

**NO EFFECTIVE TRAFFICKING DEFINITION  
EXISTS: DOMESTIC IMPLEMENTATION OF  
THE PALERMO PROTOCOL**

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## INTRODUCTION

When we speak across international borders we speak different languages. So is the lesson to be learned from considering the definition of trafficking in persons as it has been incorporated in the domestic legal order of the vast majority of countries of the world. While the United Nations established a definition of trafficking in persons in 2000,<sup>1</sup> the mechanism meant to give voice to the suppression of such traffic is transnational rather than international in nature. As a result, it is for each State to decide, once they have consented to be bound by the 2000 UN Palermo Protocol,<sup>2</sup> not only the extent to which they will adopt provisions meant to prevent, suppress, and punish trafficking in persons, but more fundamentally, how each State will decide what constitutes ‘trafficking in persons’ within their own national jurisdiction. What emerges from examining the manner in which the Palermo Protocol has been incorporated into the legal order of various countries is that the very regime of trafficking in persons is fundamentally flawed. This is so, as the Palermo Protocol is first and foremost an instrument related to cooperation amongst national law enforcement agencies seeking to suppress the trafficking in persons by organized crime groups across international borders.<sup>3</sup> Yet, in their attempt to end this transnational crime, States speak to each other in different languages: both literally and figuratively. Figuratively, as their jurisdictions are not truly compatible with each other; when they speak of ‘trafficking,’ they are mainly speaking about different things.

This Article considers the overall regime established by the 2000 Palermo Protocol to demonstrate the manner in which the

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<sup>1</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3, 344, Nov. 15, 2000, 2237 U.N.T.S. 319, <http://treaties.un.org/doc/publication/UNTS/Volume%202237/v2237.pdf> [hereinafter Protocol for Trafficking in Persons].

<sup>2</sup> *Id.* at 343. See *The Palermo Protocol*, PALERMO PROTOCOL, <http://www.palermoprotocol.com/general/the-palermo-protocol> (last visited Sept. 25, 2013) (explaining that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children is usually referred to as the Palermo Protocol).

<sup>3</sup> See *generally id.* (explaining that “despite the existence of a variety of international instruments . . . there is no universal instrument that addresses all aspects of trafficking in persons,” alluding to the responsibility of each State to define the term as they see fit).

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law of trafficking has come to be incorporated into the domestic legal order of States. In so doing, and with special reference to the definition of trafficking, it shows the limited ability of States to actually carry out their avowed wish to suppress the trafficking in persons. Because their jurisdiction over what is termed ‘trafficking’ is different, the ability for the origin, transit, and/or destination countries to ‘join-up’ is rendered unworkable by, for instance, extradition treaties that require crimes to be common to both jurisdictions, or the application of extraterritorial jurisdiction when what is deemed a crime in one jurisdiction is not so in another. Thus, in a very short period of time, legislators around the world have created, under the banner of ‘trafficking,’ an international regime which, through its implementation in the domestic sphere, has fractured its potential effectiveness.<sup>4</sup>

## I. THE TRANSNATIONAL LAW OF TRAFFICKING

On the fifteenth of November, 2000, the United Nations General Assembly adopted the United Nations Convention against Transnational Organized Crime, which was meant “[t]o promote cooperation among States Parties” in order to “to prevent and combat trafficking in persons” more effectively.<sup>5</sup> Along with that Convention are three protocols—additional instruments meant to supplement the original—that cover trafficking in persons, smuggling, and illicit firearms, which were also opened for signature.<sup>6</sup> The trafficking in persons protocol is entitled the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.”<sup>7</sup> So as to emphasize the quest to challenge organized crime, the

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<sup>4</sup> See ANTHONY M. DESTEFANO, *THE WAR ON HUMAN TRAFFICKING: U. S. POLICY ASSESSED 26–27* (2007) (discussing the conflict between States who desired to abolish prostitution as a part of this Protocol and the States that would not sign if such language was added, leading to a compromise that excluded defining “*exploitation of prostitution of others and other forms of sexual exploitation*”).

<sup>5</sup> Protocol for Trafficking in Persons, *supra* note 1, at 343–44.

<sup>6</sup> See *id.*; Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 450, 507–08, <http://treaties.un.org/doc/publication/UNTS/Volume%202241/v2241.pdf>. See also Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, May 31, 2001, 2326 U.N.T.S. 208.

<sup>7</sup> Protocol for Trafficking in Persons, *supra* note 1.

UN originally opened the Conventions and its Protocols for signature in Palermo, Italy, the heartland of the Sicilian mafia.<sup>8</sup> Since then, the anti-trafficking protocol has come to be known as the Palermo Protocol.<sup>9</sup>

The starting point for understanding the obligations which flow from the Palermo Protocol is its relationship to the UN Convention against Transnational Organized Crime, as both of these instruments are to be “interpreted together.”<sup>10</sup> States consenting to the Convention have an obligation to criminalize the involvement in an organized criminal group, laundering the proceeds of crime, corruption, and the obstruction of justice, where the offense is transnational in nature.<sup>11</sup> By an “offence [that] is transnational in nature,” what is meant is that either “[i]t is committed in more than one State,” or when committed in one State, it “has substantial effects in another,” or “substantial part of its preparation, planning, direction or control takes place in another State,” or again, it “involves an organized criminal group that engages in criminal activities in more than one State.”<sup>12</sup> By reading the Convention in conjunction with the Palermo Protocol, it becomes clear that this Protocol is not exclusively applicable to situations where a person is trafficked across an international border, but in fact can be trafficked internally—that is to say: the victim may be moved solely within one State, while the crime by contrast would be “transnational in nature” if, for instance, it “involves an organized criminal group that engages in criminal activities in more than one State.”<sup>13</sup>

While laundering, corruption, and obstruction of justice are tangential to an understanding of ‘trafficking in persons,’ the concept of an ‘organized criminal group’ as set out in the Convention is fundamental. An “[o]rganized criminal group” has

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<sup>8</sup> DESTEFANO, *supra* note 4, at 27–28.

<sup>9</sup> See *The Palermo Protocol*, *supra* note 2.

<sup>10</sup> United Nations Convention against Transnational Organized Crime, art. 37, Nov. 15, 2000, 2225 U.N.T.S. 209, <http://treaties.un.org/doc/publication/UNTS/Volume%202225/v2225.pdf> [hereinafter United Nations Convention]. See also Protocol for Trafficking in Persons, *supra* note 1, at 343.

<sup>11</sup> United Nations Convention, *supra* note 10, at 275 (“organized criminal group” is defined by the Convention in the following terms: “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”).

<sup>12</sup> *Id.* at 276.

<sup>13</sup> *Id.*

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a specific definition applicable both to the Convention and to the Protocols:

‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.<sup>14</sup>

As this is often overlooked by commentators considering instances of trafficking in persons, it should be understood that such an “organized criminal group” is not merely the sum of those who came into contact with a person who is being trafficked. Instead, it must be a “[s]tructured group,” defined in the Convention as a “group that is not randomly formed for the immediate commission of an offence.”<sup>15</sup> In other words, an organized criminal group is more than simply those that conspire or commit a crime. Rather, such a group needs to have cohesion, acting over time, and with the aim of committing a serious crime, though it “does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”<sup>16</sup> In criminalizing the involvement in an organized criminal group, the Convention requires States to adopt legislation which ensures that there is a juridical space in which activities in and around such a group are made illegal.<sup>17</sup> That space includes activities touching on those who agree to commit, as well as those that take active part in the committing of a serious crime. An active part in the committing of a serious crime, for the purposes of the Convention, includes the following activities: “[o]rganizing, directing, aiding, abetting, facilitating or counselling . . . ,” as well as other activities which knowingly contribute to the aim of the crime.<sup>18</sup>

The Palermo Protocol supplements the UN Convention against Transnational Organized Crime. Beyond criminalizing involvement in organized criminal groups, money laundering, corruption, and obstruction of justice, a State may criminalize

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<sup>14</sup> *Id.* at 275.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.* (“Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”).

<sup>17</sup> *Id.* at 276–77.

<sup>18</sup> United Nations Convention, *supra* note 10, at 276–77.

trafficking in persons within their own domestic legal systems.<sup>19</sup> Trafficking in persons is defined, for the purposes of the Protocol, as follows:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>20</sup>

When interpreting the Protocol together with the UN Convention, the crime meant to be prescribed at the domestic level is one in which—in essence—a number of people are working together to move an individual against his or her will or knowledge so as to exploit that person.<sup>21</sup>

While the definition of ‘trafficking in persons’ has been considered in depth,<sup>22</sup> that definition is somewhat moot, as despite being established at the international level, its true application takes place at the domestic level, where oftentimes unique readings of trafficking have been promulgated by various States that are a party to the Palermo Protocol.

At the international level, I have just noted that the definition is ‘somewhat moot’ as there is, in fact, limited scope to give voice to its criminalization internationally. That scope is to be found in the Rome Statute of the International Criminal Court, which establishes the crime against humanity of enslavement.<sup>23</sup> This crime is defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the *course of trafficking in persons, in*

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<sup>19</sup> *Id.* at 276–79. See also Protocol for Trafficking in Persons, *supra* note 1, at 344 (stating “The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention” and criminalising “[t]rafficking in persons” as defined in Article 3(a)).

<sup>20</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344.

<sup>21</sup> *Id.* at 344.

<sup>22</sup> See, e.g., ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 24 (2010).

<sup>23</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, at art. 7(1)(c) (July 17, 1998) [hereinafter Rome Statute].

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*particular women and children.*<sup>24</sup> While the jurisdiction of the Court does not criminalize trafficking in persons per se, it does, by reference to the phrase just highlighted, utilize the language of what would come to be the official title of the Palermo Protocol, bringing the possible application of this instrument into the orbit of international judicial consideration.

The Palermo Protocol, like the UN Convention against Transnational Organized Crime, is transnational in nature. While the Convention provides its own reading of what constitutes a transnational crime, it might be helpful to think of the notion of transnational more generally. Transnational denotes the involvement of a number of nations; however, this understanding could also be applied to the concept of international. The distinction is to be found in the fact that the *international* concept is applicable to systems where international institutions are a central pillar, whereas in the *transnational* concept, the systems function in a purely anarchical fashion, devoid of a central authority.<sup>25</sup> Thus, a transnational instrument is one which sets out a framework for acting that is meant to create half-bridges, which will then connect when other States follow suit. Think of transnational instruments as those red connectors for *Hot Wheels* sets which link up States on specific issues.

Within the context where the crime of trafficking in persons is transnational in nature, issues with regard to which State has the power to act is fundamental. In law, determining the power to act is known as jurisdiction. While the Convention pays perfunctory acknowledgment to the need for State Parties to carry out their obligations “in a manner consistent with the principles of sovereign equality and territorial integrity . . . ,”<sup>26</sup>

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<sup>24</sup> Rome Statute, *supra* note 23, at art. 7(2)(c) (emphasis added). Note the same phrase is also mentioned in footnote 11 to Article 7(1)(c) of the Elements of Crimes, Crime against Humanity of Enslavement. Assembly of States Parties to the Rome Statute of the International Criminal Court, Sept. 3–10, 2002, U.N. Doc. ICC-ASP/1/3.

<sup>25</sup> See generally Stephen J. Kobrin, *Globalization, Transnational Corporations and the Future of Global Governance*, in HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP 249–50, 252 (Andreas Georg Scherer & Guido Palazzo eds., 2008).

<sup>26</sup> U.N. Office on Drugs & Crime, *Mechanism for the Review of Implementation of the United Nations Convention against Corruption—Basic Documents* 15 (March 2011), [http://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism\\_for\\_the\\_Review\\_of\\_Implementation\\_-\\_Basic\\_Documents\\_-\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf).

negotiators needed to devote some energy to developing the other provision of Article 4 which, on its face, simply affirms the application of sovereignty, stating “[n]othing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”<sup>27</sup> Yet, States felt compelled to add this provision, and, with regard to transnational criminal law, the issue of jurisdiction is fundamental while sovereignty is primal. In setting out its jurisdiction provisions, the UN Convention is quite clear in establishing that only States have the power to assert jurisdiction over offenses committed on their territory or on vessels flying that State’s flag.<sup>28</sup> Beyond that, any jurisdictional basis for acting would require assistance of other States. So, while the “Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law,” it requires that such jurisdiction be established “[w]ithout prejudice to norms of general international law,” foremost amongst these being respect for the sovereignty of States.<sup>29</sup>

Elsewhere, the Convention provides the possibility for establishing greater jurisdiction with the proviso that such extensions of power to act are subject to Article 4, as the provisions mention a paragraph earlier related to sovereignty and the exercise of jurisdiction being the purview of a State and its domestic law.<sup>30</sup> With this as a preamble requirement, States *may* establish jurisdiction over offenses committed by nationals or stateless persons who are habitual residents of that State.<sup>31</sup> Further, States may establish jurisdiction touching on certain elements of money laundering, as well as, with regard to issues involving organized criminal groups, where a certain activity is “committed outside its territory with a view to the commission of [a serious crime] . . . within its territory.”<sup>32</sup>

This then is the context in which one should understand the parameters of trafficking in persons, as established by the Palermo Protocol, when read in tandem with the United Nations

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<sup>27</sup> United Nations Convention, *supra* note 10, at 276.

<sup>28</sup> *Id.* at 283.

<sup>29</sup> *Id.* at 284.

<sup>30</sup> *Id.* at 283.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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Convention against Transnational Organized Crime. Had the regime established to govern trafficking in persons been a truly international one, an oversight body would have been established—say, a treaty monitoring body, or an international court. Yet, much more would have been required, as the very essence of the agreements which set the foundation for suppressing the crime of trafficking in persons is one which is focused on the domestic, rather than the international legal order. All things being equal, this should not have caused issues, as the vast majority of multilateral treaties in force today are transnational rather than international in nature.<sup>33</sup> Yet, what has led to the fragmentation of our understanding of trafficking is specific to its definition.

## II. DOMESTIC IMPLEMENTATION OF ‘TRAFFICKING IN PERSONS’

The definition of trafficking in persons, as set out in the Palermo Protocol, was an unstated invitation to legislators around the world to modify its provisions.<sup>34</sup> This is so as the definition is a flawed piece of drafting. The provisions of the Palermo Protocol were always destined to be incorporated into domestic legislation; this is the essence of both it and the Convention—that the State parties adopt legislation, which establishes trafficking as a criminal offense. Yet the definition, as set out in the Palermo Protocol is, in the main, three sets of categories: “recruitment, transportation, transfer, harbouring”; “of coercion, of abduction, of fraud, of deception”; and forced labour, slavery, servitude, removal of organs.<sup>35</sup> For the members of legislatures around the world, this raised more questions than it answered as the Protocol off-loaded the need to define these

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<sup>33</sup> See UNITED NATIONS, TREATY HANDBOOK 33 (2012), <http://treaties.un.org/doc/source/publications/THB/English.pdf>.

<sup>34</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344 (It will be recalled that the definition speaks in essence of: *the movement of a person*—“the recruitment, transportation, transfer, harbouring or receipt of persons . . .”; *against their will*—“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 . . .”; *so as to exploit that 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”).

<sup>35</sup> *Id.* at 344.

various terms to domestic legislators.<sup>36</sup> The invitation was further extended by the fact that the category of types of exploitation was left open-ended by the phrase “[e]xploitation shall include, . . . .”<sup>37</sup> As a result, it was left to each country to determine what type of exploitation it would seek to suppress in the context where the very term “exploitation” was ill-understood and nowhere defined in law.

How, then, did legislators around the world incorporate the definition of trafficking in persons into their domestic legal orders? As a backdrop, it might be emphasized that we have entered a “neo-abolitionist” era as a result of the Palermo Protocol, which has led, in a very short period of time, to many States incorporating anti-trafficking provisions into their domestic legal order.<sup>38</sup> This, in the main, is the result of the emphasis, which the United States of America has placed on the issue of trafficking as part of its foreign policy. The United States has taken on the primary role as anti-trafficking advocate internationally through its development of an annual Trafficking in Persons Report, which is backed by coercive legislation developed by the U.S. Congress and has precipitated a proliferation of domestic anti-trafficking laws.<sup>39</sup> As the International Organization of Migration notes, combating “human trafficking has become an increasingly important political priority for many governments around the world.”<sup>40</sup> This is so, in large part, because, by virtue of the William Wilberforce Trafficking Victims Protection Re-authorization Act of 2008, the U.S. Congress makes it “the policy of the United States not to

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<sup>36</sup> See generally U.N. Office 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*, Notes by the Secretariat (October 4–15, 2006), 339–40, [www.unodc.org/pdf/ctocccop\\_2006/04-60074\\_ebook-e.pdf](http://www.unodc.org/pdf/ctocccop_2006/04-60074_ebook-e.pdf) (providing no guidance as to what the various terms in the definition mean).

<sup>37</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344.

<sup>38</sup> Jean Allain & Kevin Bales, *Slavery and its Definition*, GLOBAL DIALOGUE, Vol. 14, No. 2, (2012), available at <http://www.worlddialogue.org/content.php?id=529>. See also, LIANA SUN WYLER, CONG. RESEARCH SERV., R42497, TRAFFICKING IN PERSONS: INTERNATIONAL DIMENSIONS AND FOREIGN POLICY ISSUES FOR CONGRESS 2 (2013), <http://www.fas.org/sgp/crs/row/R42497.pdf>.

<sup>39</sup> Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?* 2 LOY. U. CHI. INT'L L. REV. 193, 199–200, 204, 207 (2004–2005).

<sup>40</sup> *Data and Research on Human Trafficking: A Global Survey*, INTERNATIONAL ORGANIZATION FOR MIGRATION, Vol. 43 (1/2), at 6 (2005), [www.iom.int/jahia/webdav/site/myjahiasite/.../data\\_res\\_human.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/.../data_res_human.pdf).

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provide non-humanitarian, nontrade-related foreign assistance to any government that . . . does not comply with minimum standards for the elimination of trafficking . . .”<sup>41</sup> Thus, by threatening to withdraw financial support (both American and its support before the IMF and World Bank), measuring States against its own minimum standards, and placing States that fail to meet these standards on ‘watch-lists,’ the United States has forced countries to take trafficking seriously.

Giving voice to issues of trafficking has meant that States incorporated various elements of the Palermo Protocol into their domestic legal order. That instrument, it should be acknowledged, is not an international human rights law treaty, but a transnational criminal law convention, as it supplements the 2000 U.N. Convention against Transnational Organized Crime.<sup>42</sup> While this is formally so, the Palermo Protocol is also in substance very much an instrument of criminal law as opposed to human rights law. In other words, the emphasis of the Protocol is with regards to perpetrators of the crime rather than the victim. While the Protocol mandates the criminalization of trafficking in persons: “[States] shall adopt such legislative and other measures . . .”; it leaves it to States “[i]n appropriate cases and to the extent possible,” to protect, not the victims, but their “privacy and identity.”<sup>43</sup> It is left to each State then to “consider

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<sup>41</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1480, at § 110 (2006), codified at 22 U.S.C. § 7107(a) (2006). See also Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1480, at § 108(a) (2006); 22 U.S.C. § 7106(a) (2006), which spells out those minimum standards for the elimination of trafficking as follows:

- (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.
- (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.
- (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.
- (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

<sup>42</sup> *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/treaties/CTOC/> (last visited Sept. 10, 2013).

<sup>43</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344–45.

implementing measures to provide for the physical, psychological, and social recovery of victims of trafficking in persons,” rather than actually providing for such recovery.<sup>44</sup>

Perhaps the best indication that the Palermo Protocol is not a human rights instrument is the fact that in 2005, the Council of Europe felt compelled to adopt its own Convention on Action against Trafficking in Human Beings, so as to include binding human rights obligations.<sup>45</sup> Much as the failure in the infancy of the United Nations to provide for a legal instrument dealing with human rights led to the non-binding 1948 Universal Declaration of Human Rights being adopted by the General Assembly, prompting European States in 1950 to create the binding human rights obligation manifest in the European Convention of Human Rights,<sup>46</sup> so too has the failure to provide adequate human rights protection in the 2000 Palermo Protocol led to the 2005 Council of Europe Convention.

When moving to incorporate “trafficking” into the domestic legal order, State legislators have not sought to simply transpose the Palermo definition verbatim into their legislation. Instead, in many instances, they have opened the definition to the domestic process in which the legislators crafted their own understanding of what constitutes “trafficking.”<sup>47</sup> This was well within their right, as a 2009 Model Law against Trafficking in Persons prepared by the United Nations makes plain that “the general provisions and the definitions . . . are not mandated by the Protocol per se.”<sup>48</sup> As we shall now see, very few States have incorporated the actual definition of trafficking in persons found in the Palermo Protocol, often they have set out what is, in essence, a variation on the theme, but in other instances they have provided a unique reading of what constitutes the criminal offense of trafficking in persons.

The case of Moldova is indicative of States with unique

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<sup>44</sup> *Id.* at 345.

<sup>45</sup> *Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report*, C.E.T.S. No. 197, at 27, 31 (2005), [www.conventions.coe.int/Treaty/EN/Treaties/Word/197.doc](http://www.conventions.coe.int/Treaty/EN/Treaties/Word/197.doc).

<sup>46</sup> Jonathan L. Black-Branch, *Observing And Enforcing Human Rights Under The Council Of Europe: The Creation of a Permanent European Court of Human Rights*, 3 *BUFF. JOUR. INT'L L.* 1, 3–8 (1996).

<sup>47</sup> MAGGY LEE, *TRAFFICKING AND GLOBAL CRIME CONTROL* 16, 19, 28 (2011).

<sup>48</sup> *Model Law against Trafficking in Persons*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (2009), [http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf).

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readings of trafficking, wherein the Palermo Protocol definition is used as a benchmark from which to build in new understandings of what constitutes trafficking.<sup>49</sup> In the main, States have left the means and methods elements of the definition in place and focused on expanding the purpose element of the definition—that is to say, expanding the types of exploitation to be covered under the heading of trafficking. Moldova has taken on board the widest understanding of exploitation amongst States with anti-trafficking legislation in place. Its provision establishes that exploitation includes:

- a) compelling to perform work or services, by use of force, threats or other forms of coercion, in violation of the legal provisions connected to labour conditions, remuneration, health and security;
- b) slavery, use of certain practices similar to slavery, or resorting to other ways of deprivation of liberty;
- c) compelling to engage in prostitution, to participate in pornographic performances, with a view to the production, distribution and any introduction into circulation of such performances, the acquisition, sale or possession of pornographic material, or practicing other forms of sexual exploitation;
- d) compelling harvesting of organs or tissues for transplantation or collection of other component parts of the human body;
- e) using a woman as a surrogate mother or for reproductive purposes;
- f) abuse of child's rights with a view to illegal adoption;
- g) use in armed conflicts or in illegal military formations;
- h) use in criminal activities;
- i) compelling to engage in begging;
- j) sale to another person;
- k) compelling to engage in other activities that violate fundamental human rights and freedoms.<sup>50</sup>

Having provided the Moldovan examples of a very far reaching provision, which establishes a number of other instances which constitute exploitation and thus modifies the Palermo Protocol understanding of trafficking, consideration now turns to various other readings, which States have given in their domestic legislation to the notion of trafficking in persons. It might be

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<sup>49</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344. *See also* Privind Prevenirea și Combaterea Traficului de Ființe Umane [hereinafter Laws on Preventing and Combating Trafficking in Human Beings], No. 241-XVI of 20 Oct. 2005, art. 2(1) (Rep. of Mold.), <http://www.hsph.harvard.edu/population/trafficking/moldova.traf.05.pdf>.

<sup>50</sup> Laws on Preventing and Combating Trafficking in Human Beings, *supra* note 49, at art. 2(3).

emphasized at this point, that legislation is drafted in the official language of States in question. Thus, the vast majority of the following definitions has been translated into English and thus should be treated with caution.

In the first instance, it might be emphasized that a small number of States such as the Bahamas,<sup>51</sup> Liberia,<sup>52</sup> and the Philippines<sup>53</sup> have legislation which mirrors the definition as established in the Palermo Protocol. And yet, even in this case, what constitutes trafficking is not guaranteed to be the same. The legislation of the Bahamas is instructive. If one mines deeper than the actual definition of trafficking in persons which is promulgated in the Bahamas'—The Trafficking in Persons (Prevention and Suppression) Act<sup>54</sup>—and consider the various provisions that make up that definition which are in turn defined (abuse of a position of vulnerability, coercion, exploitation, forced labor, illicit removal of organs, practices similar to slavery, servitude, and sexual exploitation),<sup>55</sup> it becomes clear that even in situations where the Palermo Protocol definition of trafficking in persons is reproduced, it does not necessarily mean the same thing or constitute the same crime. In the case of the Bahamas, this is most evident with regard to its definition of sexual exploitation. While the 2009 UN Model Law provides a definition which reads:

'Sexual exploitation' shall mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials.<sup>56</sup>

The 2008 Act of the Bahamas goes beyond prostitution and pornography by setting out a unique provision dealing with "any other sexual activity."<sup>57</sup> It criminalizes, in the context of

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<sup>51</sup> Trafficking in Persons (Prevention and Suppression), ch. 106, pt. 1(2) (2007) (Bah.), [http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2007/2007-0027/TraffickinginPersonsPreventionandSuppressionAct\\_1.pdf](http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2007/2007-0027/TraffickinginPersonsPreventionandSuppressionAct_1.pdf).

<sup>52</sup> An Act to Ban Trafficking in Persons within the Republic of Liberia, art. 1 §§ 100, 102 (2005) (Liberia), <https://www.unodc.org/tldb/showDocument.do?documentUid=7975&country=LIR&language=ENG>.

<sup>53</sup> Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 3(a) (2003)(Phil.), <http://www1.umn.edu/humanrts/research/Philippines/RA%209208%20-%20Anti-Trafficking%20Law.pdf>.

<sup>54</sup> The Trafficking in Persons (Prevention and Suppression) Act, (Bah.).

<sup>55</sup> *Id.* at § 2.

<sup>56</sup> Model Law against Trafficking in Persons, *supra* note 48.

<sup>57</sup> The Trafficking in Persons (Prevention and Suppression) Act, § 2 (Bah).

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trafficking for sexual exploitation, “any other sexual activity” which results from “being subjected to threat, coercion, abduction, . . . force, abuse of authority, or fraud.”<sup>58</sup>

However, it goes further. The 2008 Act criminalizes, as does Jamaican legislation,<sup>59</sup> the trafficking in persons for sexual exploitation where a person is recruited, transported, etc., but then compelled to participate in any other sexual activity—beyond prostitution or pornography—“as a result of being subjected to . . . the effects of narcotic drugs.”<sup>60</sup> While it might be recognized that such a provision is aimed at the use of narcotic drugs as a means of establishing control over a person with the aim of sexual exploitation, the provision could be interpreted in a manner which expands the reach of its application much further. As the 2008 Act deems that trafficking may transpire where a person assists another person engaged in transporting any person in the Bahamas,<sup>61</sup> the marginal case of two people meeting at a bar, sharing a tablet of Ecstasy, and leaving to the privacy of a house to engage in “any other sexual activity,” would meet the threshold of trafficking. Such activity might include consensual sexual intercourse, but an activity as innocuous as kissing in this context would also constitute a form of sexual activity. In such a scenario, not only would the person who drove the vehicle be committing the crime of trafficking in persons, but if the couple had decided to hale a taxi, the legislation would deem the taxi driver a trafficker. While the *mens rea* would be absent for the taxi driver, for either party to this new romance, the threshold of trafficking in persons, as established in the Bahamas, would be met.

Beyond exploitation resulting from being subject to the effects of narcotic drugs, there are a great number of varied acts which have been deemed as exploitation by State parties to the Palermo Protocol. Such legislation has established that the following are forms of exploitation and thus fall under the more general heading of trafficking in persons: begging;<sup>62</sup> illegal

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<sup>58</sup> *Id.*

<sup>59</sup> The Trafficking in Persons (Prevention, Suppression and Punishment) Act, § 2.1 (2007) (Jam.).

<sup>60</sup> The Trafficking in Persons (Prevention and Suppression) Act, § 2 (Bah.).

<sup>61</sup> *Id.*

<sup>62</sup> States which have begging as part of their definition of exploitation include: (1) Columbia, Act 985 of 2005-Human Trafficking 1/16, art. 3 § 188A (Colom.), available at <http://qub.ac.uk/slavery/?page=countries&category=6&country=37>; (2) Costa Rica, Penal Code Law No. 4573, art. 172 (1970) (Costa

adoption;<sup>63</sup> servile or forced marriage;<sup>64</sup> pornography;<sup>65</sup> sex

Rica), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=40&category=6>; (3) Egypt, The People's Assembly Law No. 64 of 2010 (Combating Human Trafficking), art. 2 (Egypt), *available at* <http://qub.ac.uk/slavery/?page=countries&country=53&category=2>; (4) Haiti, Bill to Combat against Trafficking in Persons, art. 11 § 1.3.1 (Haiti), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=73&category=1>; (5) Italy, Act Aug. 11, 2003, n. 228, in G.U. Aug. 23, 2003, n. 195 (It.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=83&category=4>; (6) Moldova, Law on Preventing and Combating Trafficking in Human Beings No. 241-XVI of 20 Oct. 2005, art. 2 (Rep. of Mold.); (7) Poland, The Police Act, art. 115 § 22 (2010) (Pol.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=8&country=135>; (8) Saudi Arabia, Anti-Human Trafficking Law Issued by the Council of Ministers' Resolution No. 244 dated 20.7.1430 AH and Royal Approval No. M/40 dated 21.7.1430 AH and circulated by the Minister of Justice under No. 13/T13733 dated 25.8.1430 AH, art. 2 (Saudi Arabia), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=149&category=3>; and (9) Thailand, The Anti-Trafficking in Persons Act B.E. 2551, § 4 (2008) (Thai.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=169&category=4>.

<sup>63</sup> The following States have legislative provisions which deem illegal adoptions as constituting exploitation: (1) Costa Rica, Penal Code Law No. 4573, art. 172 (Costa Rica); (2) Dominican Republic, Law No. 137-03 Smuggling on of Migrants and Trafficking, § 1(a) (2003) (Dom. Rep.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=6&country=51>; (3) El Salvador, Penal Code Legislative Decree NO. 1030, art. 367-B (1997) (El Sal.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=54&category=1>; (4) Equatorial Guinea, Law No. 1/2004 of Sept. 14, 2004 on the Smuggling of Migrants and Trafficking in Persons, art. 1 (Eq. Guinea), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=55&category=4>; (5) Kyrgyzstan, The Kyrgyz Republic Criminal Code, art. 124(8) (1997), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=9&country=91>; (6) Macedonia, Republic of Macedonia Criminal Code, art. 418-(a)(1) (1996), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=170&category=1>; (7) Madagascar, Penal Code Law No. 2007-038, art. 333 (2008)(Madagascar), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=9&country=101>; (8) Moldova, Law on Preventing and Combating Trafficking in Human Beings No. 241-XVI of 20 Oct. 2005, art. 2(3) (Rep. of Mold.); (9) Nicaragua, Penal Code Law No. 641 of Nov. 13, 2007, art. 182 (Nicar.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=9&country=123>; (10) Pakistan, Act XLV of 1860, PAK. PENAL CODE, § 361 (Pak.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=9&country=128>; (11) Tajikistan, Criminal Code of the Republic of Tajikistan, art. 172, *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=9&country=168>; (12) Ukraine, Criminal Code of Ukraine, art. 149 (2001), *available at* <http://www.refworld.org/docid/4c4573142.html>; (13) Venezuela, Organic Law on the Right of Women to a Life Free of Violence, art. 56 (Venez.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=0&country=188>.

<sup>64</sup> The following States have provisions designating servile or forced marriage as a type of exploitation: (1) Columbia, Act 985 of 2005- Human Trafficking 1/16, art. 3 § 188A (Colom.); (2) Costa Rica, Penal Code Law No. 4573, art. 172 (Costa Rica); (3) Dominican Republic, Law No. 137-03 Smuggling on of Migrants and

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tourism;<sup>66</sup> surrogacy;<sup>67</sup> and one or more of the removal of the following: blood, cells, organs, tissues, or body parts.<sup>68</sup>

Beyond these examples of States providing new types of exploitation, which fall under the general banner of trafficking in persons, the European Union (EU) has, for its twenty-eight

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Trafficking, § 1(a) (Dom. Rep.); (4) El Salvador, Penal Code Legislative Decree No. 1030, art. 367-B (El Sal.); (5) Equatorial Guinea, Law No. 1/2004 of Sept. 14, 2004 on the Smuggling of Migrants and Trafficking in Persons, art. 1 (Eq. Guinea); (6) Haiti, Bill to Combat against Trafficking in Persons, art. 11 § 1.3.1 (Haiti); (7) Kenya, The Counter Trafficking in Persons Bill, (2010) Cap. 8 § 24 (Kenya), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=88&category=6>; (8) Macedonia, Republic of Macedonia Criminal Code, art. 418-(a)(1); (9) Mauritius, Combating of Trafficking in Persons Act 2009, § 4 (Mauritius), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=6&country=109>; (10) New Zealand, Section 208 of the Crimes Act of 1961, as substituted by Section 9 of the Crimes Amendment Act 2005 (N.Z.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=6&country=122>.

<sup>65</sup> The following are States that have specifically determined that pornography is a type of exploitation: (1) Dominican Republic, Law No. 137-03 Smuggling on of Migrants and Trafficking, § 1(a) (Dom. Rep.); (2) Equatorial Guinea, Law No. 1/2004 of Sept. 14, 2004 on the Smuggling of Migrants and Trafficking in Persons, art. 1 (Eq. Guinea); (3) Haiti, Bill to Combat against Trafficking in Persons, art. 11 § 1.3.1 (Haiti); (4) Macedonia, Republic of Macedonia Criminal Code, art. 418-(a)(1); (5) Mozambique, Law Nr. 6/2008, art. 11 (Mozam.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=116&category=7>; (6) Peru, Criminal Code Law No. 28251, art. 182 (2004) (Peru), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=133&category=1>; (7) Poland, The Police Act, art. 115 § 22 (Pol.); (8) Tajikistan, The Law of the Republic of Tajikistan on Fight Against Human Trafficking, ch. 1, art. 1, *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=2&country=168>; (9) Thailand, The Anti-Trafficking in Persons Act B.E. 2551, § 4 (Thai).

<sup>66</sup> The two States that have determined that sex tourism is a form of exploitation are: (1) Bolivia, Trafficking and Trafficking in Persons and Other Related Offences Law of 18 Jan. 2006, art. 281 (Bol.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=2&country=21>; (2) Colombia, Act 985 of 2005-Human Trafficking 1/16, art. 3 § 188A (Colom.).

<sup>67</sup> Both Azerbaijan and Moldova have deemed the surrogacy as being exploitative. Criminal Code of the Azerbaijan Republic, art. 108-1 (Azerbaijan), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=2&country=11>; Law on Preventing and Combating Trafficking in Human Beings No. 241-XVI of 20 Oct. 2005, art. 2(3) (Rep. of Mold.).

<sup>68</sup> The following States have deemed exploitation to include the removal of elements of the body: (1) Egypt, The People's Assembly Law No. 64 of 2010 (Combating Human Trafficking), art. 2 (Egypt); (2) Indonesia, Law of the Republic of Indonesia No. 21 of 2001 About Combating Crime of the Trade by the Grace of God Almighty President of the Republic of Indonesia, art. 1, *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=8&country=78>; (3) Kenya, The Counter Trafficking in persons Bill, (2010) Cap. 8 § 24 (Kenya); (4) Poland, The Police Act, art. 115 § 22 (Pol.); (5) Slovenia, Criminal Code of the Republic of Slovenia, art. 387 (a)(1) (2005) (Slovn.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&category=8&country=156>.

member States, established that “the exploitation of criminal activities” is also included in its reading of exploitation.<sup>69</sup> Like the EU, a number of States have provided an all-encompassing provision under the banner of exploitation, which establishes that trafficking in persons will transpire where the first two elements of trafficking are present, the *method* and the *means*, and where the *purpose* of trafficking is any illegal activity. Thus, Antigua and Barbuda speak of precisely this “any illegal activity.”<sup>70</sup> Azerbaijan uses the language of the “recruitment for unlawful activities (including criminal activities)”<sup>71</sup>; Georgia uses “involvement of a person in criminal or other anti-societal conduct”<sup>72</sup>; Kyrgyzstan, the shorter “involvement of a person in criminal activities”<sup>73</sup>; while Laos is even less wordy, speaking of “for other unlawful purposes.”<sup>74</sup> For its part, Luxembourg speaks in terms of “to commit that person of a crime or offense against their will,”<sup>75</sup> while Moldova criminalizes trafficking in persons in the context of exploitation, which is understood to include the use of a person “in criminal activities.”<sup>76</sup> For Sri Lanka, the net is thrown quite wide, as exploitation relates to “any other act which constitutes an offence under any law.”<sup>77</sup> Tajikistan, for its part, criminalizes “engaging in sexual or criminal activity” in the context of trafficking,<sup>78</sup> while Ukraine speaks of simply

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<sup>69</sup> Council Directive 2011/36/EU, art. 2, Offences Concerning Trafficking in Human Beings, 2011 O.J. (L 101) 6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:001:0011:EN:PDF>, [hereinafter Council Directive].

<sup>70</sup> The Trafficking in Persons (Prevention) Act, 2010, No. 12 of 2010, pt. I, § 2, at 9 (Ant. & Barb.), <http://laws.gov.ag/acts/2010/a2010-6.pdf>.

<sup>71</sup> Law of the Republic of Azerbaijan on Trafficking in Persons, ch. I, art. 1, § 1.0.2 (2005), available at <http://www.refworld.org/docid/4417f1214.html>.

<sup>72</sup> Law of Georgia on Combating Human Trafficking, ch. I, art. 3(d) (2006), [http://www.lexisnexis.com/documents/pdf/20081027094649\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20081027094649_large.pdf).

<sup>73</sup> The Kyrgyz Republic Criminal Code, art. 124(8).

<sup>74</sup> Laos Penal Code, ch.6, art. 134 (2006), [http://www.protectionproject.org/wp-content/uploads/2010/09/Laos\\_Penal-Code-TiP\\_2005.pdf](http://www.protectionproject.org/wp-content/uploads/2010/09/Laos_Penal-Code-TiP_2005.pdf).

<sup>75</sup> Loi du 13 Mars 2009 Relative à la Traite des Êtres Humains [Act of 13 March 2009 on Trafficking in Human Beings], art. 3(4) (Lux.), [http://www.protectionproject.org/wp-content/uploads/2010/09/Luxembourg\\_TIP-Law\\_2009-French.pdf](http://www.protectionproject.org/wp-content/uploads/2010/09/Luxembourg_TIP-Law_2009-French.pdf), translated by GOOGLE TRANSLATE.

<sup>76</sup> Law on Preventing and Combating Trafficking in Human Beings No. 241-XVI of 20 Oct. 2005, art. 2(3)(h).

<sup>77</sup> Penal Code (Amendment) Act, No. 16 of 2006, §360c.(1)(b) (Sri Lanka), [http://www.documents.gov.lk/Acts/2006/Penal%20Code%20\(Amend\)%20Act%2016%202006/PL%20000608%20\(E\)%20Penal%20Code%20Act%20No.%2016%20of%202006.pdf](http://www.documents.gov.lk/Acts/2006/Penal%20Code%20(Amend)%20Act%2016%202006/PL%20000608%20(E)%20Penal%20Code%20Act%20No.%2016%20of%202006.pdf).

<sup>78</sup> The Law of the Republic of Tajikistan on Fight Against Human Trafficking (2004), ch. 1, art. 1(a).

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“engagement in criminal activities.”<sup>79</sup>

With the inclusion of various States deeming that any and all criminal activity, when carried out against one’s will or knowledge, that is, using the Palermo Protocol definition: “by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception,”<sup>80</sup> when coupled with the movement of a person, constitutes trafficking in persons. It may be appropriate to consider what in fact, and in law, exploitation actually is. Nowhere in the law related to trafficking in persons is “exploitation” defined. Instead, domestic legislation takes the lead of the Palermo Protocol in providing examples of what constitutes exploitation. Thus, in the law under consideration, exploitation is, at the international level, categorical rather than conceptual.

Where thought has been given to the notion of exploitation, the most in-depth consideration has taken place in Alan Wertheimer’s 1996 philosophical study, *Exploitation*.<sup>81</sup> For Wertheimer, “[a]t the most general level, A exploits B when A takes unfair advantage of B.”<sup>82</sup> In *Slavery in International Law: Of Human Exploitation and Trafficking*, I have applied Wertheimer’s consideration of exploitation in the legal context of trafficking in persons by establishing that, in seeking to understand the term, we should consider that unfair advantage be deemed the legal threshold.<sup>83</sup> In other words, taking unfair advantage of a person transpires when the person is compelled “by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception,” to be party to an illegal activity.<sup>84</sup> Thus, a person is exploited when they work as a prostitute while under the menace of violence, but so too, a grocery clerk, forced to take less than minimum wage as a result of a threat of losing her job. In this reading of exploitation, the activity undertaken is not the most important activity; what stands out is the means by which the person is compelled to undertake that activity. Force, fraud, and deception are then the main elements, which speak to a situation where a person takes

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<sup>79</sup> Criminal Code of Ukraine, art. 149(1).

<sup>80</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344.

<sup>81</sup> ALAN WERTHEIMER, *EXPLOITATION* (1996).

<sup>82</sup> *Id.* at 10.

<sup>83</sup> See generally JEAN ALLAIN, *SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING* (2013).

<sup>84</sup> WERTHEIMER, *supra* note 81; Protocol for Trafficking in Persons, *supra* note 1, at 344.

unfair advantage of another. Marx would consider that all workers are exploited in a capitalist system as a result of profit going to employers;<sup>85</sup> but this threshold does not assist in determining, in the law of trafficking in persons, what constitutes exploitation. The law should be the standard for determining what constitutes exploitation; it is legislators around the world who are to determine what constitutes “unfair advantage.”

With this in mind, the approach of the European Union and other states, in establishing exploitation in the context of any and all criminal activity, speaks to the notion of exploitation evolving through its incorporation—at least in European domestic legal order—from being a set of categories to being, in fact and law, a concept. Instead of delineating what constitutes instances of exploitation—slavery, forced labor, etc.—as has been done at the international level, in various states noted above, exploitation is understood as constituting any and all illegal activities in which a person, against his or her will or knowledge, (forced, fraud, deception, etc.) is compelled to perform.<sup>86</sup> When this is coupled with the process of moving a person—“recruitment, transportation, transfer, harbouring or receipt of persons,” including the exchange or transfer of control over those persons,<sup>87</sup>—it will amount to trafficking.

Where states have not moved to this conceptual model of embracing that all criminal activities could constitute trafficking, if the two elements—the means and the methods—are at play, we witness the introduction of specific examples of what constitutes exploitation in various pieces of domestic legislation.

In the Australian context, while the Criminal Code provides for ‘trafficking in persons’ within the Palermo Protocol meaning of that term, it goes on to add to those provisions by creating a unique reading of the term, and thus determining that trafficking

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<sup>85</sup> See KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO 18 (SAMUEL MOORE TRANS., MARXIST INTERNET ARCHIVE 2010) (1848), <http://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf>.

<sup>86</sup> See INTER-PARLIAMENTARY UNION & U.N. OFFICE ON DRUGS & CRIME, COMBATING TRAFFICKING IN PERSONS: A HANDBOOK FOR PARLIAMENTARIANS, at 12–15, U.N. Sales No. E.09.V.5 (2009), [Hereinafter COMBATING TRAFFICKING IN PERSONS HANDBOOK].

<sup>87</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344 (“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception . . . for the purpose of exploitation.”). See also COMBATING TRAFFICKING IN PERSONS HANDBOOK, *supra* note 86, at 12–14.

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in persons is tantamount to forced smuggling. That is, trafficking in persons includes the use of force or threats to obtain a person's compliance in his or her entering into Australia.<sup>88</sup> Further examples of unique acts deemed exploitation found in the legislation of specific states include Azerbaijan: "bio-medical research on a person"<sup>89</sup>; Bolivia: "farm labor"<sup>90</sup>; Bulgaria: "debauchery"<sup>91</sup>; Mauritania: "unpaid work"<sup>92</sup>; Oman: "sexual assault"<sup>93</sup>; and Pakistan: "purpose of exploitative entertainment," wherein exploitative entertainment is defined as "all activities in connection with human sports or sexual practices or sex and related abusive practices."<sup>94</sup> Macedonia has determined that exploitation includes "forced fertilization."<sup>95</sup> Moldova includes a somewhat unique catchall provision, determining that exploitation includes compelling to engage "in other activities that violate fundamental human rights and freedoms."<sup>96</sup> South Africa deems that "the impregnation of a female person against her will for the purpose of selling her child when the child is born," is to be considered a form of exploitation;<sup>97</sup> while the Ukraine speaks of "forced pregnancy."<sup>98</sup> Within its definition of

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<sup>88</sup> *Criminal Code Act 1995*, § 271.2 (Austl.).

<sup>89</sup> Law of the Republic of Azerbaijan on Trafficking in Persons, ch. I, art. 1, § 1.0.2 (2005).

<sup>90</sup> Trafficking and Trafficking in Persons and Other Related Offences Law of 18 Jan. 2006, art. 281(f) (Bol.).

<sup>91</sup> Закон за борба с трафика на хора [Combating Trafficking in Human Beings Act], § 1 (2003) (Bulg.), <http://www.hsph.harvard.edu/population/trafficking/bulgaria.traf.03.pdf>.

<sup>92</sup> Presidency of the Republic Justice Honor Fraternity Act No. 025/2003/ On Suppression of Trafficking in Persons, art. 1 (Mauritania), *available at* <http://qub.ac.uk/slavery/?page=countries&category=1&country=108>.

<sup>93</sup> Combating Trafficking In Persons, art. 1 (2008) (Oman), <http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/81766/88931/F1239239215/OMN81766.pdf>.

<sup>94</sup> Prevention and Control of Human Trafficking Ordinance (2002), art. 2–3 (Pak.), *available at* <http://qub.ac.uk/slavery/?page=countries&category=1&country=128>.

<sup>95</sup> Republic of Macedonia Criminal Code, art. 418-a1 (1996).

<sup>96</sup> Laws on Preventing and Combating Trafficking in Human Beings, No. 241-XVI of 20 Oct. 2005, art. 2(3)(k). *But see also* Romania, which includes within its meaning of exploitation a provision which reads, "engaging in other such activities that violate fundamental human rights and liberties." Law on the Prevention and Combat of Trafficking in Human Beings, art. 2 § 2(e) (Rom.), *available at* <http://www.hsph.harvard.edu/population/trafficking/romania.traf.01.htm>.

<sup>97</sup> Prevention and Combating of Trafficking in Persons Act, 2013, Act 7 (GG) (S. Afr.).

<sup>98</sup> Criminal Code of Ukraine, art. 149.

trafficking, Uruguay also has a residual clause, which, beyond enumerated types of exploitation, criminalizes “any activity that undermines human dignity.”<sup>99</sup>

A number of states have also sought to include, in their legislation on trafficking in persons, issues around armed conflict. Thus, Kenya determines that exploitation also includes “forcible or fraudulent use of any human being to take part in armed conflict”<sup>100</sup>; whereas Kyrgyzstani, Tajikistani, and Ukraine legislation all speak of using a person in armed conflict.<sup>101</sup> Sierra Leone makes plain the relationship it is seeking to criminalize: “exploitation during armed conflicts”<sup>102</sup>; while Norway is more concerned with it citizens fighting for foreign powers: “war service in a foreign country.”<sup>103</sup>

Legislators around the world have taken up the unstated invitation, provided by the Palermo Protocol, to define trafficking in persons, opening up the definition to their legislative process. Having considered the legislation of all States that have introduced provisions into their domestic law related to trafficking, it can be stated as fact that, at the domestic level, no two definitions of trafficking in persons are identical. While a number of States have variations on the theme regarding the methods and the means elements of the Palermo Protocol, a much larger proportion of States have promulgated different readings of exploitation by including various acts that are deemed exploitive in their domestic legal order.

As a result, no generalization can be proffered when speaking of ‘trafficking in persons.’ Instead, the near totality of obligation flowing from the Palermo Protocol, or any other obligation related to trafficking in persons, will be dependent on the manner in which individual States have incorporated the notion of ‘trafficking in persons’ into their domestic law. The overwhelming approach of States has been to take what was

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<sup>99</sup> Law No. 18,250 Diario Oficial de la Republica Oriental del Uruguay [Migration-Standards], § 2, art. 78 (2998) (2008) (Uru.), available at <http://www.qub.ac.uk/slavery/?page=countries&category=4&country=185>.

<sup>100</sup> The Counter Trafficking in Persons Bill, Cap. 8 § 24(e).

<sup>101</sup> The Kyrgyz Republic Criminal Code, art. 124(8) (1997); The Law of the Republic of Tajikistan on Fight Against Human Trafficking, ch. 1, art. 1(a) (2004); Criminal Code of Ukraine, art. 149 (2001).

<sup>102</sup> The Anti-Human Trafficking Act, pt. II, 2(3)(h) (2005) (Sierra Leone), <http://www.sierra-leone.org/Laws/2005-7p.pdf>.

<sup>103</sup> General Civil Penal Code, ch. 21, § 224 (2005) (Nor.), <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>.

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conceived as a transnational regime, meant to interrupt organized criminal groups from creating an industry out of the trafficking in persons, and, instead, with the ratification of the Palermo Protocol, create an approach focused on activities solely within their borders, further defining the notion of ‘trafficking in persons’ in ways that are sometimes unique, but oftentimes idiosyncratic.<sup>104</sup>

### III. THE TRANSNATIONAL LAW OF TRAFFICKING AFTER DOMESTIC IMPLEMENTATION

As a result of the manner in which States have implemented the Palermo Protocol, the various understandings of what constitutes ‘trafficking in persons’ means that coordinating actions meant to prevent, suppress, and punish trafficking in persons must be considered on a bilateral basis, not an international or transnational basis.<sup>105</sup>

The focus here is to ask the question: Can States effectively cooperate in addressing the transnational crime of trafficking in persons, as a result of domestic implementation which has trafficking in persons defined differently in each country? The UN Convention against Transnational Organized Crime makes plain that “the description of the offences established in accordance with this Convention . . . [are] reserved to the domestic law of a State Party . . . ” and “such offences shall be prosecuted and punished in accordance with that law.”<sup>106</sup> Thus, each reading of ‘trafficking in persons’ developed by a country is to be the basis of interaction between States, making sure that each reading of the definition being undertaken is in accordance with domestic law.

Let us now turn to a specific situation to demonstrate the extent to which the implementation of the Palermo Protocol has strayed away from the initial intent of the drafters during the diplomatic conference where the UN Convention against Transnational Organized Crime and the Palermo Protocol were developed. The United Kingdom of Great Britain and Northern

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<sup>104</sup> See Michelle Madden Dempsey et al., *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY INT’L L. REV. 137, 138–42, 145–47 (2012).

<sup>105</sup> Protocol for Trafficking in Persons, *supra* note 1, at art. 346–47 (Providing that the domestic laws of individual States must be respected during the investigation and prosecution of international human trafficking offenses).

<sup>106</sup> United Nations Convention, *supra* note 10, at 280.

Ireland (UK) have not passed any specific statutes pertaining to the criminalization of trafficking in persons, or sought to specifically implement the UN Convention or the Palermo Protocol. Instead, incorporation in the domestic legal order in the UK has taken place through the amending of two pieces of legislation: the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* and the *Sexual Offences Act 2003*.<sup>107</sup> Under the *Asylum and Immigration Act*, a person is exploited when they have been a victim of slavery or forced labor, in line with the European Human Rights Convention, or involved in commercial dealings where “force, threats, or deception” are at play,<sup>108</sup> in violating the *Human Organ Transplants Act 1989*.<sup>109</sup> In the context of that legislation, a person is involved in trafficking if they facilitate the arrival into, travel within, or departure from the UK, a victim or possible victim of exploitation.<sup>110</sup> With regard to the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*, victims are to be understood as being involved in international transit, as the legislation speaks of them as “passenger[s],” as in “[a] person commits an offence if he arranges or facilitates the arrival in the United Kingdom of an individual (the ‘passenger’) and—(a) he intends to exploit the passenger . . .”<sup>111</sup>

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<sup>107</sup> *Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004*, c. 19, §§ 1, 4 (U.K.), [http://www.legislation.gov.uk/ukpga/2004/19/pdfs/ukpga\\_20040019\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/19/pdfs/ukpga_20040019_en.pdf) [Hereinafter *Asylum and Immigration Act*]; *Sexual Offences Act, 2003*, c. 42, §§ 57–59 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2003/42/contents>. See also HOME OFFICE & SCOTTISH EXECUTIVE, UK ACTION PLAN ON TACKLING HUMAN TRAFFICKING (2007), at 15–17.

<sup>108</sup> *Asylum and Immigration Act*, at § 4.

<sup>109</sup> *Id.* See also *Human Organ Transplants Act, 1989*, c. 31, § 1(1) (U.K.), [http://www.legislation.gov.uk/ukpga/1989/31/pdfs/ukpga\\_19890031\\_en.pdf](http://www.legislation.gov.uk/ukpga/1989/31/pdfs/ukpga_19890031_en.pdf).

A person is guilty of an offence if in Great Britain he—

(a) makes or receives any payment for the supply of, or for an offer to supply, an organ which has been or is to be removed from a dead or living person and is intended to be transplanted into another person whether in Great Britain or elsewhere;

(b) seeks to find a person willing to supply for payment such an organ as is mentioned in paragraph (a) above or offers to supply such an organ for payment;

(c) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, such an organ; or

(d) takes part in the management or control of a body of persons corporate or unincorporate whose activities consist of or include the initiation or negotiation of such arrangements.

<sup>110</sup> *Asylum and Immigration Act*, at § 4(1–3).

<sup>111</sup> *Id.* at § 4(1).

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The *Sexual Offences Act 2003* also criminalizes the trafficking into, within, or out of the UK;<sup>112</sup> however, it criminalizes this movement in conjunction with various crimes of a sexual nature, including rape, sexual assault, child sex offenses, and exploitation of prostitution.<sup>113</sup> What is absent from the *Sexual Offences Act 2003*, but is found in the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*, is the need for a movement to transpire as a result of “force, threats or deception.”<sup>114</sup> As a result, in the UK, the ‘trafficking of a person’ for sexual exploitation misses the linchpin of the Palermo Protocol, namely that such criminality transpired against the will or wishes of the person. Thus, in the UK, the offenses under the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* are in line with the three elements of trafficking in persons, as defined in the of Palermo Protocol—the *method*, the *means*, and the *purpose*—however, crimes under the *Sexual Offences Act 2003* are trafficking in name only, as they lack the *means* element, “force, threats or deception,”<sup>115</sup> of the crime of trafficking in persons. As a result, the *Sexual Offences Act 2003* establishes that trafficking for sexual exploitation in the UK is simply the movement of a person in the context of a sexual offense.

In the UK, the extent to which the notion of trafficking in persons has been diluted from its original international intent is made most evident in the actual application of domestic legislation in the first case heard in Northern Ireland.<sup>116</sup> In the 2012 *Queen v. Matya Pis* case, the individual was jailed for little more than having booked air tickets, picking up two sex workers

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<sup>112</sup> *Sexual Offences Act*, at §§ 57–59.

<sup>113</sup> *Id.* at §§ 1–15, 51–54, 57–59.

<sup>114</sup> *Asylum and Immigration Act*, at § 4(4)(c).

<sup>115</sup> *Id.*

<sup>116</sup> *Queen v. Matyas Pis*, [2012] NICC 14 [p. 1, 3] (Ir.). It should be noted that in Northern Ireland, for jurisdictional reasons, certain UK legislation was promulgated by way of a separate order. While the *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* is applicable in Northern Ireland by virtue of UK-wide legislation, the *Sexual Offences Act 2003* was, in light of the suspension of the activities of Northern Ireland Assembly, brought into force by way of the *Sexual Offences (Northern Ireland) Order 2008*. Much as in the United States, where the divisions of powers means that the Federal Government and the State Governments have constitutionally entrenched exclusive jurisdiction over certain legislative areas; so to in the UK, where Northern Ireland, Scotland, and Wales have certain devolved powers. *Asylum and Immigration Act*, at § 4; *Sexual Offences (Northern Ireland) Order 2008*, S.I. 2008/1769, art. 76–78, [http://www.legislation.gov.uk/nisi/2008/1769/pdfs/ukxi\\_20081769\\_en.pdf](http://www.legislation.gov.uk/nisi/2008/1769/pdfs/ukxi_20081769_en.pdf).

at the airport in Dublin, Ireland, and bringing them north across the virtual border into the UK to an apartment in Belfast, Northern Ireland.<sup>117</sup>

Judge Burgess of the Belfast Crown Court noted: “[a]lthough there is no indication that [the two women] were brought into the United Kingdom or required to work in prostitution against their will, they are still victims of sexual offences.”<sup>118</sup> He goes on to say:

The agreed facts of this case, to which I will turn shortly, confirm that there is no allegation of coercion and corruption of unwilling victims which marks cases at the higher end of the sentencing range for these offences. However I want to take this opportunity to make it very clear that anyone who is brought before the courts in Northern Ireland for offences of this nature can, other than in exceptional circumstances, expect a custodial sentence. That sentence will be heavier for those who coerce their victims, who use violence against them, who sexually assault and degrade them and who placed them in fear for their own or their loved ones’ lives.<sup>119</sup>

Clearly in this context, there is a distinction between the crime of trafficking in the UK, for which Mr. Pis is found guilty, and the notion of trafficking in persons found in the Palermo Protocol, which requires 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” to be at play for the offense of trafficking in persons to be present.<sup>120</sup> In other words, Mr. Pis would be innocent of any charges under the Palermo Protocol.

Further, the *raison d’être* of the international criminalization of trafficking—the suppression of organized crime—appears lost in the domestic implementation of the Palermo Protocol in the UK, as among the agreed statement of facts in this case was an acknowledgement by the prosecution that Mr. Pis was “not part of any criminal gang operating in Northern Ireland.”<sup>121</sup> Instead, Mr. Pis was found guilty of trafficking for sexual exploitation because “[h]e actively recruited Hungarian woman to come to the United Kingdom to work as prostitutes” and, once in the UK, his “role was limited to introducing the women to others who would

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<sup>117</sup> Queen v. Matyas Pis, [2012] NICC 14 [p. 6] (Ir.).

<sup>118</sup> *Id.* at p. 2.

<sup>119</sup> *Id.* at p. 5.

<sup>120</sup> Protocol for Trafficking in Persons, *supra* note 1, at 344.

<sup>121</sup> See Queen v. Matyas Pis, [2012] NICC 14 [p. 7(e)] (Ir.).

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place them in brothels.”<sup>122</sup>

While it is the UK’s sovereign prerogative to define trafficking as it wishes, the issue lies with the coordination of transnational obligations in a context where the UK can establish that anybody involved in moving a sex worker into, within, or out of the UK, has committed the crime of trafficking.<sup>123</sup> Such coordination is relevant with regard to both extradition and extra-territorial jurisdiction.

Extradition refers to international cooperation in the handing over of an individual facing criminal charges in another State.<sup>124</sup> A cornerstone of extradition is the notion of “dual” or “dual criminality,” or that the offense be punishable in both the requesting State and the prospective surrendering State.<sup>125</sup> Article 16 of the 2000 U.N. Convention against Transnational Organized Crime makes this plain, as extradition may only take place with regard to “the offences covered by this Convention . . . provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.”<sup>126</sup> For Anne Gallagher, the “principle of dual criminality provides an additional, compelling reason for States to criminalize trafficking as it has been defined by international law.”<sup>127</sup> Yet this pronouncement, made in 2010, is somewhat disingenuous. Tantamount to closing the stable door after the horse has bolted, the definition of trafficking in persons has been considered to be incorporated into the domestic legal

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<sup>122</sup> *Id.* at 29.

<sup>123</sup> *Asylum and Immigration Act*, at § 4. It should be emphasized that the reach of what is termed ‘trafficking’ in the UK goes beyond prostitution, as it also falls within the context of trafficking for sexual exploitation. This crime consists of moving a victim of an offence, defined under the *Sexual Offences Act of 2003*, into, within, or out of the UK. Such offences include child sex offences, incest, rape, voyeurism, etc. *Sexual Offences Act*, at §§ 1, 5–29, 57–60, 64–71.

<sup>124</sup> *Extradition Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/extradition> (last visited Sept. 20, 2013).

<sup>125</sup> U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING, at 205, U.N. Doc. HR/PUB/10/2, U.N. Sales No. E.10.XIV.1 (2010) (despite the fundamental character of dual criminality to protect the rights of the accused in an extradition hearing, the report considers that the rights of the accused may well get in the way of putting people in prison. “The principle of dual criminality,” the author of the commentary writes, “can have the effect of obstructing prosecutions”).

<sup>126</sup> United Nations Convention, *supra* note 10, at 284.

<sup>127</sup> GALLAGHER, *supra* note 22, at 405.

order, but less than a handful of the 157 States that are a party to the Palermo Protocol have “criminalize[d] trafficking as it has been defined by international law.”<sup>128</sup> Instead, the practice of trafficking in persons has been fractured.

The incorporation of an understanding of ‘trafficking in persons’ into the domestic order of States in a multifaceted manner is fractured because the ability to extradite individuals is not predicated on the fact that the requesting and potential sending States have legislation in place that allows for the extradition of individuals accused of trafficking in persons. Instead, such extraditions will depend on whether both States have criminalized the actual act, which has transpired within their respective legislation. As was noted in the *Pinochet* case, relating to the request by Spain to extradite the former Head of State of Chile from the United Kingdom, it was noted that “the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.”<sup>129</sup> In the context of the UK, this was considered more in depth in *Government of Canada v. Aronson*, where it was stated that “[i]t is axiomatic that a person charged with a crime is entitled to know not only the offence with which he is charged . . . but also to have particulars of the conduct which it is alleged constitutes the offence.”<sup>130</sup> In the United States, the Supreme Court has established that the substance is more important than the form, or name given to the crime. In *Heilbronn v. Kendall*, the Court said:

The law does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is

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<sup>128</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, UNITED NATIONS, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf> (last visited Oct. 1, 2013). See generally, ANNE GALLAGHER & NICOLE KARLEBACH, PROSECUTION OF TRAFFICKING IN PERSONS CASES: INTEGRATING A HUMAN RIGHTS-BASED APPROACH IN THE ADMINISTRATION OF CRIMINAL JUSTICE 5.

<sup>129</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No.3) [1999], 1 A.C. 147 (H.L.) [189] (appeal taken from Eng.).

<sup>130</sup> *Gov’t of Can. v. Aronson* [1989], 1 A.C. 579 (H.L.) [594] (appeal taken from Eng.).

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criminal in both jurisdictions.<sup>131</sup>

Later in the decision “[t]he fact that a particular act is classified differently or that different requirements of proof are applicable in the two countries does not defeat extradition.”<sup>132</sup> As a result, not only may extradition take place where the same act is criminalized under different headings, but the reverse also holds; extradition will not take place where the crime under the same heading in both countries does not incorporate the particular act under consideration as criminal.

Having provided the example of the British legislature which incorporates its United Nations obligations regarding trafficking, it becomes obvious, in light of the survey conducted in the previous section regarding the definition of trafficking in persons as implemented in the domestic jurisdiction of the States that are a party to the Palermo Protocol, that any request for extradition related to trafficking, either made or received, should not automatically be granted. Beyond the formal issues of jurisdiction required for any extradition hearing, the substance of what is being termed trafficking will have to be scrutinized to ensure that, in fact and in law, what is termed trafficking in one jurisdiction is, in substance, also criminalized in the other jurisdiction. This ensures that the double criminality obligation fundamental to extradition is met.

Beyond issues of extradition, the fact that States that are a party to the Palermo Protocol have implemented a multi-varied understanding of what constitutes trafficking in persons limits the effectiveness of the transnational elements of the fight against trafficking, where issues of extra-territorial jurisdiction are brought into play. Here, the issue is much more critical than with regard to extradition. As in situations of extra-territorial jurisdiction, a State is unilaterally establishing jurisdiction over an act which has transpired in another State. This may also go as far as establishing jurisdiction where the crime has transpired in a foreign State, and the individual suspected of committing this crime is a national of that foreign State. In such a situation, the challenge to sovereignty over one’s territory and one’s nation is acute. For the issue at hand, this is most evident with the enactment of the 2011 European Union Directive on Preventing and Combating Trafficking in Human Beings and Protecting its

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<sup>131</sup> *Heilbronn v. Kendall*, 775 F. Supp. 1020, 1025 (W.D. Mich. 1991) (quoting *Collins v. Loisel*, 259 U.S. 309, 312 (1922)).

<sup>132</sup> *Id.*

Victims, which allows the twenty-eight members of the European Union<sup>133</sup> to establish jurisdiction over the crime of trafficking beyond their respective borders.<sup>134</sup> While it would ordinarily be considered that a State has exclusive jurisdiction within its territory, the sovereign equality of States denies the possibility of invoking jurisdiction within the borders of another State, with extra-territorial jurisdiction being the exception.

The 2011 EU Directive does exactly this, as it allows States to establish “jurisdiction over the offences . . . committed outside its territory.”<sup>135</sup> Such jurisdiction could be invoked if the crime was committed in State A, while the individual committing the crime of trafficking, or the victim of the crime of trafficking, is a national or habitual resident of State B. In such a case, despite the crime having taken place in State A, State B could establish jurisdiction over the matter as a result of the involvement of one of its habitual residents, or one of its citizens in the crime of trafficking.<sup>136</sup> While the possibility to invoke extra-territorial jurisdiction exists for European Union States as a result of the 2011 EU Directive, it might be noted that the 2009 UN Model Law against Trafficking in Persons already called for such extra-territorial jurisdiction to be included in trafficking legislation.<sup>137</sup>

Once again, this time in the context of seeking to invoke extra-territorial jurisdiction over the crime of trafficking in persons, success will hinge on how trafficking in persons is defined in both the State seeking to invoke extra-territorial jurisdiction, with regard to one of its nationals or habitual residents, and the State on whose territory the offense transpired. While elements of those definitions may be common to both States in question, this cannot be presumed. Thus, while Kenya will hold that a national has committed the crime of trafficking as defined under its extra-territorial jurisdiction in persons, if the national moved a victim to, for instance, Moldova, and coerced that person into a forced

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<sup>133</sup> *Member Countries of the European Union*, EUROPEAN UNION, [http://europa.eu/about-eu/countries/member-countries/index\\_en.htm](http://europa.eu/about-eu/countries/member-countries/index_en.htm) (last visited Oct. 10, 2013).

<sup>134</sup> See generally Council Directive, *supra* note 69, at art. 10.

<sup>135</sup> *Id.*

<sup>136</sup> EXTRA TERRITORIAL JURISDICTION IN THE EUROPEAN UNION: A STUDY OF LAWS AND PRACTICE IN THE 27 MEMBER STATES OF THE EUROPEAN UNION 13 (2010). A number of EU States now exercise extra-territorial jurisdiction in relation to crimes under international law. Examples of Member States which exercise extra-territorial jurisdiction are: Belgium, Denmark, France and Germany. *Id.* at 78, 110, 131, 138.

<sup>137</sup> *Model Law against Trafficking in Persons*, *supra* note 48, at 27.

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marriage,<sup>138</sup> this would not constitute the crime of trafficking under its legislation, as forced marriage is not included as a type of exploitation.<sup>139</sup> As a result, Moldova would have no obligation, stemming from its trafficking legislation, to cooperate in an investigation to assist the victim (victim, that is, from a Kenyan perspective) or to repatriate or extradite the Kenyan national.

A second scenario, more theoretical in nature, will assist in driving the point home. Consider once more the case of the United Kingdom where trafficking in persons is defined, in the context of sexual exploitation, as the simple movement of a sex worker, void of any type of “force, threats or deception.”<sup>140</sup> If the United Kingdom was to apply—it has not—what is termed in law the “passive personality” principle,<sup>141</sup> and established in its legislation extra-territorial jurisdiction over offenses committed against one of its nationals or habitual residents, far-reaching implications for other States would be created. UK legislation regards the trafficking in persons, the assisting of a prostitute who is a UK national outside of the UK, as a criminal act. In the Netherlands, where sex workers are legal, the same act would amount to nothing more than assisting a EU citizen in exercising his or her right to work within the Union. One could go further by examining the 2011 EU Directive, which not only criminalizes the act of trafficking in persons, but also the act of “aiding and abetting,” which would throw a much larger net over the application of the UK conception of trafficking in persons.<sup>142</sup> If the UK sex worker were traveling to Amsterdam, having been provided a license to establish a brothel, would the municipality be liable for trafficking in persons? Would the Mayor of

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<sup>138</sup> The Counter Trafficking in Persons Bill, at pt. II, § 3(1), pt. VI, § 25.

<sup>139</sup> *Id.* at pt. II, § 3.

<sup>140</sup> *Asylum and Immigration Act*, at § 4(4)(c).

<sup>141</sup> Vicki Trapalis, Comment, *Extraterritorial Jurisdiction: A Step Towards Eradicating the Trafficking of Women into Greece for Forced Prostitution*, 32 GOLDEN GATE U.L. REV. 207, 231–32 (2002) (defining passive personality principle). The passive personality principle emerges only after the Cold War, through its development before the Yugoslav and Rwanda Tribunals and the creation of the International Criminal Court, and then comes to be accepted as part of international relations. The Judges write: “The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking . . . . Passive personality jurisdiction, for so long regarded as controversial . . . today meets with relatively little opposition . . . .” See Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Bel.), 2002 I.C.J. 63, 70, 76–77 (Joint and Separate Opinions of Judges Higgins, Koojijmans, and Buergenthal), <http://www.icj-cij.org/docket/files/121/8136.pdf>.

<sup>142</sup> Council Directive, *supra* note 69, at art. 3.

Amsterdam, whose city provided the license, the Attorney General of the Netherlands, who maintained the legislation allowing prostitution, or the former Queen of the Netherlands having signed the law into existence,<sup>143</sup> be complicit in aiding and abetting the crime of trafficking in persons as understood from the UK perspective?

#### CONCLUSION

The regime of trafficking in persons, conceptualized in the 2000 Palermo Protocol, is flawed, as its operationalization has been fractured by the incorporation of the UN Convention against Transnational Organized Crime and the anti-trafficking Protocol into the domestic legal order. This study has shown how States, during their domestic legislating processes, have developed a large range of very diverse readings of what constitutes ‘trafficking in persons.’ As a result, when we speak about trafficking in persons across borders, we are, in essence, speaking in different languages.

The fundamental flaw of the regime of trafficking in persons is manifest in this: the system meant to facilitate the prevention, suppression, and punishment of trafficking through transnational cooperation cannot do so because the States have created different variations of what constitutes trafficking. These variations mean that points of interaction and possible cooperation amongst States do not necessarily mesh. This is most evident with regard to issues of extradition where the double criminality principle comes into play, as well as questions surrounding the application of extra-territorial jurisdiction. While there is much in common within the definitions of trafficking in persons, as incorporated into domestic legislation worldwide, there is also enough variation within those provisions as to limit the very effectiveness of the regime envisioned in the Palermo Protocol. As a result, it is imprudent to generalize about ‘trafficking in persons.’ Instead, there should be a realization that when we use the language of ‘trafficking in persons’ we mean different things, depending on the country we are dealing with.

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<sup>143</sup> See generally DUTCH MINISTRY OF FOREIGN AFFAIRS, DUTCH POLICY ON PROSTITUTION 3–6 (2012), [http://www.minbuza.nl/binaries/content/assets/minbuza/en/import/en/you\\_and\\_the\\_netherlands/about\\_the\\_netherlands/ethical\\_issues/faq-prostitutie-pdf--engels.pdf-2012.pdf](http://www.minbuza.nl/binaries/content/assets/minbuza/en/import/en/you_and_the_netherlands/about_the_netherlands/ethical_issues/faq-prostitutie-pdf--engels.pdf-2012.pdf) (laying out how the act was implemented and how the act is enforced).