

**All About Sex?!
The Evolution of Trafficking in
Persons in International Law**

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THE EVOLUTION OF TRAFFICKING IN PERSONS IN INTERNATIONAL LAW

Corin Morcom & Andreas Schloenhardt

This research paper explores the evolution of international law in relation to trafficking in persons prior to 2000 and the subsequent adoption of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*. It critically examines successive international treaties relating to slavery, prostitution, labour, and human rights law, which influence and inform this Protocol. Such historical analysis reveals that the predominant focus of international law is on the traffic in women and children for the purpose of commercial sexual exploitation; that trafficking in persons is principally approached as a 'law and order' and immigration control issue, and that the *Trafficking in Persons Protocol* attempts to incorporate influences from diverse, and at times contradictory, areas of international law, potentially rendering the broad conceptualisation of trafficking contained in the Protocol meaningless and unworkable.

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1 INTRODUCTION

Historical critique of the international legal framework which has influenced contemporary conceptualisations of trafficking in persons facilitates an understanding of the scope and limitations of current definitional issues and responses to this phenomenon. This article explores the evolution of international law relating to trafficking in persons prior to the adoption of the United Nations (UN) *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.¹ To critically examine the development of, and demonstrate the historical influences upon, the contemporary international framework in relation to trafficking in persons, the efficacy and comprehensiveness of international law in the areas of slavery, prostitution, labour, human rights, and the rights of the child are discussed. Through analysis of these branches of international law general observations are drawn in relation to the shape, scope, strengths, and weaknesses of the current international framework and its conceptualisation of trafficking in persons.

It has long been recognised that human trafficking is not solely a domestic issue, but rather, is a cross-border phenomenon.² An internationally coordinated approach, through an effective international legal framework, is required to address the catalysts, processes, and consequences of trafficking in persons.³ As a distinctly transnational issue, international law plays a fundamental role in shaping conceptualisations of, and responses to, trafficking in persons.

An analysis of the international instruments which influenced the development and adoption of the *Trafficking in Persons Protocol* enables a more comprehensive understanding of the current position in international law. “It is through an understanding of why and how the current anti-trafficking agenda came into being that we can then move towards a more informed and aware critique of current practices”,⁴ note Marie Seagrave et al.

This research paper explores the definitional limitations of, and efficacy of responses to, trafficking in persons under international law. By clarifying the various developments which have contributed to the current conceptualisation, possibilities to transcend the limitations are revealed. Analysis of historical and contemporary conceptualisations of trafficking in persons

¹ UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, (hereinafter “*Trafficking in Persons Protocol*”), opened for signature 15 December 2000, entered into force 31 May 2004, 2237 UNTS 319, supplementary to the UN *Convention against Transnational Organised Crime*, opened for signature 15 December 2000, entered into force 29 September 2003, 2225 UNTS 209.

² This is not to say that the entire trafficking process cannot, and does not, occur within the territorial borders of nation-states. Rather, the fact that the traffic in persons also occurs across borders, necessitates a coordinated international response, so that what is criminalised domestically is equally criminalised internationally.

³ International law is necessary to tackle issues, such as human trafficking, which cannot be adequately addressed at the national level. Regional and domestic efforts to address this issue are fundamentally inadequate in isolation by the fact that such directives and decisions bind only a limited number of polities. For example, as regards the European Union (EU), the majority of source states are unaffected by the provisions in EU guidelines. Thus EU policy is triggered only once the trafficking act occurs within its borders and cannot target the root causes or sources of trafficking: Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFFALO HUMAN RIGHTS LAW REVIEW 5 at 28 (2006).

⁴ MARIE SEGRAVE ET AL, *SEX TRAFFICKING: INTERNATIONAL CONTEXT AND RESPONSE*, 3 (2009).

provides an alternative perspective from which to critique the current framework and an opportunity to open discussion about significant issues within this framework which are, at present, silenced by popular discourses within the media, academic literature, government policy, and law enforcement.

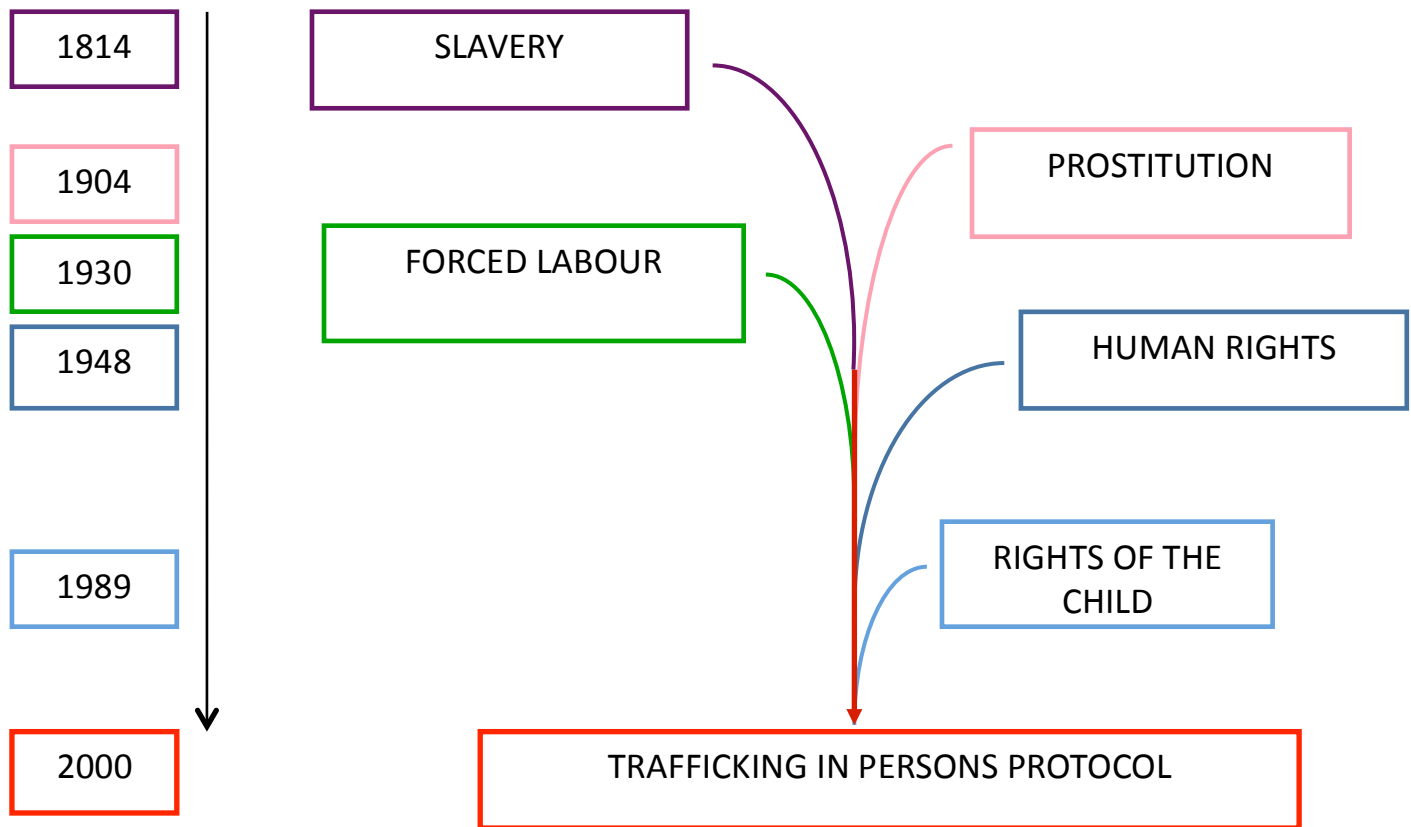
2 INFLUENCES ON THE TRAFFICKING IN PERSONS PROTOCOL

Since 2000, the *Trafficking in Persons Protocol* has defined the international legal framework for combating trafficking in persons. The *Protocol* seeks to comprehensively criminalise trafficking in persons in every conceivable shape and form. It instituted the first internationally recognised definition of trafficking in persons.⁵ From this definition three distinct phases in the trafficking process are identifiable: a) the movement of a victim from one place to another; b) the achievement of consent through improper means; and c) the final exploitation.⁶ The broad definition in the *Trafficking in Persons Protocol* (that is, the combination of various acts, means, and exploitative purposes to constitute trafficking) expands the concept of trafficking in persons. The reason behind this broad conceptualisation can be found in the multiple and sometimes contradictory influences sourced in the historical development of the international legal framework relating to trafficking in persons, as illustrated in Figure 1.

⁵ Article 3(a) *Trafficking in Persons 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’. Article 3(b) specifies that if one of the means set forth in Article 3(a) is used, it is irrelevant whether the person expressed consent or not. The definition of trafficking in minors in Article 3(c) does not take into consideration the issue of consent, so that recruitment, transportation, transfer, harbouring and the receipt of a child followed by exploitation is considered child trafficking.

⁶ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 60 (2008).

Figure 1: Contributions to the *Trafficking in Persons Protocol* from diverse branches of international law



The development of the Protocol, and its conceptualisation of trafficking in persons, was influenced by a great variety of international treaties and agreements. Five principal areas of international law can be identified which contributed to the contemporary framework which governs — and constrains — responses to trafficking in persons, both internationally and domestically. These areas are: slavery, prostitution, labour, human rights, and the rights of the child (see Figure 1 above). An in-depth look at the great number of international instruments which influenced the adoption of the *Trafficking in Persons Protocol* and the conceptualisation of trafficking in persons therein, in Parts 3–8 of this article, demonstrates the varied and sometimes contradictory influences that shaped the contemporary framework.

3 INTERNATIONAL ANTI-SLAVERY CONVENTIONS

From the beginning of the 19th Century the moral condemnation surrounding slavery and the slave trade facilitated the development of international agreements in relation to these practices. International anti-slavery conventions, in turn, greatly contributed to the development of the international anti-trafficking framework through the development of international enforcement mechanisms, recognition of the immorality of the exploitation of another human being, and, importantly, in a definitional sense.

3.1 Definitional Issues

Understandings of exploitation contained within international anti-slavery law have, to a large extent, been transferred onto the framework of trafficking in persons. While early slavery conventions focused on banning the slave trade from Africa, gradually a prohibition of the institution of slavery itself developed, culminating in the 1926 League of Nations *International Slavery Convention*,⁷ which abolished slavery in all its forms. The *Slavery Convention* was the first instrument to define both the institution of slavery and the slave trade.⁸ During drafting, an amendment to Article 2 was proposed to abolish practices resembling slavery, such as debt bondage, sham adoption, childhood marriage, and the traffic in women,⁹ yet no consensus could be reached to include these slavery-like practices.¹⁰ It was not until the 1956 United Nations *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*¹¹ that State Parties were obliged to adopt all appropriate measures to abolish 'progressively and as soon as possible' practices 'similar to slavery', in particular debt bondage,¹² serfdom,¹³ servile marriage,¹⁴ and the exploitation of children.¹⁵ These international anti-slavery instruments contributed greatly to the fight against trafficking in

⁷ *International Slavery Convention*, (hereinafter the *Slavery Convention*), adopted 25 September 1926, entered into force 9 March 1927, 60 L.N.T.S. 253.

⁸ Article 1 *Slavery Convention* states: 1) *slavery* is the status or condition of a person over whom any or all of the powers attaching to the *right of ownership* are exercised; 2) the *slave trade* includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of slaves..

⁹ U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Committee on Slavery, *The Suppression of Slavery, Memorandum submitted by the Secretary-General*, para 16, U.N. Doc. ST/SOA/4 (1951).

¹⁰ SILVIA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY, 46 (2008).

¹¹ UN *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, (hereinafter the *Supplementary Slavery Convention*), adopted 7 September 1956, entered into force 30 April 1957, 266 UNTS 3. Article 1 clarifies that these practices similar to slavery must be abolished whether or not they are within the scope of the definition in the *Slavery Convention*. Hence, the definitions in the *Supplementary Slavery Convention* do not replace, but complete, those in the *Slavery Convention*.

¹² Article 1 *Supplementary Slavery Convention* defines 'debt bondage' as the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt of the length and nature of those services are not respectively limited and defined.

¹³ Article 1 *Supplementary Slavery Convention* defines 'serfdom' as the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status Article 1 of the *Supplementary Slavery Convention*.

¹⁴ Under Article 1 *Supplementary Slavery Convention* 'servile marriage' is any institution or practice whereby: i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or ii) the husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or iii) a woman on the death of her husband is liable to be inherited by another person.

¹⁵ The exploitation of children in this context is any instrument or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour: Article 1 of the *Supplementary Slavery Convention*.

persons, especially through recognition of slavery and servitude as potential exploitative purposes of the trafficking process.

The abolition and probation of slavery has also been recognised in international human rights law. Article 4 of the 1948 *Universal Declaration of Human Rights (UDHR)*¹⁶ states that '[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.' This provision was a formal recognition that slavery still existed; even if it had assumed different and new forms.¹⁷ Similarly, Article 8 of the 1966 *International Covenant on Civil and Political Rights (ICCPR)*¹⁸ provides that 'no one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited; no one shall be held in servitude'.¹⁹ From the *Travaux Préparatoires*²⁰ it is clear that the *ICCPR* drafters sought to emphasise the differences between 'slavery' and 'servitude'; and therefore referred to these practices in different paragraphs. It was intended that slavery be dealt with in a narrow sense. A proposal by France to substitute 'trade in human beings' for 'slave trade', to also cover the traffic in persons, was rejected at the time.²¹ On the other hand, servitude was considered to be applicable to all conceivable forms of dominance and degradation of human beings by human beings. 'Servitude' encompasses all slavery-like practices mentioned in the *Supplementary Slavery Convention*, including economic exploitation, debt bondage, and servile forms of marriage.²²

These definitions have significant corollaries with conceptualisations of trafficking in persons.²³ Where the circumstances of the trafficked victim constitute complete control and ownership,

¹⁶ *Universal Declaration of Human Rights*, (hereinafter the *UDHR*), adopted 10 December 1948.

¹⁷ U.N. Econ. & Soc. Council [ECOSOC], Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Slavery: report updating the Report on Slavery submitted to the Sub-Commission in 1966*, ¶ 120, U.N. Doc. E/CN.4/Sub.2/1982/20/Rev.1 (1984) (prepared by Benjamin Whitaker).

¹⁸ *International Covenant on Civil and Political Rights*, (hereinafter the *ICCPR*), Adopted 16 December 1966, entered into force 23 May 1976, 999 UNTS 171

¹⁹ The *ICCPR* provisions relating to slavery and servitude are non-derogable; that is, they cannot be suspended by a state (Article 4(2)). The inalienability of personal freedom renders consent irrelevant in regard to slavery and servitude; so it is not possible for any individual to contract themselves into a situation of slavery or servitude. The drafters of the *Slavery Convention* and the *ICCPR* rejected proposals to add the qualification 'involuntary' to servitude, as "it should not be possible for any individual to contract [themselves] into bondage" (U.N. Doc. A/2929/33, cited in Francis G. Jacobs & Robin C.A. White, *The European Convention on Human Rights 77-78* (2nd ed. 1996)).

²⁰ The *ICCPR* does not define 'slavery', 'slave trade', 'servitude' or 'forced or compulsory labour'. Under the *Vienna Convention on the Law of Treaties*, these terms are given the meanings contained in the *Slavery Convention* and the *ILO Convention 29*, and are interpreted in light of the *ICCPR Travaux Préparatoires*, reporting guidelines and comments of the Human Rights Committee (HRC).

²¹ U.N. Secretary General, *Annotations on the text of the draft International Covenant on Human Rights*, ¶ 17, U.N. Doc. A/2929, (1955).

²² MANFRED NOVAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, *CCPR COMMENTARY*, 200 (2005).

²³ The extension of the concepts of 'slavery' and 'servitude' under the *ICCPR* to instances of trafficking in persons are exemplified by the comments of the HRC, the treaty body which monitors the implementation of the *ICCPR*. By General Comment 28, the HRC stated that even if Article 8 does not mention trafficking in women and children, States Parties are required to report on measures taken to eliminate domestic and transnational trafficking, to protect women and children and to prevent the violation of their human rights (U.N. Human Rights Committee, 'General Comment 28' in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 220, U.N. Doc. HRI/GEN/1/Rev.8,

trafficking in persons can be considered as within the category of slavery.²⁴ Trafficking in persons is considered a form of servitude in circumstances constituting dominance and degradation.²⁵ Thus, the definitions contained in the 1926 and 1956 anti-slavery instruments have significantly influenced the international trafficking in persons framework. Further contributions are revealed through analysis of the development of an international moral condemnation surrounding slavery.

3.2 Moral Condemnation of Slavery

Analysis of international law concerning the prohibition of slavery demonstrates the development of a moral condemnation surrounding the exploitation of human beings, which has been grafted onto the international trafficking in persons framework. It was public outrage against the 'evil' of slavery, rather than any international impetus to criminalise these practices, which generated momentum for the adoption of international instruments in this area. International criminalisation and enforcement of the prohibition against slavery developed much later.

From the beginning of the 19th Century the moral condemnation surrounding slavery and the slave trade facilitated the development of preliminary agreements to ban slavery under international law. The prohibition of slavery and the slave trade has been a central feature of more than 75 multilateral and bilateral conventions from the early 19th Century,²⁶ beginning with the 1814 *Treaty of Paris*, which recognises the need to abolish the slave trade.²⁷

The force driving initial efforts to abolish the slave trade was a moral imperative derived from the religious and secular principles of the European Enlightenment,²⁸ including ideas of the 'natural rights of man'.²⁹ The 1815 *Declaration relative to the Universal Abolition of the Slave Trade*³⁰ states that the slave trade is 'repugnant to the principles of humanity and universal morality'. This was the first declaration by major countries that the slave trade was a violation of human rights. Thus, while the Declaration was 'useless in practical terms', it was the first hesitant step

(2006). Taking into account the *Trafficking in Persons Protocol's* definition of trafficking, the HRC should update this comment and require State Parties to include in their reports information on trafficking in persons, including women, men and children, for the purpose of labour, sexual or any other kind of exploitation.

²⁴ See, ICTY Prosecutor v Kunarac, Case No. IT-96-23, Trial Judgement, (22 Feb 2001): trafficking may be treated as slavery when people are exploited afterwards by traffickers themselves, as this ensures the continuous exercise of the right of ownership. If people are exploited by those other than the traffickers when they reach their destination, the continuous exercise of ownership is terminated and trafficking may not be easily regarded as slavery. See further, Van Droogenbroeck v Belgium, 44 Eur. Ct. H.R. (ser. B), 30 (1980).

²⁵ SILVIA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY, 88 (2008).

²⁶ J.H.W. VERZILJ, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, 238-260 (1976).

²⁷ Article 1 of the *Additional Articles of the Treaty of Paris* declared the need to abolish the slave trade and contained the promise by France to abolish it within five years.

²⁸ Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INTERNATIONAL ORGANISATIONS 479, 479, 493, 497 (1990).

²⁹ NORMAN HAMPSON, THE ENLIGHTENMENT 153, 493 (1968).

³⁰ *Declaration relative to the Universal Abolition of the Slave Trade*, (hereinafter the 1815 *Declaration*), annexed to the Act adopted during the 1815 *Congress of Vienna*, was signed by Austria, France, Portugal, Prussia, Russia, Spain, Sweden and the United Kingdom, 8 February 1815, 63 *Consolidated Treaty Series* 473.

in the direction of the present international human rights framework.³¹ The 1885 *General Act of Berlin* further recognises the institution of slavery as morally repugnant.³² This initial moral condemnation of slavery later led to international prohibition, enforcement, and criminalisation efforts.

3.3 Enforcement and Criminalisation

Early international instruments relating to the abolition of slavery and the slave trade were effectively devoid of enforcement mechanisms, largely due to concerns regarding the retention of state sovereignty. Similar concerns are evident in relation to enforcement under contemporary international anti-trafficking laws. Further, both international slavery and trafficking in persons frameworks adopt a criminalisation approach to the abolition of such practices.

The 1815 *Declaration* only established a general consensus on the abolition of the slavery. It did not set a time limit for abolition, did not contain enforcement provisions and did not criminalise the slave trade.³³ Until the 1885 *General Act of Berlin*, no bilateral or multilateral treaty attempted to ban the slave trade by land. Under the *General Act of Berlin*, State Parties' exercising sovereign rights or influence in the Congo Basin in southern Africa were required to act to end the slave trade and abolish slavery.³⁴

At this point in the evolution of international slavery law initial enforcement and criminalisation provisions began to develop. Article 5 of the 1890 *General Act of Brussels* provided that within one year Contracting Parties had to adopt penal laws to punish those engaged in the capture, transportation and dealing of slaves and in any other act against the individual liberty of persons. This criminalisation provision was implemented in conjunction with the establishment of a reciprocal, albeit limited, right of 'visit, search and detention' of vessels at sea.³⁵ The *General Act of Brussels* also established International Slavery Bureaus in Zanzibar and Brussels to monitor the slave trade and provide a further international enforcement mechanism.³⁶ However, the success of these Bureaus was limited; the only effect on the slave

³¹ S. MIERS, *SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM* 14–15 (2003).
³² Article 9 *General Act of Berlin* recognises that slavery and the slave trade should be considered forbidden.

³³ A British proposal during the drafting of the 1815 *Declaration* to outlaw the slave trade within three years and establish a right to search other nations' ships was considered too far-reaching by other European powers, see SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 42 (2008).

³⁴ Further, State Parties were required to act to avoid the possibility of the Congo Basin becoming the market or the means of transit for the slave trade (U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Committee on Slavery, *The Suppression of Slavery, Memorandum submitted by the Secretary-General*, ¶ 9, U.N. Doc. ST/SOA/4 (1951); *Ibid*, 43).

³⁵ Article 22 of the *General Act of Brussels*. J. A. C. Gutteridge, *Supplementary Slavery Convention 1956*, 6 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 449, 456 (1957). This right was limited to vessels under 500 tons sailing in the specified maritime zone, specified in Article 21, and to vessels of contracting parties who had concluded bilateral treaties amongst themselves for the purpose of fighting the slave trade; so that no action was possible against vessels flying a flag of a contracting party that did not conclude any bilateral agreement or on those vessels of more than 500 tons: SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 43 (2008). Further, in many instances, the utilisation of this right meant that upon vessels being stopped for inspection, slaves were thrown into the sea to avoid accusations of slave trading: M. R. SAULLE, *DALLA TUTELA GIURIDICA ALL-ESERCIZIO DEI DIRITTI UMANI*, 19 (1999).

³⁶ Articles 27, 75-84 *General Act of Brussels*.

trade was to partially restrict numbers within given territories. At the outbreak of World War I the Bureaus were dismantled, and the slave trade revived in its traditional locations during the post-war period.³⁷

The 1919 *Convention revising the General Act of Berlin and the General Act of Brussels*³⁸ internationally recognised that Contracting Parties had an obligation to endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea.³⁹ However, this Convention was essentially a backward step as it abrogated the right of visit, search, and detention previously granted by the *General Act of Brussels* and did not establish or revive an international bureau.

While the *Covenant of the League of Nations*⁴⁰ did not directly mention the abolition of the slave trade,⁴¹ the League was pivotal in codifying an international prohibition against slavery.⁴² Article 2 of the 1926 *Slavery Convention* obliges State Parties to prevent and suppress the slave trade. Yet this proposition is weakened by requiring Signatories only to 'bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms'.⁴³ The *Slavery Convention* requires that State Parties adopt laws and regulations giving effect to the *Convention* and imposing severe penalties on those in contravention.⁴⁴ However, "the provisions of the 1926 *Convention* relating to the slave trade left unresolved the unsatisfactory state of international law on this matter as it existed at the time".⁴⁵

The *Slavery Convention* lacks effective provisions for the suppression of slavery and the slave trade; it fails to establish effective enforcement measures or mechanisms.⁴⁶ Further, it was

³⁷ R. SAWYER, *SLAVERY IN THE TWENTIETH CENTURY*, 217 (1986).

³⁸ The *Treaty of St-Germain-en-Laye*, (hereinafter the 1919 *Convention*), was concluded between the US, Belgium, British Empire, France, Italy, Japan and Portugal on 10 September 1919. The General Act of Berlin and the General Act of Brussels were abrogated by Article 13 of the 1919 *Convention*.

³⁹ Article 11 of the 1919 *Convention*.

⁴⁰ *Covenant of the League of Nations*, 28 April 1919.

⁴¹ However, in establishing the mandate system for the administration of Central African non-self-governing territories, Article 22 of the League of Nations *Covenant* guaranteed the prohibition of abuses such as the slave trade. Article 23(b) also provided that members of the League had 'to secure just treatment for the native inhabitants of territories under their control'.

⁴² In 1922 the League of Nations Secretary General requested that Member States provide information on the practice of slavery and the slave trade, however, only eleven states replied (League of Nations, L.N. OJ Doc. A.18.1923.VI (1923)). The General Assembly acknowledged that some states were unable, and others unwilling, to cooperate to abolish slavery and thus considered it necessary to conduct an in-depth investigation (League of Nations, L.N. OJ Doc. A.117.1923.VI (1923)), which in 1925, resulted in recognition of the need to negotiate a convention to abolish slavery (League of Nations, L.N. OJ Doc. A.19.1925.VI (1925)).

⁴³ Article 2 of the *Slavery Convention*.

⁴⁴ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 46 (2008). Article 3 of the *Slavery Convention* provides that State Parties prevent the embarkation, disembarkation and transportation of slaves in their territorial waters and on vessels flying their flags. Article 4 of the *Slavery Convention* requires State Parties to assist one another to succeed in the abolition of slavery and the slave trade.

⁴⁵ J. A. C. Gutteridge, *Supplementary Slavery Convention 1956*, 6 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 449, 456 (1957).

⁴⁶ R. SAWYER, *SLAVERY IN THE TWENTIETH CENTURY*, 219 (1986). See Article 7 *Slavery Convention*; SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 470 (2008).

possible for State Parties to declare certain territories under their jurisdiction, protection or tutelage exempt from the Convention or some of its provisions.⁴⁷ The United Kingdom sought stronger provisions in the *Slavery Convention* to equate the slave trade with piracy, and thereby extend the right of search to all ships on the high seas worldwide.⁴⁸ Yet, this was considered too far-reaching by many states,⁴⁹ and consequently, State Parties were left free to conclude bilateral agreements amongst themselves to abolish the slave trade.⁵⁰

Similarly, the 1956 *Supplementary Convention* did not establish a monitoring mechanism. Article 8 contains only a general obligation for States Parties to cooperate with each other and with the newly established United Nations (UN), and to communicate to the Security Council any provision adopted to implement the Convention.⁵¹ However, the criminalisation provisions in the *Supplementary Slavery Convention* do require State Parties to consider as a criminal offence the transportation or attempted transportation of slaves from one country to another and to free every slave who takes refuge on board one of their vessels.⁵² This focus on criminalisation provisions, rather than international enforcement mechanisms, is apparent within both international slavery and trafficking law.

3.4 Observations

In summary, international instruments relating to slavery reflect the initial conceptualisation that the exploitation of human beings is morally reprehensible, and should be criminalised. From this early perception and condemnation of slavery and practices similar to slavery, grew both the international human rights movement⁵³ and the international anti-trafficking framework. The criminalisation approach evidence in anti-slavery instruments continues to find expression within the modern international anti-trafficking framework. The principles which founded and governed the adoption of international anti-slavery laws were transposed into the framework of the similar, but distinct phenomenon, of the traffic in humans.

4 INTERNATIONAL ANTI-PROSTITUTION CONVENTIONS

International anti-prostitution conventions greatly contributed to current conceptualisations of trafficking in persons. These instruments were catalysed by an initial recognition of the traffic in women and children, and to some extent did succeed in developing an international framework to combat trafficking in persons for the purpose of commercial sexual exploitation. In the early 20th Century, the abduction of European women and girls, who were transported abroad and forced into prostitution, was labelled the 'white slave traffic'. Trafficking thus became associated with the 'immoral' purpose of prostitution. This focus on prostitution as the purpose of trafficking remained the guiding force in successive efforts to criminalise and address this issue.

⁴⁷ Article 9 of the *Slavery Convention*.

⁴⁸ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 46 (2008).

⁴⁹ S. MIERS, *SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM*, 125–126 (2003).

⁵⁰ Article 3(3) of the *Slavery Convention*; SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 46 (2008).

⁵¹ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 490 (2008).

⁵² See Articles 3 and 4 of the *Supplementary Slavery Convention*.

⁵³ Freedom from slavery was one of the first rights to be recognised under public international law and these slavery conventions precipitated the development of international human rights law J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*, 240 (1976).

Although these conventions contain the word 'traffic' they relate only to trafficking for the purpose of commercial sexual exploitation, and were — by and large — focused on the criminalisation of trafficking as an international means to abolish prostitution. This abolitionist approach to prostitution is most pronounced in the 1949 *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*,⁵⁴ which declares prostitution 'incompatible with the dignity and worth of the human person'.⁵⁵ This Convention demonstrates the preoccupation of the international community with trafficking in persons for the purpose of commercial sexual exploitation. This preoccupation continues today, despite the recognition of other exploitative purposes:

The spectre of involuntary sex and of despoilment of innocent white maidens seized the world's attention in the late 1800's and early 1900's. Overtones of that appalled, fascinated, and condemnatory prurience continue to pervade public and institutional perceptions of the traffic in human beings in the early twenty-first century.⁵⁶

The attention of policymakers, academics, and the general public continues to focus on the lurid nature of the sex industry and the victimisation of women and children who are forced into sex work. Thus, contemporary attempts to analyse and combat the traffic in persons have failed to overcome the restrictive notions of the 'iconic victim' seen in early anti-prostitution conventions.

4.1 Contextualising the 'White Slave Traffic' Conventions

The early anti-prostitution conventions which emerged at the beginning of the 20th Century were largely inspired by the work of the abolitionist movement which condemned the systems of regulating prostitution. This abolitionist perspective on prostitution was complemented by increasing social alarm concerning the movement of women throughout Europe, particularly in regard to the solicitation of Caucasian women into prostitution against their will.⁵⁷ The term 'white slavery' emerged to promote the 'vision of women held in bondage against their will, of mysterious drugging and abductions of helpless young girls, and of unexplained disappearances of innocent and naive immigrants forced into lives of prostitution and vice'.⁵⁸ While it is generally accepted that this phenomenon existed more in public perception than reality, several international instruments followed in response to public concerns.⁵⁹

⁵⁴ *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*, (hereinafter the 1949 *Convention*), approved by the General Assembly in Resolution 317(IV) of 2 December 1949, adopted 21 March 1950, entered into force 25 July 1951, 96 UNTS 271.

⁵⁵ See Preamble of the 1949 *Convention*.

⁵⁶ Karen E Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 207, 221 (2007).

⁵⁷ P. Saunders and G. Soderlund, *Threat or Opportunity? Sexuality, Gender and the Ebb and Flow of Trafficking as Discourse*, 22(3-4) CANADIAN WOMAN STUDIES 16, 16 (2003).

⁵⁸ Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEORGETOWN LAW JOURNAL 1111, 1111 (1984).

⁵⁹ P. Saunders and G. Soderlund, *Threat or Opportunity? Sexuality, Gender and the Ebb and Flow of Trafficking as Discourse*, 22(3-4) CANADIAN WOMAN STUDIES 16, 16 (2003); J. Doezeema, *Loose women or lost women? The re-emergence of the myth of "white slavery" in contemporary discourses of "trafficking in women"*, 18(1) GENDER ISSUES 23 (2000); Karen E Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 207, 217 (2007)..

4.2 Definitional Issues

The international 'white slave traffic' instruments rendered the term 'trafficking' synonymous with the international movement of women and girls for the purpose of commercial sexual exploitation. For example, Article 1 of the 1904 *International Agreement for the Suppression of the White Slave Traffic*⁶⁰ defined trafficking as the coercive procuring of women or girls abroad for immoral purposes. The scope of the 1910 *International Convention for the Suppression of the White Slave Traffic*⁶¹ remained unchanged, maintaining the link between trafficking and the commercial sexual exploitation of Caucasian females.⁶² Article 1 provides that: 'Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes shall be punished'; and, under Article 2, 'a person who by means of fraud, or by means of violence, threats, abuse of authority or any other method of compulsion, procured, enticed or led away a woman or girl over age, for immoral purposes, shall be punished'.⁶³

The 1904 *Agreement* and the 1910 *Convention* are gender and race biased: they do not apply to males of any age or to non-Caucasian women and girls.⁶⁴ The 1910 *Convention* only broadens the 1904 definition by including trafficking within national borders.⁶⁵ The 1921 *International Convention for the Suppression of the Traffic in Women and Children*⁶⁶ further endorses the definition contained in the 1910 *Convention*; thereby retaining an emphasis on prostitution as the exploitative purpose of trafficking.⁶⁷ By omitting reference to the 'white slave trade', the 1921 *Convention* recognises that women and children of any race can be trafficked.⁶⁸ The 1921 *Convention* also extends the provisions of the two previous instruments; the *Convention* applies to both male and female children,⁶⁹ as well as to adult females, and raised the age limit for protection regardless of consent from 20 years to 21 completed years of age.⁷⁰

⁶⁰ *International Agreement for the Suppression of the White Slave Traffic*, (hereinafter the 1904 *Agreement*), adopted 18 May 1904, entered into force 18 July 1905, 35 Stat. 1979, 1 LNTS 83.

⁶¹ *International Convention for the Suppression of the White Slave Traffic*, (hereinafter the 1910 *Convention*), adopted 4 May 1910, LNTS 8(a).

⁶² TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 14 (2006).

⁶³ 'Over age' was considered as over 20 completed years of age. Hence, if a woman was under 20 years, her consent was irrelevant. Whereas, in the case of a woman over 20 years of age, the trafficker had to utilise one of the means listed. See the 1910 *Convention*.

⁶⁴ TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 13 (2006).

⁶⁵ A. Derks, 2000 'From white slaves to trafficking survivors – Notes on trafficking debate', The Centre for Migration and Development, Princeton University Working Article No. 00-02m, May, 4; J. Doezema, *Who gets to choose? Coercion, consent and the UN Trafficking in Persons Protocol*, 10(1) GENDER AND DEVELOPMENT 20 (2002).

⁶⁶ *International Convention for the Suppression of the Traffic in Women and Children*, (hereinafter the 1921 *Convention*), adopted 30 December 1921, 9 LNTS 415.

⁶⁷ TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 15 (2006).

⁶⁸ TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 16 (2006).

⁶⁹ Article 2 of the 1921 *Convention*.

⁷⁰ Article 5 of the 1921 *Convention*.

The 1933 *International Convention for the Suppression of the Traffic in Women of the Full Age*⁷¹ defines trafficking as the transfer of women across nation-state borders for immoral purposes, regardless of their consent or coercion.⁷² This definition removes the element of coercion or fraud contained in previous definitions,⁷³ but retains the international character of trafficking. State Parties are required to punish the act or the attempt to commit the act of ‘procuring, enticing or leading away, even with her consent, a woman or girl of full age to take her abroad for immoral purposes’.

Through these definitional limitations, a gendered conception of the trafficking ‘victim’ developed. Moreover, these Conventions explicitly connect the traffic in women and children with exploitation in the sex industry, thereby creating a lasting notion of the link between trafficking and prostitution.

The four ‘white slave traffic conventions’ consider only the recruitment and transportation process, and leave the regulation of prostitution as a matter of national jurisdiction. These instruments are designed to address — and are solely concerned with — the process of procurement and transportation of women and girls, not with the end purpose of prostitution which remained a domestic matter.⁷⁴ This position was greatly criticised by the abolitionist movement as ineffective to address the phenomenon.⁷⁵ From the abolitionist standpoint, it is the legality and regulation of prostitution which gives impetus to the traffic of women. The League of Nations adopted this approach, accepting that the existence of brothels was the main factor contributing to the expansion of domestic and international trafficking.⁷⁶ This perspective, combined with increasing awareness and acceptance that prostitution should not merely be a matter of national regulation, led to the preparation of a draft convention in 1937 which was, however, never adopted.

⁷¹ *International Convention for the Suppression of the Traffic in Women of the Full Age*, (hereinafter the 1933 *Convention*), adopted 11 October 1933, entered into force 24 August 1934, 150 LNTS 431.

⁷² A. Derks, 2000 ‘From white slaves to trafficking survivors – Notes on trafficking debate’, The Centre for Migration and Development, Princeton University Working Article No. 00-02m, May,, 4-5.

⁷³ The 1904 and 1910 definitions require an element of coercion or fraud in the process of recruitment of trafficked persons; MARIE SEGRAVE ET AL, *SEX TRAFFICKING: INTERNATIONAL CONTEXT AND RESPONSE*, 2 (2009).

⁷⁴ For example, the retention of a woman or girl in a brothel, even against her will, was not within the ambit of the 1910 *Convention*, but rather was considered as a matter of national jurisdiction: M.C. Maffei, *Tratta, PROSTITUZIONE FORZATA E DIRITTO INTERNAZIONALE, L CASO DELLE ‘DONNE DI CONFORTO’*, 81-85 (2002). While many states did condemn the exploitation of prostitution, the regulation of prostitution was considered to be a matter of national choice: see SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 54 (2008).

⁷⁵ See UNCHR, *Report of the Special Rapporteur on violence against women, its causes and consequences, on trafficking in women, women’s migration and violence against women*, U.N. Doc. E/CH.4/2000/68 (2000), (prepared by Radhika Coomaraswamy)

⁷⁶ TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 16 (2006); UNCHR, Sub-Commission, *Note by the Secretary-General, Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, ¶ 3, U.N. Doc. E/CN.4/Sub.2/AC.2/5, (1976).

The 1949 *International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*⁷⁷ consolidates and extends the scope of the four previous white slave traffic agreements and of the League of Nations 1937 draft convention, adopting an abolitionist approach.⁷⁸ The 1949 Convention utilises race, gender and age neutral terminology and removes the transnational element of trafficking in persons, thereby extending the definition and conceptualisation of trafficking in persons, while retaining the focus on the sex industry.⁷⁹ The 1949 Convention explicitly connects trafficking in persons and the exploitation of prostitution.⁸⁰ Article 1 requires States Parties to punish any person who, to gratify the passions of another, (1) 'procures, entices or leads away, for the purpose of prostitution, another person, even with the consent of that person; (2) exploits the prostitution of another person, even with the consent of that person'.⁸¹ This approach assumes that prostitution was the sole precursor for trafficking,⁸² and equates trafficking with prostitution, thereby relegating all women in the sex industry to the status of victims requiring rescue.⁸³ The focus on prostitution — rather than trafficking — fails to protect those trafficked for purposes other than prostitution, and limits the sphere of application to this specific form of exploitation in the context of trafficking in persons.⁸⁴

Recognition that the 1949 *Convention* was obsolete and ineffective ultimately led to negotiations of the *Trafficking in Persons Protocol*,⁸⁵ and also provided impetus to the adoption of the 1979

⁷⁷ *International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*, (hereinafter the 1949 *Convention*), adopted 2 December 1949, entered into force 25 July 1951, 96 UNTS 271.

⁷⁸ Preamble of the 1949 *Convention*. However, there are some inconsistencies in approach between the title, preamble and text of the Convention. The title refers to trafficking and the exploitation of the prostitution of others; the preamble acknowledges that both prostitution and trafficking in persons for the purpose of prostitution are incompatible with human dignity; and the text refers to commercial sexual exploitation as the exploitative purposes of trafficking in persons: N. Demleitner, *Forced Prostitution: Naming and International Offense*, 18 *FORDHAM INTERNATIONAL LAW JOURNAL* 163, 174 (1994).

⁷⁹ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 52 (2008).

⁸⁰ TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 17 (2006). This Convention received few ratifications. While many states did condemn the exploitation of the prostitution of others and trafficking in persons for prostitution, they considered prostitution per se a matter of national choice.

⁸¹ Under Article 2 of the 1949 *Convention*, trafficking also connotes keeping, managing and financing brothels, and knowingly renting a building or any other place for the purpose of the prostitution of others. See Joshi Chandni, 'Violence against Women as a Human Rights & Gender Justice Issue', *Judges' Workshop on Combating Trafficking in Women and Children*, 94 (National Judicial Academy Nepal, 2006).

⁸² Although the Convention urged states to suppress trafficking and to punish brothel owners, it did not specifically require the prohibition of prostitution itself. Rather, State Parties are required to take all necessary measures to repeal or abolish existing domestic law which regulates or registers those engaged in prostitution (Article 6 of the 1949 *Convention*). This was largely due to fears that prohibition would drive prostitution underground, and that laws designed to punish both the clients and the prostitutes, in practice, would be selectively enforced only against sex workers, see N. Demleitner, *Forced Prostitution: Naming and International Offense*, 18 *FORDHAM INTERNATIONAL LAW JOURNAL* 163, 177 (1994).

⁸³ MARIE SEGRAVE ET AL, *SEX TRAFFICKING: INTERNATIONAL CONTEXT AND RESPONSE*, 2 (2009). For example, Article 16 of the 1949 *Convention* considers persons engaging in prostitution as victims who have been sexually exploited, and for whom states shall adopt rehabilitative measures.

⁸⁴ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 54 (2008).

⁸⁵ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 55 (2008).

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁸⁶ *CEDAW* was a clear attempt to sever ties with the 1949 *Convention*, and the abolitionist approach to prostitution, which was viewed as a failure to recognise and protect the rights of women.⁸⁷ Article 6 of the *CEDAW* requires State Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women. Article 6 was drafted with the well-established link between trafficking in women and forced prostitution in mind.⁸⁸ Hence, *CEDAW* reiterated and reinforced traditional conceptualisations of the woman victim of trafficking for the purpose of commercial sexual exploitation.⁸⁹ Such typecasts continue to remain predominant in contemporary conceptualisations of, and responses to, trafficking in persons.

4.3 Enforcement

These early international anti-trafficking instruments dealt with the 'white slave traffic' from an immigration control perspective, which later developed into a 'law and order' focus. This approach to trafficking is similarly evident within the contemporary international framework. The positioning of 'victims' as 'immoral' justified neglect of their rights and needs as persons who have suffered exploitation and serious human rights violations. The immigration control focus of the 1904 *International Agreement for the Suppression of the White Slave Traffic* is evidenced by provisions attempting to conduct controls, especially in railways stations and ports, to identify victims of the 'white slave traffic'. While this instrument obliges states to adopt measures for

⁸⁶ *Convention on the Elimination of All Forms of Discrimination against Women*, (hereinafter the *CEDAW*), adopted 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13.

⁸⁷ During drafting Morocco's proposal to draft Article 6 of the *CEDAW* in a way similar to the 1949 *Convention* so as to fight against all forms of prostitution was rejected. Such a provision would have undermined the potential of the whole *CEDAW* as a document upholding gender equality and the rights of women, see SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 94 (2008).

⁸⁸ Anne Gallagher, 'Using International Human Rights Law to Better Protect Victims of Trafficking: the Prohibitions on Slavery, Servitude, Forced Labour, and Debt Bondage', *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOUR OF M. CHERIF BASSIOUNI*, 399 (L. N. Sadat and M. P. Scharf eds., 2008). Taking into account the *Trafficking in Persons Protocol's* definition, trafficking in women should be, and has been, interpreted broadly to cover other forms of exploitation also.

⁸⁹ The limited focus of the *CEDAW* is exemplified by the comments of the Committee on the Elimination of Discrimination against Women, the monitoring body for the *CEDAW*. In the 1990's the Committee focused more on the issue of the exploitation of prostitution, a conception in line with the early international prostitution laws, see M. Hartl, 'Traffic in Women as a Form of Violence against Women', *COMBATING TRAFFIC IN PERSONS*, 26 (Proceedings of the Conference on Traffic in Persons held from 15-19 November 1994 in Utrecht and Maastricht, Netherlands Institute of Human Rights, Sim Special No 17, M. Klap, Y. Klerk and J. Smith eds., 1995). However, earlier this decade there was a shift towards the issue of trafficking in women for the purpose of prostitution: U.N. Committee on the Elimination of Discrimination against Women, 'General Recommendation No 19' in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 16, U.N. Doc. HRI/GEN/1/Rev.8, (2006). More recently, the Committee has overcome the interpretation of trafficking related to the 1949 *Convention* and begun to take into consideration trafficking in women and girls for whatever purpose, and has recognised trafficking in women as an offence that encompasses forms of sexual exploitation as well as new forms of exploitation such as sex tourism, domestic work of servants coming from developing countries and organised marriages: U.N. Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Mauritania*, ¶ 31, U.N. Doc. CEDAW/C/MRT/CP/1 (2007).

information exchange, identification of victims, and supervision of employment agencies, it contains no provisions designed to enhance law enforcement.⁹⁰ Although the 1904 Agreement contains measures for the identification of victims and for their repatriation, these issues are dealt with from an immigration control perspective. The 1910 *International Convention for the Suppression of the White Slave Traffic* signals recognition of the need to institute criminalisation and international cooperation provisions, providing for the amendment of national legislation to punish offenders and to facilitate extradition.⁹¹ Similar to the reluctance evidenced in international conventions relating to slavery, as previously discussed, these international instruments focusing on prostitution also fail to establish strong enforcement, implementation or monitoring mechanisms.⁹²

4.4 Summary

Analysis of international prostitution conventions demonstrates a continued criminalisation approach and the connection of trafficking with prostitution and sexual exploitation. This initial understanding of trafficking in persons has been reiterated in subsequent international instruments. These early anti-trafficking instruments establish a distinctly gendered perception of trafficking in persons, whereby women and children have been consistently positioned as the principal victims of trafficking. This focus on the traffic of women and children into the sex industry continues to dominate contemporary conceptualisations of trafficking in persons. These international instruments fundamentally influenced the contemporary international framework in relation to trafficking in persons and have formed the basis of public perceptions of this phenomenon.

5 INTERNATIONAL LABOUR LAW

The development of conventions by the International Labour Organisation (ILO) in relation to trafficking in persons has to some extent shifted attention away from the sole focus on trafficking for the purpose of prostitution. The ILO considers trafficking a 'degrading misuse of human resources resulting in undignified and unproductive work'.⁹³ By prohibiting forced and compulsory labour, the worst forms of child labour and the exploitation of migrant workers, and by extending a measure of protection to trafficked persons, international labour law has advanced a key component of the contemporary concept of trafficking in persons set out in the *Trafficking in Persons Protocol*.⁹⁴ The ILO, through the six conventions discussed in this section, recognises that trafficking in persons has dimensions of forced labour. While the anti-prostitution conventions focus on the exploitation of trafficked person's sexuality, international labour law considers the exploitation of the forced labour of the trafficked person.⁹⁵ By

⁹⁰ See Articles 1-5 of the 1904 *Agreement*; TOM OBOKATA, TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH, 14 (2006).

⁹¹ SILVIA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY, 51 (2008).

⁹² For example, the 1949 *Convention* established no strict implementation mechanisms for treaty compliance or independent body to monitor the implementation and enforcement of the treaty: Human Rights Law Network, above n 12, 77.

⁹³ International Labour Organisation, UNBEARABLE TO HUMAN HEARTS: CHILD TRAFFICKING AND ACTION TO ELIMINATE IT, vii, (2002).

⁹⁴ P. Boonpala, and J. Kane, TRAFFICKING OF CHILDREN: THE PROBLEM AND RESPONSES WORLDWIDE, 6 (2001).

⁹⁵ Karen E Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 207, 236 (2007).

expanding the scope of recognised exploitative purposes to that of labour trafficking, these conventions have influenced conceptualisations of, and responses to, the traffic in persons.

5.1 *The Prohibition on Forced Labour*

International labour law has expanded the scope of trafficking in persons to encompass the exploitation of labour. In this regard the ILO initially built upon the 1926 *Slavery Convention*, which attempted to ward against forced labour degenerating into conditions analogous to slavery.⁹⁶ Similarly, the 1930 *Forced Labour Convention*⁹⁷ and 1957 *Abolition of Forced Labour Convention*⁹⁸ institute measures to prevent compulsory labour from degenerating into conditions analogous to slavery.⁹⁹ These conventions oblige State Parties to suppress and abolish forced or compulsory labour.¹⁰⁰ The prohibition on forced labour instituted within this framework is supplemented and reinforced by the right to be free from forced and compulsory labour under international human rights law.¹⁰¹

Forced labour refers to all work or service extracted from any person under the menace of any penalty and for which the person has not offered themselves voluntarily.¹⁰² According to the ILO, forced labour occurs when people are subjected to psychological or physical coercion (the menace or the imposition of a penalty) to perform some work that they would otherwise not have accepted to perform at the prevailing conditions (the involuntariness).¹⁰³ Thus, there is significant overlap between conceptualisations of forced labour and trafficking in persons for the purpose of the exploitation of labour.

⁹⁶ Article 5 of the *Slavery Convention* aimed at preventing compulsory or forced labour degrading into conditions analogous to slavery. Under the *Slavery Convention*, forced labour could only be exacted in exceptional circumstances for public purposes, on the condition that labourers receive adequate remuneration and were not removed from their usual place of residence. See further, SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 46 (2008).

⁹⁷ *Forced Labour Convention*, adopted 28 June 1930, entered into force 1 May 1932, 39 UNTS 55.

⁹⁸ *Abolition of Forced Labour Convention*, adopted 25 June 1957, entered into force 17 January 1959.
⁹⁹ However, no U.N. body has formally invoked this prohibition on forced and compulsory labour in relation to a case of trafficking or commercial sexual exploitation: Human Rights Law Network, above n 12, 76.

¹⁰⁰ Article 1(1) of the *Forced Labour Convention* establishes a duty of State Parties to suppress such practices within the shortest possible period. Article 4(1) renders States accountable for the actions of companies, associations and private persons. Article 25 criminalised forced or compulsory labour, except in certain circumstances. Article 2 of the *Abolition of Forced Labour Convention* obliges State Parties to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.

¹⁰¹ The *ICCPR* contains a prohibition on, and recognises the right to be free from, forced labour. Article 8 of the *ICCPR* provides “No one shall be required to perform forced or compulsory labour”. As the definition of forced and compulsory labour contains an element of involuntariness, a person can consent to such practices: Y. Dinstein, ‘The Right to Life, Physical Integrity, and Liberty’, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, 126 (L. Henkin ed., 1981). It is further recognised that this right to be free from forced and compulsory labour can be derogated from in situations of public emergency: A-L. Svensson-McCarthy, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION*, 429-430 (1998).

¹⁰² Article 2(1) of the *Forced Labour Convention*; see Patrick Besler, *FORCED LABOUR AND TRAFFICKING IN PERSONS: ESTIMATING THE PROFITS, WORKING ARTICLE*, 7-8 (2005).

¹⁰³ Patrick Besler, *FORCED LABOUR AND TRAFFICKING IN PERSONS: ESTIMATING THE PROFITS, WORKING ARTICLE*, 7-8 (2005).

5.2 The Prohibition on the Exploitation of Child Labour and Migrant Workers

The framework of international labour law has also contributed to the fight against trafficking in persons in situations of trafficking for the exploitation of child labour and in cases where the trafficked person falls in the category of ‘migrant worker’. In such situations, ILO conventions also supplement international human rights law and provide protection measures for victims of trafficking.

The 1973 *Convention concerning Minimum Age for Admission to Employment*¹⁰⁴ replaced ten existing ILO Conventions which established a minimum age for admission to employment. This Convention introduced a generalised abolition of child labour.¹⁰⁵ The 1999 *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*¹⁰⁶ deals specifically with the abolition of the worst forms of child labour, calling on State Parties to abolish such practices ‘as a matter of urgency’.¹⁰⁷ The Committee of Experts on the Application of Conventions and Recommendations in comments to State Parties has emphasised the need to prohibit trafficking in children as a worst form of child labour.¹⁰⁸

ILO instruments in relation to the exploitation of migrant workers also influence the international anti-trafficking framework. The 1949 *Convention concerning Migration for Employment*¹⁰⁹ supplemented by two annexes, deals with the recruitment, placing and the conditions of labour for migrants for employment.¹¹⁰ The 1973 *Migrant Workers Supplementary Provisions Convention*,¹¹¹ Part I, includes provisions concerning the traffic of persons.¹¹² The 1990

¹⁰⁴ *Convention concerning Minimum Age for Admission to Employment*, adopted 26 June 1973, entered into force 19 June 1976.

¹⁰⁵ Article 2 of the *Convention concerning Minimum Age for Admission to Employment* requires State Parties to declare a minimum age of employment. This minimum age must not be less than the age of completion of compulsory schooling, and no less than 15 years. An exception allows states with insufficiently developed economic and education facilities to specify a minimum age of 14 years. A minimum age of 18, or in some cases 16, is established for work which, by its nature or the circumstances under which it is carried out, is likely to jeopardise the health, safety or morality of young persons (Article 3(1)).

¹⁰⁶ *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, (hereinafter *Convention 182*), adopted 17 June 1999, entered into force 19 November 2000.

¹⁰⁷ See Article 1 of the *Convention 182*. Article 3 defines the worst forms of child labour, as including: a) All forms of slavery or practices similar to slavery; b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; c) The use, procuring or offering of a child for illicit activities; d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

¹⁰⁸ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 132 (2008).

¹⁰⁹ *Convention concerning Migration for Employment*, adopted 1 July 1949, entered into force 22 January 1952, 120 UNTS 70.

¹¹⁰ Article 8 of Annex I and Article 13 of Annex II of the *Convention concerning Migration for Employment* require states to impose penalties on any person who promotes clandestine or illegal migration. However, governments may opt to exclude the annexes upon ratification.

¹¹¹ *Migrant Workers Supplementary Provisions Convention*, (adopted 24 June 1975, entered into force 9 Dec 1978, 1120 UNTS 323

¹¹² Article 2 of the *Migrant Workers Supplementary Provisions Convention* calls on states to seek to determine the eventual presence of illegal migrant workers on their territories. Article 3 of requires states to abolish the clandestine movements of migrants and their illegal employment, adopting measures against the organisers of these movements and the employers of the illegal immigrants. However, states may exclude these provisions upon ratification.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,¹¹³ although more properly positioned within international human rights law, is relevant as it contributes to the fight against trafficking in persons insofar as trafficked victims may sometimes fall within the category of ‘migrant workers’. The *Migrant Workers Convention* addresses the elimination of the exploitation of migrant workers throughout the entire process of migration and attempts to institute measures for the protection of documented and undocumented migrants. Under Article 68, State Parties should sanction those who organise or assist in the illegal or clandestine movements of migrants and those who intimidate or use violence to induce irregular migration.

Regrettably, instruments relating to the rights of migrant workers have received few ratifications.¹¹⁴ There is an evident lack of concern by states in relation to the treatment and possible exploitation of migrant workers, including through trafficking in persons. Instead, issues such as immigration control and border security have been prioritised by most states.¹¹⁵

6 THE RIGHTS OF THE CHILD IN INTERNATIONAL LAW

The 1989 *Convention on the Rights of the Child (CRC)*¹¹⁶ and its *Protocols*¹¹⁷ have further expanded the definition of trafficking in persons within the international legal framework by shifting attention to the specific problems related to child trafficking.

The *CRC* is the first major instrument to consider child trafficking as a separate phenomenon, requiring specific preventative and victim rehabilitation measures. Article 35 *CRC* requires State Parties to take all appropriate measures to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form. Article 35 is a wide measure which combats both national and transnational trafficking. Further, this provision does not establish a relationship between trafficking and forced prostitution, but rather extends the concept of child trafficking to various exploitative purposes. The *Protocol on the Sale of Children, Child Prostitution and Child Pornography* strengthens Article 31 of the *CRC* which calls on States Parties to criminalise national and transnational practices relating to child sexual exploitation; removal of organs for profit; forced labour; illegal adoption; child prostitution; and child pornography.¹¹⁸

Further evidencing the expansion of the scope of trafficking facilitated by the codification of the rights of the child under international law are arguments that the *Optional Protocol on the*

¹¹³ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (hereinafter the *Migrant Workers Convention*), adopted 18 December 1990, entered into force 1 July 2003, 2220 UNTS 3.

¹¹⁴ *Convention concerning Migration for Employment* has only 49 State Parties, the *Migrant Workers Supplementary Provisions Convention* received only 23 ratifications, and the *Migrant Workers Convention* has only 43 State Parties.

¹¹⁵ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 112 (2008).

¹¹⁶ *Convention on the Rights of the Child* (hereinafter the *CRC*), adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3

¹¹⁷ *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, adopted 25 May 2000, entered into force 18 January 2002, 2171 UNTS 227; and the *Optional Protocol on the Involvement of Children in Armed Conflicts*, adopted 25 May 2000, entered into force 12 February 2002, 2173 UNTS 222.

¹¹⁸ Some of the limitations of the *Trafficking in Persons Protocol* definition, which for example includes only those cases where there is an intention to exploit the child sold for adoption, do not apply to the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*.

Involvement of Children in Armed Conflicts extends the definition of child trafficking to the movement of child soldiers for their exploitation. The operation of this Optional Protocol means that even if the recruitment of children for their involvement in armed conflict is not explicitly included among the forms of exploitation mentioned by the *Trafficking in Persons Protocol*, both forced recruitment and the volunteering of children for involvement in armed conflict can be considered as child trafficking when minors are recruited, transported, transferred, harboured or received and later exploited in forced labour or slavery-like conditions.¹¹⁹

The *CRC* and its *Protocols* were the first international instruments which broadened the scope of trafficking in persons to the extent currently found in the *Trafficking in Persons Protocol*, and perhaps beyond. Although these instruments only apply to children, the restrictions in previous international law, such as the focus on trafficking for a specific purpose, were removed. Thus, the international law in relation to the rights of the child has greatly influenced contemporary conceptualisations of trafficking in persons; both through the recognition of child trafficking for various exploitative purposes and through the removal of the definitional limitations previously found in international law.

7 INTERNATIONAL HUMAN RIGHTS LAW

International human rights law is influential upon the contemporary trafficking in persons framework. As seen earlier, numerous international human rights instruments make specific reference to the abolition of slavery and trafficking in persons. While the *Trafficking in Persons Protocol* does not incorporate substantive protection for trafficked persons, international human rights law may be utilised as a complementary system. It operates in parallel to the *Trafficking in Persons Protocol*, both to balance the criminal justice approach of the Protocol and as a mechanism to enforce applicable human rights norms and principles.¹²⁰

The necessity of advocating the rights of trafficked persons is exemplified by situations in which trafficked persons are detained and deported for offences committed as trafficked victims, such as the entry into a country on false documents, or practicing prostitution, with no consideration for their victimisation, their human rights, or the risks they may face if returned to the country of origin.¹²¹ Adopting a human rights framework means exploring and identifying relevant human rights principles in relation to trafficking, including the rights to life, work, health, and the prohibition of torture and slavery. At another level, this framework imposes obligations upon states to prohibit trafficking, prosecute traffickers, protect trafficked persons, and address the causes and consequences of trafficking.¹²²

¹¹⁹ See SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 107 (2008).

¹²⁰ TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 165 (2006). Trafficking can constitute a violation of numerous human rights, including the right to personal liberty, privacy, freedom to choose a profession, right to movement, right to earn livelihood, right to have control over one's own body, rights to safety and health, right to a family life: Hon'ble Kalyan Shrestha, 'Women's Human Rights, Violence against Women and Gender Justice', Nepal, *JUDGES' WORKSHOP ON COMBATING TRAFFICKING IN WOMEN AND CHILDREN*, 17 (National Judicial Academy Nepal, 2006).

¹²¹ UNCHR, *Report of the Special Rapporteur Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62*, ¶ 41, U.N. Doc. E/CN.4/2003/85, (2002).

¹²² TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 35 (2006).

Comments by human rights treaty bodies demonstrate the need and the potential to balance the international response to trafficking between criminalisation and protection.¹²³ The Human Rights Commission, for instance, considers the adoption of measures designed to protect all trafficked victims as a way to facilitate cooperation with authorities and contribution to investigations and prosecutions. Silvia Scarpa notes that: 'Victims cannot be considered solely as a means to find and prosecute traffickers. Protection measures have to be granted to all those who are recognised as trafficking victims and not only to those willing to cooperate with the competent authorities.'¹²⁴

The international human rights framework thus contributes to contemporary responses to trafficking in persons by advocating a human rights-based approach to the phenomenon. However, given the limited meaningful enforcement mechanisms of international human rights law, such attempts to shift the focal lens have thus far been only minimally successful.

7 OBSERVATIONS

Three principal observations crystallise from this analysis:

First, international law has to a great extent adopted a gendered perception of trafficking in persons, whereby women and children are perceived as the 'victims' of trafficking for the purpose of the exploitation of prostitution.

Second, international law has predominantly addressed trafficking in persons from a 'law and order' perspective, rather than recognising the preventative and rehabilitative measures necessary to effectively combat this phenomenon.

Third, current conceptualisations of trafficking in persons combine influences from varied and distinct branches of international law, thereby inflating and potentially over-extending the concept and rendering responses within this framework unworkable.

7.1 *A Gendered Conception of Trafficking in Persons for the Purpose of Commercial Sexual Exploitation*

It is evident from historical critique that international law has focussed predominantly on the traffic in women and children for the purpose of commercial sexual exploitation. In fact, until the adoption of the definition in the *Trafficking in Persons Protocol* it was widely believed that trafficking in persons referred to the kidnapping and transportation of persons, mainly women and children, abroad in order to exploit them by prostitution.¹²⁵ There is now recognition that trafficking in persons encompasses a myriad of exploitative purposes.

However, legislation, policy, law enforcement, victim rehabilitation measures, media portrayal, and public perception remain predominantly focused on the sex industry. Measures which

¹²³ Following recommendations by the Working Group on Contemporary Forms of Slavery, all seven of the UN Human Rights Treaty Bodies have paid due attention to trafficking in persons when examining State Parties' reports (See, for example, U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Slovenia*, 25/07/2005, ¶ 11, UN Doc CCPR/CO/84/SVN), (2005).

¹²⁴ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 91 (2008).

¹²⁵ SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, 42 (2008).

solely address trafficking in persons from a gendered perspective are justified through reference to research and statistics which point to higher incidences of trafficking into the sex industry. However, it is arguable that findings which identify women and children as majority victims, and which posit prostitution as the predominant purpose of trafficking, reflect the research more than the broader phenomenon. This typecasting of victims and purposes of trafficking in persons has considerably captured public attention, thus diverting policy, law, enforcement and rehabilitation programs away from other, more marginalised, victims and forms of trafficking.¹²⁶

Although the *Trafficking in Persons Protocol* definition extends the scope of trafficking by recognising that it may be related to various forms of exploitation and that men, women, and children alike can be trafficked, debates during the drafting of the Protocol remained focused on the issue of prostitution. Indicative of the continued preoccupation of the international community with the traffic of women and children for the purpose of commercial sexual exploitation is the mandate given by the UN General Assembly to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, which restricted trafficking to the phenomenon affecting only women and children.¹²⁷

The very title of the *Trafficking in Persons Protocol* evidences this preoccupation insofar as it refers to the special objective of protecting women and children, despite recognition that men, too, are potential victims of exploitation. The use of such language recognises the gendered reality of the phenomenon. But it also fosters and perpetuates a gendered perception of trafficking in persons, leading to skewed preventative, legislative, policing, and rehabilitative efforts, and the stereotyping of victims and their experiences. Approaching trafficking in persons from a gendered perspective — whether regulationist or abolitionist — retains focus on prostitution and sexual exploitation, rather than on the complex realities of the trafficking process. Such a focus is to the detriment of a more comprehensive analysis of trafficking.

On the other hand, by leaving the ‘exploitation of the prostitution of others’ and ‘other forms of sexual exploitation’ undefined, the drafters of the *Trafficking in Persons Protocol* declined to comment on whether voluntary adult prostitution should be considered trafficking in persons, thus positioning the regulation or prohibition of prostitution as a matter of domestic jurisdiction. This may ‘provide a foundation upon which anti-trafficking discussion, research, and policy development may transcend the general debate about the rights and wrongs of prostitution’¹²⁸ and potentially transcend typical conceptualisations of the victim and purpose of trafficking.

Although the *Trafficking in Persons Protocol* has expanded the concept of trafficking in persons to include child exploitation and labour trafficking, the international community, governments, and academic scholarship remain predominantly focussed on trafficking for the purpose of commercial sexual exploitation and, to a significantly lesser extent, on forced labour. Such a focus has meant other forms of exploitation have not been sufficiently investigated. It is thus

¹²⁶ D. Crary, ‘Trafficking in persons goes on in US, too’, *Casa Grande Valley News Articles*, http://www.trivalleycentral.com/articles/2005/11/01/tri-valley_stories/20051101-archive14.txt (last visited 17 March 2010); J. Sanghera, ‘Unpacking the trafficking discourse’, *TRAFFICKING AND PROSTITUTION RECONSIDERED – NEW PERSPECTIVES ON MIGRATION, SEX WORK AND HUMAN RIGHTS* (K. Kempadoo, J. Sanghera and B. Pattanaik eds., 2005).

¹²⁷ UN General Assembly, *Transnational organized crime*, ¶ 10, U.N. Doc. A/RES/53/111 (20 Jan 1999).

¹²⁸ UNCHR, *Report of the Special Rapporteur on human rights aspects of the victims of trafficking in persons, especially women and children*, ¶ 33, U.N. Doc. E/CN.4/2006/62/Add.2, (2006) (prepared by Sigma Huda).

necessary to shift the perspective to a position which not only recognises the potentially diverse victim demographic and the various exploitative purposes of trafficking but also allocates sufficient resources to these aspects of trafficking.

7.2 *The Criminal Justice Approach to Trafficking in Persons*

Historically, international law has approached trafficking in persons from a criminal justice and immigration control perspective. Trafficking in persons has traditionally been perceived as a law and order problem, meaning anti-trafficking strategies have focussed on the prosecution and punishment of traffickers, and in some cases of victims.¹²⁹ While these aspects are important in addressing trafficking in persons, too often preoccupation with reactive crime control is at the expense of preventative strategies and at the expense of victim protection and rehabilitation.

The contemporary trafficking in persons framework in international law adopts a 'neo-abolitionist' perspective, founded on the abolitionist movement against the trans-Atlantic slave trade and the 'white slave' trade evidenced in early conventions. The neo-abolitionist belief that the complex and inextricably interconnected economic, social, and political issues related to trafficking in persons will be eradicated through legal mechanisms — which prohibit the practice, punish the trafficker, and rehabilitate the 'innocent' victims — fails to address, or even recognise, the structural conditions underpinning this phenomenon.¹³⁰ 'To the extent that legal instruments are not aimed at the structural underpinnings of and incentives for the activities of the actors' involved, mere prohibition and criminalisation of the activities will not and cannot transform exploitative relationships', notes Bravo.¹³¹

The impetus which precipitated the drafting and adoption of the *Convention against Transnational Organised Crime* and the *Trafficking in Persons Protocol* was the perceived threat of criminal organisations to nation-state sovereignty and border security. Hastening the adoption of the *Trafficking in Persons Protocol* was an increased political consciousness of the susceptibility of national borders to the clandestine movement of people.¹³² 'It was within this context that sex trafficking was mobilised as a gendered and moralised concern within a broader framework of transnational organised crime'.¹³³ By dealing with trafficking in persons as a supplementary issue to the *Convention against Transnational Organised Crime*, the international community firmly — but perhaps incorrectly — positioned trafficking in persons within the framework of international criminal law. Although the criminal law approach to trafficking is evident throughout the historical development of international law in this area, never before had the traffic in persons been considered or dealt with as a specific organised crime issue. The positioning of trafficking within this context dictates a continued perception of

¹²⁹ Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFFALO HUMAN RIGHTS LAW REVIEW 5 at 6 (2006).

¹³⁰ Karen E Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 207 at 240 (2007).

¹³¹ Karen E Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 207 at 241 (2007).

¹³² J. Chuang, 'The United States as global sheriff: Using unilateral sanctions to combat trafficking in persons', (2006) 27 *Michigan Journal of International Law* 437.

¹³³ MARIE SEGRAVE ET AL, SEX TRAFFICKING: INTERNATIONAL CONTEXT AND RESPONSE, 18 (2009).

trafficking as a threat to the nation-state and the control of territorial borders such that immigration control and criminal justice measures are prioritised.¹³⁴

The influence of international human rights law has resulted in trafficking in persons also being framed as a human rights issue. Considering that the *Trafficking in Persons Protocol* is a criminal law instrument primarily designed to punish human traffickers, the law enforcement provisions are clearly prioritised.¹³⁵ While the criminal justice provisions of the *Trafficking in Persons Protocol* are binding, measures relating to the assistance and support for trafficked persons are vague and largely discretionary.¹³⁶ Yet the mere inclusion of these measures and the recognition that international human rights law is a relevant supplementary framework marks a significant development from early international efforts in relation to trafficking in persons.

Yet, trafficking in persons has been and continues to be framed as a law enforcement issue, governed internationally by a criminal law instrument with limited attention paid to preventative or rehabilitative measures.¹³⁷ From the criminal law approach, strategies to combat trafficking in persons focus on imposing punishment on offenders, strengthening law enforcement, and improving prosecutions and convictions.¹³⁸ While a criminalisation and prosecutorial approach to trafficking is important, labelling trafficking in persons as a crime control issue associates and sometimes limits responses to this phenomenon to these strategies.

The crime control approach cannot address the entirety of the trafficking process. The criminal justice system, by its nature, focuses on prosecution and conviction.¹³⁹ By invoking the logic of law and order, measures to address trafficking in persons outside the criminal justice process are largely silenced. Critically, a criminal justice perspective cannot conceptualise or address,

¹³⁴ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (United Nations, 2004).

¹³⁵ The Conference to the Parties of the *Convention against Transnational Organised Crime*, which periodically reviews the implementation of the Convention and Protocols by States Parties, has considered that the *Trafficking in Persons Protocol* measures for prevention and protection of victims of trafficking should be dealt with as secondary to the achievement of the basic criminalisation and international cooperation requirements: U.N., *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime – Analytical report of the Secretariat*, 15, U.N. Doc. CTOC/COP/2005/3 (2005). This demonstrates that by dealing with the traffic in persons, which is fundamentally a human rights violation, through international criminal law, criminalisation and immigration issues will always be prioritised over the human rights of the individuals trafficked.

¹³⁶ MARIE SEGRAVE ET AL, *SEX TRAFFICKING: INTERNATIONAL CONTEXT AND RESPONSE*, 18 (2009). State Parties to the *Trafficking in Persons Protocol* must provide assistance and protection to trafficked persons, including protecting victim's privacy and identity, and ensuring confidentiality in legal proceedings. It is further suggested that state parties consider offering social services, medical assistance, employment, housing, education and training to trafficked persons.

¹³⁷ J. Doezema, *Who gets to choose? Coercion, Consent and the UN Trafficking in Persons Protocol*, 10(1) *GENDER AND DEVELOPMENT* 20 (2002); M. Ditmore and M. Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 *NEMESIS* 79 (2003).

¹³⁸ Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 *BUFFALO HUMAN RIGHTS LAW REVIEW* 5 at 27 (2006).

¹³⁹ Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 *BUFFALO HUMAN RIGHTS LAW REVIEW* 5 at 32 (2006).

firstly, the processes which lead to the trafficking experience; secondly, the exploitative experience itself; or thirdly, the consequences of such an experience. This limited approach cannot understand or confront the non-linear processes of a victim's initial contact with traffickers, the realities of the exploitative experience, or the post-trauma rehabilitative necessities. To effectively eradicate trafficking in persons, "states must adopt a multi-disciplinary, integrated, holistic and coordinated approach that focuses on (i) preventing trafficking, (ii) punishing the perpetrators and (iii) protecting, rehabilitating and reintegrating the victims".¹⁴⁰ Thus, international law must adopt an approach which balances criminalisation with measures to address the causes, processes and consequences of trafficking in persons.

7.3 A Broad Conceptualisation of Trafficking in Persons

The definition in the *Trafficking in Persons Protocol* which combines various acts, means, and purposes to constitute trafficking, has greatly expanded the concept of trafficking in persons.¹⁴¹ The reason behind this broad conceptualisation of trafficking in persons in the Protocol are the multiple — and sometimes conflicting — influences that stem from the evolution of the international legal framework relating to the traffic in persons. Trafficking in persons is now conceptualised as a process occurring for various exploitative purposes, which are reflective of diverse areas of (historical) international law.

The *Trafficking in Persons Protocol* has been shaped by the five branches of international law discussed above: slavery, prostitution, labour, human rights, and the rights of the child. The Protocol attempts to consolidate these different and sometimes conflicting approaches into the one concept, governed by a single international instrument. Yet, questions arise whether such a conceptualisation is feasible and functional. It is evident that preventative mechanisms, investigative procedures, prosecutorial systems, and victim rehabilitation must be tailored to specific aspects of trafficking in persons. The experience of a person trafficked for the purpose of commercial sexual exploitation is fundamentally different from the experience of a person trafficked for the purpose of labour exploitation; and the systems in place to address these different aspects of trafficking must be tailored accordingly.¹⁴² Over-extending the concept of trafficking in persons fails to recognise that the resources and attention of policy makers, legislators, law enforcement agencies, and the public cannot adequately encompass all the different — related and unrelated — facets of the human trafficking phenomenon.

¹⁴⁰ Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFFALO HUMAN RIGHTS LAW REVIEW 5 at 6, 56 (2006). For example, the approach within the European Union, as exemplified by the Council of Europe *Convention on Action against Trafficking in Human Beings*, May 3 2005, C.E.T.S. 197, attempts to balance prevention, prosecution, and protection of human rights while facilitating international cooperation. This *Convention* realistically and practically incorporates both a criminal justice and a human rights approach to create a 'comprehensive, integrated and coordinated system'.

¹⁴¹ Evidencing the potentially all-embracing definition in the *Trafficking in Persons Protocol* are arguments by academics that the definition goes beyond the use of deception or coercion by traffickers to encompass causal factors including economic hardship and escaping persecution. See TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH*, 35 (2006); and Linda A. Malone 'Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organised Crime Elements' 25 *Fordham International Law Journal* 54 at 89-91 (2001).

¹⁴² UNCHR, *Report of the Special Rapporteur on violence against women, its causes and consequences on trafficking in women, women's migration and violence against women*, ¶ 2, UN Doc E/CH.4/2000/68 (2000), (prepared by Radhika Coomaraswamy).

The creation of the *Trafficking in Persons Protocol* has made it increasingly difficult to determine what trafficking actually is and, just as importantly, what it is not. If the definition in the *Trafficking in Persons Protocol* and other contemporary conceptualisations of trafficking are taken at face value, trafficking in persons is a potentially indefinite phenomenon, encompassing entirely unrelated instances of exploitation. Yet, narrowly confining the concept of trafficking in persons to the area where the exploitative purposes overlap seems to unjustifiably limit the scope, and critically, is a wilful position of ignorance in relation to the exploitation experienced by countless people globally.

It may be desirable to separate the different aspects of trafficking in persons in order to recognise distinct issues requiring distinct responses. 'Trafficking in persons is a complex, multi-faceted problem that intertwines issues of law enforcement, border control, gender, crime, security and human rights'.¹⁴³ An internationally coordinated response which is tailored to suit the specific dynamics of each aspect is one possible approach to overcoming the complexity and confusion surrounding current conceptualisations of trafficking in persons in international law.

8 CONCLUSION

This article sheds light on contemporary conceptualisations of trafficking in persons, as contained within the *Trafficking in Persons Protocol*. Recognition of slavery and practices similar to slavery as the possible exploitative purpose of trafficking in persons emerged through the development of international anti-slavery instruments. Early 'white slave traffic' conventions founded the contemporary trafficking in persons framework under international law. While significant definitional limitations are evident these 'anti-prostitution' treaties were the initial recognition of the traffic of women and children for the purpose of commercial sexual exploitation. The continuation of this focus on the gendered victim forced into prostitution is evident within trafficking in persons discourses today.

Developments within international labour law, specifically, the prohibition of forced labour and the exploitation of child labour and migrant labour, have also contributed to the contemporary trafficking in persons framework, particularly by extending the scope of trafficking to encompass the exploitation of labour outside of the sex industry. Similarly, international law in relation to the rights of the child significantly extended the concept of trafficking in persons, to a focus on child trafficking for numerous exploitative purposes. Interestingly, the incorporation of the human rights framework into trafficking in persons discourses has caused both tension and recognition of parallel systems operating in international law.

However, it is not enough to focus merely on the criminalisation and prosecution of traffickers and the protection and rehabilitation of trafficked persons. It is through an understanding of trafficking in persons as a process that adequate international responses to this phenomenon can be developed to effectively address the causes and consequences of trafficking.

Analysis of historical developments in international law reveals the parameters of contemporary conceptualisations of trafficking in persons and unravels the associated complexities. It is

¹⁴³ Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFFALO HUMAN RIGHTS LAW REVIEW 5 at 5 (2006).

hoped that this article, by bringing into question the concept and scope of trafficking in persons in international law, facilitates future contemplation of this issue and assists in confronting the contemporary challenges pertaining to trafficking in persons.

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