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TRAFFICKING IN HUMAN BEINGS: A MODERN FORM OF SLAVERY OR A TRANSNATIONAL CRIME?

Harmen van der Wilt

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'Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?'

1) Introduction

Trafficking in human beings is nowadays often qualified as a 'modern form of slavery', both by international organisations, politicians and scholars.¹ This identification of a relatively new criminal phenomenon with an abhorrent practice, the prohibition whereof is considered as an obligation *erga omnes*,² has a dual purpose. For one thing it conveys the message that we should not indulge in moral complacency, believing that slavery is a thing of the past, because it surreptitiously pops up in new guises. In other words: the goal is to emphasize the seriousness of the crime. Secondly, and in my view more importantly, it serves an agenda of criminal policy. By elevating trafficking in human beings to the level of a well-established international crime, arguably possessing the status of *jus cogens*, the proponents seek to draw the phenomenon within the jurisdictional scope of the International Criminal Court or other international criminal tribunals. The syllogism is easily made: trafficking in human beings = enslavement; enslavement = a crime against humanity, provided that the contextual elements of this category are met; crimes against humanity belong to the jurisdiction *ratione materiae* of the ICC and other international criminal tribunals; *ergo* the ICC and their equals are allowed to exercise jurisdiction over persons who engage in trafficking in human beings. The assumption underlying this line of argument is that national criminal law enforcement does not suffice to cope with this inherently

¹ *Vide* Deputy Secretary General of the Council of Europe, Maud de Boer-Buquicchio, in her address to the Ad Hoc Committee on Action Against Trafficking in Human Beings, during their meeting on 15 September 2003: "(...) trafficking in human beings is a new form of slavery affecting the whole of Europe" Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, , Address at the First Meeting of CAHTEH (Sept. 15 2003). In similar terms, Mrs. Myria Vassiliadou, EU's anti-trafficking coordinator, addressing a special committee on crime at the European Parliament on 19 February 2013: 'Human trafficking is the slavery of our times', EuropaNU. [http:// www.europa-nu.nl/id/vj7awgbzejzq/nieuws/europese_commissie_vergelijkt?ctx](http://www.europa-nu.nl/id/vj7awgbzejzq/nieuws/europese_commissie_vergelijkt?ctx) (visited: 26 August 2013. Secretary of State Hillary Clinton, U.S. state Department Trafficking in Persons Report, 2009: 'This (*id est* Trafficking in Human Beings) is modern slavery, a crime that spans the globe, providing ruthless employers with an endless supply of people to abuse financial gain.' Available at [http:// www.gvnet.com/humantrafficking/](http://www.gvnet.com/humantrafficking/) (visited: 20 September 2013). Polaris Project on Human Trafficking: 'Human trafficking is a form of modern-day slavery where people profit from the control and exploitation of others.' (Available at <http://www.polarisproject.org/human-trafficking/overview>; visited on 20 September 2013. In academic discourse, the most vocal and prominent proponent of an expansionist interpretation of slavery is Kevin Bales, compare, for example, K. Bales, *Disposable People: New Slavery in the Global Economy*, University of California Press 2004 and *ibidem*, *The Slave Next Door: Human Trafficking and Slavery in America Today*, University of California Press 2009. For a seminal discussion of the relationship between trafficking and slavery, see Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge 2010, pp. 177-191. And finally, see the title of the book by Sylvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford 2008.

² The International Court of Justice qualified the protection from slavery as an example of an *erga omnes* obligation in the *Barcelona Traction* case, ICJ Report, 1970, pp. 3, 32; 46 ILR, pp. 178, 206.

transnational crime and that a back-up by supra-national criminal jurisdiction is indispensable.³

This article aims to critically assess the two elements of the position just expounded. In the first part, I will try to demonstrate that 'enslavement' and trafficking in human beings are distinct legal categories. Although I submit that the concept of enslavement has expanded, especially through the case law of the International Criminal Tribunal for the former Yugoslavia, and that trafficking in human beings partially overlaps with enslavement, both crimes should in my view not be conflated. Moreover, I will argue that trafficking in human beings in the vast majority of cases does not qualify as a crime against humanity. To that purpose, I will analyse the relevant law, dealing successively with primary sources of international conventions (section 2.1), case-law of the International criminal Tribunal for the Former Yugoslavia (ICTY) (section 2.2) and judgments of the European Court of Human Rights (section 2.3).

The second part proceeds with addressing the issue whether moving the prosecution and trial of trafficking in human beings to the supra-national level is really necessary. Those who are in favour of such a construction face the burden of proving that national jurisdictions are doing a poor job. I am not convinced by that claim. Obstacles in the realm of national prosecution of trafficking in human beings might pertain to defective jurisdiction, problems of international cooperation in criminal matters and a lack of consistent interpretation of the elements of crime, shared by most or all states. Although this is not an empirical study and I do not pretend to draw a comprehensive picture of the state of the art, I will briefly touch upon these aspects in separate sections, in order to show that the performance of national criminal law enforcement is reasonably good and is gradually improving (Section 3.1 – 3.4). Scholarly studies reveal that major bottlenecks in the successful prosecution and trial of trafficking in human beings concern the gathering of evidence, especially in view of frightened witnesses who are reluctant to testify.⁴ There is no guarantee or proof that international criminal courts perform better in this respect than national courts. In the final section (Section 4) I will briefly reflect upon the question how we should move forward in order to achieve fair and effective law enforcement, taking the specific features of trafficking in human beings into consideration.

2) Slavery and Trafficking in Human Beings in legal instruments and case law

³ Strongly advocating this approach are Nina Tavakoli, 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime', 9 *International Criminal Law Review* (2009), pp. 77-98 and Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System', 54 *International and Comparative Law Quarterly* (April 2005), pp. 445-458. See also F. Pocar, 'Human Trafficking: A Crime against Humanity', in: E.U. Savona & S. Stefanizzi (eds.), *Measuring Human Trafficking: Complexities and Pitfalls*, Berlin 2007, pp. 5-12.

⁴ See, for instance, A. Gallagher and P. Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking; Lessons from the Front line', *International Criminal Justice Review*, Vol. 18, No. 3 (2008), pp. 318, 333.

The most straightforward way to detect similarities and differences between the concepts of slavery and trafficking in human beings is to compare the definitions included in international conventions which have been concluded to suppress those practices. Case law of the ICTY and judgments of the ECHR have refined our understanding of the legal nature of these concepts and will be analysed subsequently.

2.1 Slavery and trafficking in human beings in international conventions

During the nineteenth century, the gradual abolition of slavery and the slave trade was also accomplished by the conclusion of bi-lateral treaties, mainly propelled by the United Kingdom and the United States, in which parties engaged to prosecute and inflict severe punishment on slave traders.⁵ The first multi-lateral treaty was adopted by the League of Nations in 1926.⁶ Article 1 (1) of this Slavery Convention defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’ According to article 1(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 in slaves.’ In other words: the article distinguishes between a static situation in which a person is reduced to a mere commodity and a dynamic process, enumerating all those commercial acts which are inherent to legal ownership. Article 6 of the Convention enjoins ‘those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention to undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions.’

The 1926 Slavery Convention was still very much tailored to 19th century’s ‘chattel slavery’, and the 1956 Supplementary Convention sought to update the law by extending the applicability of the Convention over slavery-like institutions and practices, including debt bondage and serfdom.⁷ The Convention obliges states parties to criminalize both the act of

⁵ Compare for surveys and analyses: J. Allain, ‘Nineteenth Century Law of the Sea and the British Abolition of the Slave trade’, 78 *British Yearbook of International Law* (2008), 342-388 and M. Cherif Bassiouni, ‘Enslavement as an International Crime’, 23 *New York University Journal of International Law and Politics* (1991), pp. 445 -514.

⁶ Slavery Convention, Geneva 25 September 1926, entered into force on 9 March 1927, UN Treaty Series, Volume 212, p. 17.

⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva 7 September 1956, entered into force on 30 April 1957, UN Treaty Series, Volume 266, p. 3. Article 1 of the Supplementary Convention considered for the purposes of the convention the following institutions and practices on the same par as slavery:

- (a) Debt peonage, that is to say, 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 of a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

enslaving another person (Article 6) and 'slave trade' (Article 3) – including attempts of , complicity in and conspiracy to accomplish those acts – remarkably considering slave trade as a more serious crime than the act of enslavement itself.

New international initiatives already indicated that the existing legal framework did not suffice to counter all forms of (commercial) abuse of human beings. The major loophole that required to be plugged was that the Slavery Conventions referred to efforts to obtain permanent ownership over persons and did not cover more volatile endeavours to acquire benefits from the temporal commercial exploitation of humans.⁸ The Protocol to Prevent , Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (hereafter: UN- Protocol) was established to fill the gaps.⁹ The Protocol offers a comprehensive definition of trafficking in human beings that has served as an authoritative model for all other subsequent treaties. The definition of Article 3 contains three elements:

- An action, mirroring the dynamic component of the Slavery Convention: 'the recruitment, transportation, transfer, harbouring or receipt of persons';
- Certain means that have been employed: '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';
- And a purpose – exploitation - which 'shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

Article 3, section b) adds that the consent of a victim shall be irrelevant where any of the means, just mentioned, have been used and section c) stipulates that any recruitment, transportation etc. of a child – *id est* a person under eighteen years of age - for the purpose

(b) Serfdom, that is to say, 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;

(c) Any institution or practice whereby:

- 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 person or group; or
- 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
- A woman on the death of her husband is liable to be inherited by another person.

(d) Any institution 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.

⁸ Compare Neil Boister, *An Introduction to Transnational Criminal Law*, OUP: Oxford 2012, p. 40: 'The requirement in both the 1926 Slavery Convention and the 1956 Supplementary Convention that slave trade be carried out with 'an intent to reduce persons to slavery', was difficult to meet when the trafficker's purpose was temporary commercial exploitation, not ownership.'

⁹ Palermo, 15 November 2000, entered into force on 25 December 2003, UN Treaty Series, Volume 2237, p. 319, Doc. A/55/383.

of exploitation shall be considered 'trafficking in persons', even if this does not involve the use of any of those means. As the Protocol is supplementary to the UN Convention against Transnational Organized Crime, its scope of application is restricted to offences of a transnational character that involve an organized criminal group (UN Protocol, Article 4). However, that limitation only concerns the obligation of states-parties to cooperate; it is not part and parcel of the definition of the conduct which states parties are expected to incorporate as a criminal offence in their legal systems.¹⁰

The Council of Europe Convention on Action against Trafficking in Human Beings of 2005 has explicitly deleted the transnational and organized crime- elements, in order to broaden the scope of application, but has left the definition of the UN-Protocol unaltered.¹¹ This Convention has considerably reinforced the protection of victims, provides for more specific punishments and draws attention to prevention by promoting measures to discourage demand – whereas the UN Protocol puts more emphasis on criminal repression of supply of human beings for the purpose of exploitation.¹² EU-instruments have been enacted to serve similar goals, but have, like the CoE-Convention, faithfully copied the definition of the UN-Protocol.¹³

It is clear from the previous exposition of the relevant treaty-provisions that the main difference between enslavement and trafficking in human beings is to be found in the purpose. Slavery (or practices similar to slavery) only constitutes one of the forms of exploitation, being the purpose of trafficking; the other goals do not reach the threshold in seriousness or permanency or are otherwise of a distinct nature. This suggests that 'trafficking in human beings' is the wider legal concept, encompassing slavery as a subset.¹⁴ Or, in other words: enslavement and slave trade will constitute trafficking in human beings

¹⁰ Article 34 (2) of the UN Convention against Transnational Organized Crime stipulates that the offences established in accordance with that Convention, including trafficking in persons, shall be established in the domestic law of each State Party *independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1 of this Convention*, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group (italics HvdW). See on this issue, Boister, footnote 8, p. 41.

¹¹ Warsaw, 16 May 2005, Council of Europe Treaty Series, No. 197.

¹² See Anke Sembacher, 'The Council of Europe Convention on Action Against Trafficking in Human Beings', 14 *Tulane Journal of International and Comparative Law* (2005-2006), pp. 435-454.

¹³ EU Council Framework Decision 2002/629/JHA on Combatting Trafficking in Human Beings (2002), Brussels, 19 July 2002, Official Journal of the European Communities, No. L 203, 1 August 2002, p. 1. The Directive 2011/36/EU of the European Parliament and of the Council of 5 April on preventing and combating trafficking in human beings and protecting its victims (replacing Council Framework Decision 2002/629/JHA), OJ L 101/1, of 15 April 2011 has slightly expanded the list of 'means' by including, in Article 2, 'the exchange or transfer of control over trafficking victims' and the 'giving or receiving of payments or benefits to achieve the consent of a person having control over another person'.

¹⁴ In a similar vein Jean Allain who rightly criticizes the conceptual confusion in Silvia Scarpa's study: Jean Allain, Book Review of Silvia Scarpa; 'Trafficking in Human Beings: Modern Slavery. Oxford: Oxford University Press, 2008, in: 20 *European Journal of International Law* (2009), pp. 453, 455: 'These conventions (on Trafficking in Human Beings, add. HvdW) thus include slavery as an example of exploitation to be suppressed. Trafficking in persons cannot be a form of slavery, as slavery is but one example of eight component parts (examples of exploitation) of one of three elements (the means, the method and the purpose) of the definition of trafficking.

but not all trafficking in human beings is enslavement. In the next chapters we will inquire whether the case law of the ICTY and the judgments of the ECHR corroborate this provisional conclusion.

2.2 Enslavement as a crime against humanity: The *Kunarac*-case

The Statute of the International Criminal Tribunal for the Former Yugoslavia stipulates that the Tribunal has jurisdiction over enslavement as a crime against humanity.¹⁵ In *Kunarac* the Tribunal had the opportunity to shed some light on the contours of this crime.¹⁶ Kunarac and Kovač were charged with enslavement and rape of Muslim women whom they had detained during six months and abused for their own sexual gratification. After having scrutinized the judgements of the Nuremberg and Tokyo Military Tribunals, relevant provisions of the Geneva Conventions, the findings of the UN International Law Commission and human rights instruments, the Trial Chamber reiterated the classic definition of the Slavery Convention – exercise of any or all of the powers attaching to the right of ownership over a person- , but observed that ‘enslavement as a crime against humanity’ may be ‘broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law.’¹⁷ In search of the proper limits of the crime, the Trial Chamber identified a number of factors. Physical and psychological control - ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape’ – was an important indication of enslavement.¹⁸ Secondly, the Trial Chamber stressed the relevance of the use of force, threat of force or other forms of coercion, rendering the determination of (lack of) consent or free will of the victim irrelevant.¹⁹ Other important factors include duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.²⁰ As examples of exploitation, the Trial Chamber mentioned ‘the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex and prostitution.’ Human trafficking was presented as a separate indication of enslavement.

On appeal, the appellants claimed that the Trial Chamber harboured too broad a definition of the crime of enslavement, emphasizing in particular the requirements of lack of consent

¹⁵ Statute of the ICTY, Article 5 Crimes against humanity: ‘The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (...) c) enslavement’.

¹⁶ *Prosecutor v. Kunarac, Kovač and Vuković*, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001.

¹⁷ *Prosecutor v. Kunarac*, § 541.

¹⁸ *Prosecutor v. Kunarac*, §§ 542 and 543.

¹⁹ *Prosecutor v. Kunarac*, § 542: ‘The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.’

²⁰ *Prosecutor v. Kunarac*, § 543.

and duration as constituent elements of the crime.²¹ The Appeals Chamber did not agree and corroborated the Trial Chamber's findings. It held that lack of consent does not have to be proved by the Prosecutor as an element of the crime, adding that the circumstances in the particular case were sufficient to presume the absence of consent.²² In respect of the time period, the Appeals Chamber conceded that duration was one factor – but not an indispensable element- of the crime, explaining that the quality of the relationship between the accused and the victim was decisive.²³ On a more general note, the Appeals Chamber sought to distinguish the 'various contemporary forms of slavery' from classic 'chattel slavery': 'In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of "chattel slavery" but the difference is one of degree.'²⁴

The 'factor-approach', as presented by the Trial Chamber and approved by the Appeals Chamber, while having the merits of flexibility, is problematic from the perspective of legality, because we do not know how these factors are weighed and which of them will be decisive in a particular situation. It will obviously be conducive to the well-known 'case-by-case' assessment. The broadening of the concept of enslavement has undeniably blurred the conceptual borders between enslavement and trafficking in human beings. After all, the (Appeal) Chamber's considerations on irrelevance of consent, exercise of control, the use or threat of force and the purpose of exploitation are all reminiscent of the definition of trafficking in human beings as developed in the UN-Protocol. As argued above, the distinguishing feature between the two crimes is the intensity and degree of (intended) exploitation, but the *Kunarac* decision has at least partially subverted that factor, by holding that 'duration' or 'permanence' is not a requirement of the crime. The gist of enslavement – the exercise of any or all of the powers attaching to the right of ownership -, though rather abstract, may give some guidance and may guard against dilution of the concept. It is to be observed that the definition of 'Enslavement' as a crime against humanity in the Rome Statute explicitly connects trafficking in human beings to the exercise of such powers of – presumed – ownership.²⁵

But even if 'trafficking in human beings' can, at least in the opinion of the ICTY, be assimilated to enslavement, that does by no means imply that it qualifies as a crime against humanity, eligible for prosecution and trial by the International Criminal Court and

²¹ *Prosecutor v. Kunarac, Kovač and Vuković*, Judgement, Case No. IT-96-23 & IT-96-23/1-A, A. Ch. 12 June, 2002, §§ 108/109.

²² *Prosecutor v. Kunarac* (Appeals Chamber), § 120.

²³ *Prosecutor v. Kunarac* (Appeals Chamber), § 121.

²⁴ *Prosecutor v. Kunarac* (Appeals Chamber), § 117.

²⁵ Compare Rome Statute of the International Criminal Court, Article 7 (Crimes against Humanity), section 2: 'For the purpose of paragraph 1: (...) c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, on particular women and children'.

international criminal tribunals. In that case it has to meet the well-known 'conceptual elements': it must be 'widespread or systematic and directed against a civilian population, with knowledge of the attack'. Moreover, for the International Criminal Court to have jurisdiction, the attack must be 'pursuant to or in furtherance of a State or organizational policy.'²⁶ The Elements of Crimes of the ICC clarify that the 'policy to commit such an attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.²⁷

Could a – private – criminal organization that engages in the business of trafficking in human beings commit a crime against humanity? That depends on the definition and interpretation of the concepts 'policy' and 'organisation'. In the Bemba confirmation decision, the Pre-Trial Chamber of the ICC held that

'the requirement of a "State or organizational policy" implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.'²⁸

The issue of the specific features of organisations that would potentially be covered by Article 7 of the Rome Statute kept the Pre-Trial Chamber in the Kenya-decision divided. The bone of contention was whether such organisations should display state-like qualities. The Majority of the Pre Trial Chamber confirmed the Bemba *dictum* that the litmus test for an 'organisation' in the sense of Article 7 Rome Statute is whether the group 'has the capability to perform acts which infringe on basic human values.'²⁹ It specified this finding by identifying a non-exhaustive list of factors:

- a) Whether the group is under a responsible command, or has an established hierarchy;
- b) Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
- c) Whether the group exercises control over part of the territory of a State;
- d) Whether the group has criminal activities against the civilian population as a primary purpose;

²⁶ Rome Statute of the International Criminal Court, Article 7, section 2, sub a.

²⁷ Elements of Crimes – International Criminal Court (2000), New York, 30 June 2000; Article 7 – Crimes against Humanity, in: Christine Van den Wyngaert (ed.), *International Criminal Law; A Collection of International and Regional Instruments*, 4th (reversed) Edition, Martinus Nijhoff Publishers: Leiden-Boston 2011, p. 309.

²⁸ *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, case No. ICC-01/05-01/08, 15 June 2009, § 81.

²⁹ Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the situation in the Republic of Kenya, Case No. ICC-01/09-19-Corr, PTC II, 31 March 2010, § 93.

- e) Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population;
- f) Whether the group is part of a larger group which fulfils some or all of the abovementioned criteria.³⁰

The majority of the Pre Trial Chamber did not exclude the possibility that non-state, 'private' groups can engage in crimes against humanity. It found support in the opinions of the International Law Commission which has determined that 'the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article (on crimes against humanity, addition HvdW); in that case, their acts would come under the Draft Code.'³¹

For Judge Hans-Peter Kaul, this approach was too liberal. He applied a more rigorous standard and argued that the organization should partake some of the characteristics of a state.³² The legal refinements of the different opinions are beyond the scope of this essay and need not detain us here.³³ Suffice to observe that the requirements for organizations that might qualify as falling under the scope of Article 7 Rome Statute are quite demanding. Even if we apply the more flexible standards of the Majority, the vast majority of criminal organizations that engage in human trafficking would by no means meet the threshold. They would simply lack the resources, power and institutional features to start and accomplish large scale attacks on the civilian population. That becomes immediately transparent if we compare the requirements of 'organization' in the Kenya-decision with the definition of 'organization' in article 2 of the UN Convention against Transnational Organized Crime (2000):

' "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences, established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.'³⁴

³⁰ Kenya Decision, § 93.

³¹ Yearbook of the International Law Commission 1991, Volume 2, Part 2, A/CN.4/Ser. A/ 1991/Add. 1(part 2). P. 103. Compare also *Prosecutor v. Blaskić*, Judgment, Case No. IT-95-14-T, 3 March 2000, § 205.

³² Kenya Decision, Dissenting Opinion of Judge Hans-Peter Kaul, § 51.

³³ See the interesting discussion in the Leiden Journal of International Law with contributions of M. Halling, 'Push the Envelope – watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity', 23 *LJIL* (2010), pp. 827-845, William A. Schabas, 'Prosecuting Dr Strangelove, Goldfinger and the Joker at the International Criminal Court: Closing the Loopholes', 23 *LJIL* (2010), pp. 846-854 and Clauss Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy requirement: Some Reflections on the March 2010 ICC Kenya Decision', 23 *LJIL* (2010), pp. 855-873.

³⁴ United Nations Convention against Transnational Organized Crime (2000), Palermo, 15 November 2000, Van den Wyngaert, footnote 27, p. 1025.

In view of these observations, the opinion of Obokata that 'it may be reasonably argued that trafficking in human beings can be elevated to a crime against humanity' is simply untenable.³⁵

2.3 Enslavement and trafficking in human beings in the case law of the European Court of Human Rights

Article 4 of the European Convention on Human Rights qualifies the prohibition of slavery or servitude – together with the ban on forced or compulsory labour – as an absolute right that allows no derogation. The European Court has had the opportunity to elaborate on the concept of slavery and its connection to trafficking in human beings in two cases.

In the case of *Siliadin v. France* the applicant, who was of Togolese origin, had initially come to France in order to visit school and find subsequent employment. It had been agreed that she would work until her air ticket had been reimbursed, but in reality she was lent to a couple, Mr and Mrs. B, who employed her as a general housemaid. Miss Siliadin had toiled during several years, for seven days a week and fifteen hours a day, virtually without remuneration and without a day off.³⁶ Mr. and Mrs. B had faced criminal proceedings and had actually been convicted for having obtained the performance of services from a vulnerable individual without appropriate payment – a criminal offence under Article 225-13 of the French Criminal Code. However, they had been acquitted of the charge of exposing an individual to working or living conditions which are incompatible with human dignity, an offence under Article 225-14 Criminal Code.

The applicant had complained that French criminal law did not contain specific criminal provisions on slavery, servitude or forced or compulsory labour, consequently flouting its positive obligations under the Convention to protect its citizens against such abhorrent practices. Instead, the legislator had left the courts with the particularly vague concept of 'infringement of human dignity' subject to random interpretation.³⁷ The Court confirmed in general terms that the positive obligations under Article 4 entailed the penalisation and effective prosecution of any act that purported to maintain persons in such situations. In assessing whether the position of the applicant was covered by the concepts featuring in Article 4, the Court distinguished between 'slavery' and 'servitude', denying that the applicant was exposed to the former situation. While the Court acknowledged that the applicant had clearly been deprived of her personal autonomy, 'she had not been held in slavery in the proper sense, in other words that Mr and Mrs B exercised a genuine right of legal ownership over her, reducing her to the status of an "object"'.³⁸ Nevertheless, the Court adopted the Commission's findings in *Van Droogenbroeck v. Belgium* that servitude entailed 'particularly serious forms of denial of freedom, including the obligation for the

³⁵ Obokata, note 3, p. 453.

³⁶ ECHR, 26 July 2005, Application no. 73316/01, *Case of Siliadin v. France*, §§109/110.

³⁷ *Siliadin v. France*, § 101.

³⁸ *Siliadin v. France*, § 122 (italics HvdW).

“serf” to live on another person’s property and the impossibility to alter his condition’ and therefore had to be linked with the concept of slavery.³⁹ The Court concluded that the applicant had been held in servitude and agreed that the French legislation and its application by the courts, exhibiting several flaws, had been inadequate to protect her. New legislation had introduced trafficking in human beings as a separate criminal offence, but had not been applicable to the applicant’s situation. Consequently, France had violated its positive obligations under Article 4 of the Convention.⁴⁰

Despite the favourable outcome for the applicant, the decision of the Court has been censured for harbouring a rigid and narrow interpretation of the concept of slavery.⁴¹ And indeed: the definition as contemplated by the Court is strongly reminiscent of the classic understanding of the concept in the 1926 Slavery Convention, which has been significantly amended (and broadened), at least in the case law of the ICTY. One of the reasons for these diverging interpretations in international criminal law and human rights law might be that Article 4 of the ECHR enumerates several concepts, suggesting some hierarchy of seriousness between them, and that the availability of adjacent and corresponding notions invites the Court to apply a rigid interpretation of the most ‘serious’, to wit slavery.⁴²

In *Siliadin*, the Court did not address the question whether trafficking in human beings would equal ‘slavery’ or ‘servitude’, probably because French legislation at the time did not even contain criminal provisions on trafficking in human beings which could be tested on their conformity with the obligations emanating from Article 4. In the later and only other case on trafficking – *Rantsev v. Cyprus and Russia* – the Court could not evade the issue, because the applicant explicitly raised the relationship between the concepts.⁴³ The case concerned the death under obscure circumstances of a Russian girl who had come to Cyprus in order to find employment as an ‘artiste’ in a cabaret, a term that has become synonymous in Cyprus to ‘prostitute’.⁴⁴ Having earlier expressed that she was tired and wished to return to Russia, Ms Rantseva was found dead on the street below a balcony on the upper floor of an apartment where she had been staying. The police had discovered a bedspread looped through the railing of the smaller balcony and had reasoned that she had made a lethal fall, in an effort to escape her captivity.⁴⁵ Both Cyprus and Russia had conducted (criminal) investigations in respect of the tragic incident, but they concluded that

³⁹ *Siliadin v. France*, § 123, quoting the Commission’s report of 9 July 1980 in *Van Droogenbroeck v. Belgium*, Series B no. 44, p. 30, §§ 78-80.

⁴⁰ *Siliadin v. France*, §§ 148/149.

⁴¹ See Anne Gallagher, footnote 1, p. 187.

⁴² J. Allain, ‘The Definition of “Slavery” in General International law and the Crime of Enslavement within the Rome Statute,’ speech given at the Guest Lecture Series of the Office of the Prosecutor, International Criminal Court, April 26, 2007 (quoted by Gallagher, footnote 1, p. 187).

⁴³ ECHR, 7 January 2010, Application no. 25965/04, *Case of Rantsev v. Cyprus and Russia*.

⁴⁴ *Rantsev v. Cyprus and Russia*, § 83.

⁴⁵ *Rantsev v. Cyprus and Russia*, §§ 25-29.

the evidence did not reveal criminal liability of a third person and that her death was the result of an accident.⁴⁶

The applicant, the father of the deceased girl, openly suggested that his daughter had been a victim of trafficking, accused both states of having failed in protecting her from trafficking and sexual exploitation and censured the inadequate investigations into the dark circumstances which were conducive of her death. He pointed out that neither Cyprus nor Russia had specific criminal provisions addressing trafficking in human beings, implying that a lack of legal framework, that would sustain the necessary protection and investigations, produced a violation of Article 4 of the Convention.⁴⁷

Interestingly, Cyprus and Russia took a slightly different approach on the issue at hand. Cyprus admitted that it had violated its positive obligation under Article 4 in 'failing to take any measures to ascertain whether Ms Rantseva had been a victim of trafficking in human beings or had been subjected to sexual or any other kind of exploitation.'⁴⁸ Apparently, Cyprus accepted that trafficking in human beings was within the scope of Article 4 of the Convention. While Russia did not explicitly deny this, it bluntly held that Ms Rantseva's treatment was not within the purview of that provision, as she had voluntarily entered the country and had obtained a work permit, while there was insufficient evidence to support a finding that she was held in servitude and forced to work.⁴⁹ This position is somewhat ambiguous, as it can be interpreted in two ways. For one thing, it might imply that, in the Russian view, trafficking in human beings in general does not meet the threshold of seriousness, inherent in the concepts of Article 4. However, a more plausible reading is that the situation to which Ms Rantseva was exposed could not be qualified as trafficking in human beings.

The Court addressed the question whether (the prohibition of) trafficking in human beings was covered by Article 4 of the Convention head on, but circumvented the thorny relationship between trafficking and slavery. First, it reiterated the features of trafficking that have been identified in previous case law as well:

'The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the worldwide slave trade. The Cypriot

⁴⁶ Rantsev v. Cyprus and Russia, §§ 41 and 78.

⁴⁷ Rantsev v. Cyprus and Russia, §§ 254, 255.

⁴⁸ Rantsev v. Cyprus and Russia, § 258.

⁴⁹ Rantsev v. Cyprus and Russia, § 209.

Ombudsman referred to sexual exploitation and trafficking taking place “under a regime of modern slavery”⁵⁰

The tension was mounting: would the Court adopt a similar position? The next paragraph provided the answer:

‘There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. *In view of its obligation to interpret the convention in the light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”.* Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.’(Italics HvdW)⁵¹

In other words, assuming that the treatment of Ms Rantseva can be qualified as trafficking in human beings, the Court leaves it open whether this particular instance of trafficking can be categorized as ‘slavery’, ‘servitude’ or ‘forced and compulsory labour’. Anne Gallagher, while calling the decision ‘significant’, has also expressed some disappointment, as the Court fails to explain why trafficking falls within the scope of Article 4.⁵²

The expansion of the notions of ‘slavery’ and ‘enslavement’, propelled by the ICTY in the Kunarac case, has obscured the limits of these concepts. The proper relationship between slavery and trafficking in human beings in particular is still left in abeyance. On the face of it, the European Court of Human Rights in Rantseva appears to retract from its earlier restrictive interpretation, as expounded in Siliadin, by moving beyond the parameters of chattel slavery. However, we cannot even be certain about that. The incorporation of trafficking in human beings within the scope of Article 4 is not decisive, because that provision encompasses several concepts, next to slavery, and the Court refrains from indicating under which tag trafficking can be brought.

The present author is of the opinion that the developments in case law of the ICTY and the European Court of Human Rights do not prove that trafficking in human beings can simply be equated with slavery. I tend to agree with the point of view of Anne Gallagher who argues that ‘(...) despite indications that legal conceptions of slavery have expanded to embrace practices that go beyond chattel slavery, it is difficult to sustain an absolute claim that trafficking, in all its modern manifestations, is included in the customary and *jus cogens* norm prohibiting slavery and the slave trade.’⁵³

⁵⁰ Rantsev v. Cyprus and Russia, §281.

⁵¹ Rantsev v. Cyprus and Russia, § 282.

⁵² Gallagher, footnote 1, p. 189.

⁵³ Gallagher, footnote 1, p. 190.

This position seems to be corroborated by the findings of a national – Australian – court in the case of *R v Tang*.⁵⁴ The High Court in this case did not explicitly address the relationship between trafficking in human beings and slavery, but moved to identify the confines of the latter concept.⁵⁵ The inquiry into the content of the concept of ‘slavery’ in the 1926 Slavery Convention and the corresponding provision in national law – which only deviated from the international model in minor respects – centred around the question whether slavery could be understood both *de jure* and *de facto*. Obviously, the background of the issue was that ‘ownership over a person’ is not accepted in law. Confirming that the international legal definition included *de facto* slavery, the High Court proceeded by identifying the core of the concept, cautiously manoeuvring between the restrictive ‘chattel slavery’ approach and the rather broad and loose interpretation in *Kunarac*. On the one hand, Gleeson, speaking for the majority, held that chattel slavery ‘falls within the definition, but it would be inconsistent to read the definition as limited to that form of slavery.’⁵⁶ On the other hand, however, the High Court defined the gist of ‘slavery’ as a complete disposition and control over another person for commercial purposes, in an obvious intent to distinguish it from less complete exercise of power. Instructing the jury how to make a distinction between slavery and harsh and exploitative conditions of labour, Gleeson held

“The answer to that, in a given case, may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services.”⁵⁷

The High Court even explicitly warned against dilution of the concept of slavery:

‘It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee’s freedom of movement. Powers of control, in the context of an issue of

⁵⁴ Tang [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008). An illuminating case note is offered by Jean Allain, ‘R v Tang; Clarifying the Definition of ‘Slavery’ in International Law’, 10 *Melbourne Journal of International Law* (2009), pp. 246-257.

⁵⁵ The case involved the transport and subsequent exploitation as sex workers of five Thai women who had to work in a brothel in Melbourne without remuneration, in order to pay back the expenses that had been made on their behalf. Lower courts had acquitted the accused Wei tang, who operated the brothel, on charges of slavery and the prosecutor had appealed the case to the High Court of Australia, with Tang making a cross-appeal.

⁵⁶ Tang [2008], p. 27

⁵⁷ Tang [2008], p. 44.

slavery, are powers of the kind and degree that would attach to the right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.’⁵⁸

These cautious words dovetail with the restrictive approach, advocated above. Trafficking in human beings only amounts to slavery if the perpetrator arrogates complete control over another person, as if he owns that person as a ‘thing’ or commodity. Such powers appear from strict control over movement and complete financial subservience. More ephemeral forms of control, while undoubtedly constituting serious crimes, would not qualify as slavery.⁵⁹

2.4 Interim conclusions and short intro to the next part

In the previous section I have argued that slavery and trafficking in human beings are not to be conflated. Although there is certainly a considerable amount of overlap between the concepts – and this overlap has augmented due to the expanded understanding of slavery – these are still distinct crimes. Traffickers in human beings who merely intend to incidentally exploit the labour or attractions of their victims, leaving them some physical freedom of movement and financial remuneration, do not commit the crime of ‘enslavement’. Even more far-fetched is the proposition that trafficking in human beings should be considered as a crime against humanity. Most organizations or networks that engage in trafficking do not reach the threshold of that category that is required in view of the recent findings of the ICC in the Kenya-case. The ‘policy requirement’ is here to stay and issues a clear message: crimes against humanity connote system criminality which implies the involvement of states or large and powerful organisations with similar (state-like) features and resources.

There are good – principled and practical – reasons to guard against ‘semantic inflation’.⁶⁰ The dilution of crimes against humanity trivializes the category which historically originated in the unimaginable atrocities of the Holocaust. Supranational criminal justice has been invented in order to express the universal horror of such crimes and as a device to thwart the reigning impunity which is a consequence of state involvement or the incapacity of states to repress those crimes in view of the power of non-state actors. These two elements – the repugnant character of those crimes and the unwillingness or inability of states to prosecute and try the perpetrators adequately – precisely coincide within the category of crimes against humanity.

But at this point the advocates of ‘upgrading’ trafficking in human beings to the realm of international crimes *stricto sensu* play their second trump card. They contend that the discussion does not merely concern the quibbling over semantics, but serves the purpose of

⁵⁸ Tang [2008], p. 32.

⁵⁹ In a similar vein: Gallagher, footnote 1, p. 190.

⁶⁰ Compare R. Slye and B. van Schaack, ‘The Internalization of Crimes’, in: Slye and Van Schaack (eds.) *International Criminal Law: The Essentials*, Wolters/Kluwer 2008, p. 108.

improved criminal law enforcement. Trafficking in human beings, so they argue, exceeds the powers and resources of national jurisdictions. The combined effects of limited jurisdiction, inadequate implementation of substantive legal provisions and deficient cooperation in criminal matters impede effective prosecution and trial of traffickers in human beings. This breeds impunity, the ending whereof is precisely one of the motives underlying the establishment of the International criminal court. Therefore, the protagonists of this view favour the prosecution and trial of trafficking in human beings by international or regional criminal courts, as an alternative or at least complementary to national jurisdictions. They assume that these courts are able to dispense justice of better quality, because they dispose of wider – preferably universal – jurisdiction, uniformly apply well-defined and generally accepted substantive law and can count on the assistance of states.

In the second part of this essay I intend to explore this argument further by investigating whether the elevation of trafficking in human beings to another – international or regional – level of jurisdiction is really necessary, apart from its obvious norm-expressive or symbolic significance. To that purpose, I will address the elements that allegedly constitute obstacles for law enforcement by national jurisdictions: lack of jurisdiction, disparities in substantive legal provisions and deficient cooperation in criminal matters. A brief introductory section on the question how these elements are inter-related will be followed by distinct chapters on these respective elements in which each time a survey of the normative standards, prescribed in conventions, will precede short impressions of legal practice, on the basis of national case law. As indicated earlier, I do by no means aspire to conduct a – more or less comprehensive – empirical study. My purpose is merely to inquire whether the proposition that national law enforcement is ill-equipped to deal with trafficking in human beings is fully corroborated by the facts.

3) National prosecutions and trials of trafficking in human beings: an impression of the state of the art.

3.1 Obstacles to national law enforcement of trafficking in human beings

The national criminal law enforcement in respect of trafficking in human beings, being of a volatile nature, is often a complicated and protracted affair. Ideally, criminal proceedings against all the suspects are to be concentrated within one jurisdiction. In that case, the criminal process enables a gradual reconstruction of the strain of events by the building up of evidence that witnesses may provide, displaying a comprehensive picture of the historical truth and the role and functions of all those involved. Moreover, such ‘mammoth’ proceedings arguably offer best chances for participation of and redress for victims. However, efforts to engage in the prosecution of all culprits involved in trafficking are often doomed to fail, due to the fact that the separate stages of trafficking are usually scattered over different states. The state where the exploitation of trafficked women in a brothel actually takes place may lack jurisdiction over foreigners who have recruited the women in another state. And that latter state may be unable to pursue criminal proceedings against

recruiters, because it has not, or only partially, implemented the substantive legal provisions that have been determined in international conventions. Deficiencies in the implementation of substantive legal provisions will often impede cooperation in criminal matters, in view of the double criminality rule which prescribes that the conduct for which cooperation is sought constitutes a criminal offence both in the requesting and in the requested state. In other words: even if a state harbours broad interpretations of (territorial) jurisdiction and is prepared to start criminal proceedings against a host of perpetrators residing in different countries, it may not be able to obtain evidence or physical custody over a suspect from other countries. Moreover, an acquittal in one state, due to lack of evidence or imperfections in the substantive criminal law, will generally preclude criminal proceedings in another state, in view of the double jeopardy-rule or '*non bis in idem*' principle.

This brief exposé already demonstrates that the obstacles are strongly intertwined and tend to reinforce each other. Extradition serves to reconcile jurisdictional competence and physical power over the fugitive and international cooperation in criminal matters is usually a prerequisite for a successful completion of criminal proceedings with international ramifications. In its turn, the availability of adequate provisions of substantive law is a precondition for both the exercise of jurisdiction and the rendering of (mutual) assistance in criminal matters. International conventions on the repression of transnational criminal law, including those on trafficking in human beings, have therefore always focused on the establishment of adequate bases for jurisdiction, harmonisation of substantive provisions and encouragement of international cooperation. Whether these efforts have yielded the desired results is the topic of the next paragraphs.

3.2 Jurisdiction in respect of trafficking in human beings

Provisions on criminal jurisdiction in respect of trafficking in human beings in the several conventions do not differ a lot inter se, although each of them displays some particularities. All relevant conventions stipulate that state parties shall ensure that they are able to exercise jurisdiction in respect of crimes that are committed on their territory, both the UN-Convention and the CoE Convention considering the vessel or the aircraft flying the flag of that State party as 'territory' for the purpose of criminal jurisdiction (the 'flag-principle').⁶¹ All conventions incorporate the active nationality principle, attaching to the nationality of the perpetrator, as well, whereas the UN-Convention and the CoE-Convention equalize stateless persons, having their habitual residence in the territory of a state, to 'nationals'.⁶² All conventions provide for the (possible) establishment of jurisdiction on the basis of

⁶¹ UNCTOC, Article 15, s. 1, sub a) and b); CoE Convention, Article 31, s. 1, sub a-c. EU Directive, Article 10, s. 1 sub a. The Palermo Protocol does not contain provisions on jurisdiction. These are to be found in the 'mother' treaty (UNCTOC) which are applicable, mutatis mutandis, to the offences, regulated by the Protocol, which only serves to supplement the UNCTOC (Palermo Protocol, Article 1, sub b).

⁶² UNCTOC, Article 15, s. 2, sub b; CoE Convention, Article 31, s. 1 sub d, EU Directive, Article 10, s. 1 sub b.

passive personality (attaching to the nationality of the victim).⁶³ Finally, the UN-Convention and the CoE-Convention contain an '*aut dedere, aut judicare*'-provision, enjoining states parties to establish jurisdiction for situations when the alleged perpetrator is on its territory and it does not extradite him, remarkably, however, only in case the requested person is a national.⁶⁴ Only the UN-Convention explicitly mentions the possibility of a wider application of *aut dedere, aut judicare*, not restricted to nationals.⁶⁵ One may be inclined to question whether the restricted *aut dedere, aut judicare* is not largely redundant, in view of the rather wide acceptance of the nationality principle. The UN-Convention is the only instrument that contemplates extension of (territorial) jurisdiction over conspiracies or criminal organisations that act abroad, but envisage a crime on the territory of the state party in question.⁶⁶

The last mentioned provision of the UN-Convention suggests a broad interpretation of the principle of territorial jurisdiction that befits the character of the crime. Trafficking in human beings is a protracted process that can be chopped in several – temporal and spatial – segments, involving different activities and agents. However, all these parts display a functional coherence and the common aim of making profit through the exploitation of human beings. Trafficking can be qualified as a continuous crime *par excellence* and this justifies an integral criminal law response, implying the exercise of jurisdiction over all participants, even if they performed their contribution abroad.

The extensive interpretation of the principle of territorial jurisdiction has been followed by criminal courts from both common law and civil law systems. For the purpose of this article, two examples will suffice.

In the *Sneep*-case, serving before a Dutch criminal court, the suspects had allegedly cooperated in a criminal organisation which had recruited women in Belgium, Germany and Turkey, and had transferred these women to the Netherlands for the purpose of their sexual exploitation. According to the indictment, the organisation was notorious for its particularly violent and intimidating behaviour, showing no respect at all for the mental and physical

⁶³ UNCTOC, Article 15, s. 2 sub a; CoE Convention, Article 31, s. 1, sub e, EU Directive, Article 10, s. 2, sub a. The Directive equals the victimhood of the national to that of the habitual resident.

⁶⁴ UNCTOC, Article 15, s. 3; CoE Convention, Article 31, s. 3.

⁶⁵ UNCTOC, Article 15, s. 4: 'Each State party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is on its territory and it does not extradite him or her.'

⁶⁶ UNCTOC, Article 15, s. 2: ' (...) a State Party may also establish its jurisdiction over any such offence when: (...)

c) The offence is

i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to commission of a serious crime within its territory;

ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory. Article 5 and article 6 refer to criminalization of participation in an organized criminal group and criminalization of the laundering of the proceeds of crime respectively.

integrity of the victims.⁶⁷ Counsel for the defence had argued that the Prosecutor should be declared inadmissible in its claims, because the court lacked jurisdiction over the recruitment of one of the women which had been performed abroad by a foreign suspect. The Court did not share counsel's opinion and held that 'on the basis of Article 2 of the Dutch Penal Code, Dutch criminal law is applicable on each person who commits an offence on Dutch territory. The suspect is charged with trafficking in human beings, which, in so far as it concerns one and the same victim, should, in the opinion of the court, be considered as a continuous crime that is realized by a composition of activities performed at different places. The suspect is charged with different executing activities which have taken place both in the Netherlands and in Belgium. If other places, outside Dutch territory, can be considered as places where the criminal offence has been committed, prosecution in the Netherlands is possible, also in respect of those elements of the criminal offence that took place outside the Netherlands'.⁶⁸

In other words: the aim of states to enforce the criminal law within the boundaries of its territory urges courts to consider transnational crimes as a single threat, consisting of several constituent elements and prompts them to extend jurisdiction over those activities that occur beyond this territorial realm.

A similar broad interpretation of the territoriality principle has been exhibited by US courts. In *Adhikari and others v. Daoud & Partners and others* the plaintiffs had brought suit against the corporations (Daoud and others) alleging that they had recruited labourers in Nepal for the purpose of performing services and work for US military bases in Iraq, while misleading them about their salary and work location. According to the plaintiffs, the corporations had wilfully and purposefully formed an enterprise with the goal of procuring cheap labour and increasing profits, thus engaging in human trafficking, in violation of the Trafficking Victims Protection Reauthorization Act (TVPRA) and the Alien Tort Statute (ATS).⁶⁹ In response to the claim that the recruitment had occurred outside US jurisdiction and US courts consequently lacked jurisdiction the Texan court held that

'human trafficking [is] by nature an international crime; it is difficult clearly to delineate those trafficking acts which are "truly extraterritorial" and those which sufficiently reach across U.S. borders. Accordingly, the thrust of the TVPRA would be severely undermined by a holding that U.S. defendants who gained commercial advantage in this country through

⁶⁷ District Court Utrecht, 11 July 2008, Case Number: 08/963002-07. Available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBUTR:2008:BD6969> (Dutch only, last visited on 16 August 2013).

⁶⁸ District Court Utrecht, 11 July 2008 (footnote 67), par. 1.2.1 (translation HvdW).

⁶⁹ *Adhikari and others v. Daoud & partners and others*, Decision on motion to dismiss, 697 F. Supp. 2d 674 (S.D. Tex. 2009), ILDC 1562 (US 2009), 3rd November 2009, District Court for the Southern District of Texas, ILDC 1562 (US 2009), Analysis by Blessing Omakwu.

engaging in illegal human trafficking were free from liability, so long as the trafficking acts themselves took place outside of American borders.’⁷⁰

Different from its Dutch colleague, the Texan court did not explicitly invoke the territoriality principle as the basis for criminal jurisdiction. However, the court apparently attached great importance to the fact that the criminal conduct that occurred abroad yielded harmful effects within the US legal order. That is strongly reminiscent of the objective territoriality-doctrine that allows the exercise of jurisdiction whenever a state discovers the consequences of a crime on its territory. This doctrine has traditionally been embraced and applied by American courts.⁷¹

Obviously, two single decisions do not prove that courts of all states would be inclined to harbour such an expansive interpretation of (territorial) jurisdiction, but that is not the point. Apparently, legal doctrine offers states the tools to act against transnational crime, including trafficking in human beings, even if constituent elements of those crimes occur outside their territory. And courts have followed suit by applying those doctrines. It demonstrates that limited jurisdiction is not the major bottleneck in the national prosecution and trial of trafficking in human beings.

3.3 Harmonisation of substantive law on trafficking in human beings: constituent elements and concepts of criminal responsibility

All conventions aim to achieve a high level of harmonisation of (substantive) criminal law between the states parties, by instructing them to implement the constituent elements of the standard definition of human trafficking in their own legislation.⁷² Additionally, the Council of Europe Convention encourages states parties to consider adopting legislation in order to criminalize the use of services of a victim and obliges states parties to criminalise acts relating to travel or identity documents, like forging or procuring such documents.⁷³ Not only principal perpetrators who actually commit the offence should incur criminal responsibility, accomplices and those who attempt the offence should be covered by criminal law provisions as well.⁷⁴

⁷⁰ *Adhikari v. Daoud*, § 18.

⁷¹ Compare Christopher Blakesley, ‘Extraterritorial Jurisdiction’, in : M. Cherif Bassiouni (ed.) *International Criminal Law, Volume II: Procedure*, Transnational Publishers, Inc. Dobbs Ferry, New York 1999, pp. 17/18, who quotes the case of *Strassheim v. Daily* (221 U.S. 280[1911]) as the most frequently cited authority. In this case Mr. Justice Holmes held that: “Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing a cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”

⁷² Exemplary is Article 5 of the Palermo-Protocol that stipulates that ‘Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.’ Article 2 of the EU Directive and Article 18 of the CoE Convention read virtually the same.

⁷³ CoE-Convention, Article 19 and 20, respectively.

⁷⁴ The language of the provisions is by no means uniform in this respect. Article 5, s. 2 of the Palermo Protocol mentions ‘attempt’, ‘participation as an accomplice’ and ‘organizing or directing other persons to commit

Interestingly, all conventions provide for corporate liability, leaving it however to the states to decide whether this liability should have a criminal, civil or administrative nature.⁷⁵ This freedom of choice is inevitable, as not all states acknowledge criminal corporate responsibility. Some conventions stipulate in some detail what position an individual or organ should have within the corporation in order to implicate its responsibility.⁷⁶

While the legal obligations pertaining to the implementation of substantive law are clear and the normative framework is both detailed and sophisticated, the pertinent question is whether national jurisdictions are inclined to abide by these international standards. I will briefly discuss two cases from distinct legal systems (Israel and the Netherlands) in which the courts addressed the relationship between national criminal law provisions and their international models.

In the case of *Frudenthal v. Israël* the appellant (Mr. Frudenthal) had been tried and convicted for trafficking in persons for the purpose of employing them as prostitutes, as well as for the additional crimes of pimping for prostitution, threats and false imprisonment.⁷⁷ On appeal, counsel for the defence argued that his client's activities could not be qualified as trafficking. In introducing the crime of trafficking in persons as a separate offence, the legislature had criminalized the 'sale' or 'purchase' of a person for the employment in prostitution, but had not criminalized any 'other transaction'. These specific legal concepts should be interpreted in their narrow sense, according to the Sale Law, 1968 and other civil laws. According to counsel, his client did not own the women and did not have the option to sell them for full consideration.

The Court rejected counsel's representation. Qualifying trafficking as a 'vile scourge', the court emphasized that the phenomenon violated 'fundamental human rights including the rights to liberty, bodily integrity and human dignity.' The Court added that 'there is no doubt that substantively, every link in the chain is an act of trafficking, so long as it permits people to be treated as property or chattel that can be transferred for trade.' A narrow, civil law interpretation of 'selling' and 'purchasing' would go against the grain of the purpose of the criminal law prohibition: 'It makes no difference whether it is a "business arrangement" under the guise of ownership, rental borrowing, partnership, or any other means of creating

trafficking in human beings'. Article 3 of the EU Directive refers to 'incitement', 'aiding and abetting' and 'attempt'. The CoE Convention soberly restricts itself to 'attempt' and 'aiding and abetting' (Article 21)

⁷⁵ UNCTOC, Article 10, s. 1 and s. 2; EU Directive, Article 5; CoE-Convention, Article 22, s. 1 and 3. The EU Directive does not explicitly leave Member the choice between several enforcement regimes, but confines itself by stating that the fines may be criminal or non-criminal, as long as the sanctions are effective, proportionate and dissuasive (Article 6).

⁷⁶ Both Article 5. S. 1 4 of the EU Directive and Article 22 of the CoE Convention require a leading position, based on:

- a) A power of representation of the legal person;
- b) An authority to take decisions on behalf of the legal person;
- c) An authority to exercise control within the legal person.

⁷⁷ *Frudenthal (Michael) v. Israël*, Appeal Judgment, CA 11196/02. 3rd August 2004, Criminal Division, ILDC 364 (IL 2003), analysis by Tally Kritzman).

a property interest in a person. All of these are considered trafficking under the provisions of section 203A(a)'.⁷⁸

In expounding its position, the Court explicitly referred to the UN Convention on Transnational Organized Crime and the Palermo Protocol:

'As part of its efforts to join the international struggle against trafficking in persons, Israel signed the United Nations Convention Against transnational Organized Crime, including the Protocol to Prevent, Suppress, and Punish Trafficking in Persons which supplements the Convention. The Convention and the Protocol, which will enter into force shortly, have yet to be ratified in Israël, but Israël's joining the Convention expresses its aspiration to take an active part in the norms that the family of nations has created around this issue. (...) We therefore should interpret the provisions of the Israeli Statute in accordance with the spirit of the Convention, which seeks to prevent the exploitation of power in the form of transferring people and trafficking in them for the purpose of prostitution or slavery.'⁷⁹

The Dutch case concerned the prosecution of the owner of a Chinese restaurant who had employed Chinese persons, illegally residing in the Netherlands, making them toil for 11 hours a day on average, during 6 days a week, in exchange for food and housing, with no or very little financial remuneration. The Court of Appeal had acquitted the accused of the charges of trafficking in human beings, finding insufficient proof of 'compulsive exploitation'.⁸⁰

The Supreme Court extensively quoted the Explanatory Memorandum on the introduction of new legislation on trafficking in human beings in the Netherlands which revealed that the new provisions had been incorporated in order to implement regional and international instruments. Whereas former provisions specifically addressed (involuntary) prostitution and other forms of sexual exploitation, the new legislation – in conformity with the international regulations – applied to all kinds of commercial exploitation. Article 273f (new) of the Dutch Penal Code literally copies the definition as provided in the Palermo Protocol and the Supreme Court proceeded to clarify two legal elements. The first issue concerned the required *mens rea* of the perpetrator in respect of 'the abuse of a position of vulnerability', being one of the means of trafficking. The Supreme Court held that for the proof of 'abuse' it would suffice that the perpetrator had been aware of the relevant factual circumstances from which a position of preponderance ensued – or could ensue – in the sense that the perpetrator had *dolus eventualis* in respect of those circumstances. The Court of Appeal had erred in requiring that the perpetrator had 'purposefully abused' the vulnerable position of the victim. Nor was it necessary, as the Court of Appeal had wrongly

⁷⁸ *Frudenthal v. Israël*, par. 5.

⁷⁹ *Frudenthal v. Israël*, par. 5.

⁸⁰ Dutch Supreme Court (Hoge Raad), 27 October 2008, ECLI:NL:HR:2009:BI7099; available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BI7099&key> (Dutch only; last visited on 31 July 2013).

held, that the perpetrator had actively created the situation of exploitation, or that he had taken the initiative to bring the victims in their vulnerable position.⁸¹ Secondly, the Supreme Court inquired what factual circumstances yielded 'exploitation' and whether the Court of Appeal had correctly interpreted and applied that concept. While the Supreme Court admitted that an abstract and general definition could not be advanced, the Court identified a number of factors, like the nature and length of the employment, the limitations it involved for the employees and the economic advantages for the employer, that should be taken into consideration. Moreover, these and similar factors should be gauged against prevailing standards in Dutch society. In view of these parameters, the Supreme Court found the Court of Appeal's conclusion that no exploitation could be proven from the facts, wanting and incomprehensible, as they earned extremely low salaries, had to work for 11 till 13 hours a day and had to share small bedrooms with others.⁸²

Both these decisions provide useful clarification of international standards that still require further elucidation and interpretation. What they also have in common, though, is that they both take the international definition as authoritative guideline and endeavour to apply national law in the spirit of the international model. Again, two cases do not evince that all courts faithfully comply with the definition as advanced in the Palermo Protocol. However, they demonstrate that the efforts at the international level to further harmonisation of substantive provisions at least have yielded results.

3.4 International cooperation in respect of trafficking in human beings

While states may be inclined to extend their jurisdiction over criminal activities relating to trafficking that occur abroad and they may possess the necessary legal tools, for a successful criminal procedure they have to rely on the assistance of other states. After all, suspects will often reside abroad and the evidence may also be dispersed over several jurisdictions.

The relevance of international cooperation in criminal matters is emphasized in the conventions that deal with the repression of trafficking in human beings. The United Nations Convention against Transnational Organized Crime in particular covers the whole gamut of forms of international cooperation. With respect to extradition, Article 16 requires states parties to consider trafficking as an extraditable offence. If the State Party makes extradition conditional on the existence of a treaty, it may consider the UNCTOC as an adequate legal basis and States Parties are deemed to include trafficking as an extraditable offence in each and every treaty that exists between them and that they are still to conclude.⁸³ As has previously been observed, these obligations only apply to transnational crimes, involving an organized criminal group. However, states parties are invited to apply these provisions also in respect of serious offences that lack those features.⁸⁴ The Council of Europe Convention

⁸¹ Dutch Supreme Court, 27 October 2008, par. 2.5.1 and 2.5.2,

⁸² Dutch Supreme Court, 27 October 2008, par. 2.6.1.

⁸³ UNCTOC, Article 16, sections 3 and 4.

⁸⁴ UNCTOC, Article 16, s. 2.

on Trafficking is far less elaborate and simply enjoins parties to adopt legislation, threatening trafficking in human beings with sanctions that can give rise to extradition.⁸⁵ While all these conventions prescribe the criminalisation of trafficking in human beings and aim at harmonisation of criminal law, the eventuality of diverging legislation, possibly impeding international cooperation, is still anticipated, as transpires from Article 16, s. 1 of the UNCTOC which restricts the application of the provision to situations in which the offence for which extradition is sought is punishable under the domestic law of both the requesting and the requested state. It is noteworthy in this context that trafficking in human beings features on the list of offences in respect of which the Framework Decision on the European Arrest Warrant has partially abolished the requirement of double criminality.⁸⁶

Mutual assistance in criminal matters, in particular with a view to the obtaining and exchange of criminal evidence, is the topic of the longest provision – Article 18 – of the UNCTOC, counting no less than 30 sections. With the usual disqualifications – the provision only applies to transnational, organized crimes -, section 1 starts by imploring states parties to afford one another ‘the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.’ Section 3 immediately makes clear that procurement and supply of evidence is at the top of the list of priorities.⁸⁷ In unprecedented detail, Article 18 regulates the procedural aspects of mutual legal assistance, enumerating the formal requirements of requests and stressing the importance of ‘spontaneous’ transmission – id est without previous request – of information. In its efforts to further mutual assistance, the Convention encourages states parties to restrain the grounds for refusal, explicitly mentioning the possibility of waiving the requirement of double criminality.⁸⁸ In this context it should be observed that the EU

⁸⁵ CoE Convention, Article 23, s. 1.

⁸⁶ EU Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender procedures between Member States (2002), Luxembourg, 13 June 2002, OJ of the EC, No. C 313, 23 October 1996, p. 11, Article 2, s. 2: ‘The following offences, if they are punishable in the issuing Member state by a custodial sentence or detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- (...)
- Trafficking in human beings’.

⁸⁷ The provision mentions the following purposes for which mutual assistance may be requested: taking evidence or statements of persons, effecting service of judicial documents, executing searches and seizures and freezing, examining objects and sites, providing information, evidentiary items and expert evaluations, providing originals or certified copies of relevant documents and records (...), identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes, facilitating the voluntary appearance of persons in the requesting State Party.

⁸⁸ Section 21 provides that mutual assistance may be refused:

- a) If the request is not made in conformity with the provisions of this article;
- b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
- c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

Framework Decision on the European evidence warrant has followed the system of the European arrest warrant by abolishing the double criminality requirement in respect of trafficking in human beings.⁸⁹

Provisions on international cooperation for purposes of confiscation (Article 13), transfer of sentenced persons (Article 17), joint investigation teams (Article 19), cooperation in the field of special investigative techniques (Article 20) and transfer of criminal proceedings (article 21) complement the impressive body of regulations on international cooperation in criminal matters of the UNCTOC. As indicated before, all these provisions are applicable *mutatis mutandis* to trafficking in human beings.

The Council of Europe Convention is far more frugal than its UN counterpart. Article 32 simply admonishes States Parties to co-operate with each other (...) to the widest extent possible, for the purpose of (...) investigations or proceedings concerning criminal offences established in accordance with this Convention. However, that need not surprise us, as this Convention is established within the wider institutional framework of an organisation that has been the world's pioneer in the realm of international cooperation in criminal matters and has created a host of conventions. The absence of more detailed provisions connotes deference to an already established regime.⁹⁰

While the normative framework thus seems to be rather comprehensive and sophisticated, the proof of the pudding is, as always, in the eating. How do states perform in the realm of international cooperation in criminal matters with respect to trafficking in human beings? The press is mixed. In their searching study on developments in criminal justice responses to human trafficking, Gallagher and Holmes at first strike a pessimist note.⁹¹ They refer to the paucity of extradition requests and observe that states have had great trouble in overcoming the manifold political and practical hurdles, both in respect of extradition and the execution of requests for mutual legal assistance. However, the authors perceive a marked improvement 'over the last years', especially with regards to less formal police cooperation:

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- d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

Sub c) alludes to the requirement of double criminality, however, Article 18, s. 9 second sentence stipulates that States Parties may, when they deem appropriate provide assistance (...) irrespective of whether the conduct would constitute an offence under the law of the requested State Party.

⁸⁹ EU Council Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (2008), Brussels 18 December 2008, OJ of the EU, No. L, 350, 30 December 2008, p. 72, Article 14. The abolition is even more drastic, as the three years threshold only applies to search and seizure. If the European Evidence Warrant does not seek a search and seizure, verification of double criminality is not allowed at all (see Article 14, section 1).

⁹⁰ Council of Europe, *Explanatory Report on the Convention against Trafficking in Human Beings*, ETS 197, 16.V. 2005 (2005), § 337.

⁹¹ Gallagher & Holmes, footnote 4, pp. 334/335.

‘In Europe there has been a noticeable increase in the number of simultaneous, proactive cross-border trafficking investigations coordinated by the Europol Agency between two or more European Union States. Many of these investigations have led to the coordinated arrest of suspects as well as to simultaneous and coordinated financial investigations and sequestrations of identified assets derived from trafficking related exploitation.’⁹²

Gallagher and Holmes wrote their article some 5 years ago and more recent trends in international cooperation in respect of trafficking seems to corroborate and even reinforce their findings. In Europe in particular, centralized and specialised agencies like Eurojust and Europol increasingly play a pivotal role in planning and orchestrating concerted action between states. Two operations illustrate the growing vigour and effectiveness of joint police operations supported by these institutions.

Operation Golf was started in the United Kingdom, in response to an outburst of theft and pick-pocketing in London in 2005, committed by very young Roma children.⁹³ At first their provenance was unknown, until contacts with the Romanian police revealed that they had investigated the disappearance of over 1000 children from one single town. The connection was quickly made, especially when it transpired that destitute Roma parents had ‘given away’ their children to criminals, promising them huge profits from the revenues of their children’s criminal activities. However, the parents had to pay in advance for the transport and nutrition of their children, leaving them no other option than to enter into debt peonage which they only could settle by going out stealing and begging themselves. ‘Police found that the criminals behind these lucrative operations consisted of members of Roma clans, some of them independent organised groups. These clans are highly hierarchically organised, family and clan-based and with the heads of family running things from their gigantic houses back in Romania’.⁹⁴ In September 2008 a Joint Investigation Team (JIT) was established between the Metropolitan Police and the Romanian National Police, supported by Europol, Eurojust, the UK Crown Prosecution Service and the Romanian Prosecutors Office. The JIT soon was successful. In April 2010 it assisted the Romanian authorities to arrest 26 individuals from the organised criminal network from Tandarei. They faced charges in Romania for trafficking and criminal exploitation of 181 named children, being members of an organised criminal network and money laundering.⁹⁵ As members of the criminal organisation had endeavoured to fraudulently obtain social benefits from the UK security system for the children and parents they had trafficked, the emphasis of the Prosecution Service in the United Kingdom was more on those charges. In November 2010 six members

⁹² Gallagher & Holmes, footnote 4, pp. 335/336.

⁹³ Information derived from: G. Vermeulen, Y. Van Damme, W. De Bondt, *Organised crime involvement in trafficking in persons and smuggling of migrants*, IRCP-series, Volume 38, Maklu: Antwerpen/Apeldoorn/Portland 2010, p. 42.

⁹⁴ Vermeulen et al. , footnote 93, p. 42.

⁹⁵ Information: Metropolitan Police, Directorate of Public Affairs, Freedom of Information Request Reference No. – (unknown), available at http://www.met.police.uk/foi/pdfs/disclosure_2010/december2010110004069.pdf (last visited: 22 October 2013).

of the criminal organisation were convicted on counts of (conspiracy to commit) fraud to prison sentences ranging from 12 months to 3 years.

Operation Koolvis was triggered by a Dutch lawyer who addressed the Dutch expert centre for human trafficking and smuggling, expressing her suspicion that one of her Nigerian clients was a victim of human trafficking.⁹⁶ Investigations at Schiphol Airport revealed a huge influx of Nigerian women in the Netherlands between October 2005 and May 2006 and the subsequent disappearance of Nigerian women from shelters for victims of human trafficking. The Pekari-project which was initiated to gather intelligence on trafficking from Nigeria divulged that the Netherlands were used as transit country in order to transport the women to their final destination in Italy or Spain where they were forced into prostitution. The Koolvis project which aimed at stopping the trafficking and exposing the organisations behind this trade in Nigerian women, involved a large number of institutions, including Europol and Interpol, and Dutch law enforcement authorities who worked in close cooperation with colleagues from Nigeria, Belgium, the United Kingdom, the United States, Spain, Germany, France and Italy. The project entailed a neat division of labour, with Nigerian police officials trying to prevent the influx of Nigerian women and Dutch law enforcement authorities engaging in the tracking down of the women who had vanished from the shelter-centres. Through the identification of 140 victims, the police officers of the states involved in the project were able to arrest several suspects, among whom Nigerian madams who had ordered the women and 3 “leaders” who were found in the UK, Ireland and the US. Parallel prosecutions took place in Italy, Nigeria and the Netherlands and in the latter country this resulted in several convictions on charges of trafficking in human beings, smuggling of migrants and membership of a criminal organisation. Although one of the accused was dismissed from the charges, because of the previous acquittal in Italy.⁹⁷

Operation Golf and operation Koolvis represent two success stories which display a number of common features. Both concerned the involvement of huge organisations with hierarchical structures, whose criminal activities affected several countries. This prompted law enforcement authorities to seek close cooperation, which was encouraged and orchestrated by supra-national institutions like Europol and Eurojust. The fairly recent instrument of the Joint Investigation Team offers ample opportunities for such concerted action.⁹⁸ However, in academic literature it is observed that large, hierarchical organisations do no longer prevail and are replaced by loose network of specialists who all perform a specific function.⁹⁹ The phenomenon of the ‘loverboy’ who works alone and is keen on making quick profit even stronger challenges the general picture that trafficking is

⁹⁶ Information derived from the 7th Report of the Dutch National Rapporteur on Human Trafficking (2009).

⁹⁷ Court of Appeal Arnhem, 12 March 2012; ECLI:NL:GHARN:2012:BV8567 (available at: www.rechtspraak.nl ; Dutch only; last visited: 22 October 2012.)

⁹⁸ Vermeulen et al. point out that international cooperation with Eurojust in a coordinating capacity has also been successful in respect of the criminal repression of smuggling of migrants, vide operation Ticket to Ride and Operation Green Sea; Vermeulen et al. , footnote 93, pp. 52-55.

⁹⁹ Vermeulen et al., footnote 93, p. 39

conducted by 'organized crime'.¹⁰⁰ This organisational shift has two consequences. First, if the threshold of a 'criminal organisation', as defined in the UN Convention on Transnational Organised Crime, is not reached, states are not under an obligation to afford each other the widest measure of assistance. And secondly, the incentive to cooperate may be less, if criminal activities have no longer ramifications in different countries, although one might observe that the establishment of for instance a JIT in such cases is not necessary, if allowed at all.¹⁰¹

While these sobering last remarks slightly dampen the high hopes, they do not distract from the general conclusion that international cooperation in criminal matters in respect of trafficking is gradually budding.

4. Some final reflections on the appropriate level of law enforcement

The previous section has attempted to give an impression of national criminal law enforcement in respect of trafficking in human beings. It cannot pretend to give more than 'an impression', because a more comprehensive survey would require the analysis in comparative perspective of many domestic jurisdictions, an exercise that would clearly exceed the limits of this article.¹⁰² Still, some observations can be made and some cautious conclusions can be drawn.

International Conventions on the suppression of Transnational Crimes in general and on trafficking in human beings in particular aspire to reinforce the legal framework for national law enforcement by identifying a number of issues which are considered as critical to that purpose: jurisdiction, substantive law and international cooperation. The findings in the previous section reveal that the performance of domestic jurisdictions in none of these fields is alarmingly wanting, urgently requiring a different approach. International law allows states some leeway to determine the scope of their territorial jurisdiction and states have used this discretion to extend their jurisdiction over acts which are committed abroad but are completed or have effects on their territory. The Palermo-Protocol has introduced a clear and detailed definition of trafficking which has been copied by other conventions and which serves states as a source of inspiration, thus contributing to the harmonisation of substantive law. And states are gradually overcoming political and legal hurdles in their quest to intensify international cooperation in criminal matters.

Still, these positive developments require some qualification. Academic literature focuses strongly on European legal practice, which is, being embedded in the institutional structures of the Council of Europe and the European Union, by far the most sophisticated and

¹⁰⁰ J. Goodey, 'Human Trafficking: Sketchy data and policy responses' *Criminology and Criminal Justice* 8(4), (2008), p. 428 who refers to similar findings of the German Bundeskriminalamt (BKA) and the Dutch National Rapporteur.

¹⁰¹ Vermeulen et al., footnote 93, p. 84.

¹⁰² See for databases on case law, UN-Office on Drugs and Crime, 'Human Trafficking; case Law Database' and the ASEAN Handbook on International Legal Cooperation in Trafficking Persons Cases.

advanced. While there are some indications of increasing cooperation between European countries and – for instance – African countries (vide Operation Koolvis), the performance of non-Western states is largely uncharted terrain.¹⁰³ Furthermore, the Palermo Protocol and its progenies have been mainly preoccupied with organized crime engaging in trafficking, whereas currently looser networks are on the rise. As legislation and multi-lateral assistance treaties may not be attuned to these forms of ‘un- or less – organized’ crime, the perpetrators may easily fall between the cracks of law enforcement.

In view of these potential shortcomings of national law enforcement, the involvement of international or regional courts and institutions is worthy of consideration. What are the options? For several reasons it seems unwise to expand the jurisdiction *ratione materiae* of the ICC with a separate crime of trafficking in human beings. The ICC has always been considered as a default mechanism which is called to intervene whenever national criminal justice is not available. That idea has of course been embodied in the famous complementarity principle. The unavailability of national criminal justice may have different causes, the most important of them being the involvement in massive human rights violations of the state itself.¹⁰⁴ But the state may also be unable to cope with a rival organisation, contending its monopoly of power and engaging in atrocities, or its judicial system may have suffered severe blows due to protracted armed conflict. None of these conditions seems to apply to trafficking in human beings. These are not crimes that are usually committed or condoned by the state, unless, of course, they are ‘common practice’ and sanctioned by official policy, in which case they would qualify as crimes against humanity (see the discussion of Kunarac in paragraph 2). Most organisations that engage in human trafficking will not have the power and resources to seriously challenge the dominant position of the state, an idea that is even more far-fetched in view of the quantitative shrinking of organisations, as noticed above. In short, states may have problems in prosecuting traffickers in human beings, they are certainly not ‘unwilling or unable’ to do so.¹⁰⁵ In this context it is telling that trafficking in human beings does not feature on the list of ‘missing crimes’ which were proposed to be included in the Rome Statute during the preparatory meetings.¹⁰⁶

¹⁰³ The ASEAN Handbook (previous footnote) contains useful surveys of the national legislation of South-Asian states, but hardly any references to legal practice and case law.

¹⁰⁴ Compare William A. Schabas, *The International Criminal Court; A Commentary on the Rome Statute*, Oxford, 2010, p. 40: ‘[international “atrocities crimes”] are generally crimes of State, in that they invoke the participation or acquiescence of a government, with the consequence that the justice system of the country concerned is unlikely to address the issue.’

¹⁰⁵ Weigend has discussed and defended the absence of an appropriate judicial response by the territorial state – or other states with superior claims – as a necessary precondition for the exercise of universal jurisdiction, see T. Weigend, ‘Grund und Grenzen universaler Gerichtsbarkeit’, in: J. Arnold et al. (eds.) *Menschengerechtes Strafrecht; Festschrift für Albin Eser zum 70 Geburtstag*, München 2005, p. 973.

¹⁰⁶ Compare Patrick Robinson, ‘The Missing Crimes’, in: A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Volume I, OUP: Oxford 2002, pp. 497-525.

Another possibility would be the establishment of a – regional or international – tribunal, exclusively dealing with the crime of trafficking, modelled after the piracy court which has been considered as one of the options to counter the threat of Somalian pirates. This court has only received lukewarm support, in view of its potentially infinite caseload.¹⁰⁷ And indeed, the disadvantages appear to outweigh the advantages, the major objection arguably being that the restricted jurisdiction of such a court would impede it from prosecuting and trying connected crimes, like for instance social security fraud (compare the case of Operation Golf, discussed in section 3.4).

A more comprehensive solution has been discussed and endorsed by Neil Boister.¹⁰⁸ He propagates the establishment of a transnational criminal court that should have jurisdiction over all kinds of transnational crime and should operate within a horizontal, non-hierarchical setting. States would be entitled to seize the court, as a third option instead of *aut dedere, aut judicare*, and the court would apply the national criminal law of the state that has taken the initiative. In Boister's opinion, this 'TCC' would serve as an auxiliary institution, protecting the autonomy of the state, rather than undermining it.¹⁰⁹ In order to protect the TCC against an overwhelming caseload, Boister suggests the introduction of admissibility thresholds, including the gravity of the crime, the transnationality of effect and the involvement of criminal organisations.¹¹⁰ But that would precisely prevent the Court from addressing the volatile, loosely structured networks that currently cause national law enforcement a lot of trouble. While Boister's interesting and unpretentious proposal deserves further study, it does not resolve all problems.

Finally, one could envisage the involvement of regional courts in the prosecution and trial of trafficking in human beings. An asset of this option is obviously that one could build on existing structures and institutions. Trafficking in human beings features on the list of crimes which will prospectively belong to the jurisdiction of the African Court of Justice and Human Rights.¹¹¹ And Article 86, s. 1 of the Treaty on the European Union explicitly provides for the

¹⁰⁷ The Secretary General, asked by the Security Council in its Resolution 1918 of 2010 to investigate the options observed: 'A new judicial mechanism to address piracy and armed robbery at sea off the coast of Somalia would be addressing a different situation to that addressed by the existing United Nations and United Nations-assisted tribunals. Such a mechanism would face ongoing criminal activity and potentially a large caseload with no predictable completion date.' Report of the Secretary General on Possible options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery off the Coast of Somalia, including, in particular, options for Creating Special Domestic Chambers possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals and the Time and Resources Necessary to Achieve and Sustain Substantive Research, UN Doc. S/2010/394 (26 July 2010), § 110.

¹⁰⁸ N. Boister, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?' 23 *Criminal Law Forum* (2012), 295-318.

¹⁰⁹ Boister, footnote 108, p. 313.

¹¹⁰ Boister, footnote 108, p. 315.

¹¹¹ Following a decision of the African Union Assembly in February 2009, the African Ministers for Justice and Attorneys General adopted the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights which extended the jurisdiction of the African Court to international crimes

establishment of a European Public Prosecutor's Office (EPPO). While Article 86, s.2 restricts the prosecutorial powers of the EPPO to offences which damage the financial interests of the European Union, section 4 envisages an extension of the Office's competence over serious crime with a transnational aspect. As Article 83 of the Treaty explicitly mentions 'human trafficking and the exploitation of women and children' as one of the topics on which the European parliament and the Council are competent to enact directives, it is rather self-evident that these offences would qualify for being pursued by the EPPO.¹¹² On the other hand, one should not overestimate the progress made in this respect. The plans of the African Union to extend the jurisdiction of the African Court are rather premature and are often considered as a political move to eclipse the ICC.¹¹³ Moreover, the project of a European criminal court has lost momentum.¹¹⁴ One of the great drawbacks of regional courts in relation to transnational crime is that they are by nature inward-looking and introspective. They would have jurisdiction over crimes committed on the territory of the closed group of states belonging to the region, but they would usually not have the legal instruments to persuade – let alone force – third states to render assistance.

In conclusion, while international or regional courts adjudicating trafficking in human beings should not be excluded a priori, all options reveal shortcomings. In the opinion of the author, one should give priority to improvement of national law enforcement, rather than bet on international or regional solutions. Two aspects deserve particular attention. For one thing, the geographical scope of international cooperation in criminal matters should be reinforced and extended, linking countries of provenance and countries of destination. Secondly, states should make efforts to invest in the effective investigation, prosecution and trial – including international cooperation – of loosely structured networks that do not exhibit the features of criminal organisations. In both respects the institutional framework of the European Union makes promising overtures. Article 26a of the EU Decision, setting up Eurojust stipulates that Eurojust may establish and maintain cooperative relations with third states, while article 27b allots a coordinating role to Eurojust in the execution of requests

(EX.CL/773(XXII), Executive Council, 22nd Ordinary Session, 21-25 January). Article 28(a) of the Draft Statute enumerates the crimes, including trafficking in persons. The adoption of the Draft Protocol has been suspended by the Assembly of African Heads of State, until further clarification of the term 'popular uprisings' which are excluded from the purview of 'unconstitutional changes of governments' one of the other crimes over which the Court has jurisdiction. For – generally critical – comments on the developments, see: A. Abass, 'The proposed international criminal jurisdiction for the African Court: Some problematic aspects' *Neth. Int. Law Rev.* LX (2013), pp. 27-50; Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011), pp. 1067-1088; and Max du Plessis, 'Implications of the AU decision to give the African Court jurisdiction over international crimes', *Institute for Security Studies*, Paper No. 235 (June 2012), pp. 1-14.

¹¹² On the European Public Prosecutor's Office, see A. Klip, *European Criminal Law; An Integrative Approach*, 2nd ed. Intersentia: Cambridge – Antwerp – Portland, 2012, pp. 459-464.

¹¹³ See especially Max du Plessis, footnote 111, p. 3.

¹¹⁴ Klip, footnote 112, p. 481.

from third states and the transmission of requests for cooperation to third states.¹¹⁵ Moreover, none of the EU Framework Decisions makes the obligation of members states to render mutual assistance dependent on the involvement of a criminal organisation in human trafficking.

Criminal law responses should be tailored to the nature and the causes of the crime. Trafficking in human beings is caused by structural – economic and social – inequities which create the supply and demand for services provided by people who can be easily exploited, because they are vulnerable. It is not caused by the demise of the state system that would primarily justify the intervention of the international community. Criminal law can of course not cure all societal ills, but it can play a modest role and should best be left in the hands of states who can mobilize their resources and integrate criminal law enforcement with other measures that will counter the scourge of trafficking in human beings.

¹¹⁵ EU Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002), as amended by EU Council Decisions 2003/659/JHA and 2009/426/JHA, OJ of the EU, No. L 63, 6 March 2002, p. 1.