the refusal of the kinds of individuality imposed through totalizing state power.²⁷ As such, the exercise of consent, even in consent to harm in the case of exploitative labour, may expose the politics of power and the limits of freedom that the pressures of power imply. There exists, in such a view, the utility of consent - as a practice of subjectivity that confronts both the form of individuality imposed by contemporary state and its totalizing power - to be a mechanisms of resistance to that power, in the least in its exposure thereof. To say that a subject’s agreement when rendered under “techniques of self” is non-consensual implies that it is ever possible for consent to be absent of the action of power – a flawed assumption from the perspective here employed. While consent itself may then fail to truly mark the distinction between freedom and power, that is not to say that it is uninteresting or that distinguishing between consensual and non-consensual acts is of no value. If the subject is free (and thus acted upon by power relations) insofar as she is not in chains we may say that informed, intended agreement in these circumstances is voluntary and thus morally transformative consent. To emphasise, this is not to say that we deem consent *sufficiently* morally transformative but that we can only view it as “freely given” insofar as it is *ever* possible to say it is “freely given” and thereby to retain consent’s revelatory function.

With this in mind, we may proceed to examine what role a critical perspective of human rights plays in this process and what potential it has in promoting these new forms of subjectivity.

²⁴ *ibid.*

²⁵ B Sullivan, “Prostitution and Consent: Beyond the Liberal Dichotomy of ‘Free or Forced’”, In M Cowling, and P Reynolds, *Making Sense of Sexual Consent*, Ashgate Publishing Limited, Aldershot, 2004, p. 137.

²⁶ M Foucault, “The Subject and Power”, *op. cit.*, p. 790.

²⁷ *ibid.*, p. 785.

2.4 Subjectivity in Human Rights

It is in Foucault's work from the mid-1970's onwards that some have sought to locate his "critical affirmation of rights".²⁸ Herein, one might invoke a non-essentialist view of human rights²⁹ that while at once acknowledging that human rights and human rights law are tools in service of political projects, so too are subjects the effects of rights as power relations.³⁰ By removing the ontological certainty of human rights, rights can be seen as political or historical artefacts that reflect the contours of the human as she or he is variously constructed – in so doing, imbedding a necessary concern for whom is excluded in the formation of rights claims.³¹ This is a way in which human rights can be made meaningful - if we deem them to be as contested and constructed as their subjects, that they mirror the very politics in which they are formed.

From this departure, Jaques Ranciere's view of the subject of human rights as the process of subjectivisation can be applied to add impetus to a nuanced understanding of the consenting subject. Ranciere constructs a basis for subjectivisation in political action: one has to right to have rights when one is able to construct a dissensus against their denial.³² Accordingly, a condition in which existence is possible as a political subject (where one has the capacity to stage dissensus)³³ allows that persons may use the very tools that construct and limit them to reflect those structures of power and coercion. In analogy to what has been argued as Foucault's view of the utility of a "relational right" to carve out new spaces for creating, broadening and breaching communities³⁴, Ranciere's view of the political field as undergoing a process of depoliticisation through the means of consensus³⁵ puts persons caught in the trafficking framework in a space in which the opportunities for dissensus are narrowed through displacing excess subjects. The act of consent to conditions deemed violations of human rights, in this context, not only reflects structures of power and freedom, but in so doing also enables the subject to claim subjectivity as a political actor and highlight their denial of their rights as humans – so potentially constituting themselves as subjects of human rights norms.

With this analytical framework in mind, it follows to further explore how the legal frameworks function to variously construct the possibility of consent.

²⁸ B Golder, "Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights", *Social and Legal Studies*, vol. 20, no. 3, 2011, pp. 283 – 312, p.286.

²⁹ *ibid.*, p. 288.

³⁰ *ibid.*, p. 292.

³¹ *ibid.*, p. 290.

³² J Rancière, "Who is the Subject of the Rights of Man?", *South Atlantic Quarterly*, vol. 103, no. 2 – 3, 2004, pp. 297 – 310, p. 306.

³³ *ibid.*, p. 304.

³⁴ B Golder, *op. cit.*, p. 299.

³⁵ J Ranciere, *loc. cit.*

3 The Trafficking Framework

In this chapter, the legal framework on human trafficking will be analysed in order to uncover what vision of consent it embodies. This chapter further seeks to establish a critique of the trafficking framework in order to motivate considering the slavery framework as an alternative.

3.1 The Historical Development of the International Legal Regime on Trafficking

Much uncertainty surrounds the prevalence of human trafficking today³⁶ but popular citations assert the massive extent of the phenomenon and frequently claims that it is increasing.³⁷ Although human trafficking has been problematized dramatically at the start of the 21st century, the historical narrative illustrates its origins as a global concern since the mid-19th century. The 1904 *International Agreement for the Suppression of the White Slave Traffic*, which was later replaced by the 1933 *International Convention for the Suppression of the Traffic in Women of Full Age*, aimed to abolish the “white slave trade” and illustrates the historically emotive framing of trafficking as induced by moral panic.³⁸ These international conventions took issue with the emerging patterns of women’s migration, reflecting patriarchally and racially gendered divisions of labour.³⁹ In 1949 the United Nations (UN) *Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others* maintained the link with prostitution but arguably evidenced the start of greater emphasis

³⁶ Much data are considered unreliable, plagued by definitional uncertainty and methodological difficulties obvious to quantifying a process that is by its very nature clandestine.

³⁷ Some estimates place the number of persons globally trafficked across international borders at between 600, 000 – 800, 000 per annum [K Touzenis, “Trafficking in Human Beings: Human Rights and Transnational Criminal Law, Developments in Law and Practice”, *UNESCO Migration Studies* 3, 2010, retrieved 30 January 2012, <<http://unesdoc.unesco.org/images/0018/001883/188397e.pdf>>, p. 7.]; while the International Labour Office (ILO) estimates that at a minimum 2.3 million persons globally are held in forced labour, including sexual exploitation as a result of trafficking [International Labour Office, Geneva, *A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 2005, Report I(B), retrieved 27 January 2012, <<http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>>, p. 12.].

³⁸ B McSherry and S Kneebone, “Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights”, *The International Journal of Human Rights*, vol. 12, no. 1, 2008, pp. 67 – 87, p.69.

³⁹ K Kempadoo, “Introduction: From Moral Panic to Global Justice: Changing Perspectives on Trafficking”, In K Kempadoo et al (Eds.), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights*, 2005, Boulder: Paradigm Publishers, p. ix.

on human rights protection.⁴⁰ The moral panic declined somewhat in the inter-war years⁴¹ with the anti-trafficking movement regaining impetus in the 1970's. In 1979 the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)⁴² engendered the prostitution/trafficking nexus further through Article 6, which obliges states to suppress traffic in women and the exploitation of prostitution of women. It was in the 1990's that the issue of consent began to centre the debate on trafficking, bringing in notions of agency and distinctions between "forced" and "free" prostitution.⁴³ The anti-trafficking campaign peaked at the UN Conference of Women/ Non-governmental Organisation Forum in Beijing in 1995 in which the goal was formulated to draft a new law on trafficking.⁴⁴ In the years to follow, Mary Robinson, as High Commissioner for Human Rights⁴⁵, and Radhika Coomaraswamy, as the Special Rapporteur on Violence Against Women⁴⁶, would both advocate for a delinking of prostitution from trafficking to include other forms of exploitation.

In November 2000, the *UN Convention Against Transnational Organised Crime*⁴⁷ was adopted by the General Assembly, aiming to improve and promote cooperation amongst states in combatting transnational organised crime. The Convention was supplemented by three protocols: the Trafficking Protocol (or "Palermo Protocol"); the *Protocol Against Smuggling of Migrants by Land, Sea and Air*⁴⁸ (the "Smuggling Protocol"); and the *Protocol Against the Illicit Manufacturing and Trafficking in Firearms*.⁴⁹ At the time of writing, the Trafficking Protocol had 124 state

⁴⁰ B McSherry and S Kneebone, *op.cit.*, p.70.

⁴¹ K Kempadoo, "Introduction: From Moral Panic to Global Justice: Changing Perspectives on Trafficking", *op. cit.*, p. Xi.

⁴² UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

⁴³ B McSherry and S Kneebone, *op. cit.*, p. 70.

⁴⁴ A Murray, "Debt Bondage and Trafficking: Don't Believe the Hype", In K Kempadoo and J Doezema (Eds.), *Global Sex Workers: Rights, Resistance and Redefinition*, Routledge, New York and London, 1998, p. 51.

⁴⁵ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, 8 February 2000, A/AC.254/27, at B(2)(4).

⁴⁶ United Nations Economic and Social Council, Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68, 2000, para.13.

⁴⁷ UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25.

⁴⁸ UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

⁴⁹ UN General Assembly, *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*, 31 May 2001, A/RES/55/255.

parties, including the majority of “destination states”. Drafted in the context of a convention against organised crime, the Trafficking Protocol is not a human rights instrument. Its stated aim is to improve cooperation between origin, destination and transit states⁵⁰ so as to establish effective judicial, penal, border control and prevention policies.

Since the adoption of the Trafficking Protocol, a surge of activity has continued in efforts to criminalise trafficking, to create mechanisms for the protection of victims and to prevent trafficking on national, regional and international levels. To better understand the nature and aims of the Protocol, a brief overview of the obligations thereunder is provided.

3.2 Obligations Under the Protocol

The content of the Trafficking Protocol reflects its purpose in strengthening the prevention and prosecution of trafficking, and to a lesser extent, providing protection for victims. Article 5 obliges state parties to establish a criminal offence for trafficking. State parties are further obliged to strengthen border control under Article 11 and, within available means, to assure the security and control of travel documentation under Article 12. Finally, under Article 10, provision is made for cooperation between jurisdictions and states on these matters. It is clear in this sense that the Protocol is aimed primarily at strengthening border controls and establishing a coordinated criminal justice response to the problem as it is defined. Those provisions specifically aimed at the protection of victims of trafficking are, on the other hand, framed in weak obligations and at times in discretionary terms.⁵¹ The only section under the protective provisions that is framed in unambiguously obligatory terms concerns the duty for states to ensure systems for victims to participate fully in the criminal prosecution of traffickers.⁵² In addition, Article 8 standardises the preference for the repatriation of the victim, whether voluntary or otherwise. Article 8(1) clearly creates a duty on states of origin or nationality to facilitate and accept back victims “without undue or unreasonable delay.” While Article 8(2) requires that sending states have “due regard for the safety” of victims (and the status of legal proceedings) when repatriating them, there is no obligation not to return victims if their safety is compromised and repatriation need merely “preferably be voluntary.”

Thus, although Article 14 provides that the Protocol does not effect the rights, obligations and responsibilities of states and individuals under

⁵⁰ See paragraph 1 of the Preamble of the Trafficking Protocol, *loc. cit.*

⁵¹ For example, Article 6(1) requires “in appropriate cases and to the extent possible under its domestic law” states shall protect the privacy and identity of victims. Article 6(3) provides merely that states “shall *consider* implementing measures” (emphasis added) to provide for the physical, psychological and social recovery of victims. States are only obliged to “endeavour to provide for the physical safety of victims” in their territory under Article 6(5) and need merely assure that the legal system offers the *possibility* of obtaining compensation for damages suffered by victims under Article 6(6).

⁵² See Article 6(2) of the Trafficking Protocol, *loc. cit.*

international law (including human rights law, the Refugee Conventions and non-*refoulement* obligations), the provisions of the Protocol nevertheless offer very little in terms of protection for victims, in terms that rhetorically undermine obligations that states might have otherwise under international human rights law. The obligations under the Protocol strongly preference migration control and victim repatriation with little in obligations that actually seek to redress the “root causes” frequently cited in trafficking literature that go far beyond the confines of the relationships between traffickers and victims. The scope of application of these obligations is however dependent on the application of the definition of trafficking: an issue that requires further examination.

3.3 Defining Trafficking

The colloquial understanding of the term “trafficking” can be applied to any kind of commodity that is traded with illicit or pernicious implications.⁵³ The IOM refers to a phenomenon as “trafficking” where “a migrant illicitly engaged (recruited, kidnapped, sold, etc.) and/ or moved, either within national or across international borders such that “intermediaries (traffickers) during any part of this process obtain economic or other profit by means of deception, coercion and/or other forms of exploitation under conditions that violate the fundamental human rights of migrants.”⁵⁴ For those working in the field, definitions typically require border crossing and some type of coercion.⁵⁵ Arguably, however, the definition under the Trafficking Protocol is the standard international referent since its adoption in 2000.

Article 3(a) of the Protocol defines “trafficking in persons” as:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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 definition is typically analysed in terms of its three constituent elements that need cumulatively to be fulfilled to comprise trafficking: (1) the action in some form of movement of the person; (2) committed through coercive means; and (3) for the purpose of exploitation. From a plain reading of the ordinary meaning of the words in the definition⁵⁶, only one element in each

⁵³ A Murray, *op. cit.*, p52.

⁵⁴ International Organisation for Migration, S Haque, *Ambiguities and Confusions in the Migration-Trafficking Nexus: A Development Challenge*, retrieved 29 January 2012, <<http://www.iom.org.bd/publications/2.pdf>>, p.7.

⁵⁵ K Abramson, *op. cit.*, p.473.

⁵⁶ In accordance with customary international law on the interpretation of treaties, as

of the three criteria needs to be established. That is to say, that the five elements listed under the “movement” criterion (recruitment, transportation, transfer, harbouring or receipt) are in the alternative; and that any one of the listed “means” will suffice.

The third criterion of a “purpose of exploitation” is elaborated in the second sentence of Article 3(a) that introduces different forms of exploitation with the words “exploitation shall include, at a minimum...”. The use of “include” and “at a minimum” implies that the list of exploitative purposes is not exhaustive but merely examples of the lowest denominator of exploitation. It is clear from the phenomena listed that “exploitation” goes beyond the previously exclusive focus on prostitution, to include forced labour or services, slavery or practices similar to slavery or the removal of organs. Furthermore, the definition provides that the movement of the person through the coercive means must be done for the “*purpose of exploitation*” (emphasis added): an indication that the exploitation of the trafficked persons need not occur in fact but need merely form the intended purpose of their movement under coercive means. The “purpose of exploitation” can thus be argued to form a type of special intent imbedded in the crime.⁵⁷

It is unclear however, what the precise limits of the “purpose of exploitation” entail. As with the consent debate, the negotiations for the Trafficking Protocol were highly divided on the issue of prostitution: whether or not to include other forms of exploitation and whether or not prostitution is exploitative *per se*. For this reason, the repetition of the word “exploitation” in the description of non-exhaustive examples of exploitation (“the exploitation of the prostitution of others or other forms of sexual exploitation”) leaves room for states to address sex work variably on the national level.⁵⁸ The word “exploitation” itself is not defined in the Protocol leaving much interpretive flexibility.

3.3.1 The Role of Consent

From this plain reading of the definition, it is not entirely clear exactly what form of consent on behalf of the trafficked person is envisaged. Will a person who consents to their movement but not to their exploitation or *vice versa*, still legally be “trafficked”? At what point will a person’s consent be deemed involuntary and what counts as coercion?

reflected in Article 31(1) of the United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

⁵⁷ The UN Office on Drugs and Crime regards the purpose element as *dolus specialis*: UNODC, *Anti-Trafficking Practitioners’ Manual* (2009), Module 1 at 4, as referenced by AT Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2012, p.34.

⁵⁸ United Nations General Assembly, *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: Interpretive notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, 3 November 2000, A/55/383/Add.1, p. 12, para. 64.

Article 3(b) of the Trafficking Protocol provides that:

“The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”.

From Article 3(a) the coercive means appear to apply to the movement of the person, while Article 3(b) explicitly extends the means element to the exploitation of the person. While Article 3(b) is clear that coercive means render the consent of the person to their exploitation invalid, a plain reading of Article 3(a) does not explicitly imply that the consent of a person to their movement will be rendered *invalid* through coercive means, although this is inferred by the attachment of the means to the *actus reus*. It is in this sense that a plain reading of the definition implies that in order to be considered trafficked, a victim does not consent to their movement; either in the sense that the person does not agree to the movement or that such agreement is involuntary on the basis of coercion. Due to the fact that the exploitative purpose element is not the *actus reus* of the crime, consent to the purpose of the movement should not inhibit a finding of trafficking under the definition but Article 3(b) nevertheless stipulates, arguably, that agreement to the exploitation under the listed coercive means is non-consensual. The absence of consent (at least in respect to the movement) is thus a requirement for the finding of trafficking but the boundaries of involuntariness that renders agreement non-consensual is left unclear.

The listed coercive means arguably set the boundaries for voluntariness. Clearly physical force, abduction and threats of force remove voluntariness from any possible agreement, if there is any. Fraud and deception may further inhibit both voluntariness and knowledge requirements for valid consent, although what amounts to “deception” is more open-ended. The giving or receiving of payments or benefits applies to persons having control over the VoT, is arguably for cases concerning person who lack the agency to consent (minors perhaps) or who have transferred their consenting capacity to another on the basis of acquiescence or otherwise. If we extend this coercive means to the context of labour exploitation, or even ordinary remunerated labour, “giving or receiving payments or benefits” to achieve consent may however be unclear: the use of bonus payments in legitimate employment to encourage consent⁵⁹ might very well fall within this element.

The most open-ended coercive means are found in “other forms of coercion” and the “abuse of power or a position of vulnerability.” The reference to “abuse of power” was discussed in the *travaux préparatoires*⁶⁰ as including the abuse of authority or power that male members of a family

⁵⁹ AT Gallagher, *The International Law of Human Trafficking*, *op. cit.*, p. 32 – 33.

⁶⁰ Which may be used as a supplementary means of interpretation according to customary international law on the interpretation of treaties, as reflected in Article 32 of the Vienna Convention, *ibid*, *supra* note 49.

may have over female members or that parents may have over children.⁶¹ Clearly, these elements leave a large space for discretion as to what extent social, moral and economic pressures may be seen to bear on the voluntariness of a person who agrees to the movement. In the *travaux préparatoires* of the Trafficking Protocol, it was further explained that the reference to the “abuse of a position of vulnerability” refers to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.⁶² Interpreting such an understanding will certainly require a political perspective as to at what point one truly lacks an “acceptable alternative” and which alternatives are acceptable. A migrant undertaking exploitative work or dangerous travel might do so willingly in the face of destitution or harm in the place of origin: does the definition accommodate this agreement as non-consensual in the absence of an abstract unacceptable alternative or would the choice by such a migrant surely be a rational exercise of their own best interests? Gallagher finds support in supplementary means of interpretation to argue that this provision is inclusive of financial, psychological, emotional and familial vulnerabilities.⁶³

In taking into account the very loaded debate that preceded the Trafficking Protocol on the issue of consent, it can be argued that the definition in the Protocol somewhat reflects an uncertain compromise. While it clearly includes some forms of “consent-nullifying behaviour”⁶⁴, it nevertheless leaves ambiguous the position taken within the debate on voluntariness⁶⁵. It has been argued, however, that the definition reinforces the view that trafficking is *per se* a forced act⁶⁶ at the implication that where a person willingly cooperates in their movement, this will not cast them as a victim of trafficking, even if the person receiving, or transporting them (etc.) follows to exploit them without, or without, the “victim’s” consent.

Anne Gallagher claims that coercion is central to the idea of trafficking and the basis of the legal and conceptual distinction between trafficking and smuggling.⁶⁷ It is in this sense that the Trafficking Protocol’s comparison with its sister protocol, the Smuggling Protocol, is somewhat revealing on the question of consent. If indeed a person who consents (without coercion or force) to the migratory component of the *actus reus* of “trafficking” is *not* a victim of trafficking, the definition of “smuggling” under Article 3(a) may apply as:

⁶¹ AT Gallagher, *The International Law of Human Trafficking*, *op. cit.*, 57, p. 32.

⁶² United Nations General Assembly, *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*, *op. cit.*, p. 12, para. 63.

⁶³ AT Gallagher, *The International Law of Human Trafficking*, *op. cit.*, p. 32 – 33.

⁶⁴ B McSherry and S Kneebone, *op. cit.*, p.72.

⁶⁵ K Abramson, *op. cit.*, p. 474.

⁶⁶ *ibid.*, p. 477.

⁶⁷ AT Gallagher, *The International Law of Human Trafficking*, *op. cit.*, p. 31.

“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”

In view of the Protocols together, both a “smuggled” person and a “trafficked” person might unlawfully cross a border (albeit that the Trafficking Protocol makes neither the crossing of a border or its unlawfulness a requirement) but in the case of trafficking, the person is forced or coerced to do so and subject to the trafficker’s purpose of exploitation, whereas neither of these two elements are required in smuggling. In the former case, the trafficked person is a “victim” of a crime; in the latter, the smuggled person, while although not criminally liable under the Protocol⁶⁸, is possibly criminalised under domestic immigration laws and subject to deportation. The position on the consent of the trafficked or smuggled person is further somewhat revealed in the choice of terminology: whereas the Trafficking Protocol consistently refers to “victims”, the Smuggling Protocol makes no such reference, only to that of “objects” or “migrants.” The comparison between the two Protocols thus reveals a very different view on the conception of the victim’s/ object’s consent and agency⁶⁹ while at the same time, the Smuggling Protocol can be said to preserve some element of passivity in the construction of the “smuggled person” who is merely an “object” of the process.

What is interesting in this respect is not only the requirement of an absence of consent in the trafficking framework but also how consent in itself is packaged in application in the extent to which jurisdictions may conceive the voluntariness requirement to include indirect coercive pressures (or “techniques of self”). Considering the extent of the division on the issue of consent in the negotiations, it may seem expected that the definition leaves some room for interpretation and domestic specification here. These sorts of questions will be touched on in the critique of the trafficking discourse below, but are obviously largely jurisdictionally-specific, empirical questions that can only be determined through extensive comparative case analysis – a task unfortunately beyond the scope of the present paper.

3.4 Criticism of the Trafficking Discourse

A brief examination, of what is frequently discussed as the “discourse” of trafficking in persons, is explored here with the purpose of alluding to the ways in which the dominant legal constructions of trafficking, as reflected in language, serve to politicise and institutionalise the framing of the problem and the selection of legal norms to apply to a given situation. One way of understanding discourse analysis is as a research method that focuses on analysing statements, speech and language to uncover the ways in which

⁶⁸ Article 5 of the Smuggling Protocol excludes criminal liability for migrants who are the “object” of the prohibited conduct under the Protocol.

⁶⁹ M Ditmore, “Trafficking in Lives: How Ideology Shapes Policy”, In K Kempadoo *et al* (Eds.), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights*, Paradigm Publishers, Boulder, 2005, p. 109.

they form subjects, objects, concepts and strategies.⁷⁰ The purpose of this section is primarily to frame a critique to motivate considering the slavery framework as an alternative. As it was illustrated before, there remains some room for ambiguity (thus flexibility) in interpreting the functioning of consent in the definition, in the least with respect to how voluntariness is constructed. Understanding the discourse of the trafficking framework thus allows insight into how policy makers, care providers, non-governmental organisations and jurists are encouraged to view the subjectivity of VoT's, and so in turn subjectivise them.

To start, it is clear from the full title of the Trafficking Protocol that the historical link to trafficking being a problem of “women and children” is perpetuated despite the fact that the definition of trafficking itself is gender neutral. The protective approach embodied in this reference arguably justifies a view of trafficked persons as vulnerable victims constructed as objects of care.⁷¹ Furthermore, while the definition includes forced labour, slavery, servitude and the removal of organs, the repetition of prostitution in the purposes of exploitation, in combination with the gendered emphasis, further perpetuates the historical link to trafficking problematized in overtones of sexual morality and as one centrally concerned with the sex trade. This is reflected in the dominance of “sex trafficking” in the focus of popular media, national prosecutions and much of the research and advocacy work on trafficking, despite the fact that International Labour Organisation (ILO) findings indicate that less than half of all trafficked persons globally are part of the sex trade.⁷² While it is widely acknowledged in some sectors that the association of trafficking with sex work is difficult to overcome,⁷³ it can be argued that the association is one indeed imbedded in the law and the language of the law. In this regard, Jo Doezema has argued that the contemporary trafficking discourse is a manifestation of the historical “myth of white slavery.”⁷⁴

This performative myth of white slavery arguably constructs an ideological narrative through a discourse of victimization that encompasses all trafficking as the denial of the possibility to consent validly.⁷⁵ Hua and Nigorizawa have shown, for example, how in the context of the USA, courts, government and law enforcement officials adopt the dominant

⁷⁰ J Motion and S Leitch, “On Foucault: A Toolbox for Public Relations”, In Ø. Ihlen *et al* (Eds.), *Public Relations and Social Theory: Key Figures and Concepts*, Routledge, New York, 2009, p. 86.

⁷¹ G Noll, “The Insecurity of Trafficking in International Law”, *Mondialisation, migration et droits de l'homme: le droit international en question*. Ed. V. Chetail, M. Carlos-Tschopp. Bruylant, 2007. 343-362, p.345.

⁷² International Labour Organisation, *ILO Action Against Trafficking in Human Beings*, 2008, retrieved 15 May 2012, <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090356.pdf>, p. 3.

⁷³ See, for example, T Bastia, “Stolen Lives or Lack of Rights? Gender, Migration and Trafficking”, *Labour, Capital and Society*, vol. 39, no. 2, 2006, pp. 21 – 47, p.22.

⁷⁴ J Doezema, “Now you see her, now you don't: Sex workers at the UN Trafficking Protocol Negotiation”, *Social and Legal Studies*, vol. 14, 2005, pp. 61 – 89, p.64.

⁷⁵ *ibid.*, p. 74.

narrative of victimization to construct a stereotype of the helpless victim that links femininity to dependency, and racial “otherness” to cultural deviancy.⁷⁶ In addition, it can be argued that through, for example, the sustained link to the trafficking of children in the very title of the Protocol, these narratives of victimhood and dependency envision persons either lacking the agency to consent at all or whose decisions are rendered non-consensual through the force of indirect coercion to generate what is often cited as a “false consciousness” that informs agreement.

The fact that the title of the Trafficking Protocol is gendered, while the Smuggling Protocol is not explicitly so, arguably reflects and perpetuates the debate on consent⁷⁷ in that entrepreneurial male migrants are cast as smuggled on the one hand, as opposed to passive female migrants being deemed to be trafficked. This aspect of the discourse may imply that the casting as “victim” fails to recognise the complexity of the experiences of persons who leave their homes and families to pursue better opportunities elsewhere through economic migration.⁷⁸ Through the discourse on trafficking, it can thus be argued that a vision of consent is created which deems the person trafficked as either not consenting in fact, or lacking the agency to render meaningful consent. In application to the theoretical framework previously provided, it can be said that while the definition itself leaves the question on consent somewhat open, the discourse described here seemingly frames the subject from the perspective of the “protectionist camp.”⁷⁹ It might thus be argued that while such a perspective does in fact leave room for the possibility of recognising the harmful aspects of the social constructions that influence and undermine instances of agreement, the rather absolute disbandment of the consenting *capacity* of the trafficked person and involuntariness of their decisions cast a troubling theoretical forecast as to the possibility for the construction of the trafficked persons as not simply victims but also subjects of human rights.

It is interesting, in this sense, to look at discursive and policy consequences of this framing of consent. Arguably, the discourse entrenches the view that the exploitation of women migrant workers in particular is viewed through the prism of the trafficking framework that in turn reflects a particular role of institutions, structures and processes necessary to combat the problem⁸⁰ that may not be beneficial to the rights and wellbeing of trafficked persons. The popular consensus on the need to fight trafficking thus mobilises particular strategies that define trafficking as first and foremost a problem of

⁷⁶ J Hua and H Nigorizawa, “US Sex Trafficking, Women’s Human Rights and the Politics of Representation”, *International Feminist Journal of Politics*, vol. 12, no. 3 – 4, 2010, pp. 401 – 423, p.402.

⁷⁷ *ibid.*, p. 479.

⁷⁸ M Ditmore, *op. cit.*, p.110.

⁷⁹ In contrast, one might argue that the Smuggling Protocol casts its subjects from the view adopted within the “autonomy camp”.

⁸⁰ H Askola, *op. cit.*, p. 164 - 165.

organised crime and illegal migration⁸¹, favouring repatriation and minimal rights guarantees in the destination state. Furthermore, while the inequality of power between trafficked persons and their traffickers is strategically emphasised, the inequality between the trafficked person and the state⁸² (and arguably the harmful practices of state policies on the consent-reducing opportunities of trafficked persons) is hidden and depoliticised. This creation of a “humane consensus” on the evils of trafficking and sexual exploitation depoliticises the trafficking discourse while concealing a range of agendas imbedded in the politics of sex, labour and citizenship.⁸³

It is emphasised here that while it is argued that the discourse entrenches an anti-migration perspective⁸⁴, the equation of illegal migration and trafficking is not supported *per se* by the Trafficking Protocol which does not require that the trafficked person’s entry into a state or territory is illegal as does the Smuggling Protocol⁸⁵ and the movement element may indeed occur within national borders. Nevertheless, resting on the hinges of the role of consent in the definition, a majority of migrant workers may fail to fulfil the three requirements in the Trafficking Protocol but nevertheless experience different points on the continuum of exploitation.⁸⁶ In this way the trafficking framework constructs a hierarchy of victims that functions to exclude from protection a broad spectrum of migrants facing exploitative recruitment and or working conditions. This is not to say the VoT’s necessarily receive more favourable treatment or outcomes within the trafficking framework, however, as, for example, the preference for repatriation will typically compel “rescued” victims to return to the same conditions that prompted their initial move⁸⁷ into new spaces of exploitation abroad. In many cases, migrants may not wish to receive the protections offered by the state as this may result in loss of employment and/or residence.⁸⁸

The discursive consequences of this view of consent can be argued to further imply human rights externalities for refugees in the asylum process. Firstly, the policies and obligations favoured by the Trafficking and Smuggling Protocols may function to prevent access to protection for refugees seeking asylum through the compulsion of generic migration control regimes in origin, transit and destination states.⁸⁹ While in theory,

⁸¹ D Coglan and W Gillian, “Defining Trafficking/ Denying Justice? Forced Labour in Ireland and the Consequences of Trafficking Discourse”, *Journal of Ethnic and Migration Studies*, vol. 37, no. 9, 2011, pp. 1513 – 1526, p.1515.

⁸² G Noll, *op. cit.*, p. 344.

⁸³ B Anderson and R Andrijasevic, “Sex, slaves and citizens: the politics of anti-trafficking”, *Soundings*, vol. 40, 2008, pp. 135–145, p.138.

⁸⁴ J Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking*, 2011, Philadelphia: University of Pennsylvania Press, p.193.

⁸⁵ B Anderson and R Andrijasevic, *op. cit.*, p.138.

⁸⁶ D Coglan and W Gillian, *op. cit.*, p. 1514.

⁸⁷ K Kempadoo, “Introduction: From Moral Panic to Global Justice: Changing Perspectives on Trafficking”, *op. cit.*, p.xvii.

⁸⁸ T Bastia, *op. cit.*, p.40.

⁸⁹ JC Hathaway, “The Human Rights Quagmire of “Human Trafficking””, *Virginia Journal of International Law*, vol. 49, no. 1, 2008, pp. 1 – 59, p. 19, p. 13.

Article 31 of the Refugee Convention⁹⁰ embodies that governments are not to penalise refugees for illegal entry or presence in a state (on condition that they present themselves to authorities and account for their presence), the smuggling and trafficking frameworks criminalise a process of unsanctioned entry which is unfortunately essential to many refugees to claim asylum.⁹¹ Furthermore, if a VoT is to make an application for asylum subsequent to their “rescue”, it can be questioned the extent to which authorities will construct as credible their account of having a “well-founded fear of persecution”⁹² in light of the extent to which the paternalistic discourse empowers a view of VoT’s as bearing a false consciousness and unable to understand their own best interests.

Gallagher, however, argues that the trafficking definition is not as narrow as some of its critics suggest: that in practical application, the exploitation and means as separate elements do not operate to limit the scope and protective impact of the Protocol.⁹³ Gallagher goes so far as to claim that it is difficult to identify a “contemporary form of slavery” that does not fall within the “generous parameters” of the Trafficking Protocol as the definition encompasses the roles of recruiters, brokers, transporters and exploiters.⁹⁴ While some of these claims lack empirical justification, it is notable that her argument largely ignores the role of consent. It also neglects the constraining function of the “transnational” impetus of the Protocol and the migration-centred discourse implied by the Convention’s obligations. While there is some agreement to be found in the underlying claim that the *application* of the definition is determinative, not merely its abstract formulation, it is argued here that the issue of consent is a powerful exclusionary device. While Gallagher points out the wide ambit of the trafficking definition (in its application to all persons involved in the process of trafficking), this relates little as a defence of the definition, as even a crime based purely on the exploitation element, could surely include other actors in the facilitation of the process through notions of secondary liability available in criminal law such as aiding and abetting, conspiracy or even accomplice liability as a primary mode.

While many share a critical perspective on the trafficking framework (including those who simply acknowledge the impracticability of prosecution under the definition), a number of different alternatives have been advocated in redress. While some have argued for abandoning the trafficking framework in entirety (at times argued to be replaced by a labour rights migration framework), others have campaigned for greater emphasis on human rights, non-coercive migration and gendered labour practices

⁹⁰ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

⁹¹ As argued by JC Hathaway, *op. cit.*, p.37.

⁹² In terms of the definition of “refugee” in Article 1(A)(2) of the Refugee Convention, *loc. cit.*

⁹³ AT Gallagher, AT, “Human Rights and Human Trafficking: Quagmire or Firm Ground? A response to James Hathaway”, *Virginia Journal of International Law*, vol. 49, no. 4, 2009, pp. 769 – 848, p. 814.

⁹⁴ *ibid.*

within the trafficking framework⁹⁵. One possible alternative is to shift focus from movement component of the definition to that of the element of exploitation, for example, through the definition of slavery. This view has been shared in 2004 by the European Union (EU) Expert Group on Trafficking in Human Beings that understood exploitation rather than movement and coercion as the hallmark or the problematique of trafficking.⁹⁶ It is in this sense that the “slavery framework” will be analysed to follow as an alternative.

James Hathaway argues that the trafficking framework has promoted a very partial approach to modern slavery, wherein no more than 3% of modern-day “slaves” meet the definition of a trafficked person under the Protocol, allowing governments to avoid endemic slavery that remains convenient in globalised investment and trade.⁹⁷ The examination of the slavery framework to follow is thus framed within this debate that problematizes the human rights externalities of the Trafficking Protocol, particularly from the perspective of a critical affirmation of rights, in which the Protocol is argued here to reduce the political and human rights subjectivity of VoT’s. Some advocates preferring a focus on the slavery framework have been criticised for taking an expansionist interpretation of the definition of slavery. It is in this regard that a thorough analysis of the slavery framework and the legal complexities of the definition, in particular in relation to consent, becomes an interesting contribution to the debate.

⁹⁵ H Askola, *op. cit.*, p.168.

⁹⁶ European Commission, *Report of the Experts Group on Trafficking in Human Beings*, 2004, retrieved 15 May 2012, < <http://ec.europa.eu/anti-trafficking/section?sectionId=1020ecb4-3a87-4849-b07d-f3c086c19f88§ionType=WEIGHTED&breadCrumbReset=true>>, P. 52.

⁹⁷ JC Hathaway, *op. cit.*, p. 4–5.

4 The Slavery Framework

4.1 Locating and Defining Slavery in International Law

“Slavery” in its everyday use may refer to a complex social system involving the control, and often the legal ownership, of human persons and their labour by another.⁹⁸ The colloquial understanding may include in the institution a variety of relationships and systems in which exploitation and control over another occurs as the resounding common point. Characteristics of the common understanding of slavery often include violence, loss of freedom of movement and the transfer of persons to others for money or goods without their informed consent.⁹⁹ These lay and historical understandings of the concept package a broadly recognised moral repugnancy for what is understood as an obvious form of injustice.

While this shared mental image of slavery is rather obvious to some, defining slavery in law is particularly complicated. Perhaps the historical account of slavery doesn’t particularly challenge the lay understanding, embodying a narrative that entails the forcible capture of slaves by slave traders and their transport and sale to slave owners who exploited their bodies and labour, enforced through violence and constraint. In the contemporary context, where this type of institution in which a person may legally own another, no longer exists, the interaction between the everyday understandings of slavery and the definition in law is more challenging. How then has slavery been defined under international law?

The 1926 Slavery Convention was the first international legal definition. The Slavery Convention sought to give practical effect and firm arrangements to the will of certain members of the League of Nations to prevent and suppress the slave trade and slavery. Under Article 1(1) of the Convention, “slavery” is defined as the

“status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

Slavery is also firmly prohibited under international human rights law. Article 4 of the *Universal Declaration of Human Rights* (UDHR) states that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”¹⁰⁰ The *International Covenant on*

⁹⁸ H Van Beck, “Slavery”, In JM Levne and MA Hogg (Eds.), *Encyclopedia of Group Processes & Intergroup Relations*, SAGE, Thousand Oaks, 2009, pp. 757-760, p. 757.

⁹⁹ J Bindman, “An International Perspective on Slavery in the Sex Industry”, In K Kempadoo and J Doezema (Eds.), *Global Sex Workers: Rights, Resistance and Redefinition*, Routledge, New York and London, 1998, p.65.

¹⁰⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

Civil and Political Rights (ICCPR)¹⁰¹ in Article 8(1) repeats the prohibition in the UDHR. The prohibition is further founded in regional human rights instruments.¹⁰²

Slavery and the slave trade, in all their forms, are also prohibited under customary international humanitarian law in both international and non-international armed conflicts.¹⁰³ While the Hague and Geneva Conventions and Additional Protocol I¹⁰⁴ do not explicitly prohibit slavery, the prohibition is inferred from *inter alia*, various rules under the Geneva Conventions relating to labour of prisoners of war and civilians and the prohibition in the Hague regulations on forced allegiance of persons in occupied territories.¹⁰⁵ In addition, the prohibition is reflected in Article 4(2)(f) of Additional Protocol II¹⁰⁶ as a fundamental guarantee for civilians and persons *hors de combat*.

The prohibition on slavery can further be found in International Criminal Law. Under the *Rome Statute of the International Criminal Court* (ICC)¹⁰⁷, enslavement is stipulated as a crime against humanity under Article 7(1)(c). Article 7(2)(c) defines “enslavement” as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”. “Sexual slavery” is also listed as a crime against humanity under Article 7(1)(g) of the Statute and as a war crime under Article 8(2)(b)(xxii) and 8(2)(e)(vi). It is noted here that the definitions of “enslavement” and “sexual slavery” under the ICC Statute and under the ICC Elements of Crimes¹⁰⁸ conflict to a certain extent, in particular in reference to respective footnotes in the Elements of Crimes that purport to

¹⁰¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁰² Article 4 of the *European Convention on Human Rights* (ECHR) prohibits slavery and forced labour; Article 6 of the *American Convention on Human Rights* (ACHR) (Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969) provides that “no one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.” The *African Convention on Human and Peoples' Rights* (ACHPR) (Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)) mentions slavery and the slave trade as a particular form of exploitation and degradation that is prohibited under the right of every individual to have respect of the dignity of a human being and to “recognition of his legal status”.

¹⁰³ For example, see Rule 94, J Henckaerts, and L Doswald-Beck, *ICRC Customary International Humanitarian Law: Volume 1: Rules*, Cambridge University Press, Cambridge, 2005, p. 327.

¹⁰⁴ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

¹⁰⁵ *ibid.*

¹⁰⁶ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

¹⁰⁷ UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9.

¹⁰⁸ *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), p.6 and p. 8.

expand the statutory definitions considerably.¹⁰⁹ It is nevertheless argued that in accordance with rules of interpretation in the ICC Statute¹¹⁰, with support in doctrine¹¹¹ and case law¹¹² that the definitions as given in the Statute, mirroring that of the Slavery Convention¹¹³, should apply in its limited version. In this manner, the definition of “enslavement”, while arguably broader than “slavery” where established in other instruments, under the ICC Statute it is argued to reflect the definition of slavery in the Slavery Convention.

The prohibition on slavery is further held to be a norm of international customary law: the efforts of states to eradicate slavery over a prolonged period of time and the multiple international codifications of the prohibition in specific treaties, in human rights law, criminal law and humanitarian law, are strong indications of the requisite practice and *opinio juris*. The prohibition is furthermore argued to be an obligation *erga omnes*. According to the decision of the International Court of Justice (ICJ) in the *Barcelona Traction* case, the “protection from slavery” was listed as an example of an obligation *erga omnes*¹¹⁴: as a right in which all States have a legal interest to protect.¹¹⁵

From these multiple legal prohibitions, it is clear that slavery is a concern that has historical prominence in many areas of international law. Although the 1926 Slavery Convention definition is considered to be the standard international legal meaning of slavery, the definition is not uncontested. In particular, the scope of the definition is debated as some advocates seek to include “lesser servitudes” to expand the remit of slavery.¹¹⁶ It is also

¹⁰⁹ For the reasoning on the inclusion of the footnotes in the *travaux préparatoires*, see WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2010, Oxford: Oxford University Press, p.160; and Hall, CK, “(c) Enslavement”, In O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2008, München: Verlag C.H. Beck oHG, p. 245.

¹¹⁰ See Article 9(1), Article 9(3) and Article 21(1)(a), Read together the implication is that the Elements of Crimes are a primary source of law but subordinate to the Statute. See too, in analogy with the Rules of Procedure and Evidence in terms of Article 51(5) of the Statute.

¹¹¹ See, for example: M Boot, revised by CK Hall, “(g) Rape... or any other form of sexual violence of comparable gravity”, In O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2008, München: Verlag C.H. Beck oHG, p. 212; and Allain, J, “The Parameters of ‘Enslavement’ in International Criminal Law”, *International Symposium*, 25 – 26 April 2009, Working Paper, retrieved 22 February 2012, <http://lawvideolibrary.com/hr/index.htm>, p.2.

¹¹² In *The Prosecutor v Omar Hassan Ahmad Al Bashir* [(ICC-02/05-01/09), Decision on the Prosecution Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 128] it was found that the Elements of Crimes “must be applied unless the competent Chamber finds an irreconcilable contradiction” with the Statute, in which case, the Statute should prevail.

¹¹³ With sexual slavery as merely a specific form of slavery.

¹¹⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*; *Preliminary Objections*, International Court of Justice (ICJ), 24 July 1964, para. 34.

¹¹⁵ *ibid.*, para. 33.

¹¹⁶ J Allain, “International Criminal Law and Anti-Slavery Today”, Panel: Going Global: New Perspectives on Slavery Studies, Symposium: Closing the Slave Trade, 29 – 31 May 2008, <http://www.yale.edu/glc/queens/abstracts/allain.pdf>, viewed: 7 February 2012, p.1.

contested to what extent the definition includes both *de jure* and *de facto* slavery: that is to say, whether or not the Slavery Convention definition includes *only* those circumstances where the institution of ownership over persons exists under law.

In closer examination, each of the elements of the definition find related contestation to the normative structure prescribed to the notion of “ownership”: what *powers* attach to what *rights* in a particular construction of ownership; if *any or all* of these powers is required, what is the threshold of sufficiency? While the ubiquity of ownership in law and social institutions tempts one to think that uncovering what ownership might be is an easy task, this is certainly not the case. As under neither common law nor civil law systems, do the notions of ownership or *dominium* respectively enlighten much substantive content, theorists continue to dispute the ontology of ownership. In order to frame a discussion on these issues to follow, it serves first, however, to clarify the contestation on some key concepts employed in the Slavery Convention definition.

4.2 Key Concepts in the Definition

4.2.1 *De Jure* and *De Facto* Slavery

As previously mentioned, some confusion exists as to whether the prohibition on slavery exclusively refers to the legal institution of slavery (slavery *de jure*) or whether it extends to include a prohibition on a condition of slavery in fact (slavery *de facto*). A close reading of the definition in Article 1 of the Slavery Convention alerts a reader to the reference to slavery including the “status or condition” of a person. “Condition” may be said to include *de facto* occurrences of slavery where formal legal recognition of the *status* of a slave is not permitted.

Furthermore, an examination of the context¹¹⁷ of the Convention in the state obligations elaborated in Article 2(b) supports this reasoning. Article 2(b) specifies the undertaking to “bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.” While eliminating *de jure* slavery is surely a legislative act, the notion of *progressive* abolition of slavery, surely reflects the intention of the signatories to intervene in dismantling social institutions of *de facto* slavery over time. Reference to the *travaux préparatoires* offers tentative confirmation of this reading.¹¹⁸

¹¹⁷ In accordance with customary international law on the interpretation of treaties as reflected in Article 31(2) of the Vienna Convention on the Law of Treaties (*op. cit.*) the context may include the text of the treaty.

¹¹⁸ Initial proposals defined slavery only as a “status”: the words “or condition” were introduced in the final version by Viscount Lord Cecil of Chelwood. That the latter addition was sustained, arguably supports a reading of the distinction between status and condition. Viscount Cecil stated in his 1926 report to the Assembly that the Sixth Drafting Committee interpreted Article 2 as embodying the aim to abolish slavery from written legislation and

Thus in understanding the purpose of the Convention, in the context where the major signatories had already abolished the legal institution of slavery in their domestic jurisdictions, the above reading of the definition must affirm that both *de facto* and *de jure* slavery were intended to be included, lest the simple outlawing of legal ownership of human beings be read as the Convention's only aim.

4.2.2 Powers of Rights

The Slavery Convention refers to the perpetrator of slavery as exercising the *powers* attaching to the *right* of ownership over another. An ordinary understanding of “powers” can be said to refer to the “capability of acting or producing an effect.”¹¹⁹ However, legal analyses of property rights frequently refer to Wesley Hohfeld's categorisation of jural relations that distinguishes between rights, privileges, powers and immunities. “Power”, in the Hohfeldian sense, refers to the ability to change the legal relation of another, who correlatively is under a liability. In the context of ownership of a tangible such as a car, for example, a power of ownership might entail the ability to transfer title of the car to another. It is not a “right”, as there is no correlative duty, but merely a power as the capacity to alter the legal relations of another.

It is understandable that adopting a Hohfeldian reading of the definition of slavery would function to limit the definition only to those manifestations of ownership one deemed to be “powers” in the narrow sense. There remains significant room to argue against such a narrow reading of power within the definition (as will be explored to follow) suffice to say here that these strict distinctions, while remaining analytically useful, are seldom practiced in the language of either municipal judicial reasoning and legislation or in international treaty law.¹²⁰ That Hohfeld himself worked from the premise that the terms have no agreed upon meaning¹²¹ in the legal context, encourages a reading of powers in the definition with at least a measure of scepticism.

from custom that admits the “maintenance by a private individual of individual rights over another person of the same nature as the rights which an individual can have over things.” (Allain, J, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff Publishers, Leiden, 2008, p. 53 and 59).

¹¹⁹ *Miriam Webster's Dictionary of Law*, Miriam Webster Incorporated, Springfield, 1996, p. 370.

¹²⁰ MK Addo, “Does Hohfeld Still Matter? (Wesley N. Hohfeld's Philosophy of Rights)”, *Bracton Law Journal*, 1997, vol. 29, pp. 7 – 12, p. 9 – 10.

¹²¹ C Nyquist, “Teaching Wesley Hohfeld's Theory of Legal Relations”, *Journal of Legal Education*, 2002, vol. 52, no. 1 – 2, pp. 238 – 257, p. 246.

4.2.3 The Inclusion of “Lessor Forms of Servitude”

While Article 1 of the Convention can be considered to be wide enough to include *de facto* slavery, much disagreement persists as to whether lessor servitudes, forced labour or servile status is or ought to be included under the definition of slavery. Those arguing to expand the scope of the definition to include “lessor servitudes” often refer to the latter phrase in Article 2(b) referring to the undertaking to abolish slavery “in all its forms.”

It is argued here that there is evidence within the wording of the provision itself, the context of the 1926 Convention,¹²² its *travaux préparatoires*¹²³, the subsequent 1956 Supplementary Convention¹²⁴, as well as in the prohibition on slavery under human rights law¹²⁵, support the contention that slavery is distinct from servitude in particular and “lessor” forms of exploitation more broadly, to the extent that those practices fail to fulfil the threshold of the “exercise of the powers attached to the right of ownership” over a person. Where the definition is met, however, a practice should logically be included under the legal banner of “slavery”, irrespective of lay terminology. This, however, does little to illuminate what “the exercise of the powers attached to the right of ownership” truly entails – the scope of which will really be determinative of the extent to which a particular exploitation will be covered by “slavery.” These questions will be developed further to follow.

¹²² To not read as redundant the reference to “slavery” in Article 2(b), the definition in Article 1, or the words “in all forms”, Article 2(b) must refer to all forms of *slavery* and not to, for example, “servitude in all forms, including slavery”.

¹²³ The *travaux préparatoires* indicate Article 2 was not intended to expand the definition beyond practices that can be demonstrated to incur the exercise of powers attached to the right of ownership. (J Allain, *The Slavery Conventions*, *op. cit.*, p. 74 – 79).

¹²⁴ The 1956 United Nations *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* as a subsequent agreement to the 1926 Convention [United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Final Act and Supplementary Convention, 4 September 1956, UN Doc E/CONF.24/23], may be relevant to interpret the 1926 Convention. The 1956 Convention maintains the 1926 definition of slavery and expands on other concepts, including the addition of “a person of servile status” in Article 7(b). That the 1926 Convention’s definition of slavery was maintained, indicates a conceptual distinction between slavery and other forms of servitude elaborated in the 1956 Convention.

¹²⁵ International human rights law supports a distinction between slavery and servitude. In both the UDHR and the ICCPR, slavery and the slave trade are prohibited with the further stipulation that “nobody shall be held in servitude”. Servitude is considered in the human rights context to be separate from, broader, and less severe than slavery; embodying “all conceivable forms of dominance and degradation of human beings by human beings.” In the *travaux préparatoires* of the ICCPR, it was clear that slavery and servitude were conceived as distinct concepts. (Bossuyt, MJ, *Guide to the “Travaux Préparatoires” to the International Covenant on Civil and Political Rights*, 1987, Dordrecht: Martinus Nijhoff Publishers, p. 54, in reference to Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952).)

4.3 Contrasting Constructions of Ownership

Three different readings of the notion of ownership in the slavery definition will be explored here in order to uncover what notion of consent the definition implies. While preference is made for a definition based on the understanding of ownership of JW Harris, the analysis will illustrate that despite differing constructions of ownership, similar outcomes result with respect to consent.

4.3.1 Comparing Penner and Hickey's Analysis

Robin Hickey and James Penner offer different accounts of ownership through contrasting interpretive methods in reading the slavery definition. Arguably, both Hickey and Penner read beyond the scope of Article 1.

Hickey commences his analysis by justifying his interpretive method through the historical context in which the principal agitator of the 1926 Convention, Lord Cecil, was educated in law. He seeks to justify his reading beyond the text of the Convention as permissible to the extent to which it explains the substantive content of the definition and is consistent with the general aim of the Convention.¹²⁶ Hickey characterises “ownership” through looking at Tony Honoré’s descriptive analysis of the liberal and Common Law concept of full ownership through the 11 “incidents” of ownership. Honoré’s incidents of ownership include those observable phenomena that indicate an ownership relation between the person exercising the incident and the thing owned.¹²⁷ Honoré’s described the incidents of ownership as:

1. The right to possess;
2. The right to use;
3. The right to manage;
4. The right to income;
5. The right to capital;
6. The right to security;
7. Transmissability;
8. Absence of term;
9. The duty to prevent harm;
10. Liability to execution; and
11. Residuary character.¹²⁸

Hickey examines each of these incidents and seeks to make analogies to everyday, lay understandings of *de facto* slavery. In so doing, he centralises the notion of “control tantamount to possession” as the distinguishing mark

¹²⁶ R Hickey, ‘Seeking to Understand the Definition of Slavery’, forthcoming in: J Allain (ed.), *The Legal Understanding of Slavery: The Historical to the Contemporary*, Oxford University Press, Oxford, 2012, p. 17.

¹²⁷ *ibid.*, p. 5.

¹²⁸ JW Harris, *Property and Justice*, Clarendon Press, Oxford, 1996, p. 125, citing Tony Honoré’s 1961 essay.

of slavery¹²⁹, in analogy to Honoré’s understanding of possession as the foundation of ownership.¹³⁰ In this sense, Hickey sees the definition under the Slavery Convention as harnessing the rhetoric of ownership as a metaphor to scrutinise factual circumstances of subjugation.¹³¹

In order to reach this understanding, Hickey has to read away the word “powers” in the slavery definition. Hickey takes for granted the contemporary usefulness of Hohfeld’s distinction of “powers” in the strict sense but deems such a reading unnecessary in order to give content to the historical understanding of “powers”.¹³² Hickey is further confronted with the challenge of having to read away the words “any or all” in the Convention definition. On a literal reading, he understands this to imply that any one of the incidents of ownership he describes will suffice to constitute ownership.¹³³ This is problematic for Hickey as it stretches the application of the definition into realms of relations he does not wish to be covered by “slavery”. Thus, in order to make “any or all” sensible¹³⁴, Hickey claims that Article 1 must be read to imply the necessity of a broader element of control, in “control tantamount to possession” that then, together then with the exercise of “any or all” of the remaining incidents of ownership, will constitute slavery. He further refers to maintenance of “effective control” as a hallmark of ownership where applied to persons in slavery.¹³⁵

While not engaging explicitly in the notion of the enslaved’s consent, Hickey’s understanding of the definition would seem to centre any question of consent in the requirement of control tantamount to possession, which he describes as a “factual prerequisite.” Arguably such a construction would not infer the irrelevance of consent but perhaps that the absence of consent is not a *necessary* element. To construct an example, A agrees to work for B to service a debt and in so doing, undertakes to work without direct pay, subjecting his or herself fully to the control and will of B, working 7 days a week, never leaving B’s premises without permission and sleeping and eating only when B allows. Under Hickey’s construction, A’s initial consent may be interesting to the extent to which it is the source of B’s control, however, it is not required to deem A’s agreement non-consensual to find that B’s control is excessive, tantamount to possession, perhaps together with the right to manage A, to find an instance of slavery. This construction does not presuppose any particular notion of A’s voluntariness and what sorts of pressures would deem A’s agreement coerced but shifts the moral repugnancy to the control that B exercises over A.

While Hickey’s use of Honoré’s incidents of ownership would no doubt sit comfortably with many in the Common Law tradition, his interpretive

¹²⁹ R Hickey, *op. cit.*, p. 16 – 17.

¹³⁰ *ibid.*, p. 6.

¹³¹ *ibid.*, p. 18.

¹³² *ibid.*, p.15.

¹³³ *ibid.*

¹³⁴ *ibid.*, p. 17.

¹³⁵ *ibid.*, p.1.

method is at odds with established rules of interpretation in international law and relies upon numerous dubious assumptions. The result is a definition that must do away with key components of the definition and in the words of Penner, does “positive violence to the Convention definition”.¹³⁶

However, Penner’s analysis of ownership in the context of the Convention definition is also problematic in certain respects, despite working closer with the text itself. Penner embraces the restrictive reading of the word “powers” in the Hohfeldian sense and attempts to show the utility of the Convention definition by illustrating through Orlando Patterson’s lay understanding’s of slavery¹³⁷ how particular elements are comparable to powers of ownership. Penner claims that the illuminating aspect of slavery from a property perspective is in the case of ownership over tangible property (such as in land or chattels) wherein the concept of property is deemed to rest of the dual bases of exclusive use and the concept of separability.¹³⁸ Penner uses the Article definition to emphasise the element of corporeal domination in this respect but insofar as this refers to the most basic feature of ownership (which he deems to be the right to immediate, exclusive possession) Penner’s insistence on the Hohfeldian notion of “powers”, requires that the exercise of this dimension of ownership be inherently normative in the way that simply taking advantage over another is not.¹³⁹ In this respect, the definition is read to demand not that the “slave owner” manifests the simple fact of having power over the slave, but that he manifests *de facto* normative powers.¹⁴⁰ It is in this respect that the social dimension of slavery is emphasised in that persons other than just the slave owner and slave need to recognise the slave owner’s *de facto* right to immediate, exclusive possession over the slave, so enforcing the slave’s social death or natal alienation.¹⁴¹ This criterion would seem to limit the applicability of the slavery definition significantly. However, Penner claims through inference to the passive language of the Convention definition, it is not required that the current slave owner himself exercised a power of ownership over the slave, merely that this was done by some other in order to establish the person as a “slave.”¹⁴² It is noted here that such a reading severely restricts the utility of the definition in a criminal law context in that a current “owner” of a slave would not fulfil the definition had such a power not been exercised over the slave himself.

Similarly to Hickey, Penner does not question directly the place of consent or agency in the slave. By inference, it might be assumed that Penner’s

¹³⁶ JE Penner, “The Concept of Property and the Concept of Slavery”, forthcoming in: J Allain (ed), *The Legal Understanding of Slavery: The Historical to the Contemporary*, 2012, Oxford: Oxford University Press, p.7.

¹³⁷ *ibid.*, p5, quoting O. Patterson in *Freedom in the Making of Western Culture* (1991), “Slavery is the violent, corporeal domination (by an owner or agent) of natively alienated and parasitically dishonoured persons.”

¹³⁸ JE Penner, *op. cit.*, p.5.

¹³⁹ *ibid.*, p. 8.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*, p. 9.

¹⁴² *ibid.*

analysis allows for a similar space for consent as Hickey's; in that any possible agreement the enslaved may make that establishes his or her relationship with the slave master does not necessarily nullify a finding of slavery, if a sufficient amount of control is exercised over the person evidencing a *de facto* right to immediate exclusive possession. What might be interesting is the extent to which Penner's construction conceives the *de facto* consenting capacity during the period of enslavement as factually limited to the relationship with the slave master. This incapacitation of the enslaved's subjectivity, *during* a period of enslavement, is seen as an element in a relationship of ownership.

Through his construction, Penner is able to avoid Hickey's detour from the concepts of "power" in the Hohfeldian sense but arguably reads away the "any or all" aspect of the definition. His view of the definition is furthermore rather limiting and makes for a very difficult application in a criminal prosecution context. With the shortcomings of either of these two models in mind, the perspective of ownership elaborated as by James Harris will be examined to follow as a possible alternative.

4.3.2 Ownership from the Perspective of JW Harris

4.3.2.1 Harris' Idea of Ownership

In *Property and Justice*, Harris provides a legal and philosophical analysis of property, addressing both normative and descriptive characteristics of property and exploring various justifications for the existence of specific property institutions in contemporary Western society. While Harris' work does not address the question of slavery as defined through ownership directly, the present analysis seeks to apply Harris' conceptualisation of property in order to construct an alternative view of the normative content of Article 1 of the Slavery Convention.

Harris conceives property as a legal and social institution that governs the use of most things and the allocation of some items of social wealth.¹⁴³ Harris imagines a great many forms in which property may legally and socially be institutionalised. He identifies two basic common features in the constitution of property as comprising what he terms "trespassory rules" and an "ownership spectrum." Trespassory rules are social norms (whether or not embodied in law) that impose obligations on members of society, other than the person(s) who has some open-ended relationship to a thing, not to make use of that thing without the consent of that person or group of persons.¹⁴⁴ An ownership spectrum exists in those open-ended relationships that are presupposed and that are protected by trespassory rules.¹⁴⁵

¹⁴³ JW Harris, *op. cit.*, p. 3.

¹⁴⁴ *ibid.*, p. 5.

¹⁴⁵ *ibid.*

Ownership to Harris is thus a much broader concept than the rather contextual notions proposed by Hickey and Penner. Harris sees ownership as irreducible to the trespassory rules that contain it: the content of ownership is a variable and imprecise product of cultural assumptions that is presupposed by legal regulation.¹⁴⁶ Ownership is not its legal regulations. Ownership interests exist along a spectrum that ranges from “mere property” (constituted in some open-ended use privileges over a thing and some open-ended powers of control over uses made by others) to “full-blooded ownership” on the upper end of the spectrum (as a person-resource relationship in which the rules of the particular property institution are premised on a *prima facie* assumption of the person is free to use, abuse and transfer that which he/she owns).¹⁴⁷ All ownership interests comprise, according to Harris, use-privileges and control powers of a sort.¹⁴⁸ Powers of transmission occur on the upper end of the ownership spectrum.¹⁴⁹ See Figure 1 below for a graphic representation of the ownership spectrum.

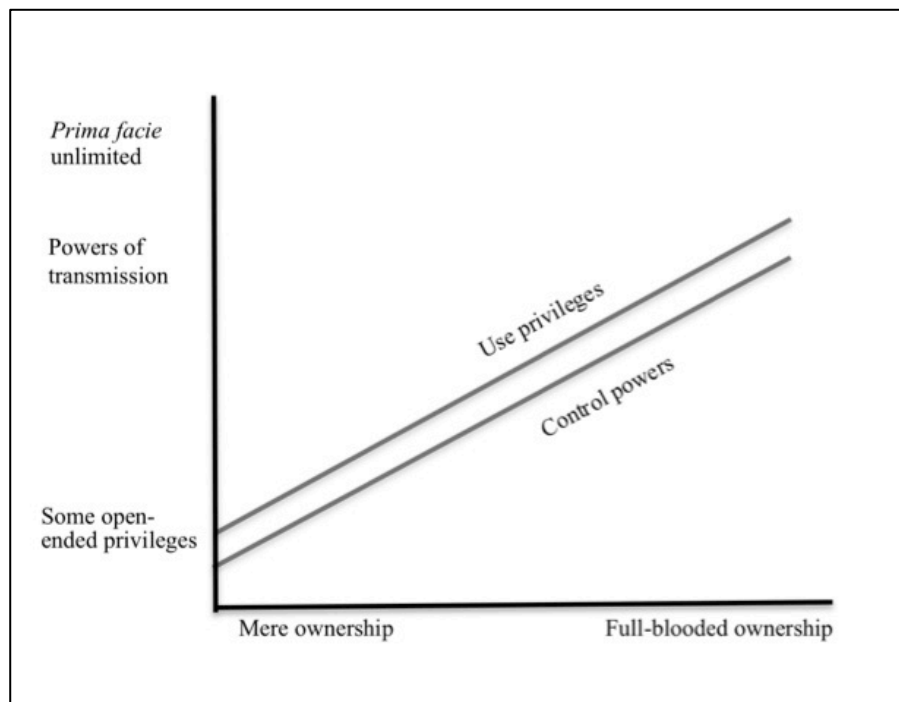


Figure 1: Ownership Spectrum¹⁵⁰

Ownership interests (privileges and powers) on the spectrum share three key features.¹⁵¹ Firstly, they all involve a juridical relation between a person or group of persons and a resource or asset. Secondly, the privileges and powers vested therein are open ended: they are not subject to finite specification. Finally, all these ownership interests authorise self-

¹⁴⁶ *ibid.*, p. 64.

¹⁴⁷ *ibid.*, p. 29.

¹⁴⁸ *ibid.*, p. 25.

¹⁴⁹ *ibid.*, p.5

¹⁵⁰ This is the author’s representation of Harris’ “ownership spectrum”.

¹⁵¹ *ibid.*.

seekingness on the part of the person or group. This is to say that in the use, control, transmission or otherwise of the resource, the owner may act with whatever motive or purpose in so doing.¹⁵² The owner's use of the resource need only please herself. For a graphic representation of the shared features of ownership interests, see Figure 2 below.

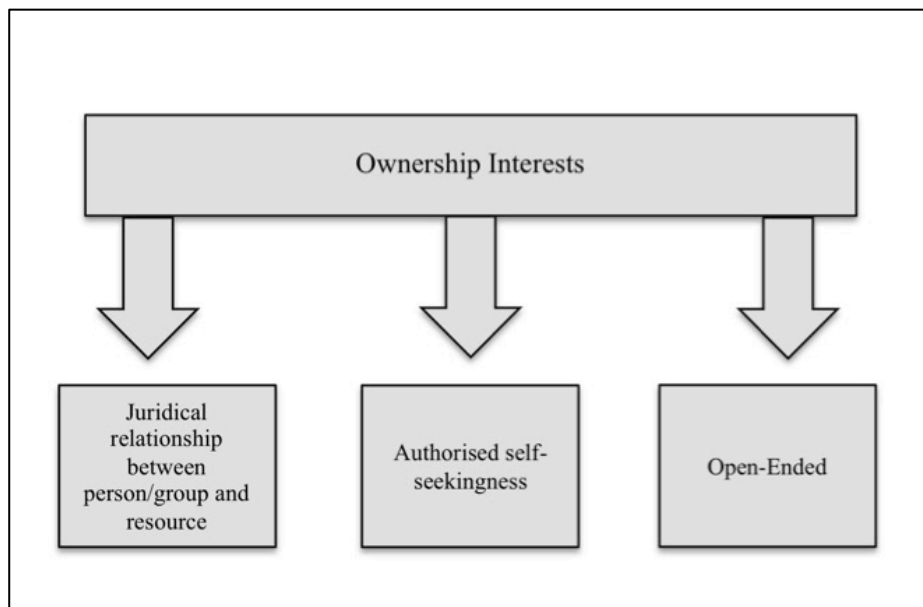


Figure 2: Common Features of Ownership Interests¹⁵³

It is commonly assumed amongst property theorists that despite the ubiquity of ownership, little is specified on the nature of ownership in itself. Harris' construction is insightful in this regard as he seeks to uncover the common assumptions upon which we build various trespassory rules related to ownership. Harris' view of ownership is useful in finding common structures in the plurality and mobility of ownership interests¹⁵⁴ across space and time. The notion of ownership in this respect need not be reliant on the juristic rules that construct its outer boundary and these common features of "ownership interests" are shown by Harris to be shared in both lay and legal use¹⁵⁵ – a feature which in the context of the slavery definition, permits an unproblematic embrace of both *de facto* and *de jure* instances of slavery.

Harris makes a brief reference to slavery that is an insightful application of this notion of ownership to the Convention definition for the present purposes. He claims that even under the times of legal slavery, it was not always the case that ownership interests that were recognised by property institutions over human beings were at the top end of the spectrum.¹⁵⁶ If we employ Harris construction of ownership to the Slavery Convention definition, we are thus permitted to evaluate a variety of powers exercised

¹⁵² *ibid.*, p. 65.

¹⁵³ This is the author's representation.

¹⁵⁴ *ibid.*, p. 64.

¹⁵⁵ *ibid.*, p. 67.

¹⁵⁶ *ibid.*, p. 75.

by an “owner” over a person that may be less than “full-blooded ownership” that permits no *prima facie* restrictions on use and abuse and full powers of transmissibility. With the “rules” of ownership being profane, applying “ownership” to slavery is not dependent on the outer boundaries of any particular construction of ownership. The hallmarks of ownership interests over a person subsist in the common features of some form of use privileges and control powers and the shared features of a relation between the owner and the owned as a “resource”; open-ended power and privileges over the enslaved; and interests that permit self-seeking over the enslaved by the owner. While transmission (sale, donation etc.) of the slave to another may indicate ownership interests on the upper end of the spectrum, we are not reliant upon transmission to indicate slavery.

Harris’ construction of ownership further avoids the Hohfeldian “power” limitation confronted by Hickey and Penner. While powers and privileges (in the lay sense) are intrinsic elements of ownership interests as described here, claim rights, duties, liabilities and immunities are not intrinsic to ownership interests in resources.¹⁵⁷ Elsewhere, Harris has shown that the Hohfeldian notion of powers imbeds an idea of ownership as “a bundle of rights”¹⁵⁸: an analogy often cited in attempts to describe ownership. As has been described, Harris’ conception illustrates that ownership is *not* a bundle of rights but that which is *assumed* by such rights. It is in this sense, that applying Harris’ construction necessitates an *ordinary* reading of the words “powers of rights” in the definition to imply a capability of acting that attaches to entitlements (or interests) of ownership, thus all those features described above as “powers and privileges.” With respect to the “any or all” criterion in the slavery definition, Harris’ concept fits well here to examine any power or privilege of use or control that meets the common features of ownership previously described.

4.3.2.2 Distinguishing Employment Relations

One might ask how regular employment relations would be distinguished from slavery through applying Harris’ concept of ownership? In the reading of Harris embraced here, we might conclude that “any or all of the powers” of ownership refers to any of those use or control privileges and powers Harris refers to as marked along the ownership spectrum. For example, we may see material evidence of an ownership-like relationship between A and B if any or all of the following powers are present: On the upper end of the spectrum, B has the capacity to sell A to another; B has the capacity to allow another to use A (or A’s labour) in a specified manner; B has the capacity to extract from A as much labour as pleases B; and/or B controls what A may do and where A may go. Obviously, any or all of these types of behaviour may be evident in an employment relationship. Even on the upper end of the spectrum where transmission is possible, we might say

¹⁵⁷ *ibid.*, p. 128.

¹⁵⁸ JW Harris, *Legal Philosophies*, 2nd ed, Oxford University Press., Oxford, 2004, p. 86.

comparably in competitive sports, that leagues might “buy” and “sell” players, for example. However, we distinguish the exercise of these sorts of powers as ownership on the basis that they fulfil Harris’ three criteria: they involve a juridical relation between a person and a resource or asset; the privileges and powers are open-ended; and the interests authorise self-seekingness (on behalf of B, the slave-owner).

In particular here, the criteria of the open-endedness of the powers and the self-seekingness of their exercise permits us to distinguish the relationship from employment. Returning to the generic example of A and B, if in the use of A’s labour, in transferring A’s labour for use by another or in selling A’s labour contract to another, B may act only to please herself in the sense that there is no limit to the arbitrariness of reaching these decisions, we might say that the relationship authorises self-seeking. If, however, A receives sufficient remuneration that limits the self-seeking of B or if A retains a capacity to decline the use of his labour by another, we might see something closer to employment than slavery. Furthermore, the criterion of “open-endedness” allows one to distinguish an employee, whose labour duties and rights might be defined, restricted and enforceable, from a slave whose duties towards the owner are limitless. While both the employer and the slave owner may exhibit similar powers of transmission over a player in a sports league for example, the slave owner’s powers are distinguished as “ownership-like” to the extent to which she may transfer or sell the slave at whatever price, whenever and to whomever she pleases, with no externally defined limit.

4.3.2.3 Harris’ Ownership in Relation to Consent

In applying Harris’ construction of ownership to the definition, we may distinguish between various moments of possible consent to examine how the definition might operate. Firstly, there is the possibility to consent to the movement or migratory aspect of acts normally caught under the banner of trafficking; secondly, there is the possibility of consent to undertake a certain employment or “exploitation”; and thirdly, there is the possibility to consent to acts or the performance of specific acts in the course of the employment or exploitation.

With respect to the first possibility, it is clear that the slavery framework’s focus on the exploitative relationship removes the question of migration or movement entirely from the equation. Thus any point at which a person agrees to transport or being harboured etc., is not necessarily a point of consideration within this framework.

With respect to the second possibility, to consent to undertake certain labour or “exploitation”, Harris’ construction might be applied in a manner quite similar to that described in the reading of Hickey above. In this sense, consent may be interesting and relevant in establishing the relationship between A and B but the absence of consent is not a prerequisite to find that

the nature of the powers of use and control exercised by B over A are of a nature akin to ownership. While A may consent, for example, to live according to B's rules and not leave B's property until he has paid off his debt to B, we may still find slavery if B exercises his control over A in a presumptively self-seeking way and if these control powers are open-ended. It is not necessary *per se* to engage on the debate on to what extent A's acceptance of the conditions of the agreement was voluntary to find that B exercised powers of ownership over A. B's factual control over A (due to socio-economic pressures, violence or otherwise that sustains her power to control A) is signifying conduct of ownership, and the reasons are interesting albeit not determinative for a finding of slavery. The third possibility of consent, in specific acts or decisions undertaken in the course of employment or labour can be similarly assessed in that the determining measure will not be whether or not the enslaved agreed to perform the individual acts but based on the measure of control or use exerted over him in relation to the markers of ownership elaborated.

4.3.3 The Utility of Harris' Ownership in Relation to Slavery

From the preceding analysis, employing Harris' framework gives content to the Slavery Convention definition without having to butcher the text of the Convention and in a manner which affirms both the purpose and aims of the Convention, and which may indeed be fitting to descriptive understandings of slavery in both historical and contemporary contexts. Importantly, this particular notion of ownership is not reliant upon such context-bound notions of ownership proposed by Hickey and Penner respectively, whose analyses are largely limited to Western, liberal, typically Common Law ownership institutions.

It is interesting to note that all three constructions of ownership examined here nevertheless lead to rather similar views on consent. We may, through this construction, fully recognise as valid the exercise of choice that A makes to undertake exploitative labour under B's control, even where this choice was made with few possible alternatives in A's sphere of action. While we may continue to find morally repugnant B's relationship with A, this particular legal construction permits one to embed that repugnancy in the nature of B's use and control of A without depoliticising A as an actor and agent.

As slavery is a human rights violation on international, regional, and most national levels, finding an instance of slavery so too invokes a question of state responsibility, beyond exclusively assigning blame on the "trafficker" or "slave-master." The slavery framework thus compels an examination of the state's role in perpetuating or allowing the relationship of slavery to exist. For example, we may look at what function a state's restrictive migration policies plays in making a person vulnerable to exploitation or by disabling the opportunities for such a person to seek protection or human

rights enforcement. In the case of *Rantsev*¹⁵⁹ in the ECtHR, it has been illustrated how through adopting a trafficking framework even with respect to state responsibility, compels a very different focus on what state responsibilities entail in prevention, respect and protection, allowing for an interpretation of anti-migration state obligations.¹⁶⁰ By keeping the troubling circumstances of consent in the light, and by retaining the subjectivity of the enslaved, we allow that the victim may continue to be an agent that can create dissensus with these sources of power that constrain her opportunities for consent, even on a practical legal level to hold the state responsibility for its role in her enslavement.

Of course, many of these markers remain rather open-ended and contestable: a factor that motivates the necessity of exploring case law to follow. In order to proceed to the case analysis, it is first necessary to make a brief overview of how these two frameworks can be compared on an abstract level.

¹⁵⁹ *Rantsev v. Cyprus and Russia*, *loc. cit.*

¹⁶⁰ V Stoyanova, "Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case," *Netherlands Quarterly of Human Rights*, 2012, vol. 30, no. 2, pp. 163 – 194.

5 Comparing the Two Legal Frameworks

In this section, a brief overview is given in order to consolidate the two legal frameworks on an abstract level for comparative purposes. The slavery framework is represented here as through Harris' concept of ownership.

5.1 Actus Reus

It is clear that the legal frameworks focus on different acts. Under the trafficking framework, the *actus reus* is constituted in "recruitment, transportation, transfer, harbouring or receipt of persons" whilst under the slavery framework, the *actus reus* consists of the *exercise of powers* of the right of ownership over a person. While under the trafficking framework, the *actus reus* is a finite list of possible actions, under the slavery framework, the conduct that signifies the crime is open-ended, in "any or all" of the specified manifestations. While recruiting, transferring, transporting or harbouring a person will not in itself fulfil the *actus reus* for slavery, the definition allows that if those acts (transfer in particular) is done in a manner indicative of open-ended powers of control and use, associated with ownership, and occurring in a manner that authorises self-seeking, we may establish conduct to fulfil the definition for slavery. While acts of "purchasing" or "selling" of the person are not necessarily required to prove slavery, we may find in those acts conduct that indicates the exercise of ownership interests on the upper-end of the ownership spectrum.

With respect to consent in the *actus reus*, under the trafficking framework, we saw that the listed coercive means attached to the *actus reus* implied that the absence of consent to the transport, recruitment or transfer (etc.) is a requirement of the crime. The extent to which coercion includes indirect "techniques of self" - to prevent the criterion (for valid consent) of voluntariness being fulfilled - is left open to interpretation. Closer examination of the discourse of trafficking and the wider obligations and politics that frames the Protocol, indicated the construction of a certain subjectivity of VoT's that points to a conclusion that these indirect coercive pressures may very well be interpreted to destroy the morally (or legally) transformative force of a victim's agreement to their movement. With respect to the slavery framework under Harris' notion of ownership, there is clearly no need to examine the consent of any possible movement within the course of the crime nor to any of the acts indicating the exercise of powers of ownership over the person. While consent or agreement on behalf of the enslaved (or the absence thereof) may be interesting for an adjudicator, it is not required to find the act non-consensual in order to find the act criminal.

The difference in focus on the punishable conduct under these two frameworks is rather important. While under the trafficking framework,

migration and movement is centralised, under the slavery framework, it is the exploitation itself or, perhaps more accurately, the exercise of powers that is interesting.

5.2 Coercive Means or Means of Control

Under the trafficking framework, it is clear that a finite list of coercive means is stipulated in relation to the *actus reus* and purpose of the crime – although the interpretation of certain of these means is rather open-ended. Once more, under the slavery framework, no specified means are required. Comparably, if under the slavery framework, we were to find that a person used threats of violence, fraud or deception to establish control over the enslaved, this may be interesting but no less effective than if we were to find that the “slave master” gained control over the enslaved through his or her own submission due to the exercise of social or moral pressures.

While, as previously argued, such an option remains open to interpretation under the trafficking framework, the real distinction lies in the operation of these means of coercion or control on consent. To emphasise once more, it is not required under the slavery definition, as it arguably is under the trafficking framework, to render an agreement of the enslaved in this context non-consensual due to these means of control or coercion. Clearly, however, where violence is used by a person in the course of the exercise of powers of ownership, we may interpret this as a very open-ended and self-seeking exercise of ownership powers of use and control towards the upper end of the spectrum, as *prima facie* unlimited. If payment is made to another who has control over a person, under the slavery framework, this again may be seen as an act occurring on the upper-end of the ownership spectrum as the exercise of powers of transmission.

5.3 Exploitation, Labour and Use

Under the trafficking framework, exploitation of the VoT need not actually occur but it must at least be a purpose of the act. “Exploitation” may take a number of different forms, including forced labour and organ removal, but the discourse of trafficking clearly indicates a strong framing of “sexual exploitation” amongst these purposes. “Slavery” is but one of the possible purposes for which trafficking may occur. In contrast, under the slavery definition, the use (and control) of the enslaved is the very essence of the crime. The “use” of the person, in a manner establishing a relationship between the “slave master” and the enslaved as a resource or asset can occur in many different forms, with the specification that this use is open-ended and self-seeking. It is thus the *manner* of the use that is important.

With respect to consent to exploitation, labour or use, under the trafficking framework, we saw that Article 3(b) explicitly rendered any agreement to a purpose of exploitation that was established through the listed coercive means, non-consensual. As discussed, however, it is unclear from the

functioning of the definition, whether or not non-consent with respect to the *purpose* of exploitation is in fact, an element of the crime. As with the discussion on consent regarding the movement aspect of trafficking, it is further rather undefined to what extent consent here is taken to package “techniques of self” into the coercive means that destroy voluntariness. We saw, however, that in light of the broader discourse and *travaux préparatoires* of the Protocol, there are strong indications to assume that these techniques of self are taken to destroy consent at least insofar as women of “other” origin are concerned. In comparison with the slavery definition, we saw here that consent was interesting in the discussion on use and control that is required for a determination of slavery, but that rendering a person’s agreement thereto non-consensual was not a requirement to establish the crime.

It is noted here that “exploitation” itself is somewhat of a relative term with respect to labour. From some perspectives, all labour is exploitation by owners of capital and certainly, wage and working conditions in the developing world might easily be viewed as exploitative in comparison with conditions in the Global North. In this respect, the use of a standard of behaviour beyond which “exploitation” is unacceptable (such as ownership behaviour) not only enables effective adjudication on exploitation but arguably goes further to keep open and politicised the relativity of exploitation in the inter-personal, local and global forms it takes.

With this overview in mind, two cases will be examined to illustrate specific applications of the respective definitions.

6 Case Law Applications

In this chapter, two cases are examined, applying the definitions under the trafficking and slavery frameworks respectively. The purpose is not to provide an empirical account of the definitions in application but rather to illustrate the functioning of either definition in relation to a concrete fact set. The courts' findings in either case will be considered in relation to the analytical and international legal frameworks previously provided. Finally, some thoughts will be presented as to what either fact set might have looked like had the alternative legal framework been applied. Both cases are selected from domestic jurisdictions on the basis of the comparability of either applied definition to the respective international instrument. It is noted here that no concrete comparative legal methodology is applied, however national peculiarities will as far as deemed relevant be specified.

6.1 Trafficking

To justify the case selection, it must first be repeated that the Trafficking Protocol is a transnational legal instrument – as such, there are currently no international tribunals that apply the Palermo definition directly. In what can be argued as supporting the claim that the definition is challenging to apply in a criminal prosecution context, it was considerably difficult to find any case law (on either domestic or regional levels) that operatively applied the Trafficking Protocol definition.

The case that has been selected for analysis is a Swedish case from the Norrköpings *Tingsrätt* (District Court)¹⁶¹ as appealed to the Göta *Hovrätt* (Court of Appeals)¹⁶² in 2006. The case has been selected on the basis that the Court applies a definition largely comparable to that of the Trafficking Protocol and that it deals with instances of complicated consent on behalf of adult victims. This was also the first case in Sweden in which a conviction for trafficking was made in a case concerning victims over 18 years old: an issue which provides for some insight on the question of subjectivity.

Sweden signed the Trafficking Protocol in 2000 and ratified the Protocol in 2004. From 2002, trafficking was included as a crime under national legislation, initially exclusively limited to trafficking for sexual exploitation, but since 2004 the provision was expanded to include other exploitative purposes, together with the removal of the requirement of border crossing. In 2010 the provision was once more revised to remove the “control” requirement that was previously included in the definition. The current prohibition is located in Chapter 4, Section 1(§a) of the Swedish Criminal Code. The case that has been selected is, however, from 2006, and so the

¹⁶¹ *B 982-05*, Norrköpings Tingsrätt (Sweden), Rotel 1, 2006-02-14. (The “District Court” decision).

¹⁶² *B 626-06*, Göta Hovrätt (Sweden), Avd.1, Rotel 13, Ref. 20014906, 2006-06-13. (The “Appeal Court” decision).

provision applied in the case is that prior to the 2010 removal of the “control” requirement. The provision applied defines trafficking (*människohandel*) as when someone uses coercion, deception or other unfair means, *and thereby taking control of a person*, recruits, transports, transfers, harbours or receives that person in order for him or her to be exploited for sexual purposes, forced labour or organ removal. The following analysis focuses exclusively on the charges relating to trafficking.

6.1.1 Case No. B-982-05 / B-626-06

6.1.1.1 Facts

Seventeen persons stood accused for charges relating to, *inter alia*, the trafficking, procuring (“pimping”) and purchasing of sex of two women, “Lenka” and “Martina”. Five of the accused were charged with trafficking (Ivan Lalik, Silvia Makulova, Halil Osmanovic, Naser Idic, and Igor Idic), two were charged with aiding trafficking (Knezair Djovani Bajrami and Lawrence Haddad¹⁶³), and one was charged with conspiracy to traffic (David Andersson). The victims, Lenka and Martina, were 20 and 29 respectively at the time of the events and are both Slovakian nationals of Roma origin. The facts surrounding the case were particularly complicated and obscured by the extent of the conflicting testimonies of all parties concerned.

Silvia and Ivan (who were at some stage a couple) were accused of having cooperated with shared intent in recruiting Lenka and Martina from Slovakia for sexual exploitation in Sweden.¹⁶⁴ While the precise circumstances on how Lenka, Martina, Silvia and Ivan had come to know one another are unclear, neither Lenka nor Martina were in any way alleged to be physically coerced, threatened or forced into their decisions to move to Sweden. However, it was rather consistently provided that it was through discussion with Silvia and Ivan in Slovakia that the prospect of going to Sweden to find work was formed for the women.¹⁶⁵ Ivan in particular, who had previously resided in Sweden where he had worked unofficially at a Pizzeria, had provided accounts of employment prospects and superior conditions in Sweden as well as offers to help that had been significant factors in both Lenka and Martina’s decisions to travel to Sweden.¹⁶⁶

Lenka and Martina were both impoverished, unemployed single mothers who lived on social benefits in Slovakia.¹⁶⁷ They claimed to have difficulty finding work there, in part due to their status in society as Roma women.¹⁶⁸ It was unclear from the facts to what extent the women had previously

¹⁶³ Lawrence Haddad was charged initially with procurement but on Appeal, he was charged in addition with assisting trafficking.

¹⁶⁴ Internationella Åklagarkammaren i Linköping, *Ansökan om Stämning* (Charge Sheet), Dnr C-3-33-05, 2005-11-22, p.5.

¹⁶⁵ *B 982-05*, District Court Decision, *op. cit.*, p. 41.

¹⁶⁶ *ibid.*, p. 41 and 42.

¹⁶⁷ *ibid.*, p.40.

¹⁶⁸ *ibid.*, p. 40 - 41

engaged in prostitution. While it appears more convincingly that Martina had previously done so prior to coming to Sweden¹⁶⁹, Lenka continued to deny that she had worked in the sale of sex before. Silvia claimed too that she shared the limited prospects of Lenka and Martina as a Roma woman in Slovakia.¹⁷⁰ Silvia had previous experience as a sex worker outside of Slovakia but claimed that she shared Lenka and Martina's intentions to find "normal jobs" in Sweden.¹⁷¹

After mutually deciding to leave Slovakia, Lenka and Ivan travelled together to Sweden by bus with the alleged purpose of finding employment.¹⁷² Silvia travelled by similar means to Sweden at a later stage, and Martina came alone by bus thereafter. It was claimed that Lenka had sought to find "normal" employment in restaurants but once realising this would not be possible, she decided to prostitute herself.¹⁷³ It was nowhere claimed that Ivan or another had forced Lenka to sell sexual services nor was it anywhere alleged that Lenka had been unwillingly so engaged. However, there was conflicting evidence as to the extent of Ivan's involvement in her prostitution, in finding clients and in how much control he had over her earnings.¹⁷⁴ During this time, it was alleged that Martina, together with Silvia was also involved in sex work¹⁷⁵ and that Ivan assisted them in finding clients¹⁷⁶. It was clear that neither Lenka nor Martina maintained control over their passports during this time. While Ivan generally had possession of their passports, it was commonly claimed that this was to assist the women who were afraid of losing their documents and that they took their passports whenever they wished.¹⁷⁷

At a party one evening, Lenka met Halil ("Budo"). In the following days, Ivan was said to have met with Halil and negotiated that Lenka go with him to Norrköping. The Prosecution alleged that Ivan and Silvia "rented" Lenka to Halil for a number of weeks, for about 7,000 Swedish krona (SEK) and handed control over her to Halil for the objective of her use for sexual purposes.¹⁷⁸ In the hearings and interrogations, Lenka gave conflicting testimonies as to her willingness to go with Halil. Lenka had sex with Halil and thereafter travelled with him to Norrköping.¹⁷⁹ During this time, Halil kept possession of Lenka's passport.

Once in Norrköping, it appears as if Lenka was transferred by Halil to Naser, Igor and Djovani and that they paid a sum of 800 Euro¹⁸⁰ to Halil to

¹⁶⁹ *ibid.*, p. 41.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² *ibid.*,

¹⁷³ *ibid.*, p. 42.

¹⁷⁴ *ibid.*, p. 42 and 44

¹⁷⁵ *ibid.*, p. 43.

¹⁷⁶ *ibid.*, p. 44.

¹⁷⁷ *ibid.*, p. 42.

¹⁷⁸ Charge sheet, *op. cit.*, p.5.

¹⁷⁹ B 982-05, District Court Decision, *op. cit.*, p. 43.

¹⁸⁰ *ibid.*, p. 47.

have sex with Lenka and with the intention to “rent” her out further to other buyers. Either Naser or Igor had possession of Lenka’s passport during this time.¹⁸¹ Lenka stayed in various apartments in Norrköping. The extent to which her movements were controlled is uncertain: while telephone conversations indicate that there were usually others around, she was apparently sometimes alone in the apartment and claimed in the trial hearing to have stayed there willingly.¹⁸² In Norrköping, Lenka continued to engage in sex work, with the assistance of Naser, Igor and Djovani in finding clients and transporting her. It is unclear exactly how the three men benefited financially from her prostitution but it is clear that they at least kept a significant portion of her earnings.¹⁸³

Shortly after Lenka’s arrival in Norrköping, Ivan and Silvia allegedly handed over control of Martina to Ersan and Naser for a sum of 5000 SEK for the purpose of her sexual exploitation.¹⁸⁴ Over a period of three days, Naser and Ersan were alleged to have enabled and assisted her in procuring paid casual sexual encounters in Norrköping and Linköping, to have transported her for these purposes, and to have benefitted financially from these actions.¹⁸⁵ Lawrence Haddad was charged with aiding Ersan and Naser in these acts while David Andersson allegedly conspired with them to do so.

6.1.1.2 Findings

As previously indicated, in the pre-trial hearings and interrogations, Lenka had given evidence that conflicted with her trial testimony in which she denied that any of the accused had subjected her to any irregular pressure and that her prostitution was of her own initiative and free-will.¹⁸⁶ The Court was not convinced that her prior evidence was given, as alleged, under pressure from police indicating that she could return faster to Slovakia if she indicated the accused’s culpability.¹⁸⁷ Furthermore, the Court noted that Lenka’s ambivalence was typical of sexually exploited women and in sum refused to consider any of Lenka’s later testimony.¹⁸⁸

The District Court was convinced that Ivan and Silvia had already established the purpose of exploiting Lenka for prostitution prior to their arrival in Sweden.¹⁸⁹ The Court was furthermore unconvinced that they had attempted to find “regular employment”, holding that Ivan himself should have known that Lenka was unlikely to find a job in Sweden.¹⁹⁰ In light of the purpose for sexual exploitation being established before, the Court found

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ Charge sheet, *op. cit.*, p8.

¹⁸⁵ *ibid.*, p. 9.

¹⁸⁶ B 982-05, District Court Decision, *op. cit.*, p. 58.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*, p. 58 – 59.

¹⁸⁹ *ibid.*, p. 62.

¹⁹⁰ *ibid.*, p. 62 – 23.

further that Martina's subsequent arrival had been in part to induce Lenka into prostitution and to encourage her to view her situation as unresolvable otherwise.¹⁹¹

The District Court held that the possibility for Ivan to "rent" Lenka to Halil was indicative of Ivan's control over her.¹⁹² On this issue of control, some of the accused argued in their defence at the District Court that the provision in the second paragraph of the prohibition (on control) was not applicable because original control over the women had not been taken by undue (coercive) means stated in the first paragraph.¹⁹³ The Court denied this defence, finding that the provision is applicable if control of some kind exists over the person, even if the source of the control is due to some other reason.¹⁹⁴ The District Court emphasised factors in Lenka's vulnerability as constituting Ivan's factual control over her. These included her uncertain living situation, her dependency on Ivan, her financial constraints, her lack of Swedish language skills and the Court also stated that her practice of street work prostitution in Gothenburg had negatively impacted her sense of self-esteem.¹⁹⁵ The Court was unconvinced that she had practiced sex work prior to her arrival in Sweden. Ivan and Silvia were thus found guilty of trafficking Lenka.¹⁹⁶

The District Court was convinced that Halil had received control over Lenka and that he had had sex with her and transferred her and her passport to Naser and Igor for the alleged payment and with the intent that she be sexually exploited.¹⁹⁷ For these reasons, the Court found Halil guilty of trafficking Lenka.¹⁹⁸ With respect to Naser and Igor (with the assistance of Djovani), the Court found them too guilty of trafficking Lenka on the grounds that they had paid a sum of 800 Euro to receive control over her for the purpose of her sexual exploitation. The Court here too established that control over Lenka was seen in the men's possession of her passport, their awareness of her difficult situation and dependency, and that they kept a "pressure" on her, that they must have realised that Lenka would not have prostituted herself without the given circumstances.¹⁹⁹

The Court further declined to give any weight to Lenka's expression that she had wanted to stay with Igor and Naser.²⁰⁰ The Court went so far as to claim that Lenka's desire to stay with Igor and Naser was evidence that she was controlled: that it was merely constituted as a "less bad" alternative to stay with Naser and Igor than it would have been to return to Halil.²⁰¹

¹⁹¹ *ibid.*, p. 64.

¹⁹² *ibid.*, p. 65.

¹⁹³ *ibid.*, p. 57.

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*, p. 66.

¹⁹⁶ *ibid.*, p. 66 – 67.

¹⁹⁷ *ibid.*, p. 73.

¹⁹⁸ *ibid.*, p. 74.

¹⁹⁹ *ibid.*, p. 77.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

Djovani was found guilty of assisting Lenka's trafficking in this respect, for having been aware of the control over her and assisting the men in their aim.²⁰²

With respect to Martina, the District Court had the impression that Martina was more able to take care of herself than Lenka.²⁰³ The Court found that Martina had previously practiced sex work and had the intent to continue to do so upon arrival in Sweden, and that it was likely that she had understood the conditions before travelling from Slovakia.²⁰⁴ In conjunction with her being older than Lenka, Ivan and Silvia, the Court held that there was insufficient evidence to prove that Ivan and Silvia had had control over Martina at the time of her transfer to Ersan and Naser.²⁰⁵ For this reason, with respect to Martina, Ivan and Silvia were found to be guilty only of "pimping" her and not trafficking.

On Ersan and Naser's charges of trafficking Martina, the Court reaffirmed that because Silvia and Ivan had not had control over her upon transferring her to Ersan and Naser, the two men could therefore not be found guilty for trafficking her. The Prosecution appealed this finding. In the Appeal ruling, the Court found that Ersan and Naser had nevertheless *independently* exercised control over Martina. Here the Court emphasised her vulnerable situation, that she knew no one in Norrköping, spoke no Swedish, had little to no money on her person and was seemingly aware of the illegality (*sic*) of prostitution in Sweden.²⁰⁶ The fact that she lacked access to her identification documents and that payment was not made directly to her further signalled she was controlled.²⁰⁷ The Appeal Court claimed that even if she had worked as a prostitute before, it was unlikely that she understood or had any influence over the conditions of her work, despite finding that she did indeed decline to perform certain sex acts.²⁰⁸ The Appeal Court held that control (or a relationship of power) need merely exist as a fact and that it may be of a more "limited" form.²⁰⁹ While the pressure on the victim should be one of (subjective) seriousness, the position of inferiority of the victim is taken to be typically necessary for the realisation of the crime.²¹⁰ Control may indeed be rather subtle, as was the case of Ersan and Naser's control over Martina.²¹¹ In the Appeal Judgment, the Court held that *in casu*, the crime of trafficking had been fulfilled (with respect to Martina) and established that this occurred prior to any exploitation manifesting²¹²: a finding consistent with the perspective that the purpose of exploitation need merely be *intended* under the definition. It was in this reference that the

²⁰² *ibid.*, p. 80.

²⁰³ *ibid.*, p. 70.

²⁰⁴ *ibid.*, p. 71

²⁰⁵ *ibid.*

²⁰⁶ B 626-06, Appeal Court Decision, *op. cit.*, p. 13.

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*, p.14.

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² *ibid.*, p. 13.

Court found that whether the victim consented to the *exploitation* is a question that lacked legal relevance to found criminal responsibility for trafficking.²¹³ With respect to these findings, the Appeal Court held that Lawrence’s assistance to Ersan and Naser in procuring clients for Martina amounted to assisting trafficking. David Andersson was acquitted on charges of conspiracy to traffic for, amongst other things, lack of sufficient evidence.²¹⁴

6.1.1.3 Analysis

In the District Court ruling, it is difficult to find that the Court anywhere explicitly engaged with the definitional requirements of the crime in a substantially analytical manner. The judgment itself is largely an assessment of the evidence and a construction of a narrative that at most insinuates references to the definition. While the Appeal Court decision deals only with issues in relation to Ersan, Naser and Lawrence, it is at least slightly more detailed with respect to the definition’s requirements on the “control” element.

It appears reliably established from the facts and the Courts’ assessments that both Lenka and Martina agreed to their movement to Sweden as well as their sale of sex. No physical force, duress or direct coercion was anywhere alleged in obtaining their agreement and while both women indicated the complexity of the desires that underlay their agreements, they at no point sought to deny their will or participation in either the movement or “exploitation.” With respect to both opportunities for consent, it is clear, however, that the Court questions the consensual nature of their agreement, in particular with respect to Lenka. While neither the District nor the Appeal Court state explicitly that it is required that the *actus reus* of the crime is non-consensual, it can be argued that the District Court makes use of the control element to constitute at least Lenka’s wilful participation in her recruitment as non-consensual - through the operation of the particular forces of control the Court considers. We see that the distinction between the consent with respect to the movement and exploitation elements is blurred in the manner in which the District Court considers Martina not to have been trafficked by Ivan and Silvia: a consequence perhaps of the Court’s failure to engage analytically with the constituent elements of the definition. In the Appeal judgment, however, the Court quite explicitly states that non-consent is not required with respect to the purpose of exploitation element in order to found liability. This is arguably on the basis that exploitation need merely be the purpose of the act (*in casu* of Martina’s transfer). Thus, where consent is structured to have operative effect is perhaps unclear to the Courts. While it is clear that the control element was used in practice to construct agreement to both movement and exploitation elements as non-consensual (at least with respect to Lenka), the District Court does not hold that non-consent to either element is a *requirement*

²¹³ *ibid.*

²¹⁴ B 982-05, District Court Decision, *op. cit.*, p. 87.

explicitly and the Appeal Court intimates that *if* it is, non-consent is only required with respect to the *actus reus* (*in casu* recruitment and transfer).

It is interesting in this respect to examine the Courts' use of the control element with respect to agreement and what this vision reflects on the subjectivity and subjectivisation of the injured parties. The District Court considers Lenka's "emergency-like", distressed situation (presumably constituted through her financial needs and presence as an immigrant in Sweden), her dependency on Ivan in particular, and the control of her passport. On multiple occasions, the Court seeks to indicate Lenka through the prism of victimhood: vulnerable, dependent and incapable of knowing her own best interests. This is evident, for example, in the District Court's reference to the presumed impact of street prostitution on her self-esteem and the Court's refusal to regard any testimony in which Lenka indicated greater agency (on the basis of a presumption that such ambivalence is typical of sexually exploited women). The Court goes so far as to claim that in the absence of pressure that Naser and Igor applied on Lenka, that it could not be possible that she would have (consensually) prostituted herself. In this regard, the Court's finding of Lenka's expression of a desire to stay with the men in Norrköping as false, is indeed interesting. The Court seems to indicate here that a preference between two unsavoury options is not a valid exercise of choice and that the very election of an alternative that conflicts with the psycho-sexual norms of the community is evidence of inter-personal control – thus, non-consensual.

The "control" element here is used in a manner to soften the coercive means criteria so as to impute upon the traffickers "techniques of self" acted upon by powers not within the traffickers' responsibility. While the breadth of the "coercive means" under the Protocol arguably includes forms of power that constitute VoTs through "techniques of self", the control criterion provides a more direct tool for this to occur, to the extent to which the District Court finds its interpretation of control to be determinative irrespective of the means in which it is established. Indeed such a construction fits well within the political foundations of the laws in the Swedish context that prohibit the purchasing of sex but not its sale: that consent to commercial sex is a fiction, a factual impossibility. With respect to the analytical framework provided here, we might argue that the construction of Lenka's will and decisions as absent of voluntarism bears reflections on her constitution as a political subject. We might say that the Court constructs Lenka's deviant desire as in conflict with what the Court, and law, presumes to be as only naturally possible to consent to certain types of sexual relationships. This agreement, poses a threat to the legal position wherein the victim is not supposed to display such agency. It is in this respect that we may view the mechanism of the "control" criterion (arguably as an extension of the view of coercive means as including indirect "techniques of self") as functioning to resolve the threat to the legal construction by presenting Lenka's agreement as non-consensual. Lenka's subjectivity is in this way displaced and the complications of her agreement depoliticised. The problematique is so isolated in the relation between her and the trafficker.

The contrast of how the District Court deals with Martina is enlightening in this respect. The Court's emphasis on her previous engagement in sex work and the distinguishing factor of her age permitted the Court to view Ivan and Silvia's actions as lacking control over her and thus "merely" pimping. When the Appeal Court subsequently views Martina's situation (with respect to Ersan and Naser) as controlled, we can see the District Court's constitution of Lenka's subjectivity extended to Martina where the conditions of control are viewed to be sufficient even if subtle or limited and arguably, the fact of agreement to conditions that are deemed exploitative, is again seen as indicative of unsanctioned "control".

In this case, there is space to argue that the application of the slavery prohibition might have had similar outcomes in finding legally (and ethically) unacceptable the relationships between the two women and the various accused - but without having deconstruct consent as done under the trafficking framework. To give a brief example, the manner in which Ivan, Igor and Naser benefitted financially from the women's prostitution could be seen as indicative of a power of use as an ownership interest in the extent to which the financial benefit is self-seeking and the use open-ended. Self-seekingness might be founded in the relatively minimal or absent benefits accrued to Lenka or Martina and the extent to which the men's choices in the manner of use of the women was founded primarily in the men's own selection of interests. Open-endedness might be exhibited in, for example, the absence of enforceable agreements as to when, how often and under what conditions the women would work. Under this framework, we need not deem Lenka and Martina as coerced or their agreement as involuntary but we may retain that such agreement, if consensual, is simply insufficiently morally transformative of the relationship with their "slave masters." The control over the women need not be absolute and the subjectivity need not be displaced in order for the relationship to be deemed as manifesting the exercise of powers of the right of ownership.

Having seen an example of the trafficking framework applied, we may thus turn to a case analysis where the slavery prohibition was applied to see if consent is so constructed.

6.2 Slavery

Only one case has been selected for examination here: a choice that demands some justification in its exclusion of some prominent applications of the slavery prohibition. Notably, the analysis has excluded two important cases in the ECtHR: *Siliadin*²¹⁵ and *Rantsev*.²¹⁶ The primary reason for this exclusion is the Court's failure to engage in the substantive content of the slavery definition and some rather problematic conceptual confusion in both

²¹⁵ *Siliadin v. France*, Council of Europe: European Court of Human Rights, Application no. 73316/01, 26 July 2005.

²¹⁶ *Rantsev v. Cyprus and Russia*, *loc. cit.*

cases: in the finding of the definition's exclusion of *de facto* slavery in *Siliadin*²¹⁷; and in the blurring between trafficking and slavery in *Rantsev*.

The case of *Hadijatou Mani v Niger*²¹⁸ from the Economic Community of West African States (ECOWAS) Court of Justice was one of the first slavery cases to be won at the international (sub-regional) level.²¹⁹ The case primarily concerned an examination of state responsibility with respect to what was an instance of *de jure* slavery established over a child at the age of 12. The Court's failure to distinguish individual criminal liability from state responsibility, and to distinguish broader international criminal law definitions of "enslavement" from the narrower meaning of "slavery"²²⁰, makes this case somewhat of a poor example for the present purposes. In addition, the age of the victim and the absence of any instance of possible consent further justify its reduced relevance here.

Notably, the *Kunarac*²²¹ case, under the ICTY is also excluded here from detailed examination. In this case, the Tribunal applied what it found to be the customary international law definition of enslavement as a crime against humanity, concerning soldiers accused of enslaving civilian detainees during armed conflict. Some interesting findings were made, including the Trial Chamber's and Appeal Chamber's diverging opinions on whether the absence of consent is an element of the crime²²², the Tribunal's listing of a number of practical indications of enslavement²²³, and the Appeal Chamber's view of the exercise of the powers of the right of ownership as incurring some destruction of the victim's juridical personality.²²⁴ Nevertheless, this case presents a fact set that is not especially comparable to traditionally conceived trafficking cases in the absence of any significant movement component in the fact set. Further reduced relevance lies in the clearly (or at least un-controversially) *non-consensual* detainment and labour of the women who were at most times held by armed opposition

²¹⁷ The Court found that the 1926 Slavery Convention required a "genuine" right of legal ownership over a person, See Gallagher, *op. cit.*, p. 809 for further critique on this point.

²¹⁸ *Hadijatou Mani Koraou v The Republic of Niger*, ECOWAS Community Court of Justice, Judgment No. ECW/CCJUD/06/08 of 27 October 2008, Unofficial translation, retrieved 16 February 2012, <http://www.unhcr.org/refworld/publisher,ECOWAS_C CJ,,496b41fa2,0.html>.

²¹⁹ H Duffy, "Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court", *Human Rights Law Review*, vol. 9, no. 1, 2009, pp. 151 – 170, p. 151. 151.

²²⁰ Note the discussion about in Chapter 4, that the definition of "enslavement" under the ICC Statute is however considered to be akin to that of "slavery" under the Slavery Convention.

²²¹ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Chamber Judgment, Case no. IT-96-23-T & IT-96-23/1-T, 22 February 2001.

²²² The Appeal Chamber found the absence of consent not to be an element of the crime but that it may be of evidential value (*Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeal Chamber Judgment, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002 at 36-37).

²²³ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Chamber Judgment, *op. cit.*, para. 542.

²²⁴ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeal Chamber Judgment, *op. cit.*, para. 117.

soldiers²²⁵. Furthermore, some aspects crucial to the development of the understanding of the 1926 Slavery Convention definition were rather poorly reflected in the case. For one, as previously discussed, the Tribunal arguably erred in its finding that “enslavement” under customary international law is akin to the 1926 Slavery Convention of “slavery”²²⁶ whilst the Trial Chamber’s decision made clear that it viewed enslavement as including factors outside of the exercise of powers of ownership²²⁷: a factor which the Appeal Chamber did not particularly distinguish.²²⁸ For these reasons, the *Kunarac* case is not a preferred example.

The case which is selected, *R v Wei Tang*²²⁹, is a domestic Australian case that has illustrated the utility of the slavery framework, as an alternative to the Trafficking Protocol definition, in a contemporary context. It is particularly interesting for the present analysis as it presents complex instances of consent or agreement. Furthermore, the contrast between the two legal contexts in which *Tang* and the previous case (*B-982-05*) are grounded is rather interesting, particularly in that both cases deal with migratory sex work. While in Sweden, the purchase of sex is prohibited and its enforcement strongly associated with anti-trafficking laws, in Australia, the commercial sex trade is decriminalised and regulated in certain jurisdictions. Inasmuch as the discussion on power and the consenting capacity of the subject is relevant in the discussion of consent, these contrasting legal contexts may be interesting to highlight the operation of regulation in the “receiving” states on the subjectivity of the victims. The trial of Wei Tang followed a number of appeals: the following findings and analysis is presented from the 2008 High Court decision²³⁰, with some reference to the second Supreme Court decision on sentencing²³¹.

6.2.1 R v Wei Tang

6.2.1.1 Facts

The case concerned five women of Thai nationality who had wilfully entered into an agreement with a broker in Thailand to come to Australia to work as sex workers.²³² All five women had previously worked as sex workers in Thailand. Through the agreement they incurred a debt of

²²⁵ On this note, the *Kunarac* case is interesting on the question of consent with respect to the crime of rape in conditions of armed conflict. See for Trial Chamber Judgment, para. 464.

²²⁶ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Chamber Judgment, *op. cit.*, para. 174; Also see J Allain, *The Parameters of ‘Enslavement’ in International Criminal Law*, International Symposium, 25 – 26 April 2009, Working Paper, retrieved 22 February 2012, <<http://lawvideolibrary.com/hr/index.htm>>.

²²⁷ As argued by J Allain, (Enslavement), p.10, in *Kunarac*- 193.

²²⁸ See for example, J Allain, *The Parameters of ‘Enslavement’ in International Criminal Law*, *op. cit.*, p. 11.

²²⁹ *R v Wei Tang* [2008] HCA 39 (28 August 2008) (High Court Judgment); *R v Wei Tang* [2009] VSCA 182 (17 August 2009) (Supreme Court Judgment).

²³⁰ *R v Wei Tang*, High Court Judgment, *loc. cit.*

²³¹ *R v Wei Tang*, Supreme Court Judgment, *loc. cit.*

²³² *R v Wei Tang*, High Court Decision, *op. cit.*, para. 6.

between 40,000 – 45,000 Australian dollars (AUD) which they were required to repay working at an Australian brothel.²³³ In exchange, their travel expenses were paid, they were to be provided with food, accommodation and incidental expenses and their visas were to be arranged.²³⁴ All the women had agreed on the basis that once the debt was repaid, they would have the opportunity to earn money for themselves through their work at the brothel.²³⁵ The Thai recruiters were generally paid 20,000 AUD per woman that they brought to the brothel.²³⁶ While there were no allegations that the women’s consent had been coerced, it was alleged that prior to their arrival in Australia, the women were “not always aware” of the precise terms of their debt agreement or their living conditions in Australia.²³⁷

The women travelled to Australia on valid tourist visas, however these were obtained without full disclosure of their intention to work in Australia. In addition, there was some conflicting evidence as to the extent of the women’s knowledge of the illegality of their working on tourist visas as some were seemingly aware that a new visa had to be obtained upon their arrival to permit them to work.²³⁸

Wei Tang was the owner of a legally licensed brothel in Fitzroy where the women were sent to work as “contract girls”. Upon their arrival in Australia, the five women were said to have had little money, spoke little if any English and knew no one.²³⁹ An intermediary at the brothel was said to have taken the women’s passports and return airline tickets to be placed in a locker at the brothel should immigration officials arrive; the prosecution claimed the documents were kept to ensure the women couldn’t run away.²⁴⁰ The five women worked as sex workers in Tang’s brothel where customers were charged 110 AUD for sexual services²⁴¹; 43 AUD of this sum was kept by Tang, the remaining amount went to the “owner” of the particular sex worker’s contract. The debt of each woman owed to the contract owner was reduced by 50 AUD per customer by which formula each woman would have to take about 900 clients to settle the debt in full.²⁴² According to the agreement, the women were allowed one “free” day every week. If they chose to work on this day they were entitled to retain 50 AUD for themselves per client.²⁴³

²³³ *R v Wei Tang*, Supreme Court Decision, *op. cit.*, para.13.

²³⁴ *ibid.*

²³⁵ *R v Wei Tang*, High Court Decision, *op. cit.*, para.11.

²³⁶ *R v Wei Tang*, Supreme Court Decision, *op. cit.*, para.17.

²³⁷ *R v Wei Tang*, High Court Decision, *op. cit.*, para.10

²³⁸ *R v Wei Tang*, Supreme Court Decision, *op. cit.*, para.13.

²³⁹ *R v Wei Tang*, High Court Decision, *op. cit.*, para.11.

²⁴⁰ *R v Wei Tang*, Supreme Court Decision, *op. cit.*, para.15.

²⁴¹ *R v Wei Tang*, High Court Decision, *op. cit.*, para. 9 – 10.

²⁴² *R v Wei Tang*, Supreme Court Decision, *op. cit.*, para. 20.

²⁴³ *ibid.*

The freedom of movement of the women was somewhat contested in the evidence.²⁴⁴ It was however clear that their working hours were strictly regulated. The women lived in accommodation arranged by Tang where they received food and were attended to with any medical needs: they were evidently well-provided for.²⁴⁵ While the women were not locked in at their residence, according to a Trial Judge they were effectively restricted to the residence and rarely went out in the absence of caretakers' approval or supervision.²⁴⁶ The women were advised to be aware of immigration authorities, to give false information if apprehended and not to leave their residence without supervision. It was found that as the contract progressed, the regime became more relaxed and the women were allowed more liberties.²⁴⁷ When two of the women had paid off their debts, the restrictions were lifted and their passports were returned to them; they were allowed to choose their working hours, were paid directly for their work and could choose their own accommodation.²⁴⁸

In May 2003, the brothel was raided. By that time, only two of the five women had managed to repay their debts.²⁴⁹ Tang was charged with having possessed the women as slaves for a period of about 9 months under Chapter 8 of the Australian Criminal Code dealing with slavery as an "offence against humanity".²⁵⁰

6.2.1.2 Findings

Tang was convicted in County Court on 5 counts of possessing a slave and 5 counts of using a slave. She was sentenced to a total effective 10 years imprisonment.²⁵¹ The Supreme Court upheld Tang's subsequent appeal against the conviction and ordered a retrial. The Director of Public Prosecution appealed the Supreme Court decision to the High Court, which upheld the second appeal, fully restored Tang's sentence and dismissed the Supreme Court order for a retrial²⁵². Tang appealed a second time to the Supreme Court against the sentence.

The definition of the crime of Slavery under Chapter 8 of the Australian Criminal Code bears strong resemblance to the Slavery Convention definition, noting the exclusion of the term "status" from "status or condition" as in the Slavery Convention:

²⁴⁴ *ibid.*, para. 16.

²⁴⁵ *R v Wei Tang*, High Court Decision, *op. cit.*, para. 16

²⁴⁶ *ibid.*, para. 16.

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*, para. 17; *R v Wei Tang*, Supreme Court Decision, *op. cit.*, para 21,

²⁴⁹ *R v Wei Tang*, Supreme Court Decision, *op. cit.*, para. 16.

²⁵⁰ *ibid.*, para. 12.

²⁵¹ *ibid.*, para. 1 – 2.

²⁵² *ibid.*, para. 3.

“the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.”²⁵³

In both the first Supreme Court decision and the subsequent High Court decision, it was held that the definition was not limited to “chattel slavery” in legal ownership of a person as legal ownership is a legal impossibility in Australia.²⁵⁴ The High Court decision referred further to the definitions in the 1926 Slavery Convention and the Convention’s *travaux préparatoires* finding that it supported the inclusion of both *de facto* and *de jure* slavery.²⁵⁵ In referring further to the 1956 Secretary General’s memorandum list of powers of ownership, the High Court found that the question before the Court was whether the women had been “an object of purchase (although in the case of one of them the purchaser was not the respondent); that, for the duration of the contracts, the owners had a capacity to use the complainants and the complainants’ labour in a substantially unrestricted manner; and that the owners were entitled to the fruits of the complainants’ labour without commensurate compensation.”²⁵⁶

The High Court proceeded to refer to the *Kunarac* decision in which charges of enslavement were considered. In so doing, it referred to the factors to be taken into account in establishing the exercise of the powers attaching to the rights of ownership over a person cited in the case, that included control of movement, control of the physical environment, psychological control, measures to prevent or deter escape, force, threat, coercion, assertion of exclusivity, duration, subjection to cruel treatment and abuse, control of sexuality, and forced labour.²⁵⁷ The Court affirmed the Appeal Chamber’s decision in the *Kunarac* case to leave open the question as to whether the ability to buy and sell the person is an added factor and its disagreement with the Trial Chamber that the lack of consent was an element of the offence, however that the lack of consent may be evidentially useful.²⁵⁸

The High Court was further of the opinion that distinguishing between slavery and “other servitudes” was not necessary in the case, and that indeed overlap may occur.²⁵⁹ The High Court proceeded to acknowledge in favour, the Supreme Court’s finding that “consent is not inconsistent with slavery.”²⁶⁰ Through analogy with historical voluntary peonage where it was

²⁵³ Australian Criminal Code §270.1, *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth), No 104 of 1999.

²⁵⁴ *R v Wei Tang*, High Court Decision, *op. cit.*, para. §29.

²⁵⁵ *ibid.*, para. 25 – 27.

²⁵⁶ *ibid.*, para. 26.

²⁵⁷ *ibid.*, para. 28; *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Chamber Judgment, *op. cit.*, at 194 [543].

²⁵⁸ *R v Wei Tang*, High Court Decision, *op. cit.*, para. 28: in reference to *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeal Chamber Judgment, *op. cit.*, at 36-37 [119]-[120].

²⁵⁹ *R v Wei Tang*, High Court Decision, *op. cit.*, para. 29.

²⁶⁰ *ibid.*, para. 30.

possible for a person to sell themselves into slavery in certain societies, the Court inferred consent to indicate the origin but not the character of the “servitude”.²⁶¹ Nevertheless, consent was held to possibly be of factual relevance, however, it affirmed that the absence of consent was not an element of the offence.²⁶²

The High Court majority considered at some length as to how to distinguish harsh labour from slavery, emphasising the nature and extent of the exercise of powers by the perpetrator, in particular, the capacity to deal with the victim as a commodity, as an object of sale or purchase.²⁶³ The Court further included powers of control over movement that extended beyond exploitative employment, and the absence or extreme inadequacy of payment.²⁶⁴ Furthermore, it was found that only in rare cases would the source of those powers be of any relevance.²⁶⁵ In this sense, a contractual basis or otherwise is of little evidence to the factual finding of the exercise of powers of ownership over a person. The Court did mention that this was emphasised in the final phrase of the definition in the Criminal Code²⁶⁶ (“including where such a condition results from a debt or contract made by the person”).

The High Court considered that the powers of ownership to consider in the case included the power to make the complainants an object of purchase, the capacity (for the duration of the contracts) to use the complainants and their labour in a substantially unrestricted manner, the power to restrict and control their movements, and the power to use their services without commensurate compensation.²⁶⁷ Both the extent and nature of these powers were deemed relevant.²⁶⁸ The commodification of the women explained the conditions of control and exploitation under which they were living and working.²⁶⁹

In a separate minority opinion, concurring with the order but distinguishing on his reasons, Kirby J preferred to examine the conditions of employment the women faced as portraying a level of oppression not analogous to contemporary “consensual Australian employment conditions”.²⁷⁰ Kirby wished to exercise caution in equating slavery with oppressive employment relations.²⁷¹ Kirby further analysed the role that the Australian law permitting a consensual commercial sex industry played in analysis of the slavery law, explaining that the law permits that sex workers can participate consensually, for economic reasons, in support of the choice such a person

²⁶¹ *ibid.*

²⁶² *ibid.*

²⁶³ *ibid.*, para. 44.

²⁶⁴ *ibid.*

²⁶⁵ *ibid.*

²⁶⁶ *ibid.*, para. 45.

²⁶⁷ *ibid.*, para. 50

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ *ibid.*, para. 81.

²⁷¹ *ibid.*, para.117.

exercises.²⁷² Kirby held that sexual slavery offences should be confined to instances where the perpetrator's intention includes the exertion of powers of possession or ownership over another because of an established belief that it his right and entitlement to do so.²⁷³ Kirby viewed the words "powers" and "ownership" as not connoting technical terms²⁷⁴ which were read to constitute the exercise of powers over a person constituting their complete subjugation: powers whose exercise would not be dependent on the assent of the person over who they are exercised.²⁷⁵ In application to the facts, Kirby proceeded that one should ask what freedom a person has in order to shed light on whether or not they are a slave.²⁷⁶ In this sense, Kirby found the question of the extent to which the complainant had a choice to be revealing of whether or not powers attaching to the right of ownership were exercised over them, and if the complainant retained freedom to choose whether the accused used the complainant, that freedom will show that the use made by the accused of the complainant was not as a slave".²⁷⁷

6.2.1.3 Analysis

With the proviso as to the very different legal cultures within which the Swedish and Australian judgments are rendered, it is nevertheless evident that the majority opinion in this case clearly applies a slavery prohibition in a manner illustrating greater analytical efficacy and transparency as to the definition than in the previous example. As argued under the slavery framework, the Court makes favourable findings as to the inclusion of *de facto* slavery under the definition and the finding as to the inclusion of "other servitudes" to the extent to which powers of ownership are manifested. In the manner in which the Court does not significantly challenge the "powers" or "any or all" criteria of the definition, and the Court's use of factors cited under the *Kunarac* case (constructing "powers" as "incidents" of ownership), the decision reflects to an extent the model of ownership illustrated in the analysis of Hickey in Chapter 4. Hickey himself explicitly aligns his model with the decision in *Tang*.²⁷⁸

Had Harris' analysis of ownership been applied to the facts, the Court may have found any or all of a variety of acts as powers of ownership. For example, the 110AUD that clients were charged only reduced the women's debt by some 50AUD. Tang was in this way, and the "contract owners" too, able to use the women's sexual exploitation in way which was particularly self-seeking. In the absence of the women's ability to access lawful institutions to enforce their agreements (due in part to the illegality of their working presence), this use of the women's labour or bodies can be seen as

²⁷² *ibid.*, para. 121.

²⁷³ *ibid.*, para. 122.

²⁷⁴ *ibid.*, para. 140.

²⁷⁵ *ibid.*, para. 142.

²⁷⁶ *ibid.*, para. 156.

²⁷⁷ *ibid.*

²⁷⁸ R Hickey, *op. cit.*, p. 11, 13, 14, 15, and 18.

rather “open-ended”. The binding of the women to the contract owners and to Tang, for their profit, further establishes what can be seen as a relation of a person to an asset or resource. Other such powers of use or control may include, for example, the factual inability of the women to reconsider their contractual obligations and even the manner in which Tang was able to allow buyers the use of the women’s bodies that can be seen as a power of transmission on the upper end of the ownership spectrum.

On the question of consent, the result is arguably consistent irrespective of which model of ownership is applied. The decision affirms repeatedly that the origins of the powers exercised over the enslaved are seldom relevant; that it is more the nature and extent of those powers that is determinative. This leaves available for analysis contractual employment relations and consensual labour or “exploitation” that despite the exploited or enslaved person’s wilful cooperation, falls within the realm of relations reflective of ownership and thus legally (and morally) condemnable. In the case, there were indeed aspects of knowledge and physical constraints over the women that complicated the consensual nature of their agreement to the conditions of their travel and labour. However, the Court did not need to render their agreements to these aspects non-consensual through the application of the definition. Indeed it appears that by and large the Thai women were well aware of the conditions of their agreement, had experience in prostitution and sought the move to Australia under the agreed conditions as a favourable opportunity within the realm of their available choices.

By retaining the subjectivity of these women, it is argued that a far greater scope of powers that act upon their actions is revealed. For example, the facts indicate that the women’s passports were retained by the accused and others and that in attempting to discourage the women from absconding, they repeatedly were warned to be fearful of Australian authorities. It is also alleged that the women were aware of the illegality of their working in Australia without the correct permits. In this sense, the effect of restrictive and criminalising migration regimes, in contributing to the factors that constrain the available alternatives for these women, is brought out of the shadows. The accused may not have needed to constrain the women to ensure their repayment of their debts: the fear of immigration authorities itself may have acted upon the women to incentivise their own self-imposed restraint of movement and social isolation. The legal framework thus allows condemnation of the relation between Tang and the women whilst retaining the subjectivity of the women’s consent and in so doing, bringing to light powers outside of the their relationship with Tang that act upon their actions. That the prevention of slavery falls within the human rights duties of the State, the framework so too calls upon a question of State responsibility in fulfilling the right to be free from slavery.

Had the trafficking framework been applied, it can be argued that some difficulty would have existed in finding these women’s exploitation as meeting the definitional elements for trafficking. There is very little in the way of coercive means, conceived either as direct or indirect, that can be

imputed to the accused. While Tang may be said to have been involved in the women's "harbour" or on the receiving side of their "transfer", the use of coercive means are not evident beyond reasonable doubt. While the purpose for the women's sexual labour may possibly be defined as "exploitation", in application to the fact set, it is difficult to determine what is exploitative and to whom. Would the Thai women see their work as exploitative? Is the sale of sex exploitation only for undocumented migrants in a jurisdiction where it is permitted through licensed brothels? Are the pay and conditions exploitative only with respect to Australian employment norms (as intimated by Kirby)? Does exploitation occur only in the absence of consent? Or is exploitation "more" ubiquitous than just in the relation between Tang and the Thai women, and if so, who is culpable? What the contrast of these two case examples hopefully illustrate is that while the trafficking framework requires that these questions be answered in a strict victim/perpetrator dichotomy, resting on the hinges of consent, the slavery framework may indeed permit a legal condemnation of the relationship without depoliticising the injured party or the powers that variously constitute his or her subjectivity.

6. Conclusion

In its essence, this paper has sought to test the efficacy of the slavery framework, based on the definition in powers of ownership, as an alternative to the contemporary legal framework on trafficking. It has been illustrated that, on the face of it, the three-tiered approach under the Trafficking Protocol's definition has somewhat of an ambiguous view of consent. In light of the broader legal framework and discourse in which trafficking is embedded, it has been argued that VoT's are constituted as non-consenting, at least with respect to the *actus reus* of the crime. The de-politicisation of the victim as a subject and as a subject of rights may function through the mechanism of "non-consent" in a manner which is not only harmful to the fulfilment of the victim's individual human rights claims, but further may function to legitimise a range of policy options that undermine the purported universal subjectivity of human rights law. If we may say that legal rules (particularly here in the context of so-called trafficking "destination states") are constructive of the "imagined community"²⁷⁹ of the state, it can be argued that the trafficking framework's vision of consent operates to imagine a community in which the constrained fields of action, in which trafficked persons may face difficult choices in electing exploitation and risk, do not occur. Through the definition's *actus reus* in the facilitation of movement as well as the Trafficking Protocol's creation of obligations focussed on migration control and victim repatriation, the framework arguably functions to physically displace and exclude those incapable of rendering consent in the contexts of choices available to those included within these imagined communities. In this sense, with consent at the hinge, the trafficking framework illustrates not a rejection of exploitation of human beings but a rejection of the contamination of the imagined community with the realities of the social and economic constraints of the "other". In so doing, the operation of consent can be said to subjectivise (or de-subjectivise) the VoT in the process of depoliticising the conditions of power and imaginations of exploitation that act upon the victim's choices. It is through this mechanism that it is not only VoT that is displaced, but so too is her subjectivity.

It is in this light that the slavery framework, as highlighted through the 1926 Slavery Convention definition is considered. The analysis has sought to explore some alternatives in the process of giving meaning to the "exercise of any or all of the powers attached to the right of ownership". A proposal is made to consider ownership from the perspective of James Harris, due to the model's conceptual clarity and broad applicability. Nevertheless, it has been illustrated through the models of Hickey and Penner that a favourable construction of consent results, even if Harris' model is not adopted. In this

²⁷⁹ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (revised edition), Verso: London, 2006. So as to imply that the norms and rules a community embraces are not exclusively reflective of a community as it is but also of the way in which it imagines itself to be.

light, the ethical and legal repugnancy is located in the acts of exploitation itself. The focus shifts not to the absence of consent on behalf of the enslaved but in the nature of the powers exercised over him or her. It is possible to apply the slavery prohibition in contexts of both individual criminal liability on the domestic level, and state responsibility as a human rights norm. The prohibition has a strong normative foundation in international customary law, arguably as an obligation *erga omnes*. In applying the definition with this in mind, we are able to keep alive the boundaries of exploitation and retain the politicisation not only of potentially consenting subjects but also of the many powers that act upon the subject's actions. We may consider not only the interactions of freedom and power as occurring between the perpetrator and victim, but so too between states and migrants, and between capital and labour. Thus the most idealistic aspect in considering the slavery framework as an alternative, is that through the exposure of power and through retaining the subject's ability to create dissensus, we are equipped better to evolve a critical attitude to the potentials of freedom and to the breadth of exploitation over time and space.

Nevertheless, the limits of this analysis warrant some consideration. For one, caution should be heeded in not endowing the legal structures with too great a causal role in these processes of subjectivisation, resistance and exclusion. Certainly no generic causal relation is claimed between the abstract framings of the legal definitions and the multitude of ways in which states, institutions, victims and perpetrators act and interact. The present study further does not consider other international legal instruments that address a wider range of servitudes, such as the ILO's Forced Labour Convention.²⁸⁰ Further research opportunities thus present in the consolidation and comparison of these instruments with slavery on the question of consent. The analysis of how consent works in either framework, under the present research, is also highly premised on the particularity of the analytical framework adopted. In this respect opportunities for further research remain in applying different analytical perspectives to the legal models to expand upon the critique. In particular, feminist modes of inquiry that offer structured objections to the vision of a Foucauldian critique of consent used here have the potential to particularise the gendered dimensions of the workings of power on consent in ways not considered in the present research.

The study's reliance on largely theoretical projections of the operation of consent in either legal framework further points to the need for insight through empirical accounts of how these models are institutionally reflected in various domestic and regional jurisdictions. A range of institutions, agencies and non-governmental organisations apply these definitions in the provision and exclusion of services and resources on a daily basis, all outside of the courts. An account of how the frameworks are applied here may indeed make for interesting further research. In addition, if we are to be

²⁸⁰ International Labour Organization (ILO), *Forced Labour Convention, C29*, 28 June 1930, C29.

critical towards the discourse of the trafficking framework, we so too should be aware of the potential for discursive overlap in relation to slavery. Slavery has a strong moral import and its frequent unreflective equation with trafficking implies that the difficulties described as associated with the trafficking discourse risk transferral. Most of all, the voices of the subjects of the legal frameworks are condemnably absent from this and the majority of research within this field: a fact that most sincerely limits the emancipatory potential of legal reform.

In closing, the concept of ownership in the definition of the 1926 Slavery Convention provides an interesting tool with which to adjudicate and assess the breadth and depth of relations of exploitation. It allows for the possibility to move beyond the discourse in trafficking that envisions a binary opposition between slavery and free-wage labour in its free-market liberal economic conception.²⁸¹ By not relying on negating the victim's consent, the definition retains the revelatory function of subjects' creation of dissensus when they shine light on the ways in which state, social, economic and interpersonal powers act upon them, exclude and exploit them, and deny them the rights guaranteed under rhetorical notions of universal subjectivity. While retaining a critical view to the function of law and of human rights, slavery as a human rights norm so embodies a tool that bears potential for an on-going enlightenment and questioning of the potentials of freedom and exploitation.

²⁸¹ R. Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking*, Palgrave Macmillan, Hampshire, 2010.

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