Spring 2022

Disaggregating Slavery and the Slave Trade

Jocelyn Getgen Kestenbaum
Benjamin N. Cardozo School of Law, jocelyn.getgen@yu.edu

DISAGGREGATING SLAVERY AND THE SLAVE TRADE

Jocelyn Getgen Kestenbaum[*]

ABSTRACT

International law prohibits slavery and the slave trade as peremptory norms, customary international law prohibitions and crimes, humanitarian law prohibitions, and non-derogable human rights. Human rights bodies, however, focus on human trafficking, even when slavery and the slave trade—and not human trafficking—are enumerated within their mandates. International human rights law has conflated human trafficking with slavery and the slave trade. Consequently, human trafficking has subsumed the slave trade and, at times, slavery prohibitions, increasing perpetrator impunity for slavery and the slave trade abuses and denying full expressive justice to survivors.

This Article disaggregates slavery from the slave trade and slavery and the slave trade from human trafficking, arguing that untangling these prohibitions is important for several reasons. First, slavery and the slave trade persist as harms today as evidenced by, inter alia, *kafala system abuses in Lebanon, slave market auctions in Libya, and Islamic State (IS) crimes in Iraq and Syria perpetrated against Yazidis. Second, slavery and the slave trade enjoy peremptory status, offering the highest form of protection in international law. Human trafficking does not. Third, naming and addressing violations of the slave trade—the precursory acts to slavery—helps to identify, provide redress, and prevent slavery and slave trade perpetration. Distinguishing the slave trade from slavery, and the slave trade and slavery from human trafficking, affords additional avenues for redress, maximizing full expressive accountability for states' obligations to prohibit slavery and the slave trade.*

Finally, delineating these prohibitions provides legal clarity and accuracy, both by correctly characterizing harms and by properly interpreting treaty provisions and jurisdictional mandates. In the short term,

---

[*] Associate Professor of Clinical Law, Benjamin N. Cardozo School of Law. I am eternally grateful to Patricia Viseur Sellers, who pushes my intellectual curiosity and understanding at the intersections of international human rights and international criminal law and with whom I journey on this slavery and slave trade scholarly path. I want to thank Khensani Mathebula and Ameen Khadir for their research assistance. Several additional colleagues provided comments along the way who deserve a heartfelt thanks, including Janie Chuang, Lisa Davis, Michel Rosenfeld, Gabor Rona, Deborah Pearlstein, Mark Drumbl, Christopher Buccafusco, Kyron Huigens, Alex Reinert, Kate Levine, Warren Binford, Jane Aiken, Julie Dahlstrom, Allison Freedman, Faraz Sanei, Cori Alonso-Yoder and Sital Kalantry. This article is dedicated to the Yazidi survivors and all others tirelessly fighting for justice and accountability for slavery and slave trade crimes perpetrated against them. All errors are my own.

playing "fast and loose" with distinct prohibitions undermines international law's institutional legitimacy. In the long term, state practice and opinio juris *that moves away from enforcing against slavery and slave trade harms might lessen or even erode these protective customary international law prohibitions.*

I. INTRODUCTION 517
II. ORIGINS OF SLAVERY, THE SLAVE TRADE AND HUMAN TRAFFICKING PROHIBITIONS IN INTERNATIONAL LAW 528
A. *1926 Slavery Convention and 1956 Supplementary Slavery Convention* 528
B. *"White Slave Traffic" Conventions and the Palermo Protocol* 536
i. "White Slave Traffic" Conventions 536
ii. U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ("Palermo Protocol") 540
III. DISAGGREGATING SLAVERY FROM THE SLAVE TRADE AND SLAVERY AND THE SLAVE TRADE FROM HUMAN TRAFFICKING ... 542
A. *Legal Distinctions* 542
i. Purpose: Exploitation, Ownership, or Intent to Enslave 542
ii. Coercion and Consent 544
iii. Status in International Law 547
B. *Jurisdictional Distinctions* 552
IV. CONFLATING AND CONFUSING SLAVERY, THE SLAVE TRADE, AND HUMAN TRAFFICKING IN INTERNATIONAL HUMAN RIGHTS LAW . 554
A. *Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR)* 554
B. *Human Rights Committee* 559
C. *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* 565
D. *CEDAW Committee* 566
i. General Recommendations 566
ii. Communications and Concluding Observations 568
E. *Convention on the Rights of the Child (CRC)* 570
F. *Committee on the Rights of the Child* 571
i. General Recommendations 571
ii. Communications and Concluding Observations 571
G. *U.N. Special Procedures Related to Slavery, the Slave Trade, and Human Trafficking* 572
i. U.N. Special Rapporteur on Slavery (1964–72) 572

ii. U.N. Special Rapporteur on Contemporary Forms of Slavery 574
iii. U.N. Special Rapporteur on the Sale and Sexual Exploitation of Children 576
iv. U.N. Special Rapporteur on Trafficking in Persons, Especially Women and Children 578
V. CONCLUSION 580

I. INTRODUCTION

Throughout human history and in law, slavery[1] and the slave trade[2] have been foundational institutions and practices for societies globally. International law, for example, served to legitimate the violent, large-scale abduction and forced removal of millions of Africans to the Americas between the 16th and 19th centuries.[3] Over the past two centuries, abolitionist movements have worked to prohibit the slave trade, slavery, and other servitudes—which has included "slavery-like practices" of forced labor, debt bondage, serfdom, servile marriage, and child trafficking—in international law.[4] In the 19th century, states began taking concrete legal steps toward

1 Slavery is defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Slavery Convention art. 1(1), Sept. 25, 1926, 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 [hereinafter 1926 Slavery Convention]; *see infra* Part I.A.

2 The slave trade is defined as:

> . . . 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.

Id. at art. 1(2); *see infra* Part I.A.

3 OPPENHEIM'S INTERNATIONAL LAW 979 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 114–20 (1966); Seymour Drescher & Paul Finkelman, *Slavery*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 890, 897 (Bardo Fassbender & Anne Peters eds., 2012); U. O. Umozurike, *The African Slave Trade and the Attitudes of International Law Towards It*, 16 How. L.J. 334, 341 (1971). Beyond this article's scope, but important to note: slavery and the slave trade crimes have been perpetrated against many groups, including lesbian, gay, bisexual, transgender, queer, intersex, non-binary, and gender non-conforming people throughout human history to the present.

4 *See, e.g.*, 1926 Slavery Convention, *supra* note 1; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter 1956 Supplementary Slavery Convention]; JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW OF HUMAN EXPLOITATION AND TRAFFICKING 10, 105 (2012); JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012) (examining the origins of international human rights law through the lens of slavery and the slave trade). Each of these harms in international law has a relationship to slavery and the slave trade, and to a greater or lesser extent has been

abolition, first by suppressing the slave trade, prohibiting the Trans-Atlantic and East African Slave Trades through unilateral declarations and bilateral or multilateral treaties.[5]

Although the status, or *de jure*, situation of slavery and the slave trade no longer exists today, the condition, or *de facto*, situation of slavery and the slave trade continues.[6] Acts of both slavery and the slave trade remain prevalent—especially in armed conflicts and against migrants and members of minority groups. Slavery and the slave trade have received recent domestic and international attention in several contexts globally.

On October 8, 2020, for instance, Legal Action Worldwide filed a domestic criminal case in Lebanon on behalf of Meseret, an Ethiopian migrant domestic worker, allegedly subjected to, among other crimes, slavery and slave trading under the *kafala* (sponsorship) system.[7] Meseret was recruited and then held captive in her *kafeel*'s apartment for more than seven years without pay; her captor subjected her to physical and verbal abuse and

---

confused or conflated with slavery (rarely the slave trade), but such analysis is beyond the scope of this article. Legal distinctions have often coincided with continuing to legitimize some practices over others due to colonizers' or States' economic interests. *See generally* SUZANNE MIERS, SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM (2003) (tracing the international anti-slavery movement over time).

5 *See, e.g.*, Declaration Relative to the Universal Abolition of the Slave Trade ('Congress of Vienna, Act XV') 2 Martens 432 (Feb. 8, 1815), *reprinted in* 63 Parry's 473; Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 10 Martens 392, 92 Parry's 437 [hereinafter Treaty of London]; Declaration Respecting the Abolition of the Slave Trade ('Congress of Verona') 16 Martens 139 (1822), *reprinted in* 772 Parry's 32; General Act of the Conference of Berlin Concerning the Congo ('General Act of Berlin') 10 Martens (2d) 414 (Feb. 26, 1885), *reprinted in* 3 AJIL 7, 7–10 (1909); June 5, 1873 Treaty between Her Majesty and the Sultan of Zanzibar for the Suppression of the Slave Trade, https://www.pdavis.nl/FrereTreaty.htm; Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors ('General Act of Brussels') 17 Martens (2d) 345, 27 Stat. 886, T.S. No. 383 (July 2, 1890), *reprinted in* 173 Parry's 293; Treaty between Great Britain and Spain for the Suppression of the African Slave Trade, 18 Martens (2d) 168 (July 2, 1890), *reprinted in* Parliamentary Papers, 1892, vol. XCV, 735, T.S. No. 3 (1892); Convention of Saint-Fermain-En-Laye Revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels July 2, 1890 (relating to Congo River Basin) ('Treaty of Saint-Germain-en-Laye') 8 L.N.T.S. 25, 49 Stat. 3027, T.S. 877 (Sept. 10, 1919), *reprinted in* 14 Martens (3d) 12. *See generally* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS (2012); *see also* Jean Allain, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, *in* BRITISH YEARBOOK OF INTERNATIONAL LAW 2007 342–88 (2008); Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. INT'L CRIM. JUST. 517 (2020); M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL'Y 445 (1991) ("In making the trade an international crime, the treaties allowed states to search and detain vessels if the ships were thought to be carrying slaves.").

6 ALLAIN, *supra* note 4, at 109; *see also* Jean Allain, *The Definition of Slavery in International Law*, 52 How. L.J. 239, 258 (2009).

7 Press Release, Legal Action Worldwide (LAW), LAW Files Groundbreaking Case on Behalf of Migrant Domestic Worker in Lebanon (Oct. 8, 2020). For additional information on the kafala system, see LEGAL ACTION WORLDWIDE, POLICY BRIEF: THE KAFALA SYSTEM IN LEBANON: HOW CAN WE OBTAIN DIGNITY AND RIGHTS FOR DOMESTIC MIGRANT WORKERS? (2020) (arguing that the system amounts to slavery and slave trading under international law).

did not permit her to contact her family.[8] As Meseret's case demonstrates, the *kafala* system's reliance on private sponsors and lack of labor protections make the system particularly susceptible to slavery and the slave trade.[9]

In Libya, border officials hold migrants in detention blocks between slave trades where they are subjected to relentless rapes, genital mutilations, forced nudity and other gendered, sexualized violence until families pay the traders to release them.[10] In addition, criminal gangs slave trade African migrants escaping conflict, oppression, and extreme poverty on open slave markets for a few hundred U.S. dollars.[11] Videos have exposed slave traders auctioning "big strong boys" as *badayie* ("the merchandise") to the highest bidders to work as enslaved persons on farms.[12] Libya's ongoing instability and the chaos it creates permit perpetrators to operate freely with near total impunity. In recent years, as European destination countries have begun to tighten their borders, smugglers fail to reach migrants' destination countries and, instead, turn to slave trade their captives like chattel.[13]

In Iraq and Syria, beginning in 2014, ISIS fighters have enslaved and slave traded Yazidi women, girls, and boys.[14] The Committee for the Buying

---

8 Press Release, *supra* note 7.

9 *See, e.g.*, *Lebanon: Abolish Kafala (Sponsorship) System*, HUM. RTS. WATCH (July 27, 2020), https://www.hrw.org/news/2020/07/27/lebanon-abolish-kafala-sponsorship-system.

10 *CNN Team Recounts Uncovering Slavery in Libya*, CNN, https://www.cnn.com/videos/world/2017/12/04/libya-slave-auctions-reporters-notebook-elbagir-pkg.cnn (last visited Mar. 17, 2022); Robert Hackwill, *Amnesty International Accuses EU of Complicity in Libyan Slave Trade*, EURONEWS (last updated Dec. 12, 2017), https://www.euronews.com/2017/12/12/amnesty-international-accuses-eu-of-complicity-in-libyan-slave-trade; WOMEN'S REFUGEE COMMISSION, "MORE THAN ONE MILLION PAINS": SEXUAL VIOLENCE AGAINST MEN AND BOYS ON THE CENTRAL MEDITERRANEAN ROUTE TO ITALY 19–30 (2019).

11 *CNN Team Recounts Uncovering Slavery in Libya*, *supra* note 10; *cf.* Hackwill, *supra* note 10.

12 *See, e.g.*, CNN, *Migrants Being Sold as Slaves in Libya*, YOUTUBE (Nov. 14, 2017), https://www.youtube.com/watch?v=2S2qtGisT34; *Libya Migrant 'Slave Market' Footage Sparks Outrage*, BBC NEWS (Nov. 18, 2017), https://www.bbc.co.uk/news/world-africa-42038451; Channel 4 News, *Rescued African Migrants Say They Are Fleeing Slavery*, YOUTUBE (Jun. 28, 2017), https://www.youtube.com/watch?v=1nSgWGUJ3jE; *Libya's Slaves: 'I was Sold'*, CNN, https://www.cnn.com/videos/world/2017/11/13/libya-migrant-slave-victory-lon-orig-md-ejk.cnn (last visited Mar. 17, 2022); *Reports of Migrant Slave Trade in Libya*, CBS NEWS (Jan. 5, 2018), https://www.cbsnews.com/video/reports-of-migrant-slave-trade-in-libya/.

13 Nour Youssef, *Sale of Migrants as Slaves in Libya Causes Outrage in Africa and Paris,* N.Y. TIMES (Nov. 19, 2017), https://www.nytimes.com/2017/11/19/world/africa/libya-migrants-slavery.html.

14 YAZDA & THE FREE YEZIDI FOUNDATION, ISIL: NATIONALS OF ICC STATES PARTIES COMMITTING GENOCIDE AND OTHER CRIMES AGAINST THE YAZIDIS 10–12 (2015) (redacted); Letter from Global Justice Center to International Criminal Court Office of the Prosecutor (Dec. 17, 2015), https://globaljusticecenter.net/documents/GJC.AmicusLetter&Annex.ICC.12.17.2015.pdf; Notably, IS has enslaved Muslim and other women and girls as well. This article, however, focuses on the Yazidi experience. *See* HRGJ CLINIC OF CUNY LAW SCHOOL, MADRE & OWFI, *Communication to ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq*, (Nov. 8, 2017),

and Selling of Slaves have carried out the Caliphate's distribution of Yazidis at organized slave markets.[15] IS policies have permitted fighters to "buy, sell, or give as a gift female captives" who were "war spoils."[16] The policy intentionally reduced into slavery "non-believing" women (*sabaya*) and boy and girl children[17] and deemed them Caliphate[18] property.[19]

Under this system, Yazidi women and girls endured enslavement[20] as individual IS fighters exerted various forms of ownership over *inter alia* their sexual autonomy.[21] Yazidi boys, also enslaved, were forced to convert to Islam, to perform forced labor, and to train and fight with IS in military camps in Iraq and Syria.[22] As of this writing, thousands of Yazidis remain in captivity.

---

https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf. For a discussion on how enslavement may constitute a form of gender persecution, *see* Lisa Davis, *Dusting off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 Nw. J. Hum. Rts. 1 (2021).

15 Sellers & Kestenbaum, *supra* note 5; Notice on buying sex slaves, Homs province, translated by Aymenn Jawad Al-Tamimi, available online at http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1 (last visited Feb. 13, 2022) [hereinafter Homs Notice]; UN Human Rights Council, *'They came to destroy': ISIS Crimes Against the Yazidis*, UN Doc. A/HRC/32/CRP.2, (June 15, 2016) § 58 [hereinafter *'They Came to Destroy'*]; OHCHR, A CALL FOR ACCOUNTABILITY AND PROTECTION: YEZIDI SURVIVORS OF ATROCITIES COMMITTED BY ISIL (2016), http://www.ohchr.org/Documents/Countries/IQ/UNAMIReport12Aug2016_en.pdf (last visited Feb. 13, 2022) [hereinafter UNAMI/OHCHR Report]. Yazidis reported that, prior to their enslavement, they were registered by officials at holding centers in Syria, loaded onto trucks, and moved to holding sites in Iraq. ISIS required fighters to pre-register for their slave purchases of females priced and sold according to their ages. ISIS fighters documented names, ages, and marital statuses, and photographed Yazidi women, girls, and boys at these holding sites. At times, ISIS auctioned Yazidi women and children online, replete with registration information, photos, and minimum purchase prices. Homs Notice, *supra* note 15; *'They Came to Destroy,'* § 43, 57, 58; UNAMI/OHCHR Report, *supra* note 15.

16 *See Islamic State (ISIS) Releases Pamphlet on Female Slaves*, MIDDLE E. MEDIA RES. INST. (Dec. 4, 2014), https://perma.cc/8N9H-ZER7.

17 *The Revival of Slavery Before the Hour*, 4 DABIQ 15.

18 ISIS created the Islamic Caliphate and considered it a state ruled by Islamic Sharia law. Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/; *ISIS Fast Facts*, CNN, https://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html (last updated Aug. 26, 2021, 11:04 AM).

19 *'They Came to Destroy,' supra* note 15, at § 55. ISIS often presented Yazidi women and girls 'as a package' until girls reached the age of nine and, thereafter, sold them separately. *Id.* at §§ 81, 82.

20 *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, '*Sexualized Slavery' and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSÈNE HABRÉ 366 (Sharon Weill et al. eds., 2020).

21 Géraldine Boezio, *Escaping from ISIL, a Yazidi Sexual Violence Survivor Rebuilds Her Life,* OFF. OF THE SPECIAL REPRESENTATIVE OF THE UN SEC'Y-GEN. ON SEXUAL VIOLENCE IN CONFLICT (July 10, 2018), https://www.un.org/sexualviolenceinconflict/escaping-from-isil-a-yazidi-sexual-violence-survivor-rebuilds-her-life/.

22 *'They Came to Destroy,' supra* note 15 §§ 40, 82, 93. *See also* Johanna Groß, *Day 9 of the Trial—Main Trial Against Taha Al-J (09 June 2020)*, AMNESTY INT'L (June 15, 2020), https://amnesty-voelkerstrafrecht.de/9-verhandlungstag-hauptverhandlung-gegen-taha-al-j-09-juni-2020/.

Despite their continued perpetration, slavery and the slave trade have received scant legal attention as international human rights violations. Today, these practices receive no protections in international law, whether in times of war or peace. Slavery and the slave trade prohibitions are peremptory norms,[23] prohibitions and crimes under customary international law,[24] humanitarian law prohibitions,[25] and non-derogable human rights.[26] The International Court of Justice (ICJ) has ruled that protection from slavery is an *erga omnes* obligation of states under human rights law.[27] Under the Rome Statute of the International Criminal Court (ICC), "enslavement"—defined as slavery, and including slavery in the course of human trafficking—is a

---

23 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 cmts. d-i, § 102 cmt. k (1987); *see also* E.J. Criddle & E. Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L LAW 331 (2009); M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 L. & CONTEMP. PROB. 63, 70–71 (1996); *see also* MARTINEZ, *supra* note 4, at 12.

24 Rod Rastan, *Complementarity: Contest or Collaboration*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 83 (Morten Bergsmo ed., 2010). Many of the 19th century anti-slave trade treaties recognized the imposition of penal sanction for slave trading, such as the Congress of Vienna Act, The Treaty of London, The General Act of Berlin, The Act of Brussels, The 1890 Treaty Between Great Britain and Spain for the Suppression of the African Slave Trade, and the Treaty of Saint-Germain-en-Laye. *See, e.g.*, Bassiouni, *supra* note 5, at 447–48, 456; *see also* Claus Kreß, *International Criminal Law*, MAX PLANCK ENCYC. OF PUB. INT'L L., https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1423?prd=EPIL (last visited Feb. 13, 2022). Nonetheless, the *stricto sensu* conditions for international crimes are met for slavery and the slave trade: (1) provisions provide for international individual criminal liability; (2) the norms against slavery and the slave trade have *jus cogens* status and, thus, proscription exists in all forms, under any circumstances, and bars immunities; and (3) slavery and the slave trade prohibitions could be enforced directly under international criminal jurisdiction, or indirectly by a national court through international *ius puniendi*, exercised under universal jurisdiction.

25 FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD 23, 42, 58 (1898) [hereinafter LIEBER CODE]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4 (June 8, 1977), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AA0C5BCBAB5C4A85C12563CD002D6D09 [hereinafter AP II]. The Commentary to Article 4(2)(f) of the Additional Protocols emphasizes that the prohibition of slavery and the slave trade are "universally accepted." The phrase "in all their forms" in relation to slavery and the slave trade should be understood within the meaning of the 1926 Slavery Convention and the 1956 Supplemental Slavery Convention. International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Commentary of 1987, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B, at § 4541.

26 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 4 (Dec. 10, 1948); International Covenant on Civil and Political Rights, Art. 8, Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171.

27 Barcelona Traction, Light and Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 32 (Feb. 5) (The other human right so identified by the Court is freedom from racial discrimination.); Int' Law Comm'n, Rep. on the work of its Fifty-Third Session, U.N. Doc. No. A/56/10 at Art. 42(b) (2001).

crime against humanity in international criminal law.[28] Numerous human rights instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples' Rights (ACHPR), explicitly enumerate both slavery and the slave trade prohibitions as states' human rights obligations.[29]

At the turn of the 20th century, the separate, albeit related, international legal framework on human trafficking emerged on a parallel historical track, beginning with a set of international law treaties to address "white slavery" or the "white slave traffic."[30] The underlying motivations for outlawing "white slavery" was not to expand or change the legal prohibitions of slavery or the slave trade; rather, these treaties sought to suppress prostitution and preserve the "sexual 'purity' of 'white women'"[31] across borders. Likening trafficking to slavery rhetorically was a way "to promote the vision of women held in bondage against their will . . . [who were] forced into prostitution. . . ."[32]

These gendered and racialized roots of human trafficking, as well as those of slavery and the slave trade, help to explain the uneven treatment and present misapplication of these human rights norms. Today, human trafficking is at the fore of human rights advocacy, particularly in the wake of the adoption in 2001 of the Protocol to Prevent, Suppress and Punish

---

28 U.N. General Assembly, Rome Statute of the International Criminal Court art. 7(2)(c), 2187 U.N.T.S. 90, entered into force July 1, 2002. "'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, in particular women and children." *Id.* The slave trade is not enumerated or defined within the Rome Statute of the ICC. For an in-depth discussion as to the problems that this omission poses for international law, as well as justice and accountability for victims, see Sellers & Kestenbaum, *supra* note 5.

29 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 4 (Dec. 10, 1948); International Covenant on Civil and Political Rights, Art. 8(1), Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171; Organization of African Unity, *African (Banjul) Charter on Human and Peoples' Rights*, art. 5, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), https://www.refworld.org/docid/3ae6b3630.html; Organization of American States, *American Convention on Human Rights,* "*Pact of San Jose*"*, Costa Rica*, Art. 6, 22 November 1969, https://www.refworld.org/docid/3ae6b36510.html; The European Convention on Human Rights (ECHR) prohibits slavery and forced labor, but not the slave trade (Art. 4). The author plans to address the prohibitions of slavery and slave trade in regional systems in future writing.

30 Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479 (1990).

31 *See* Vladislava Stoyanova, *United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations*, 38(3) MICH. J. INT'L L. 359, 374 (2017); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. R. 1655, 1666 (2010); Karen Bravo; ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING (2010).

32 Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1111 (1984); *see* Stoyanova, *supra* note 31, at 374.

Trafficking in Persons, Especially Women and Children ("Palermo Protocol").[33] The legal conflation between and among slavery, the slave trade, and trafficking that began with rhetoric at the genesis of the prohibition of human trafficking largely continues today with the term "modern slavery" equated with human trafficking (and still, mainly trafficking in women and girls).[34]

Factually, these three legal prohibitions often overlap. For instance, an individual who is bought, sold, traded, or gifted to perform any kind of physical labor or sexual act may have been trafficked, slave traded, *and* enslaved depending on the specific facts of the case. The question for slavery is whether the perpetrators who commit acts of sexual violence or forced the individual to perform labor exercise powers attaching to the rights of ownership over that individual. Exploitation is not required. The question for slave trade is whether the perpetrators involved in bringing the individual into a situation of slavery intend to do so, and whether or not the perpetrators succeed in bringing into or maintaining the person in a situation of slavery does not matter for slave trade perpetration. Moreover, neither exercising ownership powers nor exploitation is required. For trafficking, the question is whether the perpetrators forced or coerced the individual into a situation of exploitation. Exploitation is required for trafficking, but not for slavery or the slave trade. Further, for slavery and the slave trade, and in the case of children-victims of trafficking, consent is irrelevant. Consent can be a defense to trafficking if the victim is an adult.

---

33 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *adopted* Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

34 Janie Chuang has summed up the advocacy community debates well: "Attempts to equate trafficking with slavery invite both disdain and favor: they are often rejected for their insensitive and legally inaccurate conflation with transatlantic slavery yet simultaneously embraced for capturing the moral urgency of addressing this human rights problem." Chuang, *supra* note 31, at 1656; *see also* Nicole Siller, *'Modern Slavery' Does International Law Distinguish Between Slavery, Enslavement and Trafficking?*, 14 J. INT'L CRIM. JUST. 405 (2016). Scholar Anne Gallagher argues that the current practice of international law equating "trafficking as slavery" is presently "in a state of flux." GALLAGHER, *supra* note 31, at 191. Human trafficking tends to dominate debates on slavery issues in human rights law. *See* James C. Hathaway, *The Human Rights Quagmire of 'Human Trafficking,'* 49 VA. J. INT'L L. 1, 4–5 (2008); *see also* JONATHAN MARTENS ET AL., SEDUCTION, SALE AND SLAVERY: TRAFFICKING IN WOMEN AND CHILDREN FOR SEXUAL EXPLOITATION IN SOUTHERN AFRICA (3d ed. 2003); Jennifer Burn et al., *Combating Human Trafficking: Australia's Responses to Modern Day Slavery*, 79 AUSTL. L.J. 543 (2005); Anne Gallagher, *Contemporary Forms of Female Slavery*, *in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 487 (Kelly D. Askin & Dorean M. Koenig, eds., 2000); LOUISE BROWN, SEX SLAVES: THE TRAFFICKING OF WOMEN IN ASIA (2000). Even human trafficking scholars recognize that human trafficking is expanding meaning and subsuming other harms. *See, e.g.*, Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CAL. L. REV. 100 (2020) (arguing that the continuing expansion of trafficking definitions in the United States poses risks to the strength and legitimacy of the trafficking concept itself).

Despite factual and conceptual overlap, slavery, the slave trade, and human trafficking prohibitions each covers harms that the others may not address in practice. For example, a perpetrator who intends to maintain an enslaved child in slavery, who moves the child from one slaveowner to another, and who does not exploit or intend to exploit the child, or to maintain the child in slavery for purposes of exploitation, or to exercise powers of ownership is perpetrating the slave trade but not trafficking or slavery. A perpetrator who intends to or does exploit a person for labor or sex, but does not intend to enslave, is committing the crime of trafficking but not the slave trade. If that same perpetrator exploits a person for labor or sex, but does not exercise ownership powers over the person, then that perpetrator is perpetrating the crime of trafficking but not slavery or the slave trade. If a perpetrator exercises ownership powers over an enslaved person who births a child (also enslaved), and that perpetrator exercises powers of ownership over the child, that perpetrator commits slavery but not the slave trade.

While several scholars categorize slavery (and sometimes the slave trade) as a form of human exploitation,[35] or at the severe end of an "exploitation continuum,"[36] this classification is problematic from a legal perspective because it muddles the historical roots and legal distinctions between and among human trafficking, slavery and the slave trade.[37] Even though slavery often includes exploitation, the legal definition centers on the exercise of powers attaching to ownership rights over a person. The slave trade may also be exploitative in nature and often in practice, but its legal definition centers on the intent to bring someone into—or maintain someone in—slavery. Exploitation is not a necessary element to prove slavery or the slave trade; rather, it can be—and often is—*indicia*, or evidence, of slavery crimes.[38] Conceiving slavery and the slave trade as requiring exploitation or

---

35 *See, e.g.*, ALLAIN, *supra* note 4 (arguing the need to understand the law criminalizing exploitation and including both slavery and human trafficking); *see* KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (1999); KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY (2005); KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES (2007); KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY (2009).

36 KLARA SKRIVANKOVA, BETWEEN DECENT WORK AND FORCED LABOUR: EXAMINING THE CONTINUUM OF EXPLOITATION 16 (2010).

37 *See* Sellers & Kestenbaum, *supra* note 5 (with regard to international criminal law). Often, slavery and slave trading involve exploitation, but the legal definition for slavery hinges on exercising powers attaching to *ownership* rights and the slave trade turns on the intent to bring someone into slavery, bring a person enslaved from one situation of slavery to another, or otherwise dispose of a person or enslaved person. 1926 Slavery Convention, *supra* note 1; 1956 Supplementary Slavery Convention, *supra* note 4. As will be discussed *infra*, the legal definition and elements of the slave trade do not require an exercise of powers attached to the right of ownership, nor do they require exploitation.

38 Another reason for the "exploitation creep," as scholar Janie Chaung has coined the term, is due to the increased attention on slavery enumerated as a form of exploitation within the definition of trafficking under the Palermo Protocol. *See* ALLAIN, *supra* note 4 (clarifying the international law definition of slavery for the purpose of understanding the definition of human trafficking).

as points along a continuum of exploitation assumes the existence of factors that can be—but do not have to be—present in slavery or slave trade harms and, thus, may miss important ways in which the intent to enslave is perpetrated and the powers attaching to ownership rights are exercised.[39] Consequently, the law is discriminatorily applied, excluding certain harms and certain victims, especially with regard to children (*i.e.*, children born into situations of slavery or slave traded from one situation of slavery to another).[40]

Additionally, while scholars have teased out these origin stories and distinctions in international law between and among slavery and human trafficking,[41] and slavery, involuntary servitude and forced labor,[42] many scholars have overlooked or dismissed altogether the slave trade as a separate and distinct prohibition in international law.[43] This article contributes to the scholarly literature by providing a more detailed analysis in these respective international law frameworks to disaggregate these overlapping, yet distinct harms to better recognize the multiplicity of violations when they occur, and

---

39 Consider, for example, a slaveholder who covets and adores an enslaved person and does not extract any labor or other work from them. The enslaved individual, however, is not free to exercise personal autonomy or control. This exercise of powers of ownership is not necessarily exploitative in nature, but the exercise of powers of ownership over the person could still constitute slavery. Admittedly, "ownership" and "exploitation" each has its definitional limitations, but legally are not the same. In the case of the slave trade, neither "ownership" nor "exploitation" is required. The slave trader can be transporting an enslaved person willingly from one slaveowner to another with the utmost care and without any exercise of ownership—they would still be committing an international crime if they intend to maintain the enslaved person in a situation of slavery.

40 *See, e.g.*, *Prosecutor v. Ongwen,* ICC-02/04-01/15, Trial Judgment (Feb. 4, 2021) (acknowledging children born of "wives" enslaved as children that *Ongwen* "fathered" but not legally characterizing the children as enslaved, thereby excluding their experience of harm).

41 *See, e.g.*, Chuang, *supra* note 31, at 1707–09; Stoyanova, *supra* note 31; Ramona Vijeyarasa & Jose Miguel Bello y Villarino, *Modern-Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev*, 8 J. INT'L L. & INT'L RELS. 36 (2012); Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BOS. U. INT'L L.J. 207 (2007) (laying out historical differences between the Trans-Atlantic slave trade and trafficking, but, when analyzing legal differences, focusing on slavery and trafficking.)

42 See, e.g., VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED 192–93 (2017); Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609 (2014) (explaining the way in which human trafficking as a form of exploitation has, doctrinally and discursively, subsumed other regimes of forced labor and slavery, and specifically finding shifts toward all forced labor being labeled as trafficking, and all trafficking being labeled as slavery); Stoyanova, *supra* note 31, at 374; Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. HIST. INT'L L. 303 (2009).

43 *See, e.g.*, Chuang, *supra* note 42. *But see* Vijeyarasa & Bello y Villarino, *supra* note 41, at 60–61 (examining *Rantsev v. Cyprus and Russia*, finding without further analysis that: "[a]s such, the standards for slavery were reached and the conduct of Mr. X.A., the owner of the cabaret, as well as that of the other owners of cabarets using 'artiste' visas, should be considered as slave trade within the meaning of the [1926] Slavery Convention."); ALLAIN, *supra* note 4, at 10, 105. Patricia Viseur Sellers and I have begun to explore these distinctions in international criminal and humanitarian law, as well as customary international law. *See* Sellers & Kestenbaum, *supra* note 5.

to revitalize and recommit the human rights law framework to slavery and the slave trade—in addition to human trafficking legal frameworks where appropriate—to ensure full protection and accountability under international law of all persons enslaved, slave traded, and trafficked.[44]

Several reasons exist to ensure that human rights harms are characterized correctly as slavery, the slave trade, trafficking, and/or other related prohibitions in international law. First, the slave trade and slavery continue today despite clear prohibitions under international law and should be pursued as such in addition to human trafficking. Some scholars have argued that slavery—and I would add the slave trade, as slavery and the slave trade almost always occur in tandem—persists as a more widespread problem than human trafficking.[45] Second, the elevated status of prohibitions of slavery and the slave trade as non-derogable rights, *erga omnes* obligations, and *jus cogens* norms under customary and treaty law ensure broad—possibly the broadest—legal protections for victims-survivors. Erasing or disabling the peremptory status of slavery and the slave trade is to renounce binding obligations and possibly alter customary international law through either or both state practice and *opinio juris*.[46]

Third, human rights law applies in times of peace and conflict,[47] offering additional, complementary state responsibility accountability mechanisms to individual criminal liability for more comprehensive harm redress. Fourth, characterizing the precursory acts to slavery not as human trafficking but as the slave trade—or, if the factual circumstances permit, as both the slave

---

44 As I will argue in a forthcoming article, recommitting to slavery and the slave trade in international human rights law is important for several reasons, including: (1) to influence state enforcement and law reform at the domestic levels; (2) to advance the expressive functions of international law while centering slavery and slave trade victims and more comprehensively redressing harms through state accountability; and (3) to address more directly structures and institutions that perpetuate slavery and the slave trade as an effective, preventive, and reparative complement to the international and domestic criminal legal responses that target individual perpetrators for retribution and punishment but are not designed to change existing domestic legal structures, policies, or practices.

45 *See* Hathaway, *supra* note 34. Given the factual overlap in these harms, and the confusion over definitional limits, however, these data may not be a true indication of the size of either the trafficking or slavery and slave trade prevalence.

46 Customary international law (CIL) is a source of international law and refers to the international obligations of states arising from general and consistent practice of states (state practice) followed from a general sense of legal obligation (*opinio juris*). Statute of the International Court of Justice art. 38. *See, e.g.*, MALCOLM N. SHAW Q.C., INTERNATIONAL LAW 68 (5th ed. 2003) (providing a treatise on international law, including custom as a source of international law); William S. Dodge, *Customary International Law and the Question of Legitimacy,* 120 HARV. L. REV. F. 19 (2007) (finding that the article arguing for Congressional action for courts to apply customary international law misinterprets international law).

47 Unless *lex specialis* applies in conflict. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) [hereinafter Nuclear Weapons case]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9), [hereinafter Wall case].

trade and human trafficking—allows a surfacing of these harms and perpetrators for judicial redress at the domestic and international levels.[48] Correct delineation of these prohibitions untangles the conflations and confusions of juridical safeguards to ensure full redress to survivors of human trafficking, slavery, and the slave trade.[49] In many domestic contexts, perpetrators are getting away with committing acts of slavery and slave trade, and survivors are not receiving full redress for these harms, even when human trafficking is prosecuted and punished. Finally, normative clarity generally is important to ensure effective state implementation and enforcement in international and domestic law.[50]

This Article examines the international human rights law frameworks prohibiting slavery and the slave trade, uncovering drafters' conflation and confusion between slavery and the slave trade, while disaggregating these frameworks from each other and from the related, yet separate, prohibition of human trafficking in international human rights law. Specifically, this article contends that the slave trade persists as a human rights violation and, thus, should be revitalized along with slavery prohibitions—in addition to human trafficking where appropriate—to adequately protect victims and hold states accountable for these harms.

---

48 In fact, the increased attention to these harms as international crimes has led to a few cases in domestic and international human rights law courts. *See, e.g.*, Meseret case, Lebanese Criminal Court, Lebanon (2020); *C.N & V. v. France,* App. No. 67724/09, Eur. Ct. H.R., Judgment (2012); *C.N. v. United Kingdom,* App. No. 4239/08, Eur. Ct. H.R., Judgment (2012) (discussing obligations to investigate in slavery cases, but conflating trafficking with slavery harms and ultimately striking the case out); *Koroua v. Republic of Niger,* No. ECW/CCJ/JUD/06/08, Judgment (Community Court of Justice of the Economic Community of West African States 2008); *Cmty. of Río Negro of the Maya Indigenous People and its Members v. Guatemala,* Petition 844/05, Inter-Am. Comm'n. H.R., Report No. 13/08, OEA/Ser.L/V/JJ.134, doc. 5 rev. ¶ 1 (2008) (finding *erga omnes* obligations to open an investigation into acts of slavery of children); *Fazenda Brasil Verde Brazil,* Petition 12.066, Inter-Am. Comm'n. H.R., Report No. 169/11, OEA/SER/l/V/J.143, doc. 53 (2011). *But see Siliadin v. France*, App. No. 73316/01, Eur. Ct. HR, Judgment (2005) (finding servitude and forced labor but, rather controversially, that harms, including confiscation of passport, forced labor without pay or time off for many years, and control over autonomy, did not amount to slavery). For a review of regional human rights jurisprudence on slavery and related harms, see Helen Duffy, *Litigating Modern Day Slavery in Regional Courts*, 14 J. INT'L CRIM. JUST. 375 (2016). Duffy's analysis, which includes a regional human rights case on human trafficking (*Rantsev. v. Cyprus and Russia*) demonstrates the conflation and confusion between slavery and human trafficking at the regional human rights level. *Id.* In *Ranstev. v. Cyprus and Russia*, for example, the European Court of Human Rights reads the prohibition of human trafficking into the European Convention's article 4 prohibition on slavery and servitude. *See Rantsev v. Cyprus and Russia,* App No. 25965/04, Eur. Ct. H.R., Judgment (2010).

49 Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Slavery and the Slave Trade: A Feminist Critique*, *in* GENDER AND INTERNATIONAL CRIMINAL LAW (Valerie Oosterveld, Indira Rosenthal & Susana Sacouto eds.) (forthcoming 2022).

50 *See* GALLAGHER, *supra* note 31, at 7 ("As long as the law remains unclear, [states] can continue to argue about it. As long as the law remains unclear, they will, almost certainly, not be brought to task for failing to apply it.").

Part I traces the evolution of slavery and the slave trade as related, yet distinct prohibitions in general international law and international human rights law. It also examines the parallel evolution of human trafficking prohibitions in international and transnational law. The purpose of this historical analysis is to delineate these prohibitions, understand drafters' intent, and recognize their normative status under international human rights law. Part II outlines the legal and jurisdictional distinctions among slavery, the slave trade and trafficking in their respective human rights frameworks to account for the multiplicity of distinct harms. Part III then provides examples demonstrating the way in which international human rights law in practice conflates and confuses slavery, the slave trade and trafficking, while rarely invoking slavery and completely overlooking slave trade harms as human rights violations. Part IV concludes, arguing for a revitalization of slavery and slave trade prohibitions in addition to the separate prohibition of human trafficking for a more comprehensive protective regime in international law and state accountability for human rights violations.

II. ORIGINS OF SLAVERY, THE SLAVE TRADE AND HUMAN TRAFFICKING PROHIBITIONS IN INTERNATIONAL LAW

A. *1926 Slavery Convention and 1956 Supplementary Slavery Convention*

The late 19th century abolitionist movement offered the moral pretext for European colonizers to conquer Africa, justifying the violent conquest and occupation in order to end the trade in slaves and "civilize" the continent.[51] A series of 19th and early 20th century bilateral accords outlawing the slave trade halted the transport of persons to the Americas as part of the Trans-Atlantic Slave Trade.[52] While colonial conquest did not end

---

51 Joel Quirk, *Ending Slavery in All Its Forms: Legal Abolition and Effective Emancipation in Historical Perspective*, 12 INT'L J. HUM. RTS. 529, 539 (2008) (noting that "slavery would come to be . . . an emblem of the 'backward' state of the continent and an affliction to be exorcised by European civilization" but little more than "'window dressing' for strategic interests."); *see also* Onuma Yasuaki, *When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective,* 2 J. HIST. INT'L L. 1, 43–44 (2000); Richard Roberts & Suzanne Miers, *The End of Slavery in Africa*, *in* THE END OF SLAVERY IN AFRICA 3, 16–17 (Suzanne Miers & Richard Roberts eds., 1988).

52 *See, e.g.*, Treaty of London; Treaty between her Majesty and the Sultan of Zanzibar for the Suppression of the Slave Trade, Gr. Brit.-Zanzibar, June 5, 1873; Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors, July 2, 1890, 17 Martens 2d 345, 27 Stat. 886, T.S. 383, 173 Parry's 293 ("General Act of Brussels"); Treaty Between Great Britain and Spain for the Suppression of the African Slave Trade, Gr. Brit.-Spain, July 2, 1890, 18 Martens 2d 168, Parliamentary Papers, 1892, vol. XCV, 735, T.S. No. 3; Convention of Saint-Germain-En-Laye Revising the General Act of Berlin, Feb. 26, 1885, and the General Act and Declaration of Brussels, July

domestic slavery—European rule required both buy-in from African elites-slaveowners and labor resources—it largely did abolish the slave trades of the time.[53] Further, the suppression of the slave trade and slavery entrenched other abusive practices, namely forced labor, sexualized and reproductive violence, and other forms of exploitation, in colonial contexts.[54]

The steady abolishment of slave trading during the 19th and early 20th centuries then led to the international proscription of slavery and the slave trade in the 1926 Convention for the Suppression of Slavery and the Slave Trade (1926 Slavery Convention).[55] The 1926 Slavery Convention enumerates the core definitional elements of slavery while broadly governing all acts that slave owners and slave traders perpetrated and all harms that male and female children and adults experienced,[56] including any future enslavement and slave trading conduct.[57]

Specifically, the 1926 Slavery Convention calls on states "to prevent and suppress the slave trade"[58] and "to bring about . . . the complete abolition of slavery in all its forms."[59] The 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"[60] and the slave trade as:

> . . . 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

---

2, 1890, Sept. 10, 1919, 8 L.N.T.S. 25, 49 Stat. 3027, T.S. 877, 14 Martens 3d 12 ("Treaty of Saint-Germain-en-Laye"); *see also* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS (2012); Allain, *supra* note 5.

53 MIERS, *supra* note 4, at 254. The trade in slaves depopulated regions in which labor was needed to extract resources. *See* Dennis D. Cordell, *The Delicate Balance of Force and Flight: The End of Slavery in Eastern Ubangi-Shari*, *in* THE END OF SLAVERY IN AFRICA 150, 151 (Suzanne Miers & Richard Roberts eds., 1988).

54 *See* HERBERT S. KLEIN, THE ATLANTIC SLAVE TRADE 163 (2010); Sellers & Kestenbaum, *supra* note 49; Nicholas Lawrence McGeehan, *Misunderstood and Neglected: The Marginalization of Slavery in International Law,* 16 INT'L J. HUM. RTS. 436 (2012).

55 1926 Slavery Convention, *supra* note 1. Although slave-raiding and large-scale dealing had all but ended in the African colonies by World War I, labor exploitation (forced labor) was extremely prominent and necessary for the colonial economy. STOYANOVA, *supra* note 42, at 192–93; Suzanne Miers & Richard Roberts, *Introduction*, *in* THE END OF SLAVERY IN AFRICA 21 (Suzanne Miers & Richard Roberts eds., 1988).

56 For an in-depth analysis of the gendered dimensions of slavery and the slave trade, see Sellers & Kestenbaum, *supra* note 49.

57 *But see* MEMBERS OF THE RESEARCH NETWORK ON THE LEGAL PARAMETERS OF SLAVERY, THE BELLAGIO-HARVARD GUIDELINES ON THE LEGAL PARAMETERS OF SLAVERY (2012).

58 1926 Slavery Convention, *supra* note 1, at art. 2.

59 *Id.*

60 *Id.* at art. 1(1).

> of a slave acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves.[61]

Article 3 of the 1956 Supplementary Slavery Convention[62] updated the slave trade's definition, adding:

> (1) The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory …
> (2) (a) The States Parties shall take all effective measures to prevent ships and aircraft … from conveying slaves . . .
> (b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.[63]

The 1956 Supplementary Convention, without explanation or debate, also expanded the slave trade definition by changing "all acts of disposal . . . of a *slave*" to "all acts of disposal . . . of a *person*," protecting individuals who may be disposed of before entering into slavery.[64]

A closer examination of slavery and the slave trade reveal that these international prohibitions work in tandem[65] to eradicate enslavement by prohibiting each stage: the transport of a person into slavery; the exercise of powers attaching to the right of ownership over any person; and the transport of an enslaved person intended to be further enslaved. These stages may or may not include several perpetrators involved in one, the other, or both crimes. The Convention's ambitions are clear in its preparatory works,[66] the 1925 and 1926 Temporary Slavery Commission Reports,[67] and, later, were

---

61 *Id.* at art. 1(2). The 1956 Supplementary Convention broadens this definition by including "all acts of disposal by sale or exchange of a *person* acquired with a view to being sold or exchanged" as well as "by [any] means of conveyance." 1956 Supplementary Slavery Convention, *supra* note 4, at art. 7; ALLAIN, *supra* note 4, at 95.

62 1956 Supplementary Slavery Convention, *supra* note 4.

63 *Id.*

64 *Id.*; ALLAIN, *supra* note 4, at 95.

65 Sellers & Kestenbaum, *supra* note 20, at 379.

66 *See* Sellers & Kestenbaum, *supra* note 49; Sellers & Kestenbaum, *supra* note 20, at 379; JEAN ALLAIN, THE SLAVERY CONVENTIONS: THE TRAVAUX PRÉPARATOIRES OF THE 1926 LEAGUE OF NATIONS CONVENTION AND THE 1956 UNITED NATIONS CONVENTION (2008) [hereinafter ALLAIN, TRAVAUX]; Jean Allain, *A Legal Consideration Slavery in Light of the Travaux* Préparatoires *of the 1926 Convention*, *in* THE LAW AND SLAVERY: PROHIBITING HUMAN EXPLOITATION 399 (2015) [hereinafter Allain, *Legal Consideration of Slavery*].

67 *Slavery Convention: Report Presented to the Assembly by the Sixth Committee*, League of Nations Doc. A.104.1926.VI (1926) [hereinafter Temporary Slavery Commission 1926 Report].

revealed in the Convention's broad definitions[68] that focus on perpetrator conduct rather than context. The Temporary Slavery Commission Reports developed slavery's definition as the exercise of powers attaching to the right of ownership over a person. [69] The definition's emphasis on "status" or "condition" served to extend the prohibition to *de jure* slavery, evidenced by legal title or status, and *de facto* slavery, evidenced by customary practice or condition.[70]

In 1926, although slavery and the slave trade had been abolished in North and South America, Zanzibar and other tributaries of the Arab East African slave trade, members of the League of Nations remained concerned, mainly, with ending *de jure*, chattel slavery and vestiges of the slave trade. Their concerns ensued from their own practice as colonizers who engaged in slavery and other harms, such as exploitative labor practices.[71] The initial objective was to banish *de jure* slavery and distinguish the practice of forced labor from slavery.[72]

Despite this narrow goal, the independent expert-members of the Temporary Slavery Commission endorsed a broad definition of slavery that encompassed *de jure* and *de facto* situations of slavery that entail the exercise of powers attaching to the rights of ownership over a person.[73] For example, the 1925 Temporary Slavery Commission's report affirmed that "debt slavery," the enslaving of persons disguised as child adoption, and the acquisition of girls by purchase disguised as dowry payment, etc. constituted slavery whenever the definition of slavery—exercising any or all of the

---

68 Sellers & Kestenbaum, *supra* note 20, at 379. *But see* Vijeyarasa & Bello y Villarino, *supra* note 41, at 56. The *travaux preparatoires* indicate that, in order to obtain the broadest possible agreement, and with some states being reluctant to include in the scope of the Slavery Convention other situations akin to slavery but where no powers attaching to the right of ownership existed—such as domestic slavery and similar conditions—the final text of Article 1 was particularly restrictive. *Id.*

69 Allain, *Legal Consideration of Slavery*, *supra* note 66, at 399. The property construct has been used to explain the definitional elements of slavery. *See* Jean Allain & Robin Hickey, *Property and the Definition of Slavery*, 61 INT'L & COMP. L. Q. 915 (2012).

70 Brief for Helen Duffy, Human Rights in Practice as Amicus Curiae at 4, Trabalhadores Fazenda Brasil Verde v. Brazil, Case No. 12.066, Inter-Am. Ct. H.R., Judgment (Oct. 20, 2016); *see also* The Queen v Tang [2008] HCA 39, ¶ 25 (Austl.). (examining the application of the 1926 Slavery Convention to both *de jure* and *de facto* slavery).

71 *Temporary Slavery Commission 1926 Report*, *supra* note 67, at 2–3.

72 Allain, *supra* note 6, at 244 n.22. (citing Viscount Cecil: "I do not think that there is any nation, civilised or uncivilised, which does not possess powers enabling the Government, for certain purposes and under certain restrictions, to require forced or compulsory labour on the part of its citizens." *Report Presented by the Sixth Comm. on the Question of Slavery: Resolution,* 19th mtg. at 156, *in* LEAGUE OF NATIONS OFFICIAL JOURNAL (Special Supplement 33) (Sept. 26, 1925)).

73 JEAN ALLAIN, THE LAW AND SLAVERY: PROHIBITING HUMAN EXPLOITATION 423–24 (2015) [hereafter ALLAIN, THE LAW AND SLAVERY].

powers of ownership—was met.[74] Thus, the political realities of 20th century colonialism influenced the delineation of slavery from "slavery-like practices," lesser servitudes, and forced labor.[75] At the same time, the legal definition remained broad and inclusive of practices by other names when the elements constituted exercise of powers attaching to the rights of ownership over a person. The focus remains on the characterization of the perpetrator's acts and centers on exercising powers attaching to ownership rights over a person.

The Temporary Slavery Commission 1926 Report's definition of slavery was inserted in Article 1(a) of the 1926 Slavery Convention. The definition of "slavery in all its forms" [76] refers to *de facto* cases that are absent of legal ownership. Factual situations that do not encompass the exercise of powers attaching to the right of ownership over a person do not constitute slavery.[77] The Temporary Slavery Commission's 1925 Report stated:

In order to eradicate practices restrictive of liberty so far as they may occur in connection with marriage, concubinage and adoption, the first object should be to strengthen the law constituting the courts so as to enable them to prosecute and punish all abuses, and, secondly, to take measures that everyone should be fully aware that the status of slavery is in no way recognised by law.[78]

The 1926 Slavery Convention drafters' key concept was to condemn the exercise of powers attaching to the right of ownership, regardless of the

---

74 33 League of Nations O.J., Spec. Supp. 1 (1925); *see also Temporary Slavery Commission 1926 Report*, *supra* note 67*: Minutes of the Second Session*, League of Nations Doc. C.426.M.157 1925. VI. ¶ 55 (1925) [hereinafter *Temporary Slavery Commission Second Session Minutes*]. Viscount Cecil addressed the sale of children and servants in Hedjaz in the Report, recognizing the overlapping factual circumstances of human trafficking, slavery, and the slave trade:

> The Temporary Slavery Commission is informed on authority which it regards as entirely credible that many of the foreign-born slaves in the Hedjaz are girls from the Far East brought as pilgrims or smuggled for sale as slaves, and that many are persons who have come in the pilgrammage to Mecca or accompanying pilgrims as servants. The former case would seem to merit investigation by the Commission on traffic in women, but there appears to be no doubt that they are sold as slaves. It is understood that the Government of the Straits now insists that all persons traveling as servants and attendants on others should be given freedom papers and registered at the port of embarkation.

Id. at 38–39.

75 For a more in-depth look at the confusion in international law between slavery and forced labor, see Stoyanova, *supra* note 31, at 370–72.

76 *Temporary Slavery Commission 1926 Report*, *supra* note 67, at 1–2.

77 ALLAIN, THE LAW AND SLAVERY, *supra* note 73, at 423–24.

78 The Second Session meeting minutes of the Temporary Slavery Commission in 1925 describe that "concubinage" fits squarely within the intended meaning of slavery as it is distinguished from wives. *Temporary Slavery Commission Second Session Minutes*, *supra* note 74, at 62 ¶ 71.

nature of the acts (or non-acts) that masters forced enslaved persons to perform (or not to perform).[79] Importantly, the Commission intended to outlaw any demonstration of powers attaching to the right of ownership over a person. Therefore, it crafted the definition to comprise any current exercise of powers of ownership that comply with this definition of slavery[80] as well as future novel acts of slavery by any name.[81]

The 1925 Temporary Slavery Commission Report inspired the final and significant modifications to the original Slavery Convention draft. The Convention ultimately omitted language of slavery categories, such as domestic slavery and similar conditions, from the text.[82] The drafters deemed such categories as possibly restricting the Convention's reach. Indeed, the drafters preferred to underscore their aim to abolish slavery *in all its forms*,[83] meaning any and all slavery falling under the Convention's Article 1(a) definition.[84]

Slave trading usually precedes acts of slavery.[85] Persons might transit through several slave traders before being reduced into slavery.[86] A slave trader need not be a slaveowner, but a slaveowner also might trade in slaves. Slave trading is not a lesser-included offense of slavery. Trading in slaves or in people for the purpose of slavery is illicit conduct and a human rights violation in its own right.[87] Slave trading is not merely the act of an accessory to slavery, such as aiding and abetting.[88] The slave trader might intend and act to reduce a person to a status of slavery only to learn that the intended buyer chooses not to exercise powers of ownership over the person. In this

---

79 Sellers & Kestenbaum, *supra* note 20, at 379 n.102.

80 ALLAIN, THE LAW AND SLAVERY, *supra* note 73, at 423–24. At that time, neither the Commission nor subsequently the drafters of the 1926 Slavery Convention intended to outlaw what was considered to be forced labor. Drafters determined that, although evidence of constrained conditions existed, no powers of *de jure* or *de facto* ownership were exercised over persons. Thus, forced labor was not equal to, or necessarily included within, slavery. Jean Allain, *The Definition of 'Slavery' in General International Law and the Crime of Enslavement Within the Rome Statute*, *in* GUEST LECTURE SERIES OF THE OFFICE OF THE PROSECUTOR 5, 6 (2007) [hereinafter Allain, *The Definition of "Slavery"*].

81 Sellers & Kestenbaum, *supra* note 20.

82 The 1926 Slavery Convention drafters referred to "domestic slavery" interchangeably with "non-Western slavery," "African Slavery," "indigenous slavery," or slavery as practiced in the colonies of Africa. Domestic slavery was in contrast to imported slavery practiced by European colonizers in the trans-Atlantic slave trade. *See* SUSAN MIERS, BRITAIN AND THE ENDING OF THE SLAVE TRADE 118 (1975).

83 Allain, *The Definition of "Slavery," supra* note 80, at 5–6 (emphasis added).

84 1926 Slavery Convention, *supra* note 1.

85 *See* Sellers & Kestenbaum, *supra* note 5. Where persons are born into slavery, for instance, the crime of the slave trade does not precede slavery. *Id.*

86 *See* ALLAIN, TRAVAUX, *supra* note 66.

87 *See* Sellers & Kestenbaum, *supra* note 49.

88 *See id.*

case, the perpetrator commits slave trade, but not slavery, crimes. In fact, slavery, although intended, may never materialize.

Criminalizing and prohibiting slave trading independent of slavery thus protects against substantive criminal conduct and rights violations. Slave trading, unlike slavery, does not require the exercise of any or all of the powers attaching to the rights of ownership over a person. The slave trade is the intent to bring a person into slavery, maintain a person in slavery, or dispose of a person enslaved or person intended to be enslaved.[89] By contrast, slavery *does* involve such exercise of powers attaching to the rights of ownership over persons.

Slavery and the slave trade also are grounded in humanitarian law prohibitions, given that wars provide captives to slave trade[90] and increase populations' vulnerabilities to slave traders and slaveholders. The Lieber Code of 1863 prohibited slavery and the slave trade through enslavement.[91] Article 58 proclaims that: "if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation. . . . The United States cannot retaliate by enslavement . . . . [,] this crime against the law of nations."[92] The Lieber Code prohibited Union troops and enemy fighters from owning or trading in slaves.[93] While reflective of the divisive US political landscape, the prohibition was rooted in the precursor to customary international law, or the "law of nations."[94]

---

89 *See* 1926 Slavery Convention, *supra* note 1; 1956 Supplementary Slavery Convention, *supra* note 4.

90 ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 108–15 (1982); *see also* ORLANDO PATTERSON, FREEDOM IN THE MAKING OF WESTERN CULTURE 50–51 (1991) (noting that, circa 700 BCE, the Greek city-states would capture enemy females to replenish the overwhelmingly female slave population); Orlando Patterson, *Trafficking, Gender and Slavery: Past and Present*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY (Jean Allain ed., 2012). The Siete Partidas of King Alfonso the Wise of what is now Spain legally recognized that a man could become a person enslaved when captured during war. HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870 40 (1997). The slavery system of the Ottoman Middle East Empire conscripted (*i.e.* slave traded) the military commanders and administrators into slavery to govern its empire. EHUD R. TOLEDANO, SLAVERY AND ABOLITION IN THE OTTOMAN MIDDLE EAST 20–53 (1998).

91 Lieber Code, *supra* note 25, at 16, 20.

92 *Id.* at 20.

93 Art. 43 of the Lieber Code further prohibited re-enslaving persons, stating:

> … if a person held in bondage by that belligerent be captured . . . by . . . the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person . . . made free by the law of war is under the shield of the law of nations.

Id. at 16, ¶ 43.

94 *See* Sellers & Kestenbaum, *supra* note 5, at 13 n.85 (noting that "Lieber's recognition of the slave trade's illegality was rooted in the 19th century legal philosophy of *ubi societas ibi jus*, whereby 'civilized nations have come to constitute … a commonwealth of nations, under the restraint and protection of the law of nations.'"). Lieber markedly views the law of nations as governing prohibitions

Today, the 1926 Slavery Convention's and 1956 Supplementary Slavery Convention's slavery and slave trade definitions represent the most widely accepted protections under international custom and treaty law.[95] Multiple subsequent international instruments that include slavery crimes definitions mirror the Slavery Convention definitions.[96] The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956 Supplementary Convention)[97] reinforces the international prohibitions that slavery and the slave trade in all their forms "are and shall remain prohibited at any time and in any place whatsoever."[98]

In drafting the 1956 Supplementary Slavery Convention, the *ad hoc* Committee on Slavery recommended that slavery and the slave trade definitions "should continue to be accepted as accurate and adequate international definitions of these terms,"[99] adding forms of servitude—later enumerated as practices similar to slavery—to the Convention's scope.[100] In 1953, the UN Secretary General issued a report, finding that these and other servitudes could constitute slavery when factually "any or all of the powers attaching to the right of ownership [over a person] are exercised."[101] The Secretary-General further enumerated evidence of the exercise of powers attaching to ownership rights, including: making an individual of servile status the object of a purchase; using the individual of servile status in an absolute manner without restriction unless expressly provided by law; appropriating products of labor without compensation; transferring ownership from one person to another; prohibiting the individual of servile status to terminate the status at will; and permitting the transmission of servile

---

of international humanitarian law, noting that the "[l]aw of nations has its sway in peace and in war." FRANCIS LIEBER, FRAGMENTS OF POLITICAL SCIENCE ON NATIONALISM AND INTER-NATIONALISM 23 (1868). *But see* The Antelope, 23 U.S. 66, 114 (1825) (a United States Supreme Court decision finding, one-quarter century earlier, that the slave trade was legal under the law of nations. The judgment, however, did not concern the laws of war).

95 Allain, *supra* note 6, at 240; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 328 (2005) (Rule 94 states that, "[t]he military manuals and the legislation of many States prohibit slavery and the slave trade, or 'enslavement.'").

96 *See, e.g.*, 1956 Supplementary Slavery Convention, *supra* note 2; Rome Statute of the International Criminal Court , *supra* note 28.

97 1956 Supplementary Slavery Convention, *supra* note 2, at Preamble.

98 AP II, *supra* note 25.

99 *Report of the Ad Hoc Committee on Slavery (Second Session)*, at 7, U.N. Doc. E/1988 (May 4, 1951); *id.* at Recommendation A.1.

100 *Id.* at 8–11 (the Committee listed debt bondage, serfdom, servile marriages, and child exploitation).

101 U.N. Secretary-General, *Slavery, the Slave Trade, and Other Forms of Servitude*, ¶¶ 36–37, U.N. Doc. E/2357 (Jan. 27, 1953). Jean Allain argues that the intent of the 1956 Supplementary Convention was to expand international law prohibitions to servitude. *See* Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. HIST. INT'L L. 303 (2009).

status to descendants of the individual having such status.[102] Thus, the importance of the slavery definition of exercising powers attaching to the rights of *ownership*—as opposed to exploitation or compulsory labor, which may indicate ownership—remain paramount to delineating slavery and the slave trade from other related prohibitions in general international law and international human rights law.

B. *"White Slave Traffic" Conventions and the Palermo Protocol*

i. "White Slave Traffic" Conventions

Although laws to combat human trafficking have proliferated globally over the past two decades, its international law origins date back to the early 1900s. Diplomats, mainly from European countries, gathered at the 1902 International Conference on the "White Slave Traffic" to draft legal instruments to "protect" women and girls and to stop the spread of sexually transmissible infections ("STIs") stemming from the prostitution of white women.[103] From the deliberations emerged the International Agreement for the Suppression of the "White Slave Traffic" ("1904 Agreement"),[104] and a second international conference in 1910 finalized the International Convention on the Suppression of the "White Slave Traffic" ("1910 Convention").[105] Significantly, the usage of the term "white slave" gained traction by drawing on abolitionist language, painting human trafficking victims as women and girl-children forced into prostitution or other "immoral vices."[106] From its legal beginnings, human trafficking was conflated, at least rhetorically, with slavery and the slave trade.

The Legislative Commission distinguished "white slave traffic" from slavery and the slave trade, however, defining "white slave traffic" as an

---

102 *Slavery, the Slave Trade, and Other Forms of Servitude*, *supra* note 101.

103 Jean Allain, *White Slave Traffic in International Law*, 1 J. TRAFFICKING & HUM. EXPLOITATION 1, 2 (2017) (noting that the 1904 Agreement "found its origins in a Victorian paternalism of the late nineteenth century which sought to control women in the face of communicable diseases which were playing havoc on troops destined to engage in Europe's colonial project.").

104 International Agreement for the Suppression of the "White Slave Traffic," May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 (entered into force July 18, 1905) (superseded by the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others).

105 International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 1912 Gr. Brit. T.S. No. 20 (entered into force June 21, 1951) (amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23).

106 Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163, 167 (1994).

offense committed by any person who, to satisfy the passions of another, has procured, enticed, or led astray a woman or girl, with immoral intent.[107] The Commission elaborated on the definition's meaning, finding that "to 'procure' is to invite or lead the woman or girl to become a prostitute; to 'entice' is to take her away with or persuade her to follow; to 'lead astray' is to remove her illegally from her surroundings."[108] Further, the Commission delineated the crime against women and against the girl-child: for girls, "the crime exists even with consent; as for women, the crime exists only where violence or threats have been visited upon her, or where she has been deceived."[109] The final 1910 Convention language prohibiting "white slave traffic" obligates states to punish "Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes."[110] Thus, the 1904 Agreement and 1910 Convention were designed mainly to protect white women and girls from falling victim to organized forced prostitution.[111]

In codifying the prohibition of the "white slave traffic," both the 1904 Agreement and the 1910 Convention adopted the racial, gendered, and sexualized understanding of the offense. The 1904 Agreement defines the "white slave traffic" as "the procuring of girls for immoral purposes abroad."[112] The 1910 Convention broadens the definitions, distinguishing adult women from girl-children and defining "white slave traffic" as a crime in which one has "procured, enticed, or led away, even with her consent, a woman or girl underage, for immoral purposes."[113]

From its inception, international law to combat human trafficking was codified through racialized, sexualized, and feminized lenses. The early focus on women, girls and forced prostitution reflects an understanding in which the aim of such international instruments is to protect ethnically European

---

107 Commission Législative, Rapport présenté par M. Ferdinand-Dreyfus, Annexe au Procès-Verbal de la Quatrième Séance, Ministère des Affaires Étrangères, *Conférence Internationale pour la Répression de la Traite des Blanches*, Documents Diplomatiques, 1902, 122; [Correspondence respecting the International Conference on the 'White Slave Traffic,' held in Paris, July 1902, House of Commons Parliamentary Papers (United Kingdom), Miscellaneous No. 3 (1905), Cd. 2667, 9].

108 *Id.*

109 *Id.* at 123.

110 International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278 (entered into force Aug. 8, 1912) (amended by a Protocol approved by the General Assembly on Dec. 3, 1948, 30 U.N.T.S. 23 (1910 White Slavery Convention), at art. 2).

111 Demleitner, *supra* note 106, at 167.

112 International Agreement for the Suppression of the "White Slave Traffic" art. 1, May 18, 1904, 1 L.N.T.S. 83.

113 International Convention for the Suppression of the "White Slave Traffic" art. 2, May 4, 1910, 1 L.N.T.S. 83.

and European descended women from being corrupted, or "debauched."[114] These international agreements bore a narrow gendered scope, criminalizing exploitation of adult women in prostitution and all prostitution of girls.[115] Moreover, both the 1904 Agreement and the 1910 Convention distinguish between women who are trafficked as prostitutes and women who are trafficked into forced prostitution.[116] Neither the 1904 Agreement nor the 1910 Convention criminalize prostitution *per se* or protect victims of trafficking held in brothels because the legality of trafficking's ends (*i.e.*, prostitution) were contested, varied among states, and thus viewed as a matter of domestic jurisdiction.[117]

An emphasis on combating prostitution through an organized crime lens persisted in subsequent international conventions and agreements addressing human trafficking. In the aftermath of World War I, the League of Nations included in Article XXIII of the Covenant of the League of Nations to "intrust [*sic*] the League with general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs."[118] While failing to define "trafficking," international law continued to focus on women and children, underscoring the protection of women and children from prostitution, the "immoral" end of trafficking.[119] Although the 1921 International Convention for the Suppression of Traffic in Women and Children[120] expanded the scope of human trafficking's protection to include male children and removed the racialized term "white slave traffic," international law on human trafficking remained largely confined to combating forced prostitution.[121] Then, under the 1933 International Convention for the Suppression of the Traffic in Women of Full Age,[122] the League of Nations removed the element of coercion and punished "procurement," even if the adult woman consented to being procured.[123]

---

114 R. H. G., *International White Slavery*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 134, 137 (1912). For an analysis of how this continued to the drafting of the Palermo Protocol and U.S. domestic trafficking law, see Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010).

115 Allain, *supra* note 103, at 24.

116 Demleitner, *supra* note 106, at 168 ("Is the woman no longer a slave or victim once she arrives at the destination of the trafficker and has begun to work as a prostitute?").

117 *Id.* at 169.

118 League of Nations Covenant art. 23, ¶ 1(c).

119 GALLAGHER, *supra* note 31.

120 International Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415.

121 Demleitner, *supra* note 106, at 170.

122 International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S 431 (entered into force Aug. 24, 1934) (amended by a Protocol approved by the General Assembly on Oct. 20, 1947, 53 U.N.T.S. 13).

123 GALLAGHER, *supra* note 31, at 13.

In the aftermath of World War II, international human trafficking law's scope significantly broadened under United Nations' auspices, evinced by the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ("1950 Convention").[124] The 1950 Convention requires States Parties to punish:

> any person who, to gratify the passions of another:
> (1) procures or entices or leads away, for the purposes of prostitution, another person, even with the consent of that person;
> (2) exploits the prostitution of another person, even with the consent of the person.[125]

While retaining the language of procuring a person "for the purposes of prostitution," the 1950 Convention, without defining "traffic" or "trafficking," expanded prior definitions by eliminating a transportation requirement.[126] Thus, the 1950 Convention is concerned with both the process (*i.e.*, procurement, enticement) and the result (*i.e.*, exploitation of prostitution) of human trafficking.[127] Importantly, the 1950 Convention's use of the phrase "another person" explicitly criminalized human trafficking acts independent of the victim's gender, age, or race.[128]

Until the end of the 1980s, the 1950 Convention definition reflected much of the UN's efforts to combat "traffic in persons and exploitation of the prostitution of others."[129] The conflation and confusion between slavery and human trafficking was apparent during this time when the UN Working Group on Contemporary Forms of Slavery (which since has been replaced by the Special Rapporteur on Contemporary Forms of Slavery) began focusing on issues of prostitution and the transnational movement and exploitation of

---

124 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950 [hereinafter 1950 Convention].

125 *Id.* at art. 1.

126 *Id.* The lack of *travaux preparatoires* make these omissions difficult to analyze. *See* GALLAGHER, *supra* note 31, at 13–14.

127 1950 Convention, *supra* note 124, at art. 1. The lack of *travaux preparatoires* makes these omissions difficult to analyze. *See* GALLAGHER, *supra* note 31, at 13–14.

128 Demleitner, *supra* note 106, at 173.

129 *See, e.g.*, U.N. Secretary-General, *Questions of Slavery and the Slave Trade in All Their Practices and Manifestations, Including the Slavery-Like Practices of Apartheid and Colonialism: Inquiry on the Status of Combating of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, U.N. Doc. E/CN.4/Sub.2/AC.2/1982/13 (July 13, 1982); U.N. Economic and Social Council, *Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, U.N. Doc. E/RES/1982/20 (May 4, 1982); U.N. Economic and Social Council, *Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, U.N. Doc. E/RES/1983/30 (May 26, 1983); GALLAGHER, *supra* note 31.

women[130] even though the legal frameworks remained distinct in international law.

ii. U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ("Palermo Protocol")

Globalization across a wide range of economic sectors at the end of the 20th century gave rise to increased migration flows and opportunities for human exploitation.[131] Faced with an inadequate international law framework to address human trafficking harms, states began negotiating the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ("Palermo Protocol"), supplementing the United Nations Convention Against Transnational Organized Crime ("Organized Crime Convention")[132] and reframing human trafficking as a transnational crime issue.[133] The Palermo Protocol defines trafficking in persons as:

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.][134]

---

130 GALLAGHER, *supra* note 31, at n.14 ("[B]y 1991, 'prevention of traffic in persons and the exploitation of the prostitution of others' was the main agenda item for the Group's annual meeting.").

131 Chuang, *supra* note 31, at 614; *see also* John Salt & Jeremy Stein, *Migration as a Business: The Case of Trafficking*, 35 INT'L MIGRATION 467 (1997). For an in-depth look at the intersections between migration and trafficking, see MIKE KAY, THE MIGRATION-TRAFFICKING NEXUS: COMBATTING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS' HUMAN RIGHTS (2003).

132 Palermo Protocol, *supra* note 33, at art. 3.

133 *See* GALLAGHER, *supra* note 31.

134 Palermo Protocol, *supra* note 33, at art. 3; U.N. OFF. ON DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 339, n. 2, U.N. Sales No. E.06.V.5 (2006) ("The discussion on the definition of 'sexual exploitation' at the informal consultations held during the fifth session of the Ad Hoc Committee was based on the proposal submitted by the United States (A/AC.254/L.54). Two delegations expressed reservations regarding the proposal. The Netherlands suggested replacing the definition of the term "sexual exploitation" with a definition of the term 'slavery' that read as follows: 'Slavery shall mean the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including forced prostitution

The Palermo Protocol's significantly broader definition of human trafficking contrasts greatly with the 1904 Agreement's definition. Not only does the Palermo Protocol extend the 1950 Convention's removal of a transportation requirement,[135] but it also solidifies a conflation with slavery and the slave trade through its enumeration of exploitation.[136] The Palermo Protocol defines trafficking as requiring an act (the movement, recruitment, receipt, or harboring of persons) accomplished by a means (by force, threat of force, fraud, deception, coercion, abduction) for a purpose (exploitation, defined as at a minimum: exploitation of prostitution, forced labor, slavery, or slavery-like practices, servitude, or removal of organs).[137] The *travaux preparatoires* demonstrate that the drafters did consult the 1956 Supplementary Slavery Convention and understood the legal definition of slavery as the exercise of any or all powers attaching to the right of ownership over a person.[138] Still, the drafters determined to enumerate slavery even though exploitation is *indicia* or evidence of exploitation to prove slavery. The *sina qua non* of slavery is the exercise of powers attaching to the right of *ownership* over a person. Slavery does not require—although often does include—exploitation.

Further, the Palermo Protocol drafters debated extensively the issue of consent to trafficking, another indication that the law on slavery was being conflated and confused with the law on human trafficking. Regarding slavery, international law renders consent irrelevant.[139] An individual can

---

and servitude and other practices similar to slavery as defined in article 1 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.' (United Nations, *Treaty Series,* vol. 266, No. 3822).").

135 *See* GALLAGHER, *supra* note 31. *But see* Chuang, *supra* note 42, at 630.

136 *See* Jean Allain, *Genealogies of Human Trafficking and Slavery*, *in* ROUTLEDGE HANDBOOK OF HUMAN TRAFFICKING 3, 9 (Ryszard Piotrowicz, Connie Rijken & Baerbel Uhl eds., 2017) ("The genealogies of human trafficking and slavery . . . speak to one fundamental distinction: that from time immemorial until the abolitionist movement took hold, slavery and the slave trade were legal while human trafficking, at no time, was legal: rather, it was criminal.").

137 Palermo Protocol, *supra* note 33, at art. 3; Rana M. Jaleel, *The Wages of Human Trafficking*, 81 BROOK. L. REV. 563, 574 (2016); U.N. OFF. ON DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 344, n. 26, 29, U.N. Sales No. E.06.V.5 (2006) ("'Exploitation' shall mean reduction to servitude, subjection to prostitution, slavery, forced labour or child pornography . . . most delegations favoured including the reference to 'servitude.' Those opposed to the inclusion cited a lack of clarity as to the meaning of the term and duplication with the reference to 'slavery or practices similar to slavery.' It was also noted that, if the word "servitude" was to be deleted from this subparagraph.").

138 The informal working group proposal at the Seventh Session included the definition of slavery under the 1956 Supplementary Slavery Convention.

139 Proposals to add "involuntary" before "servitude" during the drafting of both the 1956 Supplementary Slavery Convention, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957), and the ICCPR, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999

never consent to be enslaved as personal freedom is inalienable. As will be explained in Part III *infra*, the trafficking elements permit the possibility of consent as a defense to the means element of human trafficking of adults.

III. DISAGGREGATING SLAVERY FROM THE SLAVE TRADE AND SLAVERY AND THE SLAVE TRADE FROM HUMAN TRAFFICKING

Several concrete legal and jurisdictional distinctions exist between and among the definitions and elements of slavery, the slave trade and human trafficking in international law. This Section highlights salient legal and jurisdictional differences that separate these overlapping, yet discrete harms both as crimes and as human rights violations. While a thin factual line often exists between subjugation and exploitation, exercising powers attaching to ownership rights and reduction into slavery, legal differences—such as the elements, possible defenses, and status in international law—and jurisdictional differences distinguish human trafficking, slavery and the slave trade from one another in human rights law.[140] Conflation of slavery, the slave trade and trafficking tends to confuse these definitions, elements, and avenues for redress.

C. *Legal Distinctions*

i. Purpose: Exploitation, Ownership, or Intent to Enslave

Human trafficking's definition centers on exploitation.[141] Although slavery often includes exploitative practices, slavery's legal definition does

U.N.T.S. 171, (entered into force Mar. 3, 1976), were rejected because "[i]t should not be possible for any person to contract himself into bondage." FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 78 (2d ed. 1996) (citing U.N. Secretary-General, *Draft International Covenants on Human Rights: Annotation*, U.N. Doc. A/2929 (July 1, 1955); *see* GALLAGHER, *supra* note 31, at 53.

140 For a recent related analysis of the international criminal legal definitions of trafficking in persons under the Palermo Protocol as compared to enslavement and sexual slavery (but of course not the slave trade) under the Rome Statute, see Aimée Comrie, *At the Crossroads: Evidential Challenges in the Investigation and Prosecution of Trafficking in Persons for Sexual Exploitation and Sexual Violence in Situations of Conflict*, 3 J. TRAFFICKING & HUM. EXPLOITATION 121, 125–32 (2019). Sellers and I have noted that the definitions of slavery and the slave trade overlap but also do diverge from enslavement and sexual slavery in important ways. *See, e.g.*, Sellers & Kestenbaum, *supra* note 20.

141 See *supra* note 33, at art. 3(a) for the definition of human trafficking under the Palermo Protocol. Exploitation includes, but is not limited to, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. U.N. Gen. Assembly, Revised Draft Protocol to Prevent, Suppress and Punish

not require exploitation for acts to constitute slavery. Instead, the definition of slavery turns on the exercise of powers attaching to the rights of ownership over a person.[142] In contrast, the slave trade requires neither ownership nor exploitation; rather, the slave trade turns on intent to reduce someone into, or maintain someone in, slavery, or to dispose of a person enslaved.[143] Thus, the purpose of prohibiting human trafficking is to criminalize the transfer of individuals into any form of exploitation and to prevent individuals from falling victim to various exploitative practices. The purpose of the slavery prohibition is to prevent the exercise of powers attaching to the rights of ownership over persons. Finally, the purpose of the slave trade is to eradicate the reduction of human beings into slavery and the transfer of slaves from slaveholder to slaveholder.[144] The slave trade also prohibits the ways in which persons are reduced to slavery or transported as slaves.[145]

While human trafficking requires that the perpetrator's purpose be exploitation, that exploitation may not constitute *de jure* or *de facto* slavery if it does not amount to the exercise of powers attaching to ownership rights.[146] For example, a trafficker may exploit her victims financially, charging victims exorbitant prices for transportation to foreign states with promises of employment that never materialize. This perpetrator would likely not be committing slavery. Or a trafficker might transport a victim for forced labor, or to organ dealers who buy, sell or steal organs on the black market. These exploitative practices may constitute trafficking, but likely would not amount to slavery or the slave trade.

Slavery's purpose of ownership, on the other hand, can manifest in myriad ways.[147] As mentioned, slaves are enslaved no matter the labor (or non-labor) or service extracted from them, meaning that a person can be enslaved and not be required to perform any work at all.[148] A person enslaved can be coveted property of a slaveholder. Slave trading requires the intent to either reduce someone to slavery, to sell or exchange a person enslaved, to dispose of a person or enslaved person through selling or exchanging her or

---

Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 2, U.N. Doc. A/AC.254/4/Add.3/Rev.7 (July 19, 2000).

142 1926 Slavery Convention, *supra* note 1, at art. 1(1).

143 *Id.* at art. 1(2).

144 Harmen van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT'L L. 297, 303 (2014).

145 *Id.*

146 Palermo Protocol, *supra* note 33, at art. 3(a).

147 Patricia Sellers, *Wartime Female Slavery: Enslavement?*, 44 CORNELL INT'L L.J. 115, 123 (2011).

148 Sellers & Kestenbaum, *supra* note 20.

him, or to trade or transport slaves.[149] The slave trade, however, does not require any subsequent exploitation or even slavery as an outcome; the intent to reduce or maintain someone in slavery or to dispose of a person either enslaved or intended to be enslaved is enough to prove the crime.[150]

These prohibitions do overlap and intersect in several ways. First, while not a requirement of slavery, exploitation can be *indicia*, or evidence, of slavery, while transporting and trading in human beings can be evidence of either the slave trade or human trafficking.[151] Additionally, acts of the slave trade are the violations that accompany—and nearly always precede or occur in the course of—slavery violations.[152] Although human trafficking often does coincide with slave trading when the acts involve transporting or maintaining individuals in slavery situations, unlike the slave trade, the purpose of human trafficking does not require an intent to reduce someone into slavery.[153] Instead, human trafficking requires proof of means (*i.e.* abusive or coercive circumstances) and the actual reduction into exploitation.

Scholars often have compared slavery to trafficking as a "more severe" form of exploitation along an "exploitation continuum."[154] For instance, Janie Chuang finds that "trafficking encompasses a wide range of practices . . . with true slavery at one end of the spectrum and comprising an exceptionally small fraction of all trafficking cases."[155] Similarly, Jean Allain categorizes the definition of slavery as limited (in that it is of degree a "worse" form of exploitation).[156] In contrast, my analysis finds slavery (and the slave trade) to be legally different in kind (and not only or even necessarily in degree) from human trafficking, forced labor, and other harmful practices often coinciding with slavery and the slave trade.

ii. Coercion and Consent

Additionally, trafficking requires proof of deleterious "means," whereas neither slavery nor the slave trade countenance proof of coercion or any such

---

149 1926 Slavery Convention, *supra* note 1, at art. 1(2); 1956 Supplementary Slavery Convention, *supra* note 4.

150 1926 Slavery Convention, *supra* note 1, at art. 1(2); *see* Sellers & Kestenbaum, *supra* note 5, at 534.

151 *See* Sellers & Kestenbaum, *supra* note 5, at 534; Sellers & Kestenbaum, *supra* note 49.

152 *See* Sellers & Kestenbaum, *supra* note 5 (discussing the international crimes of slavery and the slave trade in international criminal and humanitarian law frameworks). Children born into slavery, for example, would not be enslaved as a direct result of an act of the slave trade. *Id.*

153 Sellers & Kestenbaum, *supra* note 5, at 534; Sellers & Kestenbaum, *supra* note 49.

154 SKRIVANKOVA, *supra* note 36.

155 Chuang, *supra* note 31, at 1709.

156 ALLAIN, *supra* note 4.

maltreatment.[157] Trafficking's inclusion of the element of *means* is meant to demonstrate the adult victim's lack of consent.[158] To prove this element, it must be shown that the perpetrator acted with "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."[159] Defendants to a trafficking charge can challenge the proof of this element and claim a defense of consent with regard to the adult trafficking victim.[160]

In contrast, slavery's evidence of exercise of powers attaching to the right of ownership over a person may include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor."[161] Such coercive circumstances can be used as evidence to prove intent, the *mens rea,* or conduct, the *actus reus,* of exercising powers attaching to the right of ownership over a person, *i.e.* slavery, but are not required. Likewise, coercive circumstances are not required to prove reducing someone into slavery, nor to prove the selling, exchanging, or transporting of slaves, under the slave trade.[162]

---

157 *See* Palermo Protocol, *supra* note 33, at art. 3(a); *see also* U.N. OFF. ON DRUGS & CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO 345, U.N. Sales No. E.06.V.5 (2006) (explaining the legislative history surrounding the language and elements of the Palermo Protocol).

158 *See* Siller, *supra* note 34, at 417.

159 Palermo Protocol, *supra* note 33, at art. 3(a); A.M. PESMAN, PROSECUTING HUMAN TRAFFICKING CASES AS A CRIME AGAINST HUMANITY? 15–16 (Nov. 2012); Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 148 (2004) ("Nonconsent and the use of force or coercion by traffickers have emerged in recent international human rights documents as essential, yet controversial, elements of human rights violations in the context of trafficking.").

160 *See* Siller *supra* note 34, at 417. Defense counsel cannot raise consent as a defense where means has been proven. *See* Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 986 (2001) (finding that "the final [trafficking] definition now includes an unwieldy note to the effect that consent to intended exploitation is to be irrelevant where any of the stated elements which actually define trafficking (coercion, fraud, abuse of power, etc.) have been used.").

161 Prosecutor v. Kunarac, Kovač & Vuković, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment, ¶ 119, (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

162 *See* Slavery Convention; *see* Prosecutor v. Kunarac, Kovač & Vuković, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment, ¶ 540–43 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002). The Court defines the crime of enslavement as including only the elements of *mens rea* and *actus reus*. *Id*. The Court describes factors or methods of control "to be taken into consideration in determining whether enslavement was committed." *Id*.

Another closely related difference among these prohibitions is that human trafficking permits an alleged perpetrator to use consent (dependent upon the victim's age) to negate the prosecutor's evidence of coercive means. Only when "any of the means set forth in [Article 3](a) have been used"[163] does the Palermo Protocol disallow consent as a defense to trafficking.[164] The alleged trafficker may raise a consent defense to negate the essential *prima facie* element of coercive means by arguing that the victim was informed and agreed to being trafficked.[165] In fact, according to the UNODC, in most trafficking cases, the defendants raise the issue of consent, which often is rebutted by the evidence of severe exploitation.[166] Thus, while the Special Rapporteur on trafficking in persons has stated that "no person willingly consents to the suffering and exploitation that trafficking of persons entails,"[167] an ability to raise a consent defense exists and is historically permissible evidence to negate means under law.[168]

Under slavery and the slave trade in international law, a defense of consent is always legally irrelevant. In *Prosecutor v. Kunarac*, for instance, the International Criminal Tribunal for the former Yugoslavia ("ICTY") held that lack of consent is not an element of the crime of enslavement (generally defined as slavery), ruling that:

> . . . 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;

---

163 Palermo Protocol, *supra* note 33, at art. 3(b).

164 Sigma Huda (Special Rapporteur on trafficking in persons, especially women and children), *Integration of the Human Rights of Women and the Gender Perspective,* ¶ 6, U.N. Doc. E/CN.4/2005/71 (Dec. 22, 2004), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/169/28/PDF/G0416928.pdf?OpenElement.

165 *See* U. N. OFF. ON DRUGS AND CRIME, ISSUE PAPER: THE ROLE OF "CONSENT" IN THE TRAFFICKING PERSON PROTOCOL 21–34 (2014), https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf (discussing how the 'means' element is intended to demonstrate the negation of consent. This element is inapplicable to children due to the fact that they have diminished or no legal capacity.).

166 U. N. OFF. ON DRUGS AND CRIME, EVIDENTIAL ISSUES IN TRAFFICKING IN PERSONS CASES: CASE DIGEST 141–72 (2017) (identifying various cases within the Human Trafficking Case Law Database that found the issue of consent to be relevant to convicting a perpetrator of human trafficking).

167 Huda, *supra* note 164, at ¶ 6.

168 The United Nations Office on Drugs and Crime has indicated that "[c]onsent of the victim can be a defence in domestic law, but as soon as any of the improper means of trafficking are established, consent becomes irrelevant and consent-based defences cannot be raised." *See* U. N. OFF. ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 6–7 (2008), https://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf.

> the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.[169]

Similarly, the Extraordinary Chambers in the Courts of Cambodia ("ECCC") and Special Court for Sierra Leone ("SCSL") have held that proof of lack of consent is not required to prove enslavement.[170] What is determinative is the alleged perpetrator's intent and actions, not the victim's state of mind.[171] Neither slavery nor the slave trade distinguish the victim by age, identity, or any particular circumstances.

Thus, the elements necessary to prove trafficking in persons and slavery/slave trade crimes are different. While trafficking includes an element of means that can be negated by a defense of consent in the case of adults, slavery and the slave trade include no such element. For slavery and the slave trade prohibitions, consent of the victim is always irrelevant, even with respect to adults.

iii. Status in International Law

Third, while the prohibitions of slavery, the slave trade, and human trafficking are all human rights protections enumerated in treaty law, slavery and the slave trade enjoy higher status as norms in the hierarchy of international law. Scholar Jean Allain has described slavery (but the same also can be said about the slave trade) as being a "super-norm."[172] While human trafficking is a serious transnational crime and human rights violation, the prohibition does not share as high-level a status under international law.

---

169 Prosecutor v. Kunarac, Kovač & Vuković, Case No. IT-96-23 & IT-96-23/1-T, Trial Judgment, ¶ 542 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002); *see* Siller, *supra* note 34, at 417.

170 Prosecutor v. Duch, Case No. 001/18-07-2007-ECCC/SC, Appeals Judgment, ¶ 346 (Feb. 3, 2012); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgement, ¶ 420 (Sept. 26, 2013).

171 Siller, *supra* note 34, at 417.

172 ALLAIN, *supra* note 4, at 110. This term was originally coined by James Crawford. James Crawford, *Multilateral Rights and Obligations in International Law*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY 452 (2007).

First, slavery and the slave trade are *jus cogens* norms,[173] and, as such, are *erga omnes* obligations.[174] Norms that attain *jus cogens* status are peremptory norms in international law—similar to the concept of strict liability in domestic law—meaning that no justification exists to avoid state responsibility for a breach of prohibitions of slavery or the slave trade.[175] As *jus cogens* norms, slavery and the slave trade require attendant *erga omnes* obligations of states, which means "owed by everyone to all"; thus, if breached, any state may claim injury and thus invoke state responsibility for violations of slavery and slave trade prohibitions.[176] The human trafficking prohibition does not enjoy *jus cogens* status, nor do states have *erga omnes* obligations to remedy violations of human trafficking.

In addition to their peremptory status, slavery and the slave trade are core international crimes,[177] prohibitions and crimes under customary

---

173 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmts. d–i, § 102 cmt. k (AM. L. INST. 1987); *see also* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 331 (2009); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 70–71 (1994); MARTINEZ, *supra* note 4; TERJE EINARSEN, THE CONCEPT OF UNIVERSAL CRIMES IN INTERNATIONAL LAW 8 (2012), https://www.fichl.org/fileadmin/fichl/documents/FICHL_14_Web.pdf; *Draft Articles on the Law of Treaties with Commentary*, [1966] 2 Y.B. Int'l L. Comm'n 187, 248. While no *jus cogens* norms are enumerated in Articles 53 or 64 of the Vienna Convention on the Law of Treaties, International Law Commission drafters set out "some of the most obvious and best settled rules of *jus cogens*" as being "trade in slaves, piracy or genocide." *Id.*

174 For an in-depth survey, see Alexander Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW (2008). The reverse is not necessarily true. *See Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, [2006] 2 Y.B. Int'l L. Comm'n 177, pt. 2, conclusion no. 38, at 183. The International Court of Justice (ICJ) explicitly has ruled that protection from slavery is an *erga omnes* obligation of states under human rights law. Barcelona Traction, Light and Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 32 (Feb. 5). The other human right so identified by the Court is freedom from racial discrimination.; Int'l Law Comm'n, Articles on State Responsibility, U.N. Doc. A/CN.4/L.602/Rev.1, art. 42(b) (July 26, 2001).

175 *See* Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331; Int'l Law Comm'n, Articles on State Responsibility, U.N. Doc. A/CN.4/L.602/Rev.1, arts. 26, 40, 50 (July 26, 2001). *See also* ALLAIN, *supra* note 4.

176 *See* Int'l Law Comm'n, Articles on State Responsibility, U.N. Doc.. A/CN.4/L.602/Rev.1, art. 42(b) (July 26, 2001).

177 Rastan, *supra* note 24, at 123.

international law,[178] and humanitarian law prohibitions.[179] Under the Rome Statute of the International Criminal Court (ICC), "enslavement"—defined as slavery, and including acts of the slave trade as constituting evidence of exercising powers attaching to ownership rights over persons—is a constituent crime of crimes against humanity in international criminal law.[180] International law does not permit statutes of limitations for international

178 Several 19th century anti-slave trade and slavery treaties recognized penal sanctions for slave trading and slavery, such as the Congress of Vienna Act, The Treaty of London, The General Act of Berlin, The Act of Brussels, The 1890 Treaty Between Great Britain and Spain for the Suppression of the African Slave Trade, and the Treaty of Saint-Germain-en-Laye. *See, e.g.*, M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL'Y. 445, 447–48, 456 (1991). *But see* Claus Kreß, *International Criminal Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1423?prd=EPIL (last visited Feb. 5, 2020). Nonetheless, the *stricto sensu* conditions for international crimes are met for slavery and the slave trade: (1) provisions provide for international individual criminal liability; (2) the norms against slavery and the slave trade have *jus cogens* status and, thus, proscription exists in all forms, under any circumstances, and bars immunities; and (3) slavery and the slave trade prohibitions could be enforced directly under international criminal jurisdiction, or indirectly by a national court through international *ius puniendi*, exercised under universal jurisdiction. *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. INT'L CRIM. JUST. 517, 517–42 (2020) (regarding the slave trade).

179 General Order No. 100 arts. 23, 42, 58, https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf?loclr=bloglaw (last visited Jan. 7, 2020) [hereinafter Lieber Code]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AA0C5BCBAB5C4A85C12563CD002D6D09 (last visited Sept. 27, 2019) [hereinafter AP II] (the Commentary to Article 4(2)(f) of the Additional Protocols emphasizes that the prohibition of slavery and the slave trade are "universally accepted." The phrase "in all their forms" in relation to slavery and the slave trade should be understood within the meaning of the 1926 Slavery Convention and the 1956 Supplemental Slavery Convention.); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Commentary of 1987 § 4541, June 8, 1977, 1125 U.N.T.S. 609, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B (last visited Sept. 27, 2019).

180 Rome Statute of the International Criminal Court, *supra* note 28, at art. 7(2)(c) and accompanying text.

crimes[181] and *jus cogens* norms;[182] thus, slavery and the slave trade can be prosecuted at any time. The slave trade crime also enjoys universal jurisdiction, meaning that courts with such powers could try such crimes based on the gravity of the offense, even when no other basis for jurisdiction (*i.e.*, territory, nationality, etc.) exists.[183]

In contrast, human trafficking is a transnational, not international, crime. Transnational instruments, such as the Palermo Protocol, establish a framework for States to follow, whereas international law has "international institutions [that] serve as a central pillar."[184] Specifically in the case of human trafficking, for instance, the Palermo Protocol indicates that each state party is to handle human trafficking within domestic jurisdictions, not by a designated international tribunal.[185]

---

181 *See, e.g.*, Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 154 (Sept. 26, 2006); Org. of Am. States [OAS], Statement by the Inter-American Commission on Human Rights on the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed During the Regime of Jean-Claude Duvalier §§ 11–14, 39 (May 17, 2011), http://www.cidh.oas.org/pronunciamientocidhhaitimayo2011.en.htm; *see also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 279 (2011); PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 31 (2000) (describing Principle 6); Jan Arno Hessbruegge, *Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes*, 43 GEO. J. INT'L L. 335 (2012); ROBERTO BELELLI, *The Establishment of the System of International Criminal Justice*, *in* INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 6, 42 (Roberto Belelli ed., 2010); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 319 (2003) (regarding war crimes, crimes against humanity and genocide); WILLIAM A. SCHABAS, *Article 29*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 848 (Otto Triffterer ed., 2008); CHRISTINE VAN DEN WYNGAERT & JOHN DUGARD, *Non-Applicability of Statute of Limitations*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 873, 887 (Antonio Cassese et al. eds., 2002); Special Rapporteur on Contemporary Forms of Slavery, *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict,* ¶ 90, U.N. Econ. and Soc. Council, Com''n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (finding an "internationally accepted principle that there are no statute of limitations barriers to the prosecution and compensation of serious violations of human rights and humanitarian law").

182 Prosecutor v. Anto Furundija, Case No. IT-95-17/1-T, Judgment, 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Kallon & Kamara, SCSL-2004-15AR7€), SCSL-2004-16€2(E), ¶ 1, 84, 85, 88 (Special Court for Sierra Leone Mar. 13, 2004); *see also* Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, 41 (2001); U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties,* 11–24, HR/PUB/09/1 (2009); CASSESE, *supra* note 181, at 312–16 (2003). *But see* Elizabeth B. Ludwin King, *Amnesties in a Time of Transition,* 41 GEO. WASH. INT'L L. REV. 577, 583 (2010).

183 RASTAN, *supra* note 24, at 265; M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 48, 49 (Stephen Macedo ed., 2004).

184 James C. Hathaway, *The Human Rights Quagmire of Human Trafficking*, 49 VA. J. INT'L. L. 1, 15–25 (2008); Jean Allain, *No Effective Trafficking Definition Exists*, 7 ALB. GOV'T L. REV. 111, 117 (2014).

185 Palermo Protocol, *supra* note 33, at art. 3; *see also* Allain, *supra* note 184, at 118; Harmen van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT'L L. 297, 297 (2014) ("While enslavement as a crime against humanity may

States prosecute human trafficking independently on a domestic, "rather than . . . on an international basis."[186] As such, "the crime of trafficking is transnational in both commission and effect."[187] Scholars find that, "[w]hile enslavement as a crime against humanity may belong to the jurisdictional realm of international criminal tribunals and the International Criminal Court ["ICC"] (provided that domestic jurisdictions have proved to be 'unwilling' or 'unable'), other forms of human trafficking are . . . best left to national courts."[188]

Although the definition of enslavement under the Rome Statute mentions trafficking in persons, the Rome Statute's Elements of Crimes do not include elements of trafficking.[189] Therefore, trafficking is not a crime codified under the Rome Statute, or else, the *actus reus* and *mens rea* of trafficking in persons would be delineated in the Elements of Crimes. As such, the crime of trafficking is a description of conduct under the Rome Statute.[190]

The ICC's Office of the Prosecutor ("OTP") affirms this conclusion by finding no international jurisdiction to try human trafficking cases.[191] The OTP's 2016–2018 strategic plan states that "ICC crimes usually do not occur in isolation from other types of criminality, such as ordinary opportunistic crimes or transnational organised criminal activity."[192] The OTP enumerates trafficking within the list of transnational activities, clarifying that the OTP considers human trafficking as distinct from prosecutable international crimes within the ICC's jurisdiction.[193]

Finally, slavery and the slave trade prohibitions are non-derogable human rights.[194] Numerous human rights instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant

---

belong to the jurisdictional realm of international criminal tribunals and the International Criminal Court (provided that domestic jurisdictions have proved to be "unwilling" or "unable"), other forms of human trafficking are. . . best left to national courts.").

186 Clare Frances Moran, *Human Trafficking and the Rome Statute of the International Criminal Court*, 3 THE AGE OF HUM. RTS. J. 32, 33 (2014).

187 Anne Gallagher & Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking,* 18 INT'L CRIM. JUST. REV. 318, 334 (2008).

188 Van der Wilt, *supra* note 144, at 297.

189 Rome Statute of the International Criminal Court, *supra* note 28, at art. 9.

190 Sellers & Kestenbaum, *supra* note 5, at 517–42.

191 INT'L CRIM. CT., OFF. OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 16–17 (2014).

192 INT'L CRIM. CT., OFF. OF THE PROSECUTOR, STRATEGIC PLAN 2016–2018 § 30, at 14 (2015), http://www.pgaction.org/pdf/OTP-Draft-Strategic-Plan-2016-2018.pdf.

193 *Id*.; *see* Siller, *supra* note 34, at 415.

194 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples Rights (ACHPR), explicitly enumerate both slavery and the slave trade prohibitions as human rights obligations of states.[195] Under the ICCPR, article 4(1) permits states to derogate from treaty obligations in times of "public emergency"; however, article 4(2) designates certain rights—including slavery and the slave trade prohibitions under article 8(1)—as exempt from being suspended in times of public emergency.[196] While human trafficking—specifically, "traffic in women"—is prohibited as a human rights violation under the CEDAW and the CRC,[197] the prohibition has not been declared non-derogable in international human rights law.

Slavery's and the slave trade's elevated status as *jus cogens* norms, *erga omnes* obligations, and non-derogable human rights under customary and treaty law ensure broad legal protections for victims-survivors, including individual accountability and state responsibility. Conflating human trafficking with slavery and the slave trade or permitting human trafficking to subsume the slave trade (and, to a lesser extent, slavery) is to renounce binding obligations and possibly alter customary international law through either or both state practice and *opinio juris*.[198]

D. *Jurisdictional Distinctions*

In addition to the jurisprudential differences among slavery, the slave trade, and human trafficking as crimes and international human rights prohibitions, several jurisdictional differences exist to delineate which courts

---

195 Org. of African Unity [OAU], *African Charter on Human and Peoples' Rights*, art. 5, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981); Org. of American States [OAS], American Convention on Human Rights "Pact of San José, Costa Rica" art. 6, Nov. 22, 1969, 1144 U.N.T.S. 123. The European Convention on Human Rights (ECHR) prohibits slavery and forced labor, but not the slave trade. *See* European Convention on Human Rights art. 4, Nov. 4, 1950, 213 U.N.T.S. 221.

196 ICCPR, arts. 4(1) & 4(2), Dec. 16, 1966, 999 U.N.T.S. 171.

197 Convention on the Elimination of All Forms of Discrimination against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 (1980) [hereinafter CEDAW] ("States Parties shall take all appropriate measures, including legislation, to suppress all forms of *traffic in women* and exploitation of prostitution of women."); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

198 Customary international law (CIL) is a source of international law and refers to the international obligations of states arising from general and consistent practice of states (state practice) followed from a general sense of legal obligation (*opinio juris*). Statute of the International Court of Justice (ICJ), art. 38. *See, e.g.*, MALCOLM N. SHAW Q.C., *supra* note 46 (providing a treatise on international law, including custom as a source of international law); William S. Dodge, *supra* note 46 (finding that the article arguing for Congressional action for courts to apply customary international law misinterprets international law).

and international bodies can enforce the human rights law of slavery and the slave trade on the one hand, and human trafficking on the other.[199]

Several human rights instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples Rights (ACHPR), explicitly enumerate both slavery and the slave trade prohibitions as human rights obligations of states.[200] Focusing on the United Nations human rights treaty system, the ICCPR enumerates the prohibition of slavery and the slave trade as human rights under article 8(1).[201] Thus, the Human Rights Committee (HRC)—the treaty monitoring body of the ICCPR—has the mandate under the treaty to monitor states' compliance with the human rights prohibitions of slavery and the slave trade in international law. Under the Optional Protocol to the ICCPR, the HRC can receive individual complaints and issue quasi-jurisprudential decisions, called "individual communications," to determine human rights violations of states parties.[202] Notably, the prohibition of human trafficking is not enumerated in the ICCPR.

The prohibition of human trafficking, on the other hand, is enumerated as a human right under article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and under the Convention on the Rights of the Child (CRC).[203] The human rights prohibition of human trafficking as enumerated under the CEDAW applies only to women and girls, and the CRC applies only to children. The Treaty bodies monitor state compliance with the prohibitions of human trafficking and issue quasi-judicial "views" assessing individual complaints of human rights violations under the Conventions.[204] Although the Palermo Protocol

---

199 This part will look more narrowly at human rights bodies and courts and will focus on the United Nations treaty body system. Domestic criminal courts have primary jurisdiction over these crimes.

200 Org. of African Unity [OAU], *African Charter on Human and Peoples' Rights*, art. 5, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981); Org. of American States [OAS], American Convention on Human Rights "Pact of San José, Costa Rica" art. 6, Nov. 22, 1969, 1144 U.N.T.S. 123. The European Convention on Human Rights (ECHR) prohibits slavery and forced labor, but not the slave trade. *See* European Convention on Human Rights art. 4, Nov. 4, 1950, 213 U.N.T.S. 221. The author plans to address these prohibitions in regional systems in a separate article.

201 Article 8(1) reads: "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited." ICCPR art. 8(1), Dec. 16, 1966, 999 U.N.T.S. 171.

202 Optional Protocol to the ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

203 Convention on the Rights of the Child, *supra* note 197; CEDAW art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13. Article 6 reads: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." The CEDAW language is redolent of the mid-century focus on females and forced prostitution.

204 CEDAW art. 17, Dec. 18, 1979, 1249 U.N.T.S. 13; Articles 2 through 4 of the Optional Protocol to the CEDAW list the Committee's criteria for considering an individual complaint. Optional Protocol to the CEDAW arts. 2–4, Oct. 6, 1999, 2131 U.N.T.S. 83. CEDAW, *General Recommendation*

includes men in its definition of human trafficking, the treaty does not establish an international court or treaty monitoring body; instead, the Palermo Protocol provides for transnational cooperation of states and relies on domestic jurisdictions to enforce human trafficking crimes.[205]

IV. CONFLATING AND CONFUSING SLAVERY, THE SLAVE TRADE, AND HUMAN TRAFFICKING IN INTERNATIONAL HUMAN RIGHTS LAW

As noted in Part I *supra*, since its inception, the prohibition of human trafficking has been entangled with the prohibition of slavery and has subsumed if not led to an erasure—at least in practice—of the prohibition of the slave trade in international law today. Part II has demonstrated why this is problematic and why victims' harms are redressed more fully with all of these prohibitions enforced in international law. This Part now turns to an examination of human rights law development and implementation in these areas, demonstrating the continued conflation and confusion at these legal intersections, leading to less enforcement of these related, yet distinct, harms and, thus, fewer protections for victims.

E. *Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR)*

Jenny Martinez writes that creating a human rights system and, specifically, drafting the Universal Declaration of Human Rights (UDHR) required a detachment from European legal history because European countries had used human rights and humanitarian intervention—and specifically the need to abolish the slave trade—as a pretext for European conquest and colonization.[206] Dwelling extensively on slavery and the slave

No. 38 on Trafficking in Women and Girls in the Context of Global Migration, ¶ 13 & 15, U.N. Doc. CEDAW/C/GC/38 (Nov. 6, 2020); Convention on the Rights of the Child, *supra* note 197.

205 Palermo Protocol, *supra* note 33.

206 MARTINEZ, *supra* note 4. The former Special Rapporteur on Contemporary Forms of Slavery Urmila Bhoola and co-author Kari Panaccione argue that:

> One of the reasons that the complex legal framework around slavery is comparatively poorly understood may be the absence, in the 1926 and 1956 Conventions, of any provision for a formal treaty body charged with interpreting the Conventions or even receiving reports from states parties on their efforts to discharge their Convention obligations.

Urmila Bhoola & Kari Panaccione, S*lavery Crimes and the Mandate of the United Nations Special Rapporteur on Contemporary Forms of Slavery*, 14 J. INT'L CRIM. JUST. 363, 368 (2016). This reasoning is flawed, however, given that the Human Rights Committee (HRC), a treaty monitoring body charged

trade, she argues, would have hindered more than helped the development of an international human rights regime.[207] This historical renunciation, however, is critical to an understanding of these prohibitions in international human rights law.

The International Bill of Rights, which includes the UDHR and the International Covenant on Civil and Political Rights (ICCPR), prohibits slavery and the slave trade.[208] Article 4 of the UDHR declares that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[209] Article 8 of the ICCPR obligates states similarly by pronouncing that "[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited."[210]

In 1947, the United Nations Commission on Human Rights delegated to a Drafting Committee an international bill of rights, which would eventually become the UDHR, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[211] Among the provisions of the UDHR was draft article 8, which read:

> Slavery and compulsory labour are inconsistent with the dignity of man and therefore prohibited by this Bill of Rights. But a man may be required to perform his just share of any public service that is equally incumbent upon all, and his right to a livelihood is conditioned by his duty to work. Involuntary servitude many also be imposed as part of a punishment pronounced by a court of law.[212]

The Drafting Committee worked through several iterations—including in either its draft text or interpretive meaning: servitudes, inhuman

---

with interpreting the International Covenant on Civil and Political Rights (ICCPR), which prohibits slavery and the slave trade, has done very little to advance the understanding of the legal framework around slavery, and nothing to advance the understanding of that of the slave trade. *See* Part II, *supra*, for a detailed discussion.

207 MARTINEZ, *supra* note 4.

208 Some commentators have noted that the International Covenant on Economic, Social and Cultural Rights (ICESCR) also prohibits slavery and slavery-like practices through articles 6, 7, and 10(3); however, this inquiry is concerned with clearly delineating slavery and the slave trade from other practices that are exploitative as defined under law, recognizing that "powers attaching to the rights of ownership" is related, but distinct from, "exploitation." *See, e.g.*, Berta E. Hernandez-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COL. HUM. RTS. L. REV. 391, 406 (2006).

209 G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 4 (Dec. 10, 1948) [hereinafter UDHR].

210 ICCPR art. 8(1), Dec. 16, 1966, 999 U.N.T.S. 171. For an in-depth account of the prohibition of "servitudes," or "practices similar to slavery," in international law, see Allain, *supra* note 42.

211 U.N. ESCOR, Comm'n on Hum. Rts., Drafting Comm., Memorandum on Historical Background of the Committee, U.N. Doc. E/CN.4/AC.1/2 (May 29, 1947).

212 *Id.*

exploitation, and forced labor.[213] Formal legal distinctions between slavery, servitude, and forced labor did not concern the UDHR drafters.[214] The slave trade was not included at all in the draft article. Eventually the Committee settled on the words: "Slavery in all its forms shall be prohibited."[215]

When the Working Group on the Declaration of Human Rights discussed the draft slavery prohibition, Chairman of the Commission on the Status of Women Bodil Begtrup questioned whether the words "in all its forms" included the traffic in women, indicating a preference to cover human trafficking.[216] Further, Rapporteur of the Commission on the Status of Women Evdokia Uralova commented on the humiliating nature of slavery, especially for women, and insisted that trafficking in women explicitly be mentioned in the text.[217] The Working Group adopted the provision with the understanding that the article covered traffic in women, servitude, and forced labor.[218] In June 1948, the Commission on Human Rights debated the slavery provision and added involuntary servitude to the draft article to read: "No one shall be held in slavery or involuntary servitude."[219]

When Soviet Union representative Mr. Pavlov raised the idea of including the slave trade in the drafting process, Chairperson Eleanor Roosevelt dismissed the suggestion, conflating slavery and the slave trade, retorting that "reference to the slave trade would be unnecessary if slavery as a whole were outlawed."[220] At this meeting, French representative René Cassin seemed to agree with Pavlov that the slave trade existed, but incorrectly categorized the slave trade as a "form" or example of slavery.[221] The inclusion of slave trade in the draft UDHR language was rejected at this

---

213 Report of the Drafting Committee, E/CN.4/21, 1 July 1947, at 33, 75 & 82; *see* WILLIAM SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES VOL. I 1493 (2013).

214 *See* VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED: CONCEPTUAL LIMITS AND STATES' POSITIVE OBLIGATIONS IN EUROPEAN LAW 207 (2017).

215 U.N. ESCOR, Comm'n on Hum. Rts., Drafting Comm., Draft Outline of an International Bill of Rights, at 4, U.N Doc. E/CN.4/AC.1/3 (June 4, 1947).

216 U.N. ESCOR, 2d Sess., 4th mtg. at 2, 3, U.N. Doc. E/CN.4/AC.2/SR.4 (Dec. 8, 1947).

217 WILLIAM SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES VOL. I 1190 (2013). Later, Betgrup commented that she received assurances in the form of a drafting comment that the prohibition of slavery included trafficking in women and children, or "*white slavery*." WILLIAM SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES VOL. I 1135 (2013) (emphasis added) (U.N. Doc. E/CN.6/SR.22/Rev.1).

218 *Id.* at 1190 (U.N. Doc. E/CN.4/AC.2/SR.4).

219 *Id.* at 1618 (U.N. Doc. E/CN.4/99).

220 *Id.* at 1540 (U.N. Doc. E/CN.4/AC.1/SR.36).

221 *Id.* at 1695 (U.N. Doc. E/CN.4/SR.53).

stage.[222] Otherwise, the United Nations Commission on Human Rights focused primarily on slavery when drafting the UDHR provision.[223]

Representatives voted to include the slave trade as a separate prohibition late in the deliberation process. On October 22, 1948, during the Third Committee meeting, the Soviet Union proposed to prohibit explicitly the practice of slavery and to add the slave trade as an enumerated prohibition to the text.[224] Although USSR Representative Pavlov correctly distinguished the slave trade from slavery, he conflated the slave trade with human trafficking, stating that "[i]t was necessary, also, to prohibit the slave trade in order to ensure the just punishment of traffickers."[225] Then, Cassin added to the confusion by muddling slavery with human trafficking, explaining that the Human Rights Commission's

> . . . draft of article 4 had not been confined to a simple prohibition of slavery . . . to . . . include some wording which would cover indirect and concealed forms of slavery. The word 'servitude' had been used to cover such aspects as . . . the traffic in women and children.[226]

Finally, the representative from India conflated slavery and the slave trade, finding that: "No one shall . . . be held in slavery or involuntary servitude" was "sufficient to prohibit the slave trade."[227] The Third Committee debates demonstrate that, throughout the UDHR drafting and deliberation processes, representatives failed to consult the 1926 Slavery Convention definitions of slavery and the slave trade while conflating and confusing slavery, the slave trade, and human trafficking in international law.[228]

Drafters of the ICCPR similarly did not attempt to ground the prohibition of slavery and the slave trade in established treaty law. Examining the ICCPR preparatory works (*travaux préparatoires*) reveals that drafters also failed to refer to the 1926 Slavery Convention and its definitions of slavery and the slave trade, which continue to be the accepted legal

---

222 *Id.* at 1696 (U.N. Doc. E/CN.4/SR.53).

223 *See* SCHABAS, *supra* note 213, at 1696.

224 U.N. GAOR, 3d Sess. 110th mtg. at 214–15, U.N. Doc. A/C.3/SR.110 (Oct. 22, 1948).

225 *Id.* at 215.

226 *Id.* at 217. Cassin considered forced labor, involuntary servitude and the slave trade to be forms of slavery and argued consistently for language that prohibited "slavery in all its forms." *See, e.g.*, SCHABAS, *supra* note 213, at 1695.

227 U.N. GAOR, 3d Sess. 110th mtg. at 216, U.N. Doc. A/C.3/SR.110 (Oct. 22, 1948).

228 Comm'n on Human Rights, Rep. of the Working Group on the Decl. on Human Rights, 2d Sess., U.N. Doc. E/CN.4/57 (Dec. 10, 1947); U.N. GAOR, 3d. Sess. 109th mtg., U.N. Doc. A/C.3/SR.109 (Oct. 21, 1948); U.N. GAOR, 3d. Sess. 110th mtg., U.N. Doc. A/C.3/SR.110 (Oct. 22, 1948).

definitions under international law today. As noted in Part I.A *supra*, the legal definition of slavery under the 1926 Slavery Convention is broad, encompassing both the *status* and *condition* of a person over whom any and all powers attaching to the right of ownership are exercised, thereby including both *de jure* and *de facto* situations of slavery.[229]

When debating definitions of slavery and servitude, drafters of the ICCPR argued that "[s]lavery was a relatively limited and technical notion, whereas servitude was a more general term covering all possible forms of man's domination by man."[230] While the French representative pointed out that:

> [A]lthough servitude and slavery were frequently confused, there was a clear distinction in law: slavery implied the destruction of the juridical personality, whereas servitude, in the strict meaning of the word, implied only a state of complete personal dependence.[231]

This statement demonstrates that drafters lacked a clear understanding of the definition of slavery, grounded in the status or condition of a person over whom powers attaching to ownership rights are exercised, in international law. The destruction of the juridical personality, or the violation of the right to "recognition as a person before the law,"[232] covers *indicia*, or evidence, of one form of slavery: *de jure* slavery.[233] Thus, the ICCPR drafters' understanding of the slavery definition was much more limited than what had been accepted in international law.

Further, while some ICCPR drafters recognized distinctions in law among slavery, servitude, and forced labor, the slave trade was not similarly distinguished and overlooked as a separate prohibition.[234] Other drafters—while understanding that human trafficking differed from the slave trade—misunderstood the slave trade definition and prohibition in international law

---

229 *See* Part I.A., *supra* notes 51–102 and accompanying text.

230 U.N. ESCOR, 142d mtg. at ¶ 79, U.N. Doc. E/CN.4/SR.142, (Apr. 10, 1950).

231 *Id.* at ¶ 74.

232 Article 16 of the ICCPR obligates states parties to ensure that "[e]veryone shall have the right to recognition everywhere as a person before the law." ICCPR art. 16, Dec. 16, 1966, 999 U.N.T.S. 171. This provision has been equated with the right to "juridical personality." *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 371 (2d ed, 1993).

233 Even if violations of the right to juridical personality includes the condition (i.e. *de facto* situations) of slavery, it is still limited in that the destruction of juridical personality is one indicia of the exercise of the powers attaching to ownership and not the *sine qua non* of the prohibition of slavery under international law. *C.f.* Anzualdo Castro v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶¶ 90, 101 (Sept. 22, 2009) (finding that Article 3 of the American Convention on Human Rights implies "placing the person outside the protection of the law" and preventing them from exercising their rights).

234 U.N. ESCOR, 6th Sess. 142d mtg. at ¶ 79, U.N. Doc. E/CN.4/SR.142 (Apr. 10, 1950).

and advocated for prohibiting human trafficking instead, proposing to replace "'the slave trade' . . . with the words 'the trade in human beings' so that the paragraph could cover traffic in women who were not slaves in law."[235] The drafters rightly rejected this proposal;[236] including the slave trade as a prohibition permitted the continued protection of a separate, non-derogable, *jus cogens* norm under general international law and human rights treaty law.

Although both slavery and the slave trade made their way into the UDHR and ICCPR, the post-World War II world had shifted. The slave trade seemed to pale in comparison to the millions killed in battle,[237] and European countries conveniently buried recent histories of conquest and colonization in the wake of African decolonization.[238] As the next section demonstrates, the prohibition of the slave trade—and to some extent that of slavery—would remain fairly dormant and rarely applied in international law. When acts that could constitute the slave trade are reported to international treaty monitoring bodies or human rights experts, such acts are treated as trafficking in persons, or abductions, kidnappings, and sales incident to slavery.

F. *Human Rights Committee*

The ICCPR established the Human Rights Committee (HRC) to monitor state compliance with human rights obligations under the Covenant.[239] Specifically, the HRC issues General Comments to interpret obligations under specific ICCPR articles, considers state and civil society reports when issuing Concluding Observations on state treaty compliance, and delivers "individual communications" when individuals in states that sign and ratify the Optional Protocol to the ICCPR allege human rights violations under the Covenant.[240]

The HRC's General Comments are authoritative interpretations of state obligations under specific ICCPR provisions.[241] To date, the HRC has not

---

235 *Id.*

236 U.N. ESCOR, 6th Sess. 119th mtg., U.N. Doc. E/CN.4/SR.199 (May 31, 1950).

237 Slave policy programs and deportation to slave labor, however, were included and prosecuted at Nuremburg (and Tokyo) as crimes against humanity and as war crimes. Possibly, the concentration on non-armed conflict slavery and slave trade (colonial) distorted the drafters' view which wanted to look away from the (black) slave trade and concentrate on the (white) trafficking legal route.

238 MARTINEZ, *supra* note 4, at 157.

239 ICCPR art. 28, Dec. 16, 1966, 999 U.N.T.S. 171.

240 Optional Protocol to the ICCPR. The Human Rights Committee considers the petitions from individuals who have exhausted domestic remedies so long as the same matter is not before another international body.

241 *See, e.g.*, Helen Keller & Leena Grover, *General Comments of Human Rights Committee and their Legitimacy*, *in* U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 124 (Helen Keller & Geir Ulfstein eds., 2015).

issued a General Comment on Article 8's prohibitions of slavery and the slave trade.[242] In General Comment No. 28, interpreting Article 3 (Equality Rights between Men and Women, 2000), however, the Committee has made explicit reference to Article 8 obligations:

> Having regard to their obligations under article 8, State parties should inform the Committee of measures taken to eliminate *trafficking of women and children*, within the country or across borders, and *forced prostitution*. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, *inter alia*, as domestic or other kinds of personal service. State parties where women and children are *recruited*, and from which they are *taken*, and State parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women's and children's rights.[243]

The above paragraph shows the confusion and conflation among slavery, the slave trade, and human trafficking that occurs also in HRC treaty interpretation.[244] Moreover, the Committee, through the language of this General Comment, engages in erasing the slave trade as a distinct prohibition in international law. Possible slave trade acts instead are characterized as perpetrators "recruiting," "taking," and "receiving" victims, and human trafficking (and, notably, only of women and children) is inserted without explanation given that it is a different, albeit related, prohibition that is not even among the enumerated rights provisions of the ICCPR.[245] As demonstrated in Part I *supra*, the separate international law framework of

---

242 The lack of interpretive clarity on Article 8 demonstrates a lack of experience on the part of the HRC in the area of slavery and the slave trade given that there have not been many opportunities to elaborate views related to Article 8 violations or issue Concluding Observations in response to state reports.

243 Human Rights Comm., General Comment No. 28 on Article 3: Equality of Rights between Men and Women, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (emphasis added).

244 Interestingly, the HRC published General Comment No. 28 at the time of the drafting of the Palermo Protocol, which is the latest in a line of international treaties covering human trafficking in the transnational crime/organized crime model.

245 Author Vladislava Stoyanova argues that this insertion implies that the Human Rights Committee has brought human trafficking of women and children into the scope of Article 8 of the ICCPR. She finds that such an insertion requires explanation given the ICCPR drafter's explicit rejection of human trafficking within the purview of Article 8. *See* Stoyanova, *supra* note 31, at 406. This reasoning, however, would further confuse and conflate these related but distinct prohibitions in international law. To correct course, the Human Rights Committee should draft a general comment on Article 8 and clearly delineate the legal definitions of slavery and the slave trade without referencing human trafficking, while recognizing explicitly that human trafficking is not included within the scope of Article 8.

human trafficking concerns itself with transnational exploitation and, at least initially, with preventing forced prostitution of (white) women and children.

Relatedly, in General Comment No. 28, the HRC references Article 16 (the right to juridical personality) in a situation in which women are gifted or transferred through inheritance along with a deceased husband's property to his family.[246] These facts also lend themselves to an analysis under article 8's prohibition of slavery and the slave trade as accurate characterizations of the harms. The Committee states that:

> This right [to be recognized everywhere as a person before the law] implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be *treated as objects* to be *given* together with the property of the deceased husband to his family.[247]

In this situation, inheriting a widow along with property constitutes slavery when such acts are found to be exercising powers attaching to the right of ownership over a person. Further, the "acquisition" through gifting, transferring, or willing a widow to a deceased husband's family, as well as the act of gifting, transferring, or willing a widow to anyone, constitutes the slave trade when the intent is to bring the widow into—or maintain her in—a situation of *de jure* or *de facto* slavery.

Vladislava Stoyanova has linked the right to juridical personality (Article 16) to the prohibition of slavery (Article 8) under the ICCPR because ICCPR drafters spoke about slavery as implying the "destruction of the juridical personality" instead of relying on the international law definition under the 1926 Slavery Convention.[248] While these rights are related, important definitional distinctions remain. Most significantly, aligning slavery with destruction of the juridical personality restricts the definition of slavery to *de jure* slavery. The 1926 Slavery Convention, and the reiteration in the 1956 Supplementary Slavery Convention, definitions, however, contemplate both *de jure* and *de facto* situations of slavery. *De facto* slavery does not include the destruction of the juridical personality, as slaves in such situations would be recognized as persons before the law.[249]

---

246 Human Rights Comm., General Comment 28: Equality of Rights between Men and Women (Article 3), ¶ 19, U.N. Doc. CCPR/C/21/REV.1/ADD.10 (Mar. 29, 2000).

247 U.N. Human Rights Comm., CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶19, U.N. Doc. CCPR/C/21/REV.1/ADD.10 (Mar. 29, 2000).

248 Stoyanova, *supra* note 31, at 412–13.

249 *But see* STOYANOVA, *supra* note 214 at, 233–40 (arguing that, through case law, the right to juridical personality has been expanded to include situations of *de facto* slavery and servitudes, although courts have not ruled on the issue of slavery as yet).

In addition, the right to juridical personality has not been interpreted beyond "access to the legal system in order to have these rights and obligations enforced"[250] under the ICCPR and that "the individual is bearer of rights and duties."[251] Further, the slave trade does not resemble the destruction of the juridical personality, nor does it include any exercise of the powers attaching to the rights of ownership; thus, the slave trade likely would be overlooked in any claims brought before the HRC under Article 16.

The Human Rights Committee also has issued quasi-judicial individual communications that overlook state responsibility for slavery and the slave trade violations. One recent example from 2019 is the case of *Fulmati Nyaya* against Nepal in which 300 Royal Nepalese Army and Armed Police Force officers entered a village during the civil war in 2002 and arrested the communication's author, a fourteen-year-old girl at the time, allegedly suspecting her of being a Maoist.[252] The soldiers dragged her into a truck, blindfolded and handcuffed her, detained and interrogated her incommunicado, repeatedly beat, sexually assaulted and raped her, and forced her to "work in the barracks, such as carrying bricks and sand, making cement for the construction of a temple and watering the garden."[253] The HRC characterized the harms to include *inter alia* violations of forced labor under Article 8(3) of the ICCPR.[254]

The *Fulmati Nyaya* facts, however, also could be characterized as violations of the slave trade and slavery prohibitions under Article 8(1). The soldiers engaged in slave trading Fulmati Nyaya when they abducted her with the intent to reduce her to a situation of slavery. The evidence, or *indicia*, of slavery could include the acts that demonstrate the exercise of the powers attaching to the right of ownership—*inter alia* the incommunicado detention, the perpetration of acts of physical and sexualized violence, including rape, and forced labor.[255] Such oversight is a missed opportunity to characterize these harms also as slavery and slave trade violations and to obtain full accountability for violations of international human rights law for victims of slavery and the slave trade. The ICCPR enumerates several prohibitions relevant to the factual circumstances, and the HRC has the power to

---

250 Michael Bogdan & Brigitte K. Olsen, *Article 6*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, at 147, 148.

251 MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 281 (1993).

252 Human Rights Council Res. 2556, U.N. Doc. CCPR/C/125/D/2556/2015, at ¶ 2.2 (June 11, 2019).

253 *Id.* at ¶ 2.5.

254 Human Rights Council Res. 2556, U.N. Doc. CCPR/C/125/D/2556/2015 (June 11, 2019).

255 These facts are similar to the Sepur Zarco case from Guatemala in which sexual slavery was charged. Tribunal de Mayor Riesgo [Municpal Court] 2016, Sentencia C-01076-2012-00021, caso Guatemala v. Esteelmer Francisco Reyes Girón y Heriberto Valdez Asig (Guat.).

pronounce the state's violation of human rights under any and all ICCPR provisions. Overlooking slavery and the slave trade violations denies the full expressive functions of international human rights law for the victims-survivors of these harms. Further, addressing factual circumstances accurately under slavery and slave trade violations would assist in revitalizing and implementing these human rights norms for substantive, and possibly structural, transformative change at the domestic level.

Prior to *Fulmati Nyaya*, the HRC has referred to Article 8 of the ICCPR in only a few communications, and all have focused on forced labor (Article 8(3)) or servitude (Article 8(2)). The Committee found several of these communications—concerning military conscription,[256] child custody,[257] and prison labor[258]—to be inadmissible given that they seemed to fall under exceptions under Article 8.[259] None of the communications has yet addressed slavery or the slave trade (Article 8(1)).

The Human Rights Committee's concluding observations have conflated and confused slavery, the slave trade, and human trafficking while overlooking the slave trade as a separate human rights violation. For example, in its 2020 Concluding Observations on the Central African Republic, in addressing trafficking in persons, forced labor, and child soldiering, the HRC was "alarmed that children are being *recruited* by armed groups for exploitation as combatants, *sex slaves* or workers in the mining sector."[260] Another example includes language from the 2003 Concluding Observations on Mali in which the HRC "remain[ed] concerned by the *trafficking* of Malian children to other countries in the region, in particular,

---

256 L.T.K. v. Finland, Communication No. 185/1984, Human Rights Comm., U.N. Doc. CCPR/C/OP/2 ¶ 5.2 (July 9, 1985).

257 A.J. v. G. v. Netherlands, Communication No. 1142/2002, Human Rights Comm., U.N. Doc. CCPR/C/77/D/1142/2002 ¶ 5.6 (Apr. 14, 2003). The author argued unsuccessfully that the state held he and his children in servitude. *Id.*

258 Radosevic v. Germany, Communication No. 1292/2004, Human Rights Comm., U.N. Doc. CCPR/C/84/D/1292/2004 ¶ 7.3 (July 22, 2005).

259 Article 8(3)(c) reads:

> (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.

ICCPR art. 8(3)(c), Dec. 16, 1966, 999 U.N.T.S. 171.

260 Human Rights Comm., *Concluding Observations on the Third Periodic Report of the Central African Republic,* ¶¶ 29–30, U.N. Doc. CCPR/C/CAF/CO/3 (Apr. 30, 2020).

Côte d'Ivoire, and their *subjection to slavery* and forced labor. . . ."[261] Moreover, the 2007 Concluding Observations on Sudan noted "efforts by the State party to eradicate the practice of *abducting* women and children and secure the return of abductees. . . ." and recommended that the state "put a stop to all forms of *slavery* and *abduction* in its territory and prosecute those engaging in such practices."[262]

These concluding observations demonstrate that the HRC seemingly has replaced the slave trade with human trafficking, even in cases in which the Committee finds the harms to be precursory acts to slavery, without offering any legal reasoning. While some of these factual circumstances also may constitute human trafficking, the slave trade prohibition is the human rights violation within the HRC's purview given the ICCPR's explicit enumeration of the slave trade in Article 8. Where slavery violations exist, slave trade violations nearly always accompany such harms.[263] States parties have a legal obligation to address the precursory acts to slavery through the prohibition of the slave trade; thus, the petitioners and the HRC should characterize the harms correctly as acts of the slave trade.

Furthermore, the HRC in its 2019 Concluding Observations on the Czech Republic[264] and 2011 Concluding Observations on Kuwait evaluated compliance with Article 8, but only examined trafficking in persons. In the Kuwait observations, the Committee found that its "current penal laws do not reach all forms of *trafficking in persons* . . . [and] that statistical information on *trafficking in persons* is not available."[265] Thus, recent concluding observations demonstrate that the HRC not only has overlooked the slave trade prohibition, but also has taken on the issue of human trafficking,[266] a human rights violation not explicitly enumerated under the Covenant. The

---

261 Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Mali*, ¶ 17, U.N. Doc. CCPR/CO/77/MLI (Apr. 16, 2003).

262 Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Sudan*, ¶ 18, U.N. Doc. CCPR/C/SDN/CO/3 (Aug. 29, 2007).

263 Generally, unless individuals are born into slavery, they have in one way or another been brought into, or maintained in, a situation of slavery.

264 Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of Czechia*, ¶ 30, U.N. Doc. CCPR/C/CZE/CO/4 (Nov. 7, 2019).

265 Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observation of the Human Rights Committee: Kuwait*, ¶ 17, U.N. Doc. CCPR/C/KWT/CO/2 (Nov. 18, 2011); *see also* Human Rights Comm., *Concluding Observations on the Initial Report of Cabo Verde*, ¶¶ 25–26, U.N. Doc. CCPR/C/CPV/CO/1/Add.1 (Dec. 3, 2019).

266 *See, e.g.*, Human Rights Comm., *Concluding Observations on the Fifth Periodic Report of Portugal*, ¶¶ 32–33, U.N. Doc. CCPR/C/PRT/CO/5 (Apr. 28, 2020); Human Rights Comm., *Concluding Observations on the Sixth Periodic Report of Tunisia*, ¶¶ 39–40, U.N. Doc. CCPR/C/TUN/CO/6 (Apr. 24, 2020); Human Rights Comm., *Concluding Observations in the Absence of the Initial Report of Dominica*, ¶¶ 32–34, U.N. Doc. CCPR/C/DMA/COAR/1 (Apr. 24, 2020).

HRC is undermining institutional legitimacy in the short term by incorrectly applying its legal mandate in assessing state compliance with international treaty obligations under the ICCPR.

G. *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is one of two core human rights treaties to enumerate the prohibition of human trafficking. Article 6 obligates states to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[267] Notably, the treaty does not prohibit slavery or the slave trade of women or girls.

The treaty's preparatory works demonstrate that the Convention's article 6, originally introduced by the Philippines as draft Article 9, was an effort to duplicate protections covered in other international law treaties, including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention)[268] detailed in Part I.B *supra*. The Soviet Union proposed similar language under article 17 of its proposed draft Convention.[269] The Netherlands' amendment to the original draft article proposed slight changes that would have expanded exploitation beyond prostitution,[270] but the representative withdrew the amendment.[271] The Working Group drafters voted by consensus to amend the article according Argentina's proposed language to read: "The States Parties shall take all appropriate measures, including legislation, to suppress all

---

267 G.A. Res. 34/180, CEDAW, art. 6 (Dec. 18, 1979).

268 *See* U.N. Secretary-General, *International Instruments and National Standards Relating to the Status of Women: Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Elimination Discrimination Against Women*, Annex 1, art. 4, U.N. Doc. E/CN.6/573 (Nov. 6, 1973) ("Each State Party agrees to take all appropriate measures, including legislation, to combat all forms of traffic in women and exploitation of prostitution of women in accordance with international conventions and agreements in this regard.").

269 U.N., Econ. & Soc. Council, *Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Elimination Discrimination Against Women*, art. 9, U.N. Doc. E/CN.6/C.1/L.2 (Jan. 7, 1974) ("The States Parties shall adopt all necessary measures, including legislative measures, to ensure the complete elimination of all forms of traffic in women and prostitution.").

270 The Netherlands proposed replacing "exploitation of prostitution of women" with "exploitation of women, in particular through prostitution." Rep of the G.A., *Report of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination against Women*, ¶ 112, U.N. Doc. A/C.3/32/L.59 (Dec. 6, 1977).

271 *Id.* at ¶¶ 112–113 (The meeting minutes do not explain the Netherlands' withdrawal of its proposed amendment, despite Romania and other states sharing these concerns).

forms of traffic in women and exploitation of prostitution of women."[272] This language was based on article 8 of the Declaration on the Elimination of Discrimination Against Women and the relevant articles of the 1949 Convention.[273] Thus, the CEDAW does not suppress prostitution as such; rather, it suppresses the exploitation of prostitution.

H. *CEDAW Committee*

Similar to the Human Rights Committee, the Committee for the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) is charged with ensuring effective implementation of the treaty through monitoring and compliance: drafting General Recommendations—the same as HRC's General Comments—which are authoritative interpretations of particular treaty provisions; issuing quasi-judicial "communications" when individuals allege violations of human rights—the equivalent to HRC's "views"; and monitoring compliance through "concluding observations" to each state party to the CEDAW.[274]

i. General Recommendations

In November 2020, the CEDAW Committee released its General Recommendation No. 38 on trafficking of women and girls in the context of global migration.[275] While the draft text did not define or recognize explicitly the legal distinctions among slavery, the slave trade, and trafficking,[276] the final text does include important language distinguishing these prohibitions and recognizing the slave trade as a separate prohibition with concurrent protections under international law.[277] Such definitions and delineation may assist with ensuring the correct application of each prohibition and prevent further conflation and confusion between and among these harms in addition

272 *Id.* at ¶ 114 (Additionally, Denmark suggested adding the term "illicit" to "traffic in women," but this amendment was withdrawn for lack of support.). U.N. ESCOR, 26th Sess., 638th mtg. at ¶¶ 42, 47–49, U.N. Doc. E/CN.6/SR.638 (Sept. 20, 1976).

273 *Id.* at ¶¶ 115–16.

274 G.A. Res. 34/180, *supra* note 267, art. 17.

275 CEDAW, *General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration*, ¶ 13 & 15, U.N. Doc. CEDAW/C/GC/38 (Nov. 6, 2020).

276 CEDAW, DRAFT General recommendation on Trafficking in Women and Girls in the Context of Global Migration, https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx.

277 U.N. Doc. CEDAW/C/GC/38, *supra* note 275, ¶ 13 & 15.

to preventing the erasure of the slave trade by the trafficking in persons legal framework, at least rhetorically if not legally.[278]

The General Recommendation includes factual circumstances that the drafters characterized as "trends of trafficking in women and girls."[279] The drafters enumerated many factual circumstances that also could be characterized as slavery or slave trading crimes and human rights violations. In addition to torture, the CEDAW Committee noted that trafficking harms also may constitute crimes of slavery or the slave trade, the prohibitions of which are peremptory (*jus cogens*) norms in human rights law, and that survivors retain concurrent protection under each of these prohibitions.[280] General Recommendation No. 38 also links human trafficking and enslavement in international criminal law under the Rome Statute of the International Criminal Court (Rome Statute), finding that "positive obligation[s] of States parties to prohibit trafficking is reinforced by international criminal law, including the Rome Statute of the International Criminal Court which recognizes that enslavement, sexual slavery and enforced prostitution may be crimes within the jurisdiction of the Court."[281] Additional clarification may be needed, however, to delineate these various crimes because of their different statuses and definitions under international law. Given that the Rome Statute does not include the slave trade,[282] the General Recommendation also could have included customary international

---

278 Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, letter to the CEDAW Comm., commentary on draft General Recommendation on Human Trafficking (2020), *available at* https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CallTraffickingGlobalMigration.aspx.

279 This includes: child marriage of girls fleeing humanitarian crises (A/71/303 (2016), para. 34; A/72/164 (2017), para. 20; A/72/164 (2017), paras. 27, 40; CEDAW/C/TUR/CO/7); sexual exploitation in refugee camps, temporary reception centres and informal settlements (A/72/164 (2017), para. 35); recruitment of women forced to sell their babies (A/71/261 (2016), para. 41) or give them up for adoption (CEDAW/C/MHL/CO/1-3); forced begging (A/HRC/34/55/Add. 1 (2016), para. 25); sexual exploitation by peacekeepers (A/71/303 (2016), paras. 43-44); forced recruitment or abduction into military service or by armed forces (A/71/303 (2016), paras. 31-32) or by terrorist groups for purposes of forced marriage, forced pregnancy, sexual slavery, domestic servitude, to serve as combatants including as suicide bombers, for sale or for ransom, and for purposes of being gifted to fighters as a reward to increase the recruitment and retention (A/71/303 (2016), para. 33; A/72/164 (2017), paras. 19, 21, 26; CEDAW/C/NER/CO/3-4). CEDAW, *General recommendation on Trafficking in Women and Girls in the Context of Global Migration*, ¶ 12 n.17, https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx.

280 CEDAW, *General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration*, ¶ 13, 15, U.N. Doc. CEDAW/C/GC/38 (Nov. 6, 2020); CEDAW, *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19,* ¶ 16–17, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017).

281 CEDAW, *General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration*, ¶ 14, U.N. Doc. CEDAW/C/GC/38 (Nov. 6, 2020).

282 *See* Sellers & Kestenbaum, *supra* note 5, at 517–42. The Rome Statute omits the slave trade. *See* U.N. G.A., *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998).

law protections to encourage practitioners to pursue the slave trade in addition to slavery, enslavement, and acts of trafficking as proof of enslavement in international criminal law.[283]

Previous General Recommendations link human trafficking and slavery crimes, but without carefully delineating the legal distinctions and by erasing the slave trade. General Recommendation No. 30 (Women in Conflict), for instance, reiterates Rome Statute language that enslavement in the course of trafficking in persons may constitute an international crime.[284] General Recommendation No. 32 (Gender and Refugee Status, Asylum, Nationality and Statelessness) recognizes that women in displacement are trafficked for the purposes of *inter alia* "slavery and servitude."[285] Although often human trafficking and slavery are interlinked harms, the criminal conduct to reduce an individual to slavery is the slave trade and should also be characterized as such.

ii. Communications and Concluding Observations

The CEDAW Committee has addressed human trafficking harms in its 2008 communication *Zhen Zhen Zheng v. the Netherlands*.[286] The Committee found the author's claim under article 6 inadmissible for failure to exhaust domestic remedies.[287] Three CEDAW Committee members dissented, however, recognizing the State's obligation to exercise due diligence in identifying human trafficking victims and providing information on their rights and remedies under law.[288] In the dissenting opinion, Committee members mischaracterized the transnational crime of human trafficking as an international crime,[289] finding that State parties must "protect victims of an

283 Sellers & Kestenbaum, *supra* note 278.

284 CEDAW, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, ¶ 53, U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2013). In previous writings Patricia Viseur Sellers and I lay out the reasons why this conflation under the Rome Statute is problematic. *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Sexualized Slavery and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSENE HABRE 375 (2020); Sellers & Kestenbaum, *supra* note 5, at 517–42.

285 CEDAW, *General Recommendation No. 32, on Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, ¶ 14, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014).

286 CEDAW, Dec. 15/2007, ¶ 3.1, U.N. Doc. CEDAW/C/42/D/15/2007 (Nov. 14, 2008).

287 *Id.* Notably, the facts presented indicate that perpetrators may have committed crimes of slavery and the slave trade. These prohibitions, however, are not enumerated in the CEDAW. ("Ms. Zheng stayed with a young man for one night. Then a Chinese woman took her into her house and made her do heavy housework. When, some eight months later, her pregnancy began to show, she was put out on the street."). *Id.* at ¶ 2.2. The author also claims that she was a victim of "slavery and prostitution." *Id.* at ¶ 3.4.

288 CEDAW, Dec. 15/2007, ¶¶ 8.1–9.1, U.N. Doc. CEDAW/C/42/D/15/2007 (Nov. 14, 2008).

289 *See infra* Part III.

international crime such as trafficking in persons and to have law enforcement officials adequately trained. . . ."[290]

Additionally, the dissenting Committee members found that the author was victim not only of human trafficking, but also of "slavery and prostitution; she was forced to sleep with men, was raped several times and was locked in a house."[291] Like slavery, the slave trade also may have described criminal conduct; however, neither slavery nor the slave trade is enumerated as a prohibition in the CEDAW. This case demonstrates the way in which the CEDAW Committee recognizes the factual overlap between slavery and human trafficking harms; however, human trafficking seems to subsume precursory conduct to slavery without deeper factual and legal analyses to understand whether the slave trade also may have been perpetrated.

The CEDAW Committee also acknowledges the related nature of human trafficking harms and slavery in its Concluding Observations. When addressing harms that may constitute trafficking in women and girls, or when pointing to slavery violations directly, the CEDAW Committee also may be identifying, but not naming, slave trade violations. For example, the Committee observes the following harms: "adolescent refugee girls . . . sold as brides from refugee camps"[292] in Turkey; "women and girls abducted and subjected to sexual slavery by Boko Haram"[293] in Nigeria; and women seasonal agriculture workers in "contemporary forms of slavery"[294] in Romania. In each of these factual circumstances, the Committee characterizes the harm as trafficking or slavery; facts may also constitute the slave trade, especially in situations of *selling* child brides and *abducting* women into sexualized slavery. Thus, the human trafficking framework seems to have subsumed the slave trade prohibition, even when identifying slavery harms and addressing precursory acts of slavery.

---

290 CEDAW, *Decision of the Committee on the Elimination of Discrimination Against Women Under the Optical Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, ¶ 8.1, U.N. Doc. CEDAW/C/42/D/15/2007 (Nov. 14, 2008).

291 *Id.* at ¶ 8.6.

292 CEDAW, *Concluding Observations on the Seventh Periodic Report*, ¶ 39, U.N. Doc. CEDAW/C/TUR/CO/7 (July 25, 2016).

293 CEDAW, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Nigeria*, ¶¶ 7, 15(c), U.N. Doc. CEDAW/C/NGA/CO/7-8 (July 24, 2017). Notably, the CEDAW also describes a situation of child-slaves born into slavery of mothers who are slaves of Boko Haram.

294 CEDAW, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Romania,* ¶ 30, U.N. Doc. CEDAW/C/ROU/CO/7-8 (July 24, 2017).

I. *Convention on the Rights of the Child (CRC)*

The other core human rights treaty that prohibits trafficking against children is the Convention on the Rights of the Child (CRC). Article 34 protects children from sexual exploitation, and Article 35 obligates states to take measures to "prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[295] While this provision does seek to prevent conduct of the slave trade through prohibiting *abductions*, *sales*, and *traffic* in children, the treaty does not explicitly prohibit the slavery or the slave trading of children. Article 36 protects children from all other forms of exploitation.[296]

The first draft of the CRC included in Article IX protection against "all forms of . . . exploitation[, including] . . . traffic, in any form."[297] Poland put forth the draft child rights Convention, pointing to the "many children [especially migrant children] . . . in bondage or exploited as child prostitutes" as reasons for the need for the CRC.[298] The preparatory works drew upon, *inter alia*, the Declaration on the Rights of the Child, the 1949 Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, the 1956 Supplementary Slavery Convention, and the African Charter on Human and Peoples Rights to enumerate protections from exploitation and, in particular, sexual exploitation, of children.[299]

The CRC's Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography also prohibits conduct that could constitute the *actus reus* of either slavery or slave trading, especially with regard to selling children and protecting children from economic exploitation.[300] Similarly, the CRC's Optional Protocol on the Involvement of Children in Armed

---

295 Convention on the Rights of the Child, *supra* note 197, at arts. 34, 35.

296 *Id.* at art. 36.

297 Draft Convention on the Rights of the Child, art. IX, in Report of the Comm. on Human Rights of the Thirty-Fourth Session to the Economic and Social Council, U.N. Doc. No. E/CN.4/1292 (Feb. 6 – Mar. 10, 1978).

298 U.N. GAOR, 39th Sess., 48th mtg. at ¶ 10, U.N. A/C.3/39/SR.48 (Nov. 23, 1984). Subsequent drafts expanded these notions across several articles. Comm'n on Human Rights, Draft Convention on the Rights of the Child on its Fourty-Second Session, U.N. Doc. E/CN.4/1988/WG.1/WP.1, at 20–22 (Oct. 16, 1987).

299 Comm'n on Human Rights, Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1987/WG.1/WP.2, at 12–13 (Nov. 12, 1986). Consensus was challenging on this particular provisions. *See* Comm'n on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1987/25, at 16–19 (Mar. 9, 1987); Comm'n on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1989/48, at 90–94 (Mar. 2, 1989). None of the recorded debates and documentation, however, included discussions to include slavery or the slave trade prohibitions explicitly in the text.

300 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227.

Conflict protects against forced recruitment, conscription, and use of children in armed groups, but this conduct is not considered explicitly to be indicia of slavery or the slave trade.[301] Notably, slavery and the slave trade are not mentioned in the text of the Convention or the Optional Protocols.

J. *Committee on the Rights of the Child*

i. General Recommendations

The CRC has issued three general comments that mention trafficking and slavery, but do not cover these prohibitions in depth. While conduct of the slave trade is covered, the slave trade itself is not explicitly mentioned in any of the relevant CRC general comments. For example, General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence enumerates (sexual) slavery, trafficking, and sale of children for "sexual purposes and forced marriages" as forms of sexual exploitation and violence.[302] General Comment No. 11: Indigenous Children and their Rights under the Convention recognizes that Indigenous children are extremely vulnerable to child labor, and categorizes slavery, bondage and trafficking as among child labor's "worst forms."[303] Further, General Comment No. 16: State Obligations regarding the Impact of the Business Sector on Children's Rights makes mention of obligations to keep supply chains free of child slavery and forced labor.[304]

ii. Communications and Concluding Observations

To date, the CRC Committee has not addressed violations of Articles 34, 35, or 36 of the CRC.[305] While various concluding observations discuss slavery, the Committee does not tend to conflate slavery with human trafficking, but rather discusses slavery as a violation of civil rights and

---

301 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

302 Comm. on the Rights of the Child, General Comment No. 13: The Right of the Child to Freedom From All Forms of Violence, ¶ 25, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011).

303 Comm. on the Rights of the Child, General Comment No. 11: Indigenous Children and Their Rights Under the Convention, ¶ 70, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009).

304 Comm. on the Rights of the Child, General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights, ¶ 65, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013).

305 *But see* Comm. on the Rights of the Child, Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 17/2017,U.N Doc. CRC/C/82/D/17/2017 (context of trafficking of babies for sale).

freedoms as well as a form of torture.[306] At times, slavery is discussed alongside forced labor[307] and human trafficking,[308] but are not necessarily conflated with one another. When it comes to the slave trade, however, the Committee's concluding observations discuss "abductions,"[309] "recruitment,"[310] "trafficking,"[311] or "sale"[312] of children for various types of enslavement. The slave trade is not explicitly mentioned.

K. *U.N. Special Procedures Related to Slavery, the Slave Trade, and Human Trafficking*

i. U.N. Special Rapporteur on Slavery (1964–72)

The first U.N. Special Rapporteur on Slavery, Mohamed Awad, delineated slavery and the slave trade from each other and kept these prohibitions separate from the law on human trafficking. He did, however, make recommendations following the prior recommendations of the Secretary-General that may have further permitted human trafficking to

306 Comm. on the Rights of the Child, Concluding Observations on the Combined Third to Fifth Periodic Reports of Mauritania, U.N Doc. CRC/C/MRT/CO/3-5 (2018) (Mauritania criminalizes slavery but practices still exist); Comm. on the Rights of the Child, Concluding Observations on the Second Periodic Report of Mauritania, U.N Doc. CRC/C/MRT/CO/2 (2009) (Mauritania); Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: NIGER, U.N Doc. CRC/C/NER/CO/2 (2009) (Niger); Comm. on the Rights of the Child, Concluding Observations on the Combined Third to Fifth Periodic Reports of Niger, U.N Doc. CRC/C/NER/CO/3-5 (2018) (Niger) (discussing talibé children and girls subjected to the practice of *wahaya* (fifth wife)); Comm. on the Rights of the Child, Concluding Observations on the Second Periodic Report of the Holy See, U.N Doc. CRC/C/VAT/CO/2 (2014) (Holy See) (discussing practices of slavery against girls by the Catholic Church in the Magdalene laundries of Ireland).

307 *See, e.g.*, Comm. on the Rights of the Child, Observations of the Committee on the Rights of the Child: Sudan, ¶¶ 14, 25, U.N Doc. CRC/C/15/Add.10 (1993) (Sudan).

308 Comm. on the Rights of the Child, Concluding Observations on the Combined Second to Fourth Periodic Reps. of Congo, U.N Doc. CRC/C/COG/CO/2-4 (2014) (Congo).

309 Comm. on the Rights of the Child, Considerations of Reps. Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: the Sudan, U.N Doc. CRC/C/15/Add.190 (2002) (Sudan) (discussing "slavery and abduction" in detailing the abduction and enslavement of thousands of children "in the context of the armed conflict as well as for commercial gain (i.e. sold as servants, agricultural labourers and concubines, or forcibly recruited as soldiers).").

310 Comm. on the Rights of the Child, Concluding Observations on the Combined Fourth and Fifth Periodic Reps. of Colombia, U.N Doc. CRC/C/COL/CO/4-5 (2015) (Colombia) ("Girls *recruited* being subjected to . . . sexual slavery.").

311 Comm. on the Rights of the Child, Concluding Observations on the Combined Second to Fourth Periodic Reps. of Iraq, U.N Doc. CRC/C/IRQ/CO/2-4 (2015) (Iraq) (noting children abducted into sexual slavery by ISIL and separately discussing the internal violence increasing trafficking for the purposes of *inter alia* slavery).

312 Comm. on the Rights of the Child, Concluding Observations on the Fifth Periodic Reps. of the Syrian Arab Republic, U.N Doc. CRC/C/SYR/CO/5 (2019) (Syria) (deeply concerned about "the girl victims of *sale* and sexual slavery by non-State armed groups, particularly Yazidi girls.").

subsume and obscure the slave trade in international human rights discourse.[313]

In 1963, the Economic and Social Council discussed again slavery and the slave trade, finding that the slave trade still persisted, and the Council asked the UN Secretary-General to appoint a special rapporteur on slavery.[314] In 1964, the Secretary-General appointed Awad, who submitted a final report in 1966.[315] The Report recommended that the Council "refer the question of slavery and the slave trade in all their practices and manifestations" to the Human Rights Commission.[316]

The Human Rights Commission referred this mandate to the sub-commission on the Prevention of Discrimination and Protection of Minorities. Then, in 1968, the Economic and Social Council authorized the sub-commission to study measures for the implementation of the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention.[317] Further, the sub-commission was tasked with examining "the possibilities of international police co-operation to interrupt and punish the transportation of persons in danger of being enslaved. . . ."[318] The Sub-Commission appointed Special Rapporteur Awad to undertake this study,[319] which echoed two of the Secretary-General's earlier study recommendations: (1) to adopt the techniques used to suppress the illicit narcotics trade to suppress the slave trade, and (2) to model future conventions in the field of slavery in all its forms from the articles of the Single Convention on Narcotic Drugs of 1961 that address implementation.[320] In his 1971 Report, Awad specifically states that he "avoids [*inter alia*] dealing with matters covered by the Convention

313 Mohamed Awad, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, Including Slavery-Like Practices of Apartheid and Colonialism (Report)*, U.N. Doc. E/CN.4/Sub.2/322 (July 16, 1971) ("Discussions with officials of the Division of Narcotic Drugs related in particular to the suggestions which the Secretary-General had made in 1967, that 'the techniques used to suppress the illicit trade in narcotics might be adopted to suppress the illicit trade in slaves'"); Mohamed Awad, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-Like Practices of Apartheid and Colonialism (Report)*, U.N. Doc. E/CN.4/Sub.2/312 (July 1, 1970).

314 19 U.N. ESCOR Off. Rec., Annexes, Agenda Item No. 8, U.N. Doc. E/2673 (1955). The report of 1955 was prepared by Hans Engen, pursuant to Council resolution 525.

315 Mohamed Awad (Special Rapporteur on Slavery), *Report on Slavery*, U.N. Doc. E/4168/Rev.1 (1966). This report was an update to the 1955 Engen Report.

316 *Id.* at 313. The Human Rights Commission has since been replaced by the Human Rights Council.

317 U.N. ESCOR, Preliminary Report Submitted by the Special Rapporteur, Mr. Mohamed Awad, at 1–2 U.N. Doc. E/CN. 4/Sub. 2/304 (Aug. 18, 1969).

318 *Id.* at 2.

319 1971 Report, at p. 4 & 5. The questions sent to states to gather information at the national levels regarding slavery, the slave trade, and traffic in persons are clearly delineated.

320 U.N. ESCOR, Preliminary Report Submitted by the Special Rapporteur, Mr. Mohamed Awad, U.N. Doc. E/CN. 4/Sub. 2/304, (Aug. 18, 1969), at 10.

for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others of 1949. . . ."[321] Thus, although Awad recognized two separate legal frames—slavery/slave trade and trafficking in persons—his report may have recommended a convergence or subsuming of the slave trade by trafficking in persons.

ii. U.N. Special Rapporteur on Contemporary Forms of Slavery

The current U.N. Special Rapporteurs with mandates that include slavery and the slave trade have confused and conflated slavery, the slave trade, and human trafficking while largely ignoring the slave trade altogether. The U.N. Special Rapporteur on Contemporary Forms of Slavery replaced the U.N. Working Group on Contemporary Forms of Slavery.[322] The mandate of the U.N. Special Rapporteur on contemporary forms of slavery, including its causes and consequences, for instance, does mention *inter alia* both slavery and the slave trade prohibitions, anchoring their definitions in the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention.[323] There is no explicit treatment of the slave trade, however, in the more than twelve years of the mandate.

The conflation and confusion among slavery, the slave trade, and human trafficking, and the overlooking of the slave trade, exist in the UNSR on Contemporary Slavery's first report when defining the scope of the mandate itself. Even the name "Contemporary Forms of Slavery" connotes trafficking in persons, forced labor, and other exploitative practices that have benefitted, at least in advocacy efforts, from closely associating with the term "slavery" more than the actual prohibition of slavery. The Special Rapporteur includes several nonlegal definitions of slavery when defining her mandate. The first, from Benjamin Whitaker, former Special Rapporteur of the then Sub-Commission on Prevention of Discrimination and Protection of Minorities, defines slavery as "any form of dealing with human beings leading to the

---

321 1971 Report, at ¶ 6.

322 *See* Gulnara Shahinian (Special Rapporteur on Contemp. Forms of Slavery, including its Causes and Consequences), *Promotion and Prot. of all Hum. Rts., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev.*, ¶ 1, U.N. Doc. A/HRC/9/20 (July 28, 2008).

323 *Id.* at ¶ 6. The definition of slave trade is not quoted correctly. *See* definition *supra* note 61. The mandate also covers practices analogous to slavery from the 1956 Supplementary Slavery Convention, namely: debt bondage, serfdom, servile marriage and sale of children. These practices are not necessarily "lesser" forms of slavery or exploitation, as scholars often claim. They are different harms with different legal definitions and may constitute slavery if the slavery definition—"the exercise of any or all powers attaching to the right of ownership over a person"—also is met. *See, e.g.*, Alexandra Adams, *Sexual Slavery: Do we Need this Crime in Addition to Enslavement?* 29 CRIM. L. F. 279, 284, 290 (2018).

forced exploitation of their labour."[324] This definition deviates from the legal definition in two critical ways—focusing on *exploitation* rather than *ownership* and including circumstances better characterized as trafficking (*i.e.*, "dealing with human beings *leading to* exploitation") or slave trade if slavery is the end harm—while also conflating slavery with forced labor, a separate human rights prohibition.[325]

The second definition is the constituent crime of "enslavement" as a crime against humanity as enumerated under the Rome Statute of the ICC.[326] As discussed in Part III.D, this definition includes human trafficking while defining evidence of ownership with acts of the slave trade. The third definition from expert Kevin Bales is "a state marked by the loss of free will where a person is forced through violence or the threat of violence to give up the ability to sell freely his or her own labour power."[327] This definition diverges from the legal definition of slavery in several key ways as well. Namely, Bales inserts requirements of (1) a loss of agency; (2) appropriation of "labor power"; and (3) violence or the threat of violence, all of which may be indicia or evidence of slavery but not necessarily present in all slavery situations. Finally, the Special Rapporteur includes Orlando Patterson's conception of the status of slavery as "social death"[328]—a notion from social science that presumably covers only *de jure* situations of slavery.

Several additional examples illustrate the conflation and confusion among slavery, the slave trade, and human trafficking, as well as an outright neglect of the slave trade. In the mandate's 2009 report, for instance, the UNSR on Contemporary Slavery details communications related to trafficking and exploitation without addressing its relationship to slavery and the slave trade.[329] In her 2010 thematic report analyzing "domestic servitude" and "domestic slavery," the Special Rapporteur details the connection

---

324 *See* Shahinian, *supra* note 322, at ¶ 8 (quoting Benjamin Whitaker (Special Rapporteur of the Sub-Commission of Discrimination and Prot. of Minorities), *Updating of the Rep. on Slavery Submitted to the Sub-Commission in 1966*, U.N. Doc. E/CN.4/Sub.2/1982/20/Add.1 (July 7, 1982).

325 Forced Labour Convention (No. 29) art. 2, June 28, 1930, C029 (defining forced or compulsory labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"). Under ICCPR article 8(3), forced labor is prohibited but not defined. *See* International Covenant on Civil and Political Rights art. 8(3), Dec. 16, 1966, 999 U.N.T.S. 171. The mandate also conflates slavery with forced labor, a problem that has been explored in some respects by other scholars. *See, e.g.*, Stoyanova, *supra* note 31, at 374.

326 *See* Shahinian, *supra* note 322, at ¶ 8 (citing Rome Statute of the International Criminal Court, *supra* note 28, at art. 7(2)(c)).

327 *Id.* at ¶ 9 (quoting Kevin Bales & Peter T. Robbins, *"No One Shall Be Held in Slavery or Servitude": A Critical Analysis of International Slavery Agreements and Concepts of Slavery*, 2(2) HUM. RTS. REV. 18, 32 (2001).

328 *Id.* at ¶ 10 (citing ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 38 (1982)).

329 *Id.* at ¶¶ 17–25.

between trafficking in persons and domestic servitude without mentioning the slave trade,[330] even though the report also describes slave trade as: "the [domestic slavery] victim and her children are considered to be their master's property and can be rented out, loaned or given as gifts to others."[331] When reporting on "servile marriages," the Special Rapporteur describes acts of the slave trade—selling wives, inheriting widows, and bride kidnapping—without characterizing them as such.[332] In her 2019 report, the UNSR outlines emerging slavery trends, including for-profit "orphanages" serving as "gateways into child slavery," recognizing that children may be trafficked into such situations,[333] but not slave traded.

In 2016, UNSR Urmila Bhoola demonstrated her astute understanding of the ways in which a single set of facts can give rise to various human rights violations and crimes under several international law frames. She writes:

> The same fact pattern that gives rise to slavery violating a state's human rights obligations can thus also give rise to domestic criminal liability, transnational criminal liability (for interstate trafficking in persons) or even, in some cases, international criminal liability of individuals (especially in the context of crimes against humanity). Slavery is not, *simply,* a human rights problem, or a problem of labour law or a problem for international law enforcement cooperation. It is all of these things, at once.[334]

Here, while there is a recognition that slavery and trafficking in persons are distinct violations and crimes,[335] the Special Rapporteur overlooks the slave trade as another distinct violation and crime often arising from the same set of facts.

iii. U.N. Special Rapporteur on the Sale and Sexual Exploitation of Children

The first U.N. Special Rapporteur on the sale and sexual exploitation of children defined the mandate to include the sale of children for several slavery-like practices—forced labor, debt bondage (cheap and bonded labor),

---

330 *Id.* at ¶ 28.

331 *Id.*

332 *Id.* at ¶¶ 66–71.

333 Urmila Bhoola (Special Rapporteur on Contemp. Forms of Slavery, including its Causes and Consequences), *Promotion and Prot. of all Hum. Rts., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev.: Current and Emerging Forms of Slavery*, ¶ 18, U.N. Doc. A/HRC/42/44 (July 25, 2019).

334 Urmila Bhoola & Kari Panaccione, *Slavery Crimes and the Mandate of the United Nations Special Rapporteur on Contemporary Forms of Slavery*, 14 J. INT'L CRIM. JUST. 363, 368 (2016).

335 *Id.* at 367.

serfdom, child marriage, and child trafficking[336]—but did not characterize such sale of children into slavery as the slave trade. This mandate seems most suited to address harms that can be characterized also as the slave trade under international human rights law, at least with regard to the sale of children into slavery.[337] Additionally, the Rapporteur broadened "sale" to include other forms of exchange in which there exists "exploitation of the child, which usually entails the action of another benefitting from the child in violation of his/her[/their] rights."[338] Although the "anti-slavery conventions" are mentioned as part of the international law framework, no explicit mention of slavery or the slave trade was reported to have guided the original mandate's scope.[339] Further, the Special Rapporteurs who have held this position have not focused on the "sale" or other form of exchange for purposes of ownership as the slave trade; instead, the focus is on the exploitation or abuse as forced labor, trafficking, or slavery.[340]

When the Special Rapporteur on the sale and exploitation of children mentions slavery or enslavement, here too the slave trade is overlooked, even when clear factual evidence exists to identify the harms as such.[341] For

---

336 Vitit Muntarbhorn (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to the Colonial and Other Dependent Countries and Territories: Sale of Children*, ¶ 11, U.N. Doc. E/CN.4/1991/51 (Jan. 28, 1991).

337 The sale of children into slavery is slave trading. The CRC Protocol, however, tends to take a human trafficking lens to the issue.

338 Muntarbhorn, *supra* note 336, at ¶ 10.

339 *Id.* at ¶ 39.

340 *Id.* at ¶¶ 10–11; Vitit Muntarbhorn (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child: Sale of Children*, ¶ 72, U.N. Doc. E/CN.4/1992/55 (Jan. 22, 1992); Vitit Muntarbhorn (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child: Sale of Children*, ¶ 6, U.N. Doc. E/CN.4/1993/67 ("[T]he web of transnational *trafficking in children* between developing countries and developed countries, between the developing countries themselves, and between the developed countries themselves is becoming more evident.").

341 *See, e.g.*, Vitit Muntarbhorn (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to the Colonial and Other Dependent Countries and Territories: Sale of Children*, U.N. Doc. E/CN.4/1991/51 (Jan. 28, 1991); Vitit Muntarbhorn (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child: Sale of Children*, ¶ 72, U.N. Doc. E/CN.4/1992/55 (Jan. 22, 1992) ("The truth is that in many parts of the world today, children are *literally sold into several types of employment*, either by their parents or other intermediaries. Some are *enslaved from generation to generation* due to the debts and other obligations which have impact on families almost in perpetuity."); Vitit Muntarbhorn (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child: Sale of Children*, ¶¶ 76, 79, 90, U.N. Doc. E/CN.4/1993/67 (Jan. 12, 1993) ("[T]he instrumental use of children in criminal activities, . . . their *forced recruitment into sexual slavery*. . . . There are . . . elderly men from various countries of the Middle East who travel to South Asia in search of young brides. The parents of the latter are *paid a sum to convey the girls to the customers*. . . ."); Vitit Muntarbhorn (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child: Sale of Children, Child Prostitution, and Child Pornography*, ¶¶ 118, 158, U.N. Doc. E/CN.4/1994/84 (Jan. 14, 1994) ("In China,

example, in a communication alleging slavery violations against Sri Lanka, an uncle *kidnapped* the girl-child, *took her* to his home, and then *handed her* to an army officer.[342] The army officer then *took her* to his mother's house where she was forced to work without pay and kept from attending school.[343] These facts—the precursory acts to slavery—suggest that the uncle, the army officer, and the army officer's mother slave traded the girl-child in addition to the officer's mother enslaving her.

In another case alleging violations in Benin, the Special Rapporteur reports that the *Etireno*, a Nigerian ship "carrying some 200 children . . . *trafficked to be sold as slaves* . . . raised awareness of an existing *trade in children which often uses ships to transport them*."[344] In addition to potential child trafficking crimes, the facts also suggest that the alleged perpetrators engaged in the slave trade. Finally, the Special Rapporteur reported on the ISIS slave markets and slave auctions in which fighters undoubtedly engaged in the trade in slaves, including boy and girl-children, but did not identify these crimes as acts of the slave trade.[345]

iv. U.N. Special Rapporteur on Trafficking in Persons, Especially Women and Children

The U.N. Special Rapporteur on Trafficking in Persons generally has engaged polemically with slavery and the slave trade to conflate it with human trafficking. For instance, the mandate's 2009 report conflates trafficking and the slave trade by calling human trafficking the "modern day

---

a boy was *kidnapped and sold into slavery* in a distant province . . . [T]housands of women and children are *sold clandestinely as slaves*."); Ofelia Calcetas-Santos (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child*, ¶ 34, U.N. Doc. E/CN.4/1996/100 (Jan. 17, 1996) ("In Asia, it is estimated that 1 million children are involved in the sex trade under conditions that are indistinguishable from slavery. Many of these children are *sold by their parents into sex rings* that often involve corrupt policemen and politicians."); Ofelia Calcetas-Santos (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child*, ¶¶ 42, 66 U.N. Doc. E/CN.4/1997/95 (Feb. 7, 1997) (speaking about the practice of trokosi, a manifestation of slavery in which parents "gift" their daughters as slaves to priests to appease the gods and atone for crimes.) ("In Brazil, young girls from outback mining communities, around 15 or 16 years old, are *imported like chattel* after being *lured from isolated areas by traffickers* promising them employment."); Ofelia Calcetas-Santos (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child*, ¶ 77, U.N. Doc. E/CN.4/1999/71 (Jan. 29, 1999) ("Sudanese children are . . . suffering through abduction and forced slavery. . . . The *raiders* come from the north.").

342 Juan Miguel Petit (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Rights of the Child*, ¶ 29, U.N. Doc. E/CN.4/2002/88 (Feb. 4, 2002).

343 *Id.*

344 *Id.* at ¶ 28.

345 Maud de Boer-Buquicchio (Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography), *Sale of Children, Child Prostitution and Child Pornography*, ¶ 49, U.N. Doc. A/71/261 (Aug. 1, 2016).

slave trade."[346] When describing the legal and policy framework of trafficking, the UNSR incorrectly indicates that human trafficking was addressed in the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention.[347]

In addition, when describing ISIS crimes—including "sexual slavery"—against Yazidi women and girls, the abductions are characterized as trafficking, but not as slave trading:

Although some form of *abduction* has been a feature of armed conflicts in the past, recently there has been an egregious pattern of *abducting* women and girls from their homes or schools in conflict-affected settings. These women and girls may subsequently be *forced to marry* and/or serve as *sex slaves*. Such exploitation, which in some cases also involves *trafficking for forced marriage and sexual enslavement* by extremist groups, such as ISIS, Boko Haram and their affiliates, is believed to be a strategy to generate revenue as well as to recruit, reward and retain fighters. For instance, it is reported that Yazidi women and girls are being *trafficked for sexual enslavement* by ISIS between Iraq and the Syrian Arab Republic.[348]

Moreover, the UNSR conflates trafficking with slavery, finding that "[t]rafficking is a grave violation of human rights, especially the . . . right not to be held in slavery or involuntary servitude."[349] Human trafficking is not found to violate the right to be free from the slave trade, however, indicating that either trafficking, slavery, or both prohibitions are subsuming or obscuring the prohibition of the slave trade. Further obfuscation is illustrated when the UNSR examines the treatment of trafficking victims deported to countries of origin. The 2018 Report states:

---

346 Joy Ngozi Ezeilo (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Promotion and Prot. of all Hum. Rts., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev.*, ¶ 6, U.N. Doc. A/HRC/10/16 (Feb. 20, 2009).

347 Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Promotion and Protection of all Human Rights., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev.*, ¶ 30, U.N. Doc. A/HRC/29/38 (Mar. 31, 2015). The only mention of the word "traffic"—used at that time almost interchangeably with the term "trade"—is in the preamble of the 1926 Slavery Convention when it finds that signatories at the "Brussels Conference of 1889-90 declared that they were equally animated by the firm intention of putting an end to the traffic in African slaves . . . ." 1926 Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 254.

348 Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Trafficking in Persons, Especially Women and Children*, ¶ 33, U.N. Doc. A/71/303 (Aug. 5, 2016). U.N. Human Rights Council, *They Came to Destroy": ISIS Crimes Against the Yazidis*, ¶¶ 127, 174, U.N. Doc A/HRC/32/CRP.2 (Jun. 15, 2016).

349 Joy Ngozi Ezeilo (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Promotion and Prot. of all Hum. Rts., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev.*, ¶¶ 19, 44 U.N. Doc. A/HRC/10/16 (Feb. 20, 2009); *see also* Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Promotion and Prot. of all Hum. Rts., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev.*, ¶ 29, U.N. Doc. A/HRC/29/38 (Mar. 31, 2015).

> The human rights impact of returns, especially mass returns, cannot be underestimated. For instance, the deportation from Libya of 3,480 young Nigerians, mostly girls and women, following the shocking video on *slavery-trade markets*, reveals that some *victims of human trafficking* encounter considerable obstacles when they return home . . . .[350]

Even when the markets where trafficking victims are traded are called "slave trade markets," the Special Rapporteur does not mention the prohibition of the slave trade in addition to human trafficking harms.

V. CONCLUSION

From their historical roots to their contemporary legal definitions, slavery, the slave trade, and human trafficking are related, overlapping, yet distinct prohibitions in international law. Calling human trafficking and other related forms of exploitation "modern day slavery" muddles and distorts these legal frameworks, making accurate and full expressive human rights legal redress for victims elusive. At the same time, the slave trade—one of, if not *the* first and most universally accepted and condemned prohibitions in international law—has been overlooked or dismissed as a separate international law prohibition in human rights law.

The slave trade and slavery still occur today despite clear prohibitions under international law and should be pursued as such in addition to human trafficking. Slavery and the slave trade, almost always occurring in tandem, persist as a much more widespread problem than human trafficking. The elevated status of prohibitions of slavery and the slave trade as non-derogable rights, *erga omnes* obligations, and *jus cogens* norms under customary and treaty law ensures broad legal protections for victims-survivors. Erasing or disabling the peremptory status of the slave trade and, to a lesser extent, slavery is to renounce binding obligations and possibly alter customary international law through either or both state practice and *opinio juris*. This analysis has attempted to make visible these harms, while teasing out the distinctions, in order to revitalize the human rights law framework on slavery and the slave trade to ensure full protection of victims-survivors enslaved, slave traded, and trafficked across the globe.

Given that international human rights law applies in times of peace and conflict, the framework offers additional, complementary state responsibility accountability mechanisms to individual criminal liability for more

---

350 Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Promotion and Prot. of all Hum. Rts., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev.*, ¶ 53, U.N. Doc. A/HRC/38/45 (May 14, 2018).

comprehensive redress for slavery and the slave trade as well as human trafficking harms. Characterizing and pursuing accountability for the precursory acts to slavery not as human trafficking but as the slave trade—or, if the factual circumstances and jurisdiction permit, as both the slave trade and human trafficking—allows for a visibilization of these harms and additional perpetrators for judicial redress at the domestic and international levels. Correct delineation of these prohibitions untangles the conflations and confusions of their juridical safeguards to ensure full judicial redress to victims and survivors of human trafficking, slavery, and the slave trade. Finally, normative clarity generally is important to ensure effective state implementation and enforcement in international and domestic law.

From the kafala system abuses in Lebanon, to the slave trades and auctions in Libya, to the slave-traded and enslaved Yazidi women, girls, and boys at the hands of ISIS in Iraq and Syria, the slave trade and slavery persist as international crimes and human rights violations today. Thus, the slave trade and slavery prohibitions should be revitalized and redressed—in addition to redressing human trafficking where appropriate—to adequately protect victims and hold states accountable for these harms. Specifically, in addition to the CEDAW Committee's General Recommendation on Trafficking in Women and Girls in the Context of Global Migration, the HRC should consider drafting a General Comment on Article 8 of the ICCPR to define clearly these prohibitions and to distinguish human trafficking as a separate prohibition under international law.

Understanding the parallel historical legal origins, legal definitions, and legal distinctions between and among these human rights prohibitions, while recognizing that the misapplication and misunderstandings abound in international law, assists in accurately recognizing and characterizing each of these human rights violations for better state accountability and victim redress for these harms. When international law application correctly aligns human trafficking with the Palermo Protocol, the CEDAW and the CRC, and slavery and the slave trade with the 1926 Slavery Convention, the 1956 Supplementary Slavery Convention, the UDHR, and the ICCPR, enslaved, slave traded, and trafficked victims-survivors will receive redress for the full and accurate characterization of the harms perpetrated against them in international law.