

**EXPLORING MODERN SLAVERY AND THE MODERN  
SLAVERY ACT 2015: HOW DOES THE FRAMING OF  
MODERN SLAVERY LIMIT THE EFFICACY OF  
LEGAL AND POLICY RESPONSES TO HUMAN  
TRAFFICKING AND SLAVERY?**

Thesis submitted in accordance with the requirements of the  
University of Liverpool for the degree of Doctor in Philosophy

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September 2018

## **ABSTRACT**

In recent years interest in the issues of slavery and human trafficking has converged with the emergence of the concept of 'modern slavery'. This thesis seeks to address the complex phenomenon of 'modern slavery' and analyse the effect it has on legislative responses to slavery and human trafficking, with a particular focus on the Modern Slavery Act 2015. It begins by locating the problem historically through its foundations in slavery and human trafficking and explores the incomplete nature of the abolition of the practices. These observations provide the context for analysis of the existing international anti-slavery and trafficking legal frameworks, the emergence of the concept of 'modern slavery' and the subsequent blurring of the legal boundaries between the practices. The complexity of the concept of 'modern slavery' is reflected in the variety of practices included within its scope and the lack of consensus among stakeholders concerning the meaning of the term. This thesis examines the phenomenon of 'modern slavery' and the conflation of human trafficking and slavery underneath the umbrella of 'modern slavery'. It demonstrates that the shortcomings of the existing models of 'modern slavery' are themselves evident in the legal and policy responses to slavery and human trafficking. The overall effect of the uncritical use of the concept is a negative impact on potential victims of human trafficking and slavery, but also other exploitative practices. These observations are supported by doctrinal analysis of i) historical anti-slavery and trafficking movements ii) international frameworks and definitions of slavery and trafficking iii) existing academic literature examining the concept of 'modern slavery' and iv) The Modern Slavery Act 2015. This thesis extends the existing literature by investigating how different conceptualisations of slavery impact the efficacy of anti-slavery legislation, specifically the Modern Slavery Act 2015. The thesis explores the disconnect between different sections of the literature of slavery and trafficking. The thesis argues in conclusion that the development of the concept of 'modern slavery' and the subsequent collapse of the legal boundaries between human trafficking and slavery has a potential threefold effect, which limits the utility of current anti-slavery/trafficking legal and policy responses.

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## ACKNOWLEDGEMENTS

While the remaining 90,000 or so words of this thesis have at times been painful to write, the current task is one I can only enjoy. The completion of this thesis has been a journey and a half, and I owe an enormous amount of thanks to many people who have been along for the ride. We often think of a PhD as a solitary task; it is only natural when you spend so much time alone in your office with a pile of books and a computer. However, the list of the people I have to thank definitely proves the opposite.

I am grateful to the Liverpool Law School for providing me with an opportunity to pursue my interest in this area and with a GTA scholarship. This opportunity enabled me to work on my research free of the financial concerns that many PhD researchers are faced with. I would also like to thank the department for providing a supportive and vibrant community for which I am hugely appreciative. It has been a long and not always smooth journey, but I am immeasurably grateful for the opportunity to work with my two supervisors who have supported me along the way, Samantha Currie and Michelle Farrell. Sammie and Michelle have been vital in the development of my research and have (perhaps unfortunately for them) been happy to read numerous drafts and provide thoughtful and helpful feedback right until the end (and I do mean the very end). I am lucky to have been able to work with a supervisory team that have helped guide and support me and, I will always be thankful for their interest in my research and belief in me. I would also like to thank other colleagues in the department who have supported the PhD journey through progression panels, post-graduate conferences and making the department a genuinely supportive and friendly environment for PhD students.

Thanks to all my PhD/GTA colleagues both old and new, to the Muspratt originals, particularly my old office buddies. A special thankyou to Kerry, Sarah, Ben and Seamus for your doors always being open and always having time to chat and offer advice. To my long-time friend Katy, for being there to distract me from research and, for always being happy to go and see a midnight showing of the Avengers once or maybe three times.

To Sam, I am so glad that if nothing else both us doing PhDs meant that we met each other (since your office is now in the same building I am convinced it was meant to happen one way or another). Thank you for supporting me through the ups and downs of the PhD and life over the last three years and listening to my endless research and non-research related ramblings. I may have started this thesis without you but, I also know that I could never have finished it without you. I also have to say thank you to the Horners – P & C, Rosie and Katie, you have been nothing but supportive, and I am so glad to have all of you in my life.

Last but definitely not least, my mum and dad, Mary and Ray. For not just your support over the last few years, but for your support in everything I have done which led me to this path. There really aren't enough words to tell you how much I appreciate your love and encouragement and belief in me, especially when I didn't believe in myself. So, thank you.

## **PREFACE**

The law is stated up to 30<sup>th</sup> August 2018

## Introduction

### 1. Slavery and Abolition

In international law freedom from slavery is an established fundamental right. Despite international universal condemnation and complete legal abolition, slavery has persisted and continues to exist as a social and economic phenomenon. To tell the history of slavery is often to tell the story of abolition and notable anti-slavery figures such as William Wilberforce and Thomas Clarkson. Further to this, the story of abolition is one of the successes of colonial powers in dismantling and legally prohibiting the slave trade. However, this particular selective approach remains mostly silent on the uneasy relationship between anti-slavery and colonialism and the resulting anti-slavery policies. This parallels the contemporary narrative surrounding ‘modern slavery’, immigration and the economy.

Since the British Abolitionist movement of the 18<sup>th</sup> Century, with the passing of the *1815 Declaration Relative to the Abolition of the Slave Trade*,<sup>1</sup> and the *Slavery Abolition Act 1833*,<sup>2</sup> the parameters of anti-slavery law have seen significant expansion. The initial aim of this movement was to end the international trade rather than to end the institution as a whole. However, Joel Quirk comments that the reality of abolition left much to be desired, highlighting that many of the emancipated still faced a large degree of discrimination and continued to be subjected to exploitative practices.<sup>3</sup>

The presence of anti-slavery sentiment has not been consistent; there has been an ebb and flow to political and social interest in the issue. However, recently the issue has proliferated, moving from being marginalised to a mainstream societal issue. Austin Choi Fitzpatrick has described this surge in interest and advocacy as an explosion, however, it can also be characterised as a resurgence.<sup>4</sup> This movement is reflected through the work of non-governmental organisations (NGOs), international organisations and national governments with an outpouring of anti-slavery legislation. Quirk argues that from its inception the ‘great anti-slavery project’ has framed slavery

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<sup>1</sup> Declaration Relative to the Abolition of the Slave Trade 8<sup>th</sup> February 1815 63 Conso/TS no.473

<sup>2</sup> *Slavery Abolition Act 1833*

<sup>3</sup> Joel Quirk, *Unfinished Business: A Comparative Survey of Historical and Contemporary Slavery*, (UNESCO Publishing 2009) 93-98

<sup>4</sup> Austin Choi Fitzpatrick, From Rescue to Representation: A Human Rights Approach to the Contemporary Anti-Slavery Movement (2015) 14, *Journal of Human Rights*, 486

as an “unconscionable evil that falls outside normal [i.e. legitimate] practices”.<sup>5</sup> Thus the spectres of Trans-Atlantic slavery and 18th century abolitionism have become the benchmark when it comes to discussing modern slavery.

The resurgent interest in slavery has emerged in an institutional environment in which the practice of slavery is already prohibited and criminalised.<sup>6</sup> There are two dominant debates in the contemporary narrative of modern slavery. First, it is asked which contemporary practices are similar enough to legal slavery to warrant inclusion under the term. Such debates have led to the creation of a dichotomy between new and old slavery.<sup>7</sup> This creates an unnecessary and distracting distinction. It also reinforces a myth that slavery and more broadly human exploitation, did, in fact, cease to exist at some point in history. The original abolitionists, such as William Wilberforce, Granville Sharp and Thomas Clarkson, had a difficult but singular goal to outlaw the institution of slavery. Thus, the second debate surrounds the search for a solution to the continued existence of slavery.<sup>8</sup>

Nicholas McGeehan has suggested that the long silence of the legal community on contemporary slavery would insinuate that legal scholars have until recently viewed slavery as a historical institution, which did not warrant continued and serious research.<sup>9</sup> In addition, it has been observed by academics such as Jean Allain<sup>10</sup> and McGeehan<sup>11</sup> that the legal definition of slavery has, until recent years, been a stagnant and marginalised tool in seeking to bring about the full abolition of slavery.

There are many different conceptualisations of slavery; alongside the persistence of traditional forms of slavery (old slavery) the idea of ‘new slavery’ has emerged. Silvia Scarpa lists such practices as including: forced and bonded labour, debt bondage,

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<sup>5</sup> Joel Quirk. *The Anti-Slavery Project: Linking the Historical and Contemporary* (2006) 28, Human Rights Quarterly, 565, 587

<sup>6</sup> *ibid* 587

<sup>7</sup> see Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press May 2012), Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013)

<sup>8</sup> See Austin Choi-Fitzpatrick, Alison Brysk, *From Human Trafficking to Human Rights: Reframing Contemporary Slavery* (University of Pennsylvania Press 2012) Kevin Bales, *Ending Slavery: How We Free Today's Slaves* (University of California Press 2008)

<sup>9</sup> Nicholas Lawrence McGeehan, *Misunderstood and Neglected: the Marginalisation of Slavery in International Law* (2012) 16, *The International Journal of Human Rights*, 436

<sup>10</sup> Jean Allain, *The Legal Definition of Slavery into the Twenty-First Century* in ed Jean Allain *The Legal Understanding of Slavery – From the Historical to the Contemporary* (Oxford University Press 2012)

<sup>11</sup> McGeehan fn9

forced prostitution, child labour, forced marriage and finally trafficking.<sup>12</sup> Much of the academic literature of the concept of ‘modern slavery’ is focused on the practice of trafficking in human beings, which has become an issue of great importance at both the regional and international levels.

This thesis examines the phenomenon of ‘modern slavery’. It investigates the contemporary conflation of slavery with trafficking under the umbrella term of modern slavery. It demonstrates that the trafficking-dominated narrative negatively impacts on the legal responses to slavery and trafficking in the contemporary setting. It does so by limiting the range of tools available to tackle the existence of human exploitation. The current discourse is framed such that slavery and trafficking are treated as synonymous. This has the effect of excluding from the discourse both actual practices of slavery, which are entirely distinct from trafficking, and other exploitative labour practices. In addition, placing an emphasis on trafficking restricts the role of the victim in responses by prioritising criminalisation. Nevertheless, the discourse has gained its hold and is manifest in the legal approach – the judgement of the European Court of Human Rights in *Rantsev v Cyprus*<sup>13</sup> is illustrative as is the Modern Slavery Act,<sup>14</sup> as we will be demonstrated in this thesis. The overall effect has negative implications for potential victims of slavery and trafficking. The existing conceptualisation of ‘modern slavery’ is limited, and this outlook manifests in contemporary legislative approaches. This thesis contributes to the development of a critical perspective of the ‘modern slavery’ narrative arguing that it is a fallacy, and considers its role in shaping legislative and policy responses to slavery and trafficking.

## 2. Modern Slavery and Trafficking

Within the neo-abolitionist era, there are many intersecting terms and definitions, which are applied to situations of unfree or exploitative labour. Although each of these terms has a distinct legal definition, the understanding of slavery has become blurred with the use of the umbrella term modern slavery and the conflation of slavery and trafficking. Anti-trafficking activists call on us to restate opposition to slavery and

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<sup>12</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 4

<sup>13</sup> *Rantsev v. Cyprus and Russia*, Application no. 25965/04 ECtHR 7 January 2010)

<sup>14</sup> Modern Slavery Act 2015 C.30

defend human rights and freedom.<sup>15</sup> However, academics such as Julia O’Connell Davidson highlight the fact that the discourse of trafficking as modern slavery’ “closes down, rather than opens up, possibilities for effective political struggle against the restrictions, exploitation and injustices that many groups of migrants experience.”<sup>16</sup> Thus, the concept of ‘modern slavery’ can limit the avenues available to tackle human trafficking and the broader issue of human exploitation by essentially demarcating it as distinct from other human and labour rights violations and reinforcing a criminal justice approach.<sup>17</sup>

Slavery is defined in international law in article 1(1) of the 1926 Slavery Convention as: ‘*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*’<sup>18</sup> The legal definition of slavery is dependent on the concept of ownership; yet, the right of ownership over another person is no longer legally permissible. There is a lack of clarity in this definition in relation to the concept of ownership, and the *travaux préparatoires* to the 1926 Convention<sup>19</sup> also fail to explain how the definition is to be interpreted. In the absence of legal ownership, Jean Allain turns to the idea of possession and ownership, arguing that in a situation whereby a person can exercise control over another person, as they would control a thing, it will be deemed in law to be an instance of slavery.<sup>20</sup> Such a situation is described as being control tantamount to possession. However, as will be demonstrated in this thesis, despite this interpretation of the 1926 Convention there remains a lack of precision. This imprecision contributed to the judgment of the European Court of Human Rights in *Rantsev v Cyprus*<sup>21</sup> in which the Court ruled that the practice of trafficking fell within the scope of Article 4 of the European Convention on Human Rights.<sup>22</sup> This lack of precision, this thesis argues, creates the legal backdrop to anchor the ‘modern slavery narrative’, which places trafficking at its centre.

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<sup>15</sup> Julia O’Connell Davidson, *New Slavery, Old Binaries: Human Trafficking and the Borders of Freedom* (2010) 10, *Global Networks*, 244, 245

<sup>16</sup> *ibid*

<sup>17</sup> *ibid* 245

<sup>18</sup> League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253

<sup>19</sup> Jean Allain, *The Slavery Conventions The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Brill Nijhoff 2008)

<sup>20</sup> Allain *Op Cit* fn7 5

<sup>21</sup> *Rantsev Op Cit* fn 13

<sup>22</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

The practice of trafficking is defined independently in article 3 of the Palermo Protocol as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>23</sup>

The practice of trafficking consists of three elements – an action (recruitment), the means (abduction/fraud/deception etc.) and the purpose (exploitation). Thus the term trafficking is itself an umbrella term for a process that may lead to a variety of different exploitative outcomes.<sup>24</sup> It has been noted that the link between slavery and trafficking is unsurprising as both practices involve the organised movement of persons for the purposes of exploitation for profit, engage in the complete control over others and can only be achieved by massive and systematic violations of human rights.<sup>25</sup> Following the judgment in *Rantsev*<sup>26</sup>, slavery and trafficking are used more frequently as if they were synonymous practices. However, in definitional terms, slavery is a form of exploitation that may or may not be present during the process of trafficking. Romana Gardiner Vijayarasa has described the blurring of the concepts as a domino effect.<sup>27</sup> Consequently, rather than the two being viewed as connected but separate concepts, academics such as Kevin Bales have contributed to uniting contemporary human trafficking and the concept of legal slavery. Bales' seminal work, *New Slavery*, created a dichotomy between 'new' and 'old' slavery, intended to demonstrate that while certain elements of the definition of slavery, such as legal ownership, no longer exist, the essential characteristics of slavery are present in the practice of trafficking.<sup>28</sup> Thus, the term 'modern slavery' represents what could be

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<sup>23</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

<sup>24</sup> Davidson fn16, 249

<sup>25</sup> Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 177, Nicole Siller, 'Modern Slavery': Does International Law Distinguish between Slavery, Enslavement and Trafficking? (2016) 14, *Journal of International Criminal Justice*, 405

<sup>26</sup> *Rantsev* fn 13

<sup>27</sup> Ramona Gardiner Vijayarasa, *Sex, Slavery and the Trafficked Woman* (Taylor and Francis 2016) 7

<sup>28</sup> See Bales fn7

thought of as an expansion with the practice of trafficking being fully subsumed within anti-slavery norms.

The instrumentalisation of phenomena or social issues by the anti-trafficking industry is not a novel occurrence. Austin Choi Fitzpatrick has outlined the way in which the anti-trafficking movement has reframed the practice over the years to intersect with a number of different issues and agendas – prostitution, migration, criminal justice, forced labour human rights and finally slavery.<sup>29</sup> From this perspective, drawing a connection between trafficking and a prevalent social issue is not a new occurrence. It is this most recent iteration of trafficking as slavery that has become dominant within the discourse.

The deployment of anti-slavery rhetoric to galvanise support against trafficking has been hugely successful to the point that, as Vijayarasa points out, even the academic community has stopped challenging the equation of human trafficking as slavery.<sup>30</sup> The domain expansion of trafficking under term ‘modern slavery’ acts as a powerful claim-making tool.<sup>31</sup> However, it has been argued that the conflation of practices such as slavery, trafficking and forced labour risks “undermining the effective application of the relevant legal regimes”.<sup>32</sup> The danger in the conflation of slavery and trafficking are threefold. First, the use of the term slavery has the potential to raise the expectations of the harm that must be suffered beyond what anti-trafficking norms require.<sup>33</sup> Second, as O’Connell Davidson has described, a “discourse of depoliticisation” is created.<sup>34</sup> In essence, by invoking the imagery of anti-slavery and abolitionists, the state can absolve itself of any role in the structures that create or reinforce vulnerability and precarity. Thus, the state is able to evade accountability and divert attention through the moral persuasion and power of anti-slavery. Third, by focussing on trafficking, the emphasis is placed on a criminal-justice response to the issue of slavery and trafficking. This focus can have implications, which are to the detriment of victim support and protection.

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<sup>29</sup> Fitzpatrick *Op cit* fn4, 489-495

<sup>30</sup> Vijayarasa *Op cit* fn27, 49

<sup>31</sup> Joel Best, Rhetoric in Claims-Making: Constructing the Missing Children Problem, *Social Problems*, Vol:34 No:2 (1987) 101, 104

<sup>32</sup> Janie Chuang, The Challenges and Perils of Reframing Trafficking as ‘Modern-Day Slavery’ (2015) 5 *Anti-Trafficking Review*, 146

<sup>33</sup> *ibid*

<sup>34</sup> O’Connell Davidson *Op cit* fn16, 245

Research has demonstrated that boundaries between severe labour exploitation, forced labour and slavery are blurred.<sup>35</sup> Labour exploitation exists on a spectrum, and studies show that workers can move fluidly between the blurred boundaries, as there is no “clear line demarking the beginning and end of one form of exploitation to another”.<sup>36</sup> Allain argues that in taking slavery seriously, we must also acknowledge that human exploitation is wrong.<sup>37</sup> Nevertheless, while current academic debates continue to conceptualise the problem in terms of trafficking and slavery, the ‘modern slavery’ paradigm does not take into account the full spectrum of exploitation and thus, does not utilise all available tools to combat the issue.

### 3. The Modern Slavery Act 2015

In August 2013, then Home Secretary, Theresa May, announced the government’s intention to introduce a bill aimed at strengthening anti-trafficking laws and eradicating the phenomenon of modern slavery in England and Wales. The Act is the first of its kind in Europe and the cornerstone of the approach in England and Wales. The passing of the Modern Slavery Act<sup>38</sup> demonstrates a willingness in England and Wales to confront the more severe forms of exploitation. The Act exhibits the influence of the modern slavery paradigm on legislative efforts surrounding the most extreme forms of labour exploitation. The Act reflects the conflation of trafficking, slavery and related practices under the umbrella term of ‘modern slavery’. It further demonstrates the heavy emphasis is placed on criminal justice owing to the prominence of trafficking within current debates.

The legislation consolidates the existing offences of slavery, servitude, forced labour and trafficking under the umbrella of ‘modern slavery’. This places the conflation of different forms of exploitation, which are present in the current narrative, on a statutory basis. In pursuit of a criminal justice focus, which emphasises trafficking and organised crime, the Act introduces tougher penalties,<sup>39</sup> new asset recovery

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<sup>35</sup> Mike Wilkinson, *Demonising ‘the other’: British Government complicity in the exploitation, social exclusion and vilification of new migrant workers* (2014) 18, *Citizenship Studies*, 499, 500

<sup>36</sup> Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation (2010) 17 accessed at (<https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation>)

<sup>37</sup> Allain fn7, 8

<sup>38</sup> Modern Slavery Act 2015 C.30

<sup>39</sup> *ibid* s6

regimes to provide compensation to victims,<sup>40</sup> and new slavery and trafficking prevention and risk orders.<sup>41</sup>

The Act also makes provisions outside of the criminal justice response, creating a statutory duty to address the National Referral Mechanism and the vulnerability of child trafficking victims. The Act provided the basis for two pilot programmes aimed at supporting enhanced victim protection mechanisms. The first of these was for the provision of child trafficking advocates whose role would be to look after best interests of child victims of trafficking.<sup>42</sup> The second pilot was aimed at reforming the National Referral Mechanism (NRM). The NRM is the main gateway for identification and support for victims of trafficking in the UK. The pilot was aimed at improving the identification of victims and removing the involvement of immigration services in the identification process. The final element of the Act was the introduction of the transparency in supply chains clause.<sup>43</sup> This clause creates a legal obligation on all commercial organisations with a turnover exceeding £36 million per year to produce an annual modern slavery statement. This statement should include all actions taken to remove exploitation and modern slavery from the organisation's supply chains. Some elements of the Act were immediately operational, for example, the criminal justice elements. However, many provisions dealing with victim protection, including the two pilots discussed above required further action by the Secretary of State.

The Act does not set out to address labour exploitation in a *general* sense but only that which falls underneath the umbrella of 'modern slavery'. Thus, as it focuses on only one end of the spectrum, it makes use of a limited set of tools to prevent and protect. The concept places emphasis on the concept of trafficking and thus creates an expectation of victims without agency and binaries between free and unfree or slave and non-slave labour. Therefore, the conceptualisation of trafficking as slavery, risks what has been termed as an exploitation creep, whereby different forms of exploitation are redefined as slavery, and a criminal justice response dominates over labour market intervention and corporate responsibility and effective victim

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<sup>40</sup> *ibid* s7

<sup>41</sup> *ibid* ss14-29

<sup>42</sup> *ibid* s47

<sup>43</sup> *ibid* s47

protection.<sup>44</sup> A more holistic approach would allow consideration of exploitation at all points on the continuum and reduce vulnerability to exploitation. The ability to consider precarity within the labour market presents the opportunity to prevent exploitation before it can become tantamount to possession and, therefore, be classified as slavery. Such a shift would thus broaden the focus of the modern slavery narrative beyond trafficking and criminal justice responses.

#### 4. 'Modern Slavery and the Normalisation of Labour Exploitation'

The 'modern slavery' paradigm is beset by limitations and, as such, a new way of thinking about slavery would be beneficial in terms of placing it within the wider context of exploitation. This thesis will argue that the 'modern slavery' approach does not adequately respond to contemporary institutional arrangements, taking into account the inherent vulnerability to exploitation posed by migrant labour and flexible labour arrangements and less severe forms of exploitation which have the potential to span the spectrum of exploitation.

In the 1970s, with the rise of neo-liberalism, a new mindset took hold, one of labour market flexibility. According to David Harvey, the neo-liberal state favours "strong individual private property rights, the rule of law, and the institutions of freely functioning markets and free trade."<sup>45</sup> Thus under the assumption that "the rising tide lifts all boats" it is, therefore, essential that businesses are not encumbered by unnecessary regulations and can operate within a framework of free markets and free trade.<sup>46</sup> The idea of labour market flexibility is central to this, the argument put forward was that unless labour markets became more flexible labour costs would rise and profits would fall.<sup>47</sup>

Privatisation and deregulation combined with competition it is claimed, eliminate bureaucratic red tape, increase efficiency and productivity, improve quality, and reduce costs, both directly to the consumer through cheaper commodities and services and indirectly through the reduction of the tax burden.<sup>48</sup>

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<sup>44</sup> Alex Balch, 'Understanding and Evaluating UK Efforts to Tackle Forced Labour' in ed Gary Craig et al. *Vulnerability, Exploitation and Migrants: Insecure Work in a Globalised Economy* (Springer 2015) 94

<sup>45</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2009) 64

<sup>46</sup> *ibid* 54

<sup>47</sup> Guy Standing, *The Precariat* (Bloomsbury Publishing 2011) 9

<sup>48</sup> Harvey, fn45, 65

There are many different elements of labour market flexibility, but perhaps the most important in the context of slavery and exploitation is employment flexibility. Employment flexibility means that employers can easily change employment levels, usually implying a reduction in employment security and protection. While such an approach undoubtedly maximises profits, this approach has the effect of systematically making employees more insecure.<sup>49</sup>

There is a growing body of literature and evidence that suggests that large sections of migrant communities in low paid and insecure work in sectors such as construction, domestic work and agriculture, are the most precarious and also the most at risk of exploitation.<sup>50</sup> Vulnerable jobs are characterised as “insecure, temporary and low paid with non-payment, long and irregular working hours, and unfair dismissal all common”.<sup>51</sup> The emergence of neo-liberalism ushered in a two-tier labour market divided between highly protected workers (civil servants and holders of permanent contracts) and highly flexible jobs taken up by migrants, as well as young people, women and unskilled workers.<sup>52</sup>

In the UK despite the apparent commitment to combatting exploitation in the form of ‘modern slavery’ and trafficking, the Government has introduced a number of policies aimed at labour market deregulation. The conceptualisation of slavery as equating to trafficking conditions a criminal justice response. Thus, the State is able to pursue two incongruous policies with impunity and thus, normalise the existence of labour exploitation and poor working conditions. This evidences the argument posited by O’Connell Davidson that the trafficking and modern slavery paradigm creates a context of depoliticisation which allows the state to continue to create structures, which can, in turn, create or deepen vulnerability to all forms of exploitation.<sup>53</sup> Genevieve Le Baron argues that the current paradigm isolates the worst forms of exploitation from the “broad matrix of unfreedom that characterises the bottom rungs

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<sup>49</sup> *ibid* 10

<sup>50</sup> See Michael Potter, Jennifer Hamilton, Picking on vulnerable migrants: precarity and the mushroom industry in Northern Ireland (2014) 28, *Work, Employment and Society*, 390, Hannah Lewis, Louise Waite Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a lens for understanding and tackling forced labour (2015) 5 *Anti-Trafficking Review*, 49

<sup>51</sup> Hiranthi Jayaweera, Bridget Anderson, Migrant workers and vulnerable employment: A review of existing data, Report for TUC Commission on Vulnerable Employment (2008)

<sup>52</sup> Hannah Lewis, Peter Dwyer, Stuart Hodkinson, Louise Waite, *Hyper-Precarious Lives, Migrants, Work and Forced Labour in the Global North* (2014) 39, *Progress in Human Geography*, 580

<sup>53</sup> *ibid* 256

of the global labour market”.<sup>54</sup> Such accounts mean that social, political and economic foundations and institutional frameworks are left unquestioned, supporting O’Connell Davidson’s theory of depoliticisation and thus, allows the normalisation of exploitation in the workplace.

Consequently, in practice, when it comes to ‘modern slavery’ it is the restriction of a person’s choices or freedom via violence or coercion which is viewed as the true problem. Yet, the trafficking as ‘modern slavery’ discourse is silent when it comes to the migrant or temporary worker who works for long hours and is unable to quit their employment and subjected to poor working conditions but, is not beaten, raped or tortured.<sup>55</sup>

In line with the neo-liberal project and the ethos of labour market flexibility, at the same time that the government was advancing the Modern Slavery Bill, the Department for Business Innovation and Skills and the Cabinet Office began the ‘Red Tape Challenge’. The red tape challenge aimed to remove unnecessary regulation and the financial burden on businesses; it culminated in the Deregulation Bill in 2013. The main concerns with the Deregulation Act 2015<sup>56</sup> lie in the provisions aimed at the rules governing health and safety for self-employed workers as well as curtailing the powers of employment tribunals and the main UK labour inspection authorities.<sup>57</sup> Two particular targets of the government’s labour deregulation mission were the Employment Agencies Standards Inspectorate (EAS) and the Gangmasters Licensing Authority (GLA). Robinson argues that the majority of measures contained within the Act have an impact on the protection of vulnerable and precarious workers.<sup>58</sup> Further to this, a broader culture of failing to protect workers is evident in the UK with reports in September 2018 highlighting that employers can evade legal requirements such as the payment of minimum wage with relative impunity. Failing to pay workers the minimum wage is a criminal offence with the maximum penalty of

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<sup>54</sup> Genevieve LeBaron, *Unfree Labour Beyond Binaries: Insecurity, Social Hierarchy and Labour Market Restructuring* (2015) 17 *International Feminist Journal of Politics*, 1, 12

<sup>55</sup> O’Connell Davidson *Op Cit* fn16.251

<sup>56</sup> Deregulation Act 2015 C. 20

<sup>57</sup> Caroline Robinson, *Claiming Space for Labour Rights within the United Kingdom Modern Slavery Crusade* (2015) 5 *Anti-Trafficking Review*, 129

<sup>58</sup> *ibid*

200% of every penny underpaid and the full reimbursement of employees.<sup>59</sup> In 2017-2018, HMRC reported a £15.6 million underpayment of over 200,000 employers with employers fined £14 million.<sup>60</sup> These figures suggest that HMRC is not using the full power of the law to hold employers to account for breaching national minimum wage requirements.<sup>61</sup>

Exploitation has been characterised as a spectrum on which labourers may voluntarily enter into employment or working conditions without any reference to trafficking or coercion, yet still experience poor or exploitative conditions. Thus, it is entirely possible that such an individual may experience low levels of exploitation which may be associated with precarity and vulnerable labour positions but then move across the continuum, falling “into a tunnel of entrapment as their options get narrower and narrower”.<sup>62</sup> It is hence necessary to make a link between precarious and less severe forms of exploitation and more severe examples such as slavery. Consequently, deregulation and defunding of services like the GLA and EAS and a reluctance to confront precarious forms of employment have the potential to combine with the focus of the current narrative on more extreme forms of exploitation to produce a potentially dangerous environment for victims of all forms of exploitation.

## 5. Objectives of the Thesis

This thesis examines the impact of the international legal frameworks on slavery and trafficking and domestic provisions of slavery and trafficking. This research focuses on the impact of the ‘modern slavery narrative’ on legal and policy responses to slavery and human trafficking. It extends the existing literature by investigating how different conceptualisations of slavery impact the efficacy of anti-slavery legislation. Specifically, this thesis will explore the disconnect between different sections of the literature of slavery and trafficking. There is recognition by some that slavery exists

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<sup>59</sup> Department for Business, Energy & Industrial Strategy, National Minimum Wage Act 1998 C.39, National Minimum Wage Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law (November 2017) accessed at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/656568/nmw-enforcement-beis\\_-\\_policy\\_doc\\_-\\_full\\_vFINAL\\_\\_3\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656568/nmw-enforcement-beis_-_policy_doc_-_full_vFINAL__3_.pdf)

<sup>60</sup> *ibid*

<sup>61</sup> Richard Partington, Ministers urged to get tough on minimum wage offenders (The Guardian 22 September 2018) accessed at <https://www.theguardian.com/society/2018/sep/22/ministers-urged-to-get-tough-on-minimum-wage-offenders>

<sup>62</sup> Hannah Lewis, Peter Dwyer, Stuart Hodkinson, Louise Waite, Hyper-precarious lives: Migrants, work and forced labour in the Global North (2015) 39(5) *Progress in Human Geography*, 580, 588

on a spectrum of labour exploitation. However, at the same time, large sections of the academic literature propagate the idea of trafficking as ‘modern slavery’. This thesis focuses on the legal definitions and prohibitions of slavery and of trafficking in order to investigate the binary of slave and non-slave labour and in order to understand the meaning and impact of the discourse of ‘modern slavery’. It analyses the relevant international legal frameworks and exposes how established definitions contribute to legal ‘blind spots’, which limit the utility of legislation in tackling contemporary slavery and restricting victim protection and support. In particular, this thesis asks: First, how has the concept of trafficking become dominant in the current narrative on slavery? Second, how does the focus on trafficking within the modern slavery narrative form a barrier for dealing with exploitation at all points of the exploitation spectrum? Third, does the concept of modern slavery impact victims of slavery and trafficking?

Chapter 1 explores the historical abolition of slavery and anti-slavery initiatives. In the process of addressing the link between abolitionism and colonialism, this chapter will consider the prominent role of non-governmental actors and societies in paving the road to international abolition. The chapter will chart three anti-slavery episodes: first, the initial abolitionist movement from the 17<sup>th</sup> century; second, anti-slavery post-1807 Slave Trade Act; and, third, anti-slavery and the League of Nations. This chapter will conclude with an examination of the importance of abolition and anti-slavery narratives and analogies, and begin to consider how the framing and use of such analogies and potential lessons from anti-slavery’s past may map onto contemporary ‘modern slavery’ narratives.

Chapter 2 examines the first constituent element of the concept of ‘modern slavery’: human trafficking. This chapter is comprised of two parts: it will first investigate the creation of human trafficking as a phenomenon in the context of British colonial and anti-prostitution narratives. It will, thereby, consider the historical and social roots of the ‘modern slavery’ narrative, and also highlight key rhetorical parallels between the white slavery and modern slavery narratives. The second section of this chapter will focus on the legal definition of trafficking primarily in the context of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized

Crime (Palermo Protocol).<sup>63</sup> The crime of trafficking is comprised of three individual elements and can be characterised as a process, which may or may not involve exploitation which could be equated to slavery. The chapter aims to demonstrate that contrary to the prevailing narrative and trends in the interpretation of anti-slavery frameworks, although slavery and trafficking are linked, in legal terms, the process of trafficking is not only nominally but also substantively distinct from slavery.

Chapter 3 analyses the legal framework that sets out the parameters of the legal definition of slavery in international law. In doing so, it seeks to assess what the current state of the law is on slavery. Allain argues that the League of Nations 1926 Slavery Convention<sup>64</sup> provides an operational definition. Any practice that falls outside the scope of Article 1 of the Convention should not be categorised as slavery. This chapter will discuss the possibility that the legal definition and the use of the term slavery are not tools suitable for dealing with the persisting problem of labour exploitation. The international legal definition relies on a legal right of ownership, something that is no longer a legal status but a social condition. In order for the definition to be operational, it hinges upon on the concept of incidents of ownership. This chapter will explore how this reliance on a broad and flawed definition leaves the legal framework open to an increasingly expansive interpretation. This, arguably, allows the focus to be placed on the crime of trafficking within current debates and legislation such as the Modern Slavery Act. In doing so, it also restricts the scope of modern slavery, negating the fact that exploitation exists on a spectrum. The construction of this narrative means the concept of modern slavery does not have much capacity to deal with less severe forms of labour exploitation. Further to this, due to the expansive interpretation of the legal definition, the concept of modern slavery is unable to comprehend the existence of *de facto slavery*.

Chapter 4 builds on the analysis of the international legal framework to evidence how the flaws identified have been operationalised in social and political discourse. The chapter focuses on the concept of modern slavery and the dangers of the current paradigm. Modern slavery is conceptualised as an umbrella term for a number of exploitative labour practices. This has a number of negative implications when it comes to considering the bigger picture of exploitation. The current narrative draws a

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<sup>63</sup> Palermo Protocol fn23

<sup>64</sup> Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253

line between poor or appalling work conditions and cases of the most severe exploitation (modern slavery). However, a large proportion of the academic literature in the area does not engage with the doctrinal and practical hurdles to the construction of the concept of ‘modern slavery’. This means that the literature on ‘modern slavery’ is often uncritical and offers no reflection on the amalgamation of the substantive concepts of slavery and trafficking. This chapter will, therefore, explore what modern slavery is understood to mean in academic literature and probe the potential dangers of the use of this phrase within legal responses to exploitation, slavery and trafficking. It will also ask whether the concept may be detrimental to victims.

Chapter 5 moves the thesis on to consider the current antislavery legal framework in England and Wales and the specific context in which the Modern Slavery Act has developed.<sup>65</sup> The chapter will explore the Modern Slavery Act 2015 in order to establish to what extent the drafting process became a missed opportunity to address the wider issue of labour exploitation. It opens with a general overview of the Act, outlining the key features, including definitions, consolidation, criminal justice and victim protection. In light of the discussion in the previous chapter, this chapter proceeds to examine gaps in the current antislavery framework. It will also explore to what extent the Act is able to accommodate protection against exploitation in a broader sense. The Act relies heavily on a criminal justice response, a consequence of the focus on trafficking. The chapter will demonstrate how the ‘modern slavery and trafficking narrative have permeated the Act and, therefore, its approach. This chapter will advance the argument that, while the government is offering an agenda on modern slavery, the bigger pictures of exploitation and effective victim protection and support remain a blind spot. Ultimately, the Act represents a failure to reflect on the most precarious aspects of contemporary labour practices and tackle vulnerability to exploitation.

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<sup>65</sup> Modern Slavery Act 2015 C.30

## **Chapter 1: The Road to International Abolition and the 1926 Slavery Convention:**

### **1. Introduction**

This chapter will not provide a retelling of the history of slavery; the focus of this thesis is anti-slavery and anti-trafficking legislation. Thus, this chapter will situate the issue of anti-slavery in the context of transatlantic slavery and the subsequent abolition movement in order to chart the path to the 1926 Slavery Convention and the legal definition of slavery. This chapter will assess how the problem of anti-slavery came to be a key component of the work of the League of Nations in post-war Europe. The first section will address the link between anti-slavery activism and colonialism from the 1807 Slave Trade Act up until the 1926 Slavery Convention, considering how global abolition was placed firmly on the international agenda and how the League of Nations decided to create an international convention on slavery. This chapter will demonstrate that, at different points, various factors and actors drove abolitionism in the 19<sup>th</sup> and 20<sup>th</sup> centuries. It was ultimately organisations such as the Anti-Slavery Society which were the true driving force behind the evolution of international abolitionism, with colonial powers often using the vehicle of abolition for their own economic and territorial interests.

The chapter will be comprised of three parts: the first section will provide a summary of the historical background of the trans-Atlantic slave trade and the initial abolitionist movements of the 17<sup>th</sup> and 18<sup>th</sup> centuries. The second part of this chapter will move on to consider abolitionist debates in Britain and internationally post 1807, and the abolition of the slave trade in the British Empire under the Slave Trade Act 1807. This section will examine how post-British abolition policies sought to extend anti-slavery on a global scale and dismantle the slave trade itself but not necessarily the institution of slavery in colonial territories. The third section will inspect anti-slavery and abolition during the League of Nations era up until 1926, evaluating how it became the advocacy of organisations, such as the British Anti-Slavery Society, which placed the issue of slavery firmly on the international agenda in 1925 and created the path for the creation of the 1926 Slavery Convention. This chapter will conclude with an examination of the importance of abolition and anti-slavery narratives and analogies, and begin to consider how the framing and use of such

analogies and potential lessons from anti-slavery's past may map onto contemporary 'modern slavery' narratives.

## 2. The Transatlantic Slave Trade

It has been argued by Robin Blackburn there are many indicators of medieval Europe which foreshadow the development of slavery in the New World.<sup>66</sup>

The powers which successfully colonised the Americas had their roots in medieval kingdoms, each of which displayed a propensity for ethno religious intolerance and persecution, territorial expansion, colonial settlement, arrogant impositions on subject peoples, and the theological justification of slavery, racial exclusion and sordid enterprise.<sup>67</sup>

The transatlantic slave trade encapsulates a period of history spanning four centuries, beginning in the 15<sup>th</sup> Century and 'ending' in the 19<sup>th</sup> Century. James Rawley and Stephen Behrendt argue, "it is not a paradox that the start of the Atlantic slave trade coincides with the dawn of modern Europe. The trade was closely interwoven with the major changes that are associated with the making of the modern era."<sup>68</sup> The catalyst for the creation of the transatlantic slave trade and the transportation of Africans to the Americas was the demand for what was known as 'white gold' by British colonists or, as we now know it, sugar. The demand for African slaves was rooted in the development of plantation agriculture. Rawley and Behrendt comment that the harsh manual labour necessary for cultivating sugar required numbers that "as it turned out, could be supplied only from Africa."<sup>69</sup> The progression of the trans-Atlantic slave trade can be broken down into three distinct stages. The three stages have been characterised according to the dominating colonial power.

In the first period, before 1642, the Iberian powers dominated the trade, with Portugal and Spain being united in 1580-1640 and, in commercial terms, their separation taking place in 1641. By that date, a second phase of the trade was underway as nations of northern Europe began systematically to engage in it. They were subsequently joined by traders from mainland North America. This phase of the trade ended in 1808 when the British and U.S. anti-slave-trade

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<sup>66</sup> Robin Blackburn, *The Making of New World: From the Baroque to the Modern 1492-1800* (Verso 2<sup>nd</sup> Edition 2010) 33

<sup>67</sup> *ibid*

<sup>68</sup> James, Rawley, Stephen Behrendt, *The Transatlantic Slave Trade: A History* (University of Nebraska Press 2005) 8

<sup>69</sup> *ibid* 12

laws of 1807-1808 took effect, and other northern European nations began disengaging from the trade. Disengagement ushered in the third period dominated by Portuguese and Spanish speakers, operating largely from bases in Brazil and Cuba, against a background of growing abolitionist and suppression activities.<sup>70</sup>

The catalyst for the transatlantic slave trade was the expansion of the Portuguese into Africa. It was, therefore, the Portuguese exploration of Africa, the settlement of the Atlantic Islands, and the subsequent creation of sugar plantations supplied with slave labour via Africa, which paved the way for sugar to “become the economic foundation of a transatlantic slave trade in enslaved Africans.”<sup>71</sup> This would lead to a near 150-year Portuguese monopoly in the Atlantic and Africa.<sup>72</sup> It was, therefore, the slave trade to the Spanish Americas, in the 16<sup>th</sup> and 17<sup>th</sup> centuries, which became the “foundation of 350 years of forced migration from Africa to the Americas.”<sup>73</sup> The first systematic trade of African slaves in the Atlantic was from Seville in 1501.<sup>74</sup> In 1505, 117 slaves were sent to Hispaniola (Santo Domingo) to work in the islands’ gold mines.<sup>75</sup> In 1518, Charles I (the future Holy Roman Emperor) authorised licenses to send 4000 slaves to the Spanish Americas, and, in that same year, the Spanish Government allowed the movement of 400 slaves to Hispaniola. The Portuguese trade averaged just over 1000 slaves per year in the 1490s; however, by the 1510s, “the volume of the trade passed 3000 slaves per annum, and after the 1530s these slaves were shipped directly to Americas from the entrepot island Sao Tome”.<sup>76</sup> By this point, slaves were transported directly from Africa to the Americas, shifting the supply of slaves from Europe to Africa. Antonio de Almeida Mendes argues that the trade in African slaves from the Iberian Peninsula to the Americas in the 16<sup>th</sup> Century

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<sup>70</sup> David Eltis, David Richardson, David W Blight, David Brion Davis, *Atlas of the Transatlantic Slave Trade* (Yale University Press 2010) 21

<sup>71</sup> *ibid* 1

<sup>72</sup> see Blackburn *Op cit* fn66 95-126 for a detailed discussion on Portugal’s involvement with the early stages of the trade

<sup>73</sup> Antonio de Almeida Mendes, *The Foundations of the System: A Reassessment of the Slave Trade to the Spanish Americas in the Sixteenth and Seventeenth Centuries* in ed, David Eltis et al, *Extending the Frontiers: Essays on the New Transatlantic Slave Trade Database* (Yale University Press 2008) 63

<sup>74</sup> *ibid*

<sup>75</sup> *ibid* 64

<sup>76</sup> Herbert Klein, *The Atlantic Slave Trade* (Cambridge University Press 2010) 11

demonstrates that trade in slaves "from Africa to Mediterranean Europe (Italy, Spain, and Portugal) long preceded the transatlantic traffic."<sup>77</sup>

It was the Portuguese who dominated the transatlantic slave trade until the mid-17<sup>th</sup> Century when countries such as the Netherlands, Britain, and France established their colonies in the Americas and "almost immediately began a steady traffic in slaves".<sup>78</sup> By 1660 a new status quo of colonial powers involved in the transatlantic slave trade had been established which held for the next century and a half.<sup>79</sup> The Portuguese gained dominance of the trade in the South Atlantic operating out of Brazil, while the newer European slaving nations gained prominence in the traffic to the Spanish Americas and the Caribbean,<sup>80</sup> operating north of the equator. For a majority of the 18<sup>th</sup> century, Britain was the leading slave trading power in the North Atlantic. During the 19<sup>th</sup> Century, the emergence of abolitionism shifted the balance of power once more. As discussed above by Rawley and Beherendt, abolitionism brought about the withdrawal of European powers from the slave trade, leaving the Spanish and Portuguese, who were operating primarily out of Cuba and Brazil, to gain dominance of the trade once more.<sup>81</sup>

Table 1. The number of slaves taken from Africa by Nationality of the vessel carrying them, 1501-1867.<sup>82</sup>

	Spain / Uruguay	Portugal / Brazil	Great Britain	Netherlands	U.S.A.	France	Denmark / Baltic	Totals
1501-1525	6363	7000	0	0	0	0	0	13363
1526-1550	25375	25387	0	0	0	0	0	50762
1551-1575	28167	31089	1685	0	0	66	0	61007
1576-1600	60056	90715	237	1365	0	0	0	152373
1601-1625	83496	267519	0	1829	0	0	0	352844
1626-1650	44313	201609	33695	31729	824	1827	1053	315050
1651-1675	12601	244793	122367	100526	0	7125	653	488065
1676-1700	5860	297272	272200	85847	3327	29484	25685	719675
1701-1725	0	474447	410597	73816	3277	120939	5833	1088909
1726-1750	0	536696	554042	83095	34004	259095	4793	1471725
1751-1775	4239	528693	832047	132330	84580	325918	17508	1925315
1776-1800	6415	673167	748612	40773	67443	433061	39199	2008670
1801-1825	168087	1160601	283959	2669	109545	135815	16316	1876992
1826-1850	400728	1299969	0	357	1850	68074	0	1770978
1851-1875	215824	9309	0	0	476	0	0	225609
Totals	1061524	5848266	3259441	554336	305326	1381404	111040	12521337

<sup>77</sup> Mendes *Op cit* fn73, 63

<sup>78</sup> Eltis et al *Op* fn70 22

<sup>79</sup> *ibid*

<sup>80</sup> *ibid*

<sup>81</sup> Eltis et al *Op cit* fn 70

<sup>82</sup> Assessing the Slave Trade: Estimates of Slaves Traded to Colonial Powers [2013], *Voyages: The Trans-Atlantic Slave Trade Database* accessed at (<http://www.slavevoyages.org/assessment/estimates> 22/08/17)

Table 1 demonstrates the shifts in the power balance of the trans-Atlantic slave trade between 1500 and 1800. The table shows intensification in the trade and the number of enslaved Africans transported during the 18<sup>th</sup> Century. From 1701 to 1800, Table 1 estimates that 6,494,619 Africans were transported. This represents over half of the overall total for the duration of the trade. During the 19<sup>th</sup> Century, the figure demonstrates a decline in the transportation of slaves with the numbers steadily falling to 225609 between 1851 and 1875.

Contemporary research has demonstrated that a majority of enslaved Africans came from Benin, Biafra<sup>83</sup>, and Angola.<sup>84</sup> Over the course of 374 years, an estimated total of 12,521,335 Africans were enslaved and forcibly transported across the Atlantic. David Eltis comments that information on the sources of African captives is limited as is the information on the nature of their capture and their movement to the coast.<sup>85</sup> However, the research which is available suggests that war, commerce, and politics supplied sources of enslaved Africans.<sup>86</sup>

Many, if not most, came from places much closer to the coast. Some captives from Senegambia and West Central Africa were victims of drought and famine. Others found themselves enslaved because of debt. However, the largest single source of captives was violence, including warfare, state-sponsored raiding, and kidnapping. As the scale of the Atlantic slave trade grew, the circles of violence in Africa linked to transatlantic slavery intensified and widened.<sup>87</sup>

There is, however, much more detailed information available on the places of sale and embarkation of enslaved Africans.

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<sup>83</sup> Benin was a pre-colonial kingdom in what is now southern Nigeria, the Bight of Biafra is located on the West African Coast in the Gulf of Guinea.

<sup>84</sup> Rawley *Op cit* fn68, 16

<sup>85</sup> Eltis *Op cit* fn70, 87

<sup>86</sup> Rawley *Op cit* fn68, 16

<sup>87</sup> Eltis *Op cit* fn70, 87

Table 2. Embarkation regions of enslaved Africans between 1501-1875.<sup>88</sup>

	Senegambia and offshore Atlantic	Sierra Leone	Windward Coast	Gold Coast	Bight of Benin	Bight of Biafra	West Central Africa and St. Helena	South-east Africa and Indian ocean islands	Totals
1501-1525	12726	0	0	0	0	0	637	0	13363
1526-1550	44458	0	0	0	0	2080	4225	0	50763
1551-1575	48319	1168	0	0	0	3383	8137	0	61007
1576-1600	41778	237	2492	0	0	2996	104879	0	152372
1601-1625	23862	0	0	68	3528	2921	322119	345	352843
1626-1650	30360	1372	0	2429	6080	33540	241269	0	315050
1651-1675	27741	906	351	30806	52768	80780	278079	16633	488064
1676-1700	54141	4565	999	75377	207436	69080	293340	14737	719675
1701-1725	55944	6585	8878	229239	378101	66833	331183	12146	1088909
1726-1750	87028	16637	37672	231418	356760	182066	556981	3162	1471724
1751-1775	135294	84069	169094	268228	288587	319709	654984	5348	1925313
1776-1800	84920	94694	73938	285643	261137	336008	822056	50274	2008670
1801-1825	91225	89326	37322	80895	201054	264834	929999	182338	1876993
1826-1850	17717	84416	6131	5219	209742	230328	989908	227518	1770979
1851-1875	0	4795	0	0	33667	2	156779	30167	225610
Totals	755513	388770	336867	1209322	1999060	1594560	5694575	542668	12521335

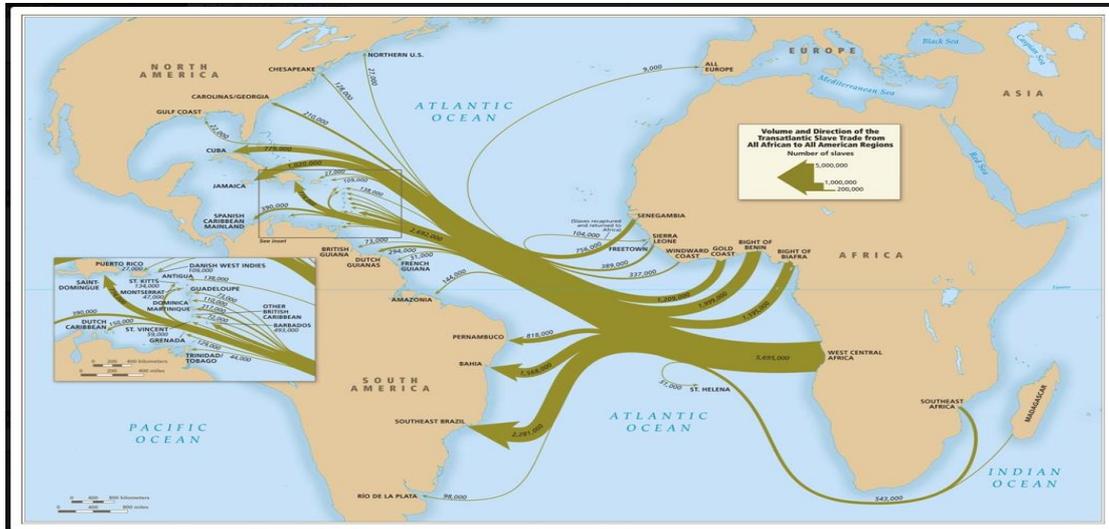
Table 2 above provides information on the sale and embarkation sites of enslaved Africans between 1501 and 1875. The embarkation sites do not necessarily correlate to the areas from which the enslaved were procured. The enslaved would be moved to ports along the coast of Africa for sale and transportation. The embarkation sites are compiled into regional areas – Upper Guinea (Senegambia, Sierra Leone and the Windward Coast), the Gold Coast, the Bight of Benin, Biafra, West Central Africa (mainly Angola) and Southeast Africa.<sup>89</sup> During the early years of the trade, the Portuguese and Spanish dominated. Therefore, in the 15<sup>th</sup> Century, a majority of enslaved Africans were sourced from the coast south of the Sahara. A large number of enslaved Africans were then transported from Senegambia and West Central Africa. In the 16<sup>th</sup> Century, the bulk of enslaved Africans were transported from Cape Verde and the Congo.<sup>90</sup> By the end of the 17<sup>th</sup> Century, a shift in procurement can be seen in areas such as Benin, Biafra seeing an increase in embarkation numbers. Towards the end of the 18<sup>th</sup> Century, with the spread of abolitionism and the gradual removal of the involvement of many European powers, the supply of slaves from West Africa and Senegambia once again increased.

<sup>88</sup> Estimates: Sale and Embarkation Sites: Estimates of Slaves Traded to Colonial Powers [2013], Voyages: The Trans-Atlantic Slave Trade Database accessed at (<http://www.slavevoyages.org/assessment/estimates> 22/08/17))

<sup>89</sup> Eltis *Op cit* fn70, 87

<sup>90</sup> Rawley *Op cit* fn68, 16

Figure 1. The map displays the volume and direction of the trans-Atlantic slave trade from all African to all American regions.<sup>91</sup>



Colonial economies were built on the systematic enslavement and exploitation of millions of Africans forcibly transported from the areas outlined above. For a majority of the nearly 400 years of the transatlantic slave trade, public, moral, religious and political opinion helped to uphold the practice of slavery; however, in the 18<sup>th</sup> Century, after 200 years at the heart of the slave trade, a new movement emerged in Britain calling for the abolition of the slave trade.

### 3. Abolition of Trans-Atlantic Slavery: The First Wave of Anti-Slavery

The timeline of the legal abolition of the transatlantic slave trade and slavery is relatively straightforward: European nations began to take action in 1792 with the Danish abolition of the slave trade. Complete legal abolition was concluded in 1836 with Portugal being the final slave trading state to end its trade across the Atlantic.<sup>92</sup> However, the narratives of abolition are more complex, with various factors feeding into the eventual decision of slave trading states to abolish the trade.

<sup>91</sup>Introductory Maps: Major coastal Regions from which Captives left Africa [2013] Estimates of Slaves Traded to Colonial Powers [2013], Voyages: The Trans-Atlantic Slave Trade Database accessed at (<http://www.slavevoyages.org/assessment/intro-maps#map8> ad 22/08/17)

<sup>92</sup>Elits *Op cit* fn70 271

The trade existed for nearly 400 years, and for over 300 of these years the scales of public and political opinion weighed heavily on the side of the slave traders and merchants. It is important to understand, in the context of British abolition, the factors which lit the tinder of the marginal anti-slavery movement in the late 1780s, culminating in the first legal response to anti-slavery in 1806. While it is true that there were religious, moral and humanitarian concerns at play, from its inception, the great anti-slavery project which is invoked in the contemporary ‘modern slavery’ narrative, was tied up in the mêlée of competing interests and social transformations.

It has been observed by John Oldfield that, “properly speaking, the history of organised anti-slavery dates from the 1780s”.<sup>93</sup> This is not to say that anti-slavery sentiment did not exist prior to the late 18<sup>th</sup> Century. Christopher Leslie Brown remarks, “slave traders in Britain encountered public disapproval early in the 18<sup>th</sup> Century, decades before the emergence of those cultural movements often credited for engendering antislavery sentiment.”<sup>94</sup> Indeed, anti-slavery and the subsequent abolition of the slave trade were not driven by the morality of white colonial abolitionists. A key element of anti-slavery was the agency of the enslaved through slave resistance. The study of the oppression of slavery and trans-Atlantic slave trade has been complemented by the extensive study of strategies of resistance. Emphasis is often placed on physical and overt resistance in the form of fugitive or runaway slaves,<sup>95</sup> and slave rebellion on the plantations.<sup>96</sup> However, resistance also manifested itself psychologically via religion and rhetorical devices such as song and slave spirituals as a form of self-definition.<sup>97</sup> David Eltis et al. have remarked that anti-slavery and the suppression of slave trade began on the slave vessels themselves: “In a very real sense, captives on board slave vessels attempted to suppress the slave trade by attempting to capture the vessels taking them away from Africa.”<sup>98</sup>

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<sup>93</sup> John R. Oldfield, *Transatlantic Abolition in the Age of Revolution* (Cambridge University Press 2013) 13

<sup>94</sup> Christopher Leslie Brown, *Moral Capital: Foundations of British Abolition* (2006) 37

<sup>95</sup> John Hope Franklin, Loren Schweninger, *Runaway Slaves: Rebels on the Plantation* (Oxford University Press 2000)

<sup>96</sup> Eugene Genovese, *From Rebellion to Revolution: Afro-American Slave Revolts in the Making of the Modern World* (LSU Press 1981)

<sup>97</sup> Kerran L Sanger, Slave Resistance and Rhetorical Self-Definition: Spirituals as a Strategy [1995] Vol 50, *Western Journal of Communication*, 177

<sup>98</sup> Eltis *Op cit* fn70 271

Thus, anti-slavery in the sense of trying to oppose enslavement, escape from exploitation and disrupt the institution long pre-dated the formalisation of an abolitionist movement. But, while recognising the pivotal importance of slave agency in the fight for abolition, it is essential, to this enquiry, to examine the legislative anti-slavery developments and the political and economic motivations, which influenced the eventual capitulation of the British Government to the abolition movement.

The late 18<sup>th</sup> Century could be thought of as the pivot of anti-slavery, the moment at which a disparate collection of individuals and loosely organised groups became a coherent movement or network.<sup>99</sup> However, how we perceive this coalescence is important. The turning point of the 1780s was not a straightforward case of a levee breaking the banks or a great swell of anti-slavery sentiment building to the point of an abolitionist revolution.

We should resist the inclination to view the antislavery movements of the late 18<sup>th</sup> century as the working out of cultural trends or as the consequence of a series of intellectual steps that ascended to a break-through in moral perception. The long history of sincere but inconsequential protest belies such narratives of cultural progress. Antislavery thought in the 18<sup>th</sup> Century did not build cumulatively block by block to a higher stage of consciousness. The essentials of the case against the enslavement of Africans had been articulated long before the antislavery movements began. Nor did the intensity of antislavery sentiment swell to a breaking point in the late 18<sup>th</sup> century from which it loosed abolitionist fervour across the cultural landscape.<sup>100</sup>

Thus, rather than viewing British abolitionism as a moral breaking point, Brown highlights that the case against the slave trade had been articulated long before the inception of the great anti-slavery organisations. The fact stands that, for over a century, British involvement in the slave trade was unopposed due to the fact that it bore significant financial gains for a range of commercial, public and political interests;<sup>101</sup> in fact, “with the crucial exception of the slaves themselves, everyone seemed to benefit.”<sup>102</sup> Therefore, in light of the financial advantages of the slave trade and the long-standing public and political support for the institution, the "take off" of

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<sup>99</sup> see Oldfield *Op cit* fn93, 13, Brown *Op cit* fn94, 37-40

<sup>100</sup> Brown *Op cit* fn94, 40

<sup>101</sup> *ibid* 53

<sup>102</sup> *ibid*

abolitionism in the late 18<sup>th</sup> Century was neither accidental<sup>103</sup> nor the result of a gradual moral awakening in British society and politics. However, neither was it that there had been a decline in the productivity of the British slave trade:

British slavery did not decline because of any major shift in the institution's contribution to the British economy. Nor did British slave production diminish as a proportion of Atlantic slave output during the last quarter of the eighteenth century. In 1807, British-controlled territories produced well over half of the sugar reaching Europe, up from less than one-third in 1775.<sup>104</sup>

The formation of the Society for the Abolition of the Slave Trade in Britain saw a rapid coalescence of anti-slavery sentiment into practical action. As discussed earlier Brown contends that the anti-slavery movement should not be viewed as a great moral breakthrough and a sudden change in perception.<sup>105</sup> In a similar vein, David Brion Davis stated that “climates of opinion do not give virgin birth to social movements.”<sup>106</sup> Thus, what was the distinguishing factor that contributed to the abolition of the slave trade in Britain. British abolitionism was symptomatic of a broader and radical shift in the political discourse. While there were many contributing factors, including “economic development and the growth of compassionate humanitarianism, there is little doubt that the American Revolution changed the terms of the debate”.<sup>107</sup> Drescher argues that: “Before the end of the American War of Independence, the possibility of abolishing Britain's Atlantic slave trade had never been debated in Parliament. By the end of the French Wars three decades later, Parliament had entirely shut down Britain's own slave trade.”<sup>108</sup>

Post War of Independence, within the American context questions were raised regarding the nature and extent of liberty. Oldfield remarks that such ideological questions were “not lost on some British observers, who suspected the Patriots, especially those in the slave South, of insincerity or, worse hypocrisy.”<sup>109</sup> Meanwhile in Britain the Revolution and subsequent Declaration of Independence “unleashed a

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<sup>103</sup> Oldfield *Op cit* fn93, 14

<sup>104</sup> Seymour Drescher, *Abolition: A History of Slavery and Antislavery* (Cambridge University Press 2009) 206

<sup>105</sup> Brown *Op cit* fn100

<sup>106</sup> David Brion Davis, *The Problem of Slavery in the Age of Revolution* (Oxford University Press 1999) 215

<sup>107</sup> Oldfield *Op cit* fn93 14

<sup>108</sup> Drescher *Op cit* fn104 208

<sup>109</sup> *ibid*

heated debate about political representation that was quite often framed in terms of slavery (disenfranchisement) and freedom (the vote).<sup>110</sup> Thus the Revolution proved to be an essential catalyst for political radicalisation in Britain via calls for reform to political representation. James Walvin states that it was, in fact, the Society for Constitutional Information founded in 1780 that would become the model for radical agitation and mobilisation used by the abolition movement.<sup>111</sup> Further to this, in purely practical terms the conflict divided British America, meaning that the number of slaves in the British Empire was halved – making the question of abolition more manageable.<sup>112</sup> Thomas Clarkson himself conceded “as long as America was ours there was no chance that a minister would have attended to the groans of the sons and daughters of Africa, however, he might feel for their distress.”<sup>113</sup>

Prior to the formal beginning of the abolition movement, the issue of enslavement and the indignities suffered by the victims of the slave trade had already been brought to mass public attention through the *Zong* and *Somerset* cases. The judgement in *Somerset v Stewart*<sup>114</sup> set the precedent that slavery was unsupported by the common law in England and Wales. This case involved a runaway slave named James Somerset who had been purchased in Boston by a customs officer Charles Stewart. Somerset was transported to England in 1769 but escaped in 1771. Upon his subsequent recapture, Stewart imprisoned Somerset on a boat bound for Jamaica and directed he be sold to a plantation on arrival. An application was made on Somerset’s behalf for a writ of *habeas corpus*. Lord Mansfield ruled that:

The state of slavery is of such a nature, that it is incapable of now being introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its rise from positive law; the origin of it can in no country or age be traced back to any other source: immemorial usage preserves the memory of positive law long after all traces of the occasion; reason, authority, and time of its introduction are lost; and in a case so odious as the condition of slaves must be taken strictly, the power claimed by this return was never in use here; no master ever was allowed here to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever; we cannot say the cause set forth by

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<sup>110</sup> *ibid*

<sup>111</sup> James Walvin, *The Impact of Slavery on British Radical Politics, 1787-1838* (1977)s292(1), *Annals of the New York Academy of Sciences*, 343

<sup>112</sup> *ibid*

<sup>113</sup> Andrew O’Shaughnessy, *An Empire Divided: The American Revolution and the British Caribbean* ( University of Philadelphia Press ) 245

<sup>114</sup> *Somerset v Stewart* 98 ER 499 (1772)

this return is allowed or approved of by the laws of this kingdom, therefore the black must be discharged.<sup>115</sup>

Thus, while the practical effect of Mansfield's judgement was not the emancipation of all enslaved Africans in Britain, "the most significant transatlantic aspect of the decision was that it stimulated discussion from one end of the Continental colonies to the other."<sup>116</sup>

The courts attention was once again drawn to the issue of enslavement via a line of insurance litigation beginning in 1807, the most infamous being the *Zong*.<sup>117</sup> The case involved a slave vessel owned by the Gregson Syndicate, the *Zong*, which sailed from Accra on the 18<sup>th</sup> August 1781 carrying 442 slaves. A typical slave vessel of the *Zong*'s size at this time would have carried around 193 slaves. On this journey the *Zong* carried a ratio of 4 slaves per ton, James Walvin has commented that it was unusual for a ship of the *Zong*'s size to carry so many slaves.<sup>118</sup> The ship called at Sao Tome on the 6 September to take on drinking water and failed to make port subsequently to replenish supplies. The task of stocking a slave vessel was a well-practised routine, and Walvin states that:

The men in charge must have felt confident that they had enough water, for all on board, to last until arrival in Jamaica. For a predicted voyage of eight weeks, there was enough water to allow three-quarters of a gallon per person, per day – a simple average which takes no account of different allowances for Africans and crew, nor for any subsequent loss of life which would leave fewer people to provide for. Nor does it allow for a longer than average transatlantic voyage, or for wastage by leakage or pollution. Still, at first glance, the water stored on board the *Zong* seemed more than adequate for the voyage – unless something went dramatically wrong.<sup>119</sup>

The vessel eventually arrived in Jamaica on 22 December with only 208 slaves aboard, half of the original cargo. Three months prior it had been discovered that the

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<sup>115</sup> *ibid*

<sup>116</sup> Drescher *Op cit* fn104 104, see chapter for a detailed discussion of the effect of the Somerset decision across the slave holding colonies.

<sup>117</sup> see James Oldham, *Insurance Litigation involving the Zong and Other British Slave Ships 1780-1807* (2007) Vol 28:3, 299

<sup>118</sup> James Walvin, *The Zong: A Massacre, the Law and the End of Slavery* (Yale University Press 2011) 27

<sup>119</sup> *ibid* 72

on-board water supplies had diminished beyond expectations due to leaks in the water caskets. For a slave vessel water was an essential commodity:

Because of the peculiar conditions on board, and because of the location of the voyage. Slave ships, packed with hundreds of people in a crowded, dehydrating and suffocating environment, plied their trade in the sapping heat of the tropics. The Africans needed regular water simply to remain hydrated, particularly when they were cramped below. The crew too needed ample supplies of liquid. Theirs was strenuous, backbreaking daily labour, compounded by the difficulties Europeans faced of debilitating toil in the tropics.<sup>120</sup>

Thus, upon the discovery of the missing water, the decision was taken that “part of the slaves should be destroyed to save the rest and the remainder of the slaves and the crew put to short allowance.”<sup>121</sup> Walvin states that this was a unanimous decision amongst the crew and on the 29 November 54 women and children were pushed overboard to drown. Two days later 42 men were thrown overboard, and 38 were killed later that day, with a further 10 slaves then anticipating what was to come and jumping of their own volition.<sup>122</sup> The Gregson Syndicate attempted to obtain compensation for the lost cargo. During the ensuing compensation case, Lord Mansfield concluded that the insurers were not liable for the losses resulting from the crew’s actions. Walvin comments that in the wake of the case little changed for those directly involved, charges were not brought against the crew and the Gregson Syndicate continued on with “business as usual”.<sup>123</sup> However, the Zong Massacre bought to the public attention in a vivid manner the atrocities of the slave trade:

Once the Zong story became public in March 1783, the grisly details about the slave trade seeped from the courtroom into the wider public sphere. When scrutinised at close quarters – as it was in Mansfield’s courtroom – the slave trade was revealed to be brutal, morally bankrupt and even murderous. Repeated and discussed in public and in print, the story of the Zong went from being an utterly exceptional story to becoming the very model for the slave trade itself. Here was the exception which became the rule. It shocked those people long inured to the realities of the slave ships – even those who had suffered on slave ships – and won over others who were unaware of the problem. Moreover, much of the impetus for the growing public awareness

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<sup>120</sup> *ibid* 91

<sup>121</sup> *ibid* 97

<sup>122</sup> *ibid* 98

<sup>123</sup> *ibid* 160

about these grim realities flowed directly from the efforts of Granville Sharp. It was, in John Newton's words, 'a melancholy story.'<sup>124</sup>

Consequently, in the context of political upheaval and political radicalisation, cases such as Somerset and the Zong helped to fuel the disparate pockets of anti-slavery sentiment in Britain, and create a lasting and graphic image that the public could link to the very distant slave trade.

Further to these factors, industrialisation and the changing character of Britain's cities played a key role in creating fertile soil for the abolition campaign. The socio-economic context of 18<sup>th</sup> Century Britain helps to explain further why mass mobilisation became possible at this point. Population growth and the extension of a leisured middle class who were better informed, with a higher rate of literacy and, therefore, an interest in the printed press created the battlegrounds for the abolitionist movement. Seymour Drescher has argued that the growth of cities such as Manchester in the 18<sup>th</sup> Century coincided with the growth of an identity in these areas which empathised with the 'uprooted' and a concern for the loss of kin, home, and community – which characterised the enslaved in the Americas.<sup>125</sup> Working class communities and labour organisations provided the base for mass mobilisation against the slave trade, with the petition campaigns in industrial cities such as Manchester providing a jump start to the abolition campaign between 1787-1788,<sup>126</sup> Therefore, it is in this context of the growing appeal of political radicalisation that political reform became linked to the abolition of slavery. Oldfield highlights that "both were part of an attack on a system that increasingly began to appear outmoded and in urgent need of repair."<sup>127</sup>

Organised anti-slavery on a nationwide level began in 1787 with the creation of the Society for the Abolition of the Slave Trade.<sup>128</sup> Oldfield observes that it was the establishment of the Society and particularly its London Committee, which made it

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<sup>124</sup> *ibid* 176

<sup>125</sup> John Oldfield, *Popular Politics and British Anti-Slavery: The Mobilisation of Public Opinion Against the Slave Trade 1787-1897* (Routledge 1998) 2, Seymour Drescher, *Econocide: British Slavery in the Age of Emancipation* (University of North Carolina Press 2010)

<sup>126</sup> Drescher *Op cit* fn104 214

<sup>127</sup> Oldfield *Op cit* fn125, 14

<sup>128</sup> *ibid* 41

possible to mobilise thousands of people across the country.<sup>129</sup> The mandate of the Committee was to be a vehicle for “procuring such information and evidence, and for distributing Clarkson’s Essay [on the Inhumanity of the Slave Trade]<sup>130</sup> and such other publications, as may tend to the Abolition of the Slave Trade.”<sup>131</sup> However, at this point, a lack of political influence within the Houses of Parliament still held the Society back.

Between 1788 and mid-1790s there was a great growth in British Abolitionism. This growth can be linked directly to two petition campaigns organised by the Society in 1788 and 1792.<sup>132</sup> This was the advent of the mass mobilisation of British society. The involvement of the industrial city of Manchester was pivotal as a “booming hardnosed manufacturing town” where inhabitants had a tangible stake in the trade.<sup>133</sup> The petition campaign of 1788 directed by the London Committee saw over 100 petitions sourced from cities up and down the country with an estimated 60,000 signatures presented to the House of Commons between 1 February and 9 May 1788.<sup>134</sup> However, it was the Manchester petition with its 10,600 signatures that highlighted the mass support, particularly of the working class for the abolitionist cause. Drescher remarks that:

These ten thousand names, the largest of the 1787–1788 campaign, also offered striking evidence that Manchester’s workers were also aligned with the abolitionist cause. This caught the slave interest by surprise. Manchester’s abolitionist signers represented about two-thirds of its eligible adult males. That forestalled any argument that abolitionism lacked a mass base. Along with Birmingham’s later petition, Manchester was given pride of place in affirming that a broad popular and economically informed portion of the nation had opted for abolition.<sup>135</sup>

The abolitionist agenda was first introduced into the House of Commons in May 1788 however; the period of 1791-1792 provides the perfect window to assess the political motivation for abolition and the role of the market and economic interests. In 1791 the

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<sup>129</sup> *ibid*

<sup>130</sup> Thomas Clarkson, *An Essay on the Slavery and Commerce of the Human Species* (1786) accessed at (<http://oll.libertyfund.org/titles/clarkson-an-essay-on-the-slavery-and-commerce-of-the-human-species>)

<sup>131</sup> Oldfield *Op cit* fn125, 54

<sup>132</sup> Oldfield *Op cit* fn93, 21

<sup>133</sup> Drescher *Op cit* fn125 214

<sup>134</sup> Oldfield *Op cit* fn125, 49

<sup>135</sup> Drescher *Op cit* fn125 215

House of Commons gave a clear rejection of William Wilberforce's first abolition bill, yet within 12 months, in April 1792, the Commons drastically changed its position. The Commons decided in favour of gradual abolition by 1796. Drescher comments that this provides a “stark juxtaposition of consecutive rejection and acceptance”.<sup>136</sup> Following the defeat of Wilberforce’s abolition bill, the second wave of abolition and petitioning took place. The second round exceeded the numbers of 1788 with upward of 400,000 names reaching London by 1792 for Wilberforce’s second abolition motion.<sup>137</sup>

In addition, a grassroots mobilisation continued to grow with the organisation of a nationwide slave-produced sugar boycott. The roots of the absentation campaign lay outside of the London Committee in a pamphlet entitled *An Address to the People of Great Britain on the consumption of West Indian Produce*.<sup>138</sup> The address highlighted the complicity of the British people in the slave trade through their consumption of sugar, “the produce of robbery and murder”.<sup>139</sup> Thus, the campaign created a direct connection between the British people and the suffering of slaves in the West Indies. Drescher argues that the campaign aided in the mobilisation of women to abolitionism:

It was meant to be an instrument of direct economic coercion against the whole slave interest and it dramatically broadened the public sphere. Special appeals were directed toward women, as managers of the household budget. They stressed women’s special sensitivity to family separations and offered the boycott as a means of compensating for their exclusion from the petition.<sup>140</sup>

Yet, mass mobilisation and support for abolition was not a new factor in the abolition campaign. Thus, given the rapid change of opinion in the Commons by 1792, one might expect to see a change in the profitability of the Trade during this period. However, this is not the case. Following a slave uprising in the French Colony of St. Domingue led by self-liberated slaves – most notably Toussaint L’Ouverture – the colonial rule was overthrown, and the independent state of Haiti was established in

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<sup>136</sup> Drescher *Op cit* fn125, 147

<sup>137</sup> *ibid* 220

<sup>138</sup> William Fox, *An Address to the People of Great Britain on the Consumption of West Indian Produce* (1791)

<sup>139</sup> *ibid* 2

<sup>140</sup> Drescher *Op cit* fn125 221

1804.<sup>141</sup> The uprising began in 1791; consequently, from 1791 there was a drop in the production of sugar from the French slave market. This presented a key opportunity for the British trade, "the St. Domingue explosion meant that British colonies were offered an unparalleled opportunity to regain the ascendancy in sugar they had lost over 60 years before".<sup>142</sup> Further to this, the slave trade itself hit its peak in 1791 and 1792 with almost a fifth more enslaved Africans transported in 1792. All of this makes it clear that the profitability of slavery was at an all-time high for the British Empire. This demonstrates the pertinence of the question of *why* the Commons chose this point to begin the move towards abolition.

Thus, in the context of the French Revolution the possibility of the British foreign slave trade supplying slaves to areas which would aid French colonial interests "pressed heavily on questions of national interests."<sup>143</sup> Oldfield provides some explanation between abolitionism and the issue of the national interest:

It is almost certain, moreover, that a fair number of non-philanthropic MPs were swayed to vote for abolition in the belief that ending the British slave trade would actually damage the French colonies more than the British; for it was commonly held that not only were St. Domingue, Martinique and Guadeloupe expanding rapidly but they were also heavily dependent on slaves carried in British Ships.<sup>144</sup>

However, abolition did not occur until 1806 with the passage of the bill, which would become the 1807 Slave Trade Act. Following the 1792 victory, the momentum of the abolition movement slowed down with the political window for abolition closing. The political appetite for abolition was quelled by the fear of slave rebellion following the uprising in St. Domingue, the French Revolutionary wars, and fears of domestic radicalism.<sup>145</sup> The French Revolution of 1789 was initially the fuel for discussions surrounding liberty and was welcomed by many British observers. Walvin remarks that the Revolution was viewed as the French equivalent of the Glorious Revolution of 1688.<sup>146</sup> Further to this, there was an intersection between support for the Revolution and abolition in Britain. Key figures of the abolition such as Thomas

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<sup>141</sup> See C L R James, *The Black Jacobins* (Taylor and Francis 2017)

<sup>142</sup> Oldfield *Op cit* fn125 149

<sup>143</sup> Oldfield *Op cit* fn93, 180

<sup>144</sup> *ibid* 151

<sup>145</sup> Drescher *Op cit* fn125 223

<sup>146</sup> James Walvin, England, *Slaves and Freedom, 1776-1838* (Palgrave Macmillan 1986) 111-112

Clarkson – a political radical himself, sought to forge networks between the British abolitionists and French revolutionaries. Robin Blackburn comments that the onset of the Jacobin phase of the French Revolution divided abolitionist ranks, further radicalising many democrats but provoking a counter-revolutionary mobilisation.”<sup>147</sup> The Jacobins were a left-wing revolutionary group led by Maximillien Robespierre and were responsible for the escalation of the Revolution and the establishment of the Reign of Terror, which targeted monarchists, and traitors of the revolution. Thus, the French Revolution posed a significant barrier to abolition:

The abolitionist movement could not rise above the harsh polarisations produced by the Revolution in France. Events across the Channel in the latter of 1792 prompted increasing alarm in ruling-class circles and opened a breach within the ranks of radicals, reformers and democrats; these months witnessed the formation of the counter-revolutionary coalition.<sup>148</sup>

Also, in light of French expansion in Europe and the declaration of war between Britain and France in 1793 the political tide turned fully against abolitionism.<sup>149</sup> The French Revolutionary wars were fought between 1792 and 1802, with revolutionaries led by Napoleon Bonaparte seeking to expand the French Empire and replace absolute European monarchies with Republics.<sup>150</sup> Blackburn notes that such divisions undermined the mass mobilisation of previous years:

The fate of the first wave of British Abolitionism had been determined by the interplay between the domestic and political crisis and the international situation. Abolition had gained a foothold in Parliament and a following in the country because of the narrowness of its target and the breadth of the constituencies, which could identify with it ... but once the popular element was distracted or repressed, and abolitionism reduced to the dimension of a Parliamentary caucus it ceased to make headway.<sup>151</sup>

During the final years of the 18<sup>th</sup> Century the anti-slavery cause petered out, it was "stopped in its tracks by a change in political conjuncture: the anti-Jacobin

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<sup>147</sup> *ibid* 147

<sup>148</sup> Robin Blackburn, *The Overthrow of Colonial Slavery* (Verso 1988) 147

<sup>149</sup> *ibid* 146

<sup>150</sup> *ibid*

<sup>151</sup> *ibid* 151

mobilisation at home and abroad, reinforced by the perceived necessities of imperial defence and competition."<sup>152</sup>

However, by 1804, the anti-slavery movement underwent a miraculous recovery. In the late 18<sup>th</sup> Century, abolition became synonymous with political radicalism and Jacobinism. The French had abolished slavery in its colonies through the passage of Law of 4 February 1794. However, following attempts by Napoleon to reintroduce slavery with Law of 20 May 1802, the tide was set to turn once again, however, this time in favour of abolition. Thus, Blackburn remarks "abolitionism was to become quite compatible with patriotic hostility."<sup>153</sup>

From 1805 the London Committee set out to target interest in the West Indies and split the pro-slavery lobby. James Stephen (a prominent abolitionist and MP) published a study on the threat of competition during war-time, demonstrating that "West Indian colonies – of the enemy powers notably France and Spain – were supplying vast quantities of sugar, coffee and cotton to continental markets by the simple device of using neutral carriers" – securing the cargo from seizure by British blockade.<sup>154</sup>

Thus, rather than choosing to attack the slave trade directly, it was suggested by Wilberforce that a new Bill should "prohibit the foreign slave trade as well."<sup>155</sup>

Drescher highlights the fact that such action was welcomed out of economic self-interest:

The government introduced it explicitly as a measure of political economy, based on the need to prevent enemy colonies from taking advantage of the cover of American and European flags. A trade system has evolved to ensure a flow of European goods to French and Spanish colonies and of their staples to the Continent, despite the fact that the English had swept the Atlantic Ocean of almost all enemy merchant fleets by late 1805.<sup>156</sup>

Therefore, while enemy states and colonies were able to circumvent the costs of war insurance and convoys, the British trade, however, suffered the inconvenience and costs of war. Consequently, the abolition bill was proposed "under a mercantilist

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<sup>152</sup> *ibid* 295

<sup>153</sup> *ibid* 303

<sup>154</sup> *ibid* 304

<sup>155</sup> Oldfield *Op cit* fn93, 180

<sup>156</sup> Drescher fn125, 121

rationale for restraining the growth of rivals.”<sup>157</sup> The British slave trade at this point becomes a significant disadvantage due to the handicaps of the British transportation of produce.<sup>158</sup>

When introducing the Bill to Parliament on 31 March 1806, the Attorney General, Sir Arthur Piggott stressed the "wider political implications of the measure" and referenced "humanity" once. Piggott stated that it was contrary to 'sound policy' to "afford its European rivals the means of 'attaining a high degree of commercial prosperity."<sup>159</sup> Oldfield comments that "although with reason, some members of the West India lobby suspected that the Foreign Slave Bill was a 'scheme to abolish the slave trade'",<sup>160</sup> it finally passed both Houses with comfortable majorities.

It took nearly twenty years to bring about an end to Britain's involvement in the Trans-Atlantic slave trade. However, this was merely the first step in the anti-slavery campaign. Britain's participation in the trade may have reached an end; however, the trade continued to exist outside of Britain's involvement, and further to this, the institution of slavery continued in British colonies. The 'take off' of British abolition was motivated and facilitated by a number of factors. Nevertheless, it is undeniable that the spark for the 1806 Bill was the protection of national interests and foreign policy, rather than any genuine humanitarian concern. While Britain's involvement in the trade had come to an end, it was not until 1833 and the passing of the Slavery Abolition Act that the institution of slavery was brought legally to an end in the British Empire. However, this decision came with an exemption for territories controlled by the East India Company.

#### **4. Abolitionism and Colonialism: Antislavery 1807-1890**

Following the abolition of British involvement in the Trans-Atlantic slave trade, a complex relationship between anti-slavery and imperial power emerged.<sup>161</sup> Following the passing of the Slave Trade Act 1807, the first international document against slavery was the 1815 Declaration Relative to the Universal Abolition of the Slave

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<sup>157</sup> *ibid*

<sup>158</sup> *ibid* 122

<sup>159</sup> Oldfield *Op cit* fn125, 180

<sup>160</sup> *ibid*

<sup>161</sup> Richard Huzzey, *Freedom Burning: Anti-Slavery and Empire in Victorian Britain* (Cornell University Press 2012) 132

Trade (appended to the Treaty of Vienna).<sup>162</sup> The Declaration was the result of continued pressure from the British government to encourage rival colonial and maritime powers to follow the British example and abolish their respective slave trades. In the period preceding the Congress of Vienna of 1814 Britain gained the formal support of France to begin work to end the international slave trade by introducing the issue at the Congress.<sup>163</sup> A proposal was put forward that the international trade should be ended within a three-year period. However, the expected support of the French delegation did not appear. The British interest in encouraging international abolition was motivated by financial concerns, "to prevent this lucrative trade from passing into foreign hands and providing foreign colonies with needed manpower."<sup>164</sup> This step taken by the British was correctly perceived as an attack on rival colonies and commerce leading France and the Iberian States to oppose the proposal.<sup>165</sup> Kevin Bales comments that the 1815 Declaration was the first clear achievement of the abolitionist movement – which aimed for not just abolition of the institution but also the international trade in persons.<sup>166</sup> However, the colonial powers would only agree to append the Declaration to the 1815 Vienna Treaty, stating that the slave trade was "repugnant to the principles of humanity and universal morality."<sup>167</sup> Miers states that while this may have been the first step on the long road to the current anti-slavery movement it was of "no practical value".<sup>168</sup>

The failure of the Vienna Congress was followed by the subsequent disappointment of the Congress of Verona of 1822 where "the British grand design of a universal treaty outlawing the trade was again thwarted, not because of the principle, but because of a lack of consensus on the modalities to be used".<sup>169</sup> Thus, Britain adopted

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<sup>162</sup> Declaration relative to the Universal Abolition of the Slave Trade, (hereinafter the 1815 Declaration), annexed to the Act adopted during the 1815 Congress of Vienna, was signed by Austria, France, Portugal, Prussia, Russia, Spain, Sweden and the United Kingdom, 8 February 1815, 63 Consolidated Treaty Series 473.

<sup>163</sup> Jean Allain, *The Law of Slavery: Prohibiting Human Exploitation* (Brill 2015) 61

<sup>164</sup> Suzanne Miers, *Slavery and the Slave Trade as International Issues* (1998) 19(2), *Slavery & Abolition*, 16

<sup>165</sup> Allain *Op cit* fn163, 62

<sup>166</sup> Kevin Bales, *Understanding Global Slavery: A Reader* (University of California Press 2005) 41

<sup>167</sup> Declaration relative to the Universal Abolition of the Slave Trade, (hereinafter the 1815 Declaration), annexed to the Act adopted during the 1815 Congress of Vienna, was signed by Austria, France, Portugal, Prussia, Russia, Spain, Sweden and the United Kingdom, 8 February 1815, 63 Consolidated Treaty Series 473.

<sup>168</sup> Miers *Op cit* fn16 16

<sup>169</sup> Allain *Op cit* fn163, 63

a new policy of bilateral treaties, entering into bilateral agreements with 31 States in an attempt to suppress the slave trade.<sup>170</sup>

The era of the bilateral regime ended in the 1880s with the advent of the ‘Second European Empires’ and the establishment of a new ideology of colonial conquest.<sup>171</sup> The second international agreement regarding slavery and the slave trade was the Brussels Act of 1890,<sup>172</sup> which was created during the "scramble for Africa".<sup>173</sup> With Britain keen to preserve its abolitionist crown, attention turned to Africa and the domestic and external slave trade. However, to understand how anti-slavery became intertwined with colonial ambition one must consider Britain's relationship with the African continent post-1830. Britain's relationship and contact with Africa at the time were historically anchored in slave trade and slavery and, negotiations regarding the trade “were the only source of interest keeping West Africa before the British public and Parliament’ until 1860”.<sup>174</sup> Richard Huzzey discusses the nature of the British relationship with Africa up until this point:

A tradition of anti-slavery for the ‘improvement’ of the continent shaped understandings of African politics, economics, and society. Abolitionism in Africa dated back to the earliest criticism of the slave trade itself; the improvement of Africa was expected to overlap with the solution to slave trading since legitimate trade would replace slave-dealing in local economies.<sup>175</sup>

Thus, a political dialogue of improvement and civilisation had emerged during this time. During the late 19<sup>th</sup> Century Africa became the target of colonial ambition combined with an anti-slavery sentiment. Suzanne Miers states that the colonial powers "proceeded to negotiate a treaty against the African slave trade on land, as well as at sea, and carefully designed it to serve their territorial and commercial ambitions."<sup>176</sup>

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<sup>170</sup> *ibid* 64

<sup>171</sup> Huzzey *Op cit* fn161, 134

<sup>172</sup> General Act of the Brussels Conference relative to the African slave trade, signed at Brussels, July 2, 1890

<sup>173</sup> James Heartfield, *The British and Foreign Anti-Slavery Society, 1838–1956: A History* (2017) 297

<sup>174</sup> Huzzey *Op cit* fn161

<sup>175</sup>, *ibid* 134

<sup>176</sup> Miers *Op cit* fn164, 19

The Brussels Anti-Slavery Conference, which took place between 1889-1890 essentially "carved up Africa among the European powers".<sup>177</sup> The Brussels Conference Act was the first comprehensive international treaty against the slave trade in Africa.<sup>178</sup> However, the Brussels Act placed abolitionist sentiment against the backdrop of colonial power struggles.<sup>179</sup> The Brussels Act 1890 affirmed that 'native welfare' was an international responsibility; thus the signatories were bound to "prevent slave raiding and trading, to repatriate or resettle freed and fugitive slaves, and to cut off the free flow of arms to the slaving areas."<sup>180</sup> The means to achieve this task was to establish colonial administrators, placing "an anti-slavery guise on the colonial occupation and exploitation of Africa."<sup>181</sup> Further to this, while the Act created an obligation to prevent slave raiding and trading, it failed to legally abolish slavery. The colonial powers could not afford to set themselves in opposition to the slave-owning elite and therefore, argued, "once robbed of its cruellest features –slave raiding, kidnapping, and trading – it would die out gradually."<sup>182</sup> However, in reality, colonial rulers felt no urgency to aid in the end of slavery, returning fugitive slaves to their owners and discouraging them from asserting their freedom.<sup>183</sup>

## 5. The League of Nations and Ethiopia

In the intervening period between 1890 and 1919, the colonial occupation of Africa under the Brussels Act had reduced the external slave trade to a small traffic between Arabia and the Persian Gulf.<sup>184</sup> However, the outbreak of World War I brought great hardship to native African labourers. During the course of the war large numbers of labourers were recruited from Africa. However, such numbers could not be acquired voluntarily, and many were forced directly or through tribal chiefs to undertake hard labour:

The work was hard, carrying up to 60 pounds for 24 kilometres a day and the rations were not enough, falling to less than 1,000 calories in East Africa in

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<sup>177</sup> Heartfield *Op cit* fn173, 297

<sup>178</sup> Junius P. Rodriguez, *The Historical Encyclopedia of World Slavery*, Volume 1 (ACC-CLIO 1997) 106

<sup>179</sup> For a detailed account of the Brussels Conference see Heartfield fn173

<sup>180</sup> Miers *Op cit* fn164, 19

<sup>181</sup> *ibid*

<sup>182</sup> *ibid* 20-21

<sup>183</sup> *ibid* 21

<sup>184</sup> *ibid* 22

1917. The death rate was extraordinary, at about 20%, which was about the same as for frontline duty.<sup>185</sup>

Thus, while the Brussels Act may have succeeded in reducing the slave trade in Africa, colonial powers were instituting a system of forced labour and subjecting native labourers to harsh and dangerous working conditions.

The Brussels Act had lapsed during the War and, wishing to be free from its commercial constraints, the Colonial powers were not motivated to renew it believing the issue of slavery in Africa had been successfully dealt with. A single clause was included in the Treaty of Saint-Germain-en-Laye<sup>186</sup> which mandated that colonial powers in Africa were to ‘endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea.’<sup>187</sup> However, in the wake of World War I and the creation of the League of Nations a new chapter in the history of anti-slavery opened.

The League of Nations was an inter-governmental organisation founded in 1920 as a result of the end of World War I and the Paris Peace Conference. The aim of the League was to maintain world peace.<sup>188</sup> Article 23 of the League of Nations Covenant bound member states to “secure and maintain fair and humane conditions of labour and the just treatment of the native inhabitants under their protection”.<sup>189</sup> This widened the scope of the obligation to include the suppression of slavery and similar conditions of native labour.<sup>190</sup> Miers comments that the great powers wanted no such supervision of their colonial policies and doubtless hoped that the clauses in the Treaty of Saint Germain and the League Covenant were ‘a sufficient sop to allay whatever remained of European and American interest in slavery.’<sup>191</sup> The shift towards an international instrument concerning the legal status of slavery by the League of Nations results from efforts to focus the question of slavery in Africa –

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<sup>185</sup> Heartfield *Op cit* fn173, 406

<sup>186</sup> Treaty of Saint-Germain-en-Laye (adopted 10<sup>th</sup> September 1919 entered into force 16<sup>th</sup> July 1920)

<sup>187</sup> Miers *Op cit* fn164, 22

<sup>188</sup> Covenant of the League of Nations (adopted 29<sup>th</sup> April 1919, entered into force 10<sup>th</sup> January 1920)  
Art 23

<sup>189</sup> *ibid* Art 23

<sup>190</sup> Miers *Op cit* fn164, 22

<sup>191</sup> *ibid* 23

specifically Ethiopia.<sup>192</sup> The League of Nations became the vehicle for abolitionism in the early 20<sup>th</sup> Century.

In post-war Europe, one of the most onerous tasks, which lay ahead of the League of Nations, concerned the seizure and future of German Colonies in Africa and the Middle East. These territories were to be governed by the newly created mandates system.<sup>193</sup> The system was envisioned as a "sacred trust to civilisation", and the League would provide "tutelary administration of the peoples not yet able to stand by themselves under the strenuous conditions of the modern world."<sup>194</sup> The League envisioned the mandates system as a means to "protect the interests of backward people, to promote their welfare and development, and to guide them toward self-government and, in certain cases, independence".<sup>195</sup> This reflects what Allain calls a 'gentlemen's club' atmosphere<sup>196</sup> which was characteristic of the League of Nations era where the Convention was intended to apply to the 'Other' and not to the Member States.<sup>197</sup> The Anti-Slavery Society stated that "restraining retrograde measures, abuse and evil influences in tropical territories through international control was of paramount importance to world peace and would have powerful effects on the future development of native populations."<sup>198</sup>

It was the hope of anti-slavery organisations such as the British Anti-Slavery Society to use the League of Nations and the newly created mandate system to "re-launch its campaign against old and new forms of bonded labour on a global scale."<sup>199</sup> However, there were limitations to the utility of the League, first, due to America's refusal to ratify the peace treaties and the exclusion of Germany and the absence of the Soviet Union, there was a geographical limitation. Second was the fact that the decision-making institution – the council – was dominated by the colonial powers, Britain,

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<sup>192</sup> Allain *Op cit* fn163, 77

<sup>193</sup> Amalia Ribí Forclaz, *Humanitarian Imperialism: The Politics of Anti-Slavery Activism 1880-1940* (Oxford Scholarship Online 2015) 47

<sup>194</sup> *ibid*

<sup>195</sup> Anthony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandates System of the League of Nations* (2001) 34, *International Law and Politics*, 513, 523

<sup>196</sup> Jean Allain, *The Slavery Conventions; The Travaux Préparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 6

<sup>197</sup> Jean Allain, *The Legal Definition of Slavery into the Twenty-First Century*, in Jean Allain (ed) *The Legal Understanding of Slavery – From the Historical to the Contemporary* (Oxford University Press 2012) 199

<sup>198</sup> Forclaz *Op cit* fn193, 47

<sup>199</sup> *ibid*

France and Italy.<sup>200</sup> While the League of Nations agenda was predominantly focused on European issues including territorial issues, disarmament, and humanitarian crises, its work did extend to 'non-political' areas including combatting the so-called white slave trade.<sup>201</sup> Thus, the monopoly held by colonial powers allowed the League of Nations, through the pursuit of anti-slavery, to become the vehicle for colonial expansion.

Slavery was placed firmly on the agenda of the League of Nations through the work of John Harris – the secretary of the British Anti-Slavery Society. The Society aimed to use the mandate system to test the commitment of the League to the protection of 'indigenous people' against slavery and exploitation.<sup>202</sup> While attending the League of Nations first Assembly in 1920, Harris worked tirelessly to petition any delegates who may have a sympathetic ear on the terms of the mandate system and the issue of slavery.<sup>203</sup> Following what Harris described as the five most difficult weeks of his life, he found an ally in William Rappard, the Director of the Mandate System.<sup>204</sup> In letters to Harris, Rappard expressed his "ignorance" on questions relating to slavery and sought Harris's opinion and support.<sup>205</sup> The existence of the mandate system combined with the campaigning of John Harris and the Anti-Slavery Society placed slavery on the League's agenda. However, it was the issue of the persisting slave trade in one of only two independent African states – Ethiopia – which acted as the catalyst for the League of Nations 1926 Slavery Convention.

Prior to World War I the British Foreign Office was made aware of continued slave raiding and trading in Ethiopia, however, chose not to take action for fear of damaging relations with Italy and France.<sup>206</sup> The Government was made aware of an eyewitness account of slavery in Ethiopia by Henry Darley and N.A. Dyce Sharp.<sup>207</sup> In 1919 an Anglo-Ethiopian commission had been sent to the borders of Ethiopia to investigate the reported evidence of widespread slave raiding by Ethiopian

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<sup>200</sup> *ibid* 49

<sup>201</sup> *ibid*

<sup>202</sup> *ibid* 50

<sup>203</sup> *ibid*

<sup>204</sup> Miers *Op cit* fn164, 23

<sup>205</sup> Forclaz *Op cit* fn193, 50

<sup>206</sup> Suzanne Miers, Britain and the Suppression of slavery in Ethiopia (1997) 18(7), Slavery & Abolition, 257, 261

<sup>207</sup> See Forclaz *Op cit* fn193, 59

officials.<sup>208</sup> However, Britain was reluctant to take action in these matters for fear of destabilising the Ethiopian government and affecting British interests. Therefore, reports of persisting slavery in Ethiopia were suppressed until 1922 when Harris sent Rappard a pamphlet containing Darely and Sharp's accounts which branded Ethiopia as "the last great home of slavery in Africa and therefore in the world".<sup>209</sup> The pamphlet echoed the Victorian sentiment of Africa as the 'Dark Continent,' and Darley and Sharp depicted slave raiding and convoys of slaves marching openly on the roads.<sup>210</sup> Harris and the Anti-Slavery Society saw the situation as a cause for "serious concern and apprehension that should be addressed by the British Government ... and other European Governments, which have territorial responsibilities in that quarter of Africa."<sup>211</sup>

However, dealing with the issue of slavery in Ethiopia was not straightforward; Ethiopia was not a member of the League of Nations and therefore, not bound by the Covenant. In addition, as an independent African state, the country also fell outside the League's mandate system. Therefore, Harris once again reached out to British delegates to support his cause. Having gained the support of Sir Arthur Steel-Maitland, the issue of slavery in Ethiopia was raised to the League's General Assembly. Maitland submitted two Resolutions for consideration by the Assembly of the League of Nations. The first of these resolutions pertained to slavery in Ethiopia, and the second was to refer to the appropriate Committee the question of the resurgence of slavery in Africa in order that it 'be considered and propose the best methods for combatting the evil.'<sup>212</sup> The Assembly passed this resolution in part adding slavery to its agenda and requesting that the Sixth Committee 'entrust to a competent body the duty of continuing the investigation' of the question of slavery.<sup>213</sup> The Secretary-General was subsequently instructed to collate data from member states and compile a report on slavery for the next General Assembly. In a memorandum written by Lord Lugard – a member of the Mandates Commission and

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<sup>208</sup> Miers *Op cit* fn206

<sup>209</sup> Amalia Ribi, 'The Breath of New Life'? – British Anti-Slavery Activism and the League of Nations in ed. Daniel Laqua *Internationalism Reconfigured: Transnational Ideas and Movements Between the World Wars* (Tauris Academic Studies 2011) 101

<sup>210</sup> Miers *Op cit* fn164, 263

<sup>211</sup> Ribi *Op cit* fn209, 101

<sup>212</sup> Allain *Op cit* fn196, 51

<sup>213</sup> League of Nations, Report of the First Sub-Committee to the Sixth Committee, Record of the Fourth Assembly, Minutes of the Sixth Committee (Political Questions) Annex 10, p.40

retired British colonial governor – a scheme was proposed to place Ethiopia under administration similar to that of a B class mandate.<sup>214</sup> Lugard stated that Ethiopia was to be treated like the former German territories and placed under international control.

However, Forclaz states “Lugard did not leave much room for doubt that his abolitionist intentions and humanitarian ideals went hand in hand with a wish to increase European economic involvement in Ethiopia.”<sup>215</sup> For many years a battle had been fought between Britain, France, and Italy to gain a commercial concession in Ethiopia and access to natural resources.<sup>216</sup> Lugard's Memorandum was, therefore, interpreted by France and Italy as an attempt by the British to up the stakes and seek territorial control in Africa.<sup>217</sup>

Following this memorandum, Ethiopia applied for and was granted membership to the League of Nations in 1923.<sup>218</sup> The admission of Ethiopia was conditional upon adherence to the provisions of the 1919 Treaty of Saint Germain-en-Laye; however, questions of suppression and the trade persisted with potential enquiries into the issues discussed in 1924 and 1931.<sup>219</sup> The conditional acceptance of Ethiopia into the League of Nations served to confer an international personality on to the country. However, Rose Parfitt has remarked that the nature of this acceptance recast Ethiopia as a hybrid state.<sup>220</sup>

In the process of accepting Ethiopia, conditionally, as a member, the League of Nations reconstituted Ethiopia's international personality. For Ethiopia fulfilled, and/or agreed in future to fulfil, two sets of conditions: both the general conditions of accession contained in the Covenant and the ‘special’ conditions attached to its own accession. As a result, Ethiopia, which had been recognized as a state since at least the mid-nineteenth century, came after 1923 to possess a hybrid international personality that was both sovereign and less-than-sovereign at the same time.<sup>221</sup>

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<sup>214</sup> Ribi *Op cit* fn120902

<sup>215</sup> Forclaz *Op cit* fn193, 65

<sup>216</sup> Ribi *Op cit* fn193,102, see Miers *Op cit* fn164

<sup>217</sup> *ibid*

<sup>218</sup> Miers *Op cit* fn164, 25

<sup>219</sup> See League of Nations, Temporary Slavery Commission, *Slavery and Other Systems Restrictive of Liberty*, Memorandum by F D Lugard, Annex 3, Conditions in Abyssinia, LofN Doc CTE 36, May 1925, pp.10-11, Suzanne Miers, *Britain and the Suppression of Slavery in Ethiopia* in Taddese Beyene (ed) *Proceedings of the Eighth International Conference of Ethiopian Studies*, vol 2 1999, 258.

<sup>220</sup> Rose Parfitt *Empire des Negres Blancs* : The Hybridity of International Personality and the Abyssinia Crisis of 1935–36 (2011) 24, *Leiden Journal of International Law*, 849, 850

<sup>221</sup> *ibid*

Jean Allain comments that the issues surrounding Ethiopia were a low point in the history of the League of Nations, the worst being the annexation of Ethiopia by Italy in 1926.<sup>222</sup> Italy worked to delegitimise Ethiopia in the eyes of the League and the civilised Member States; this is evidenced by a memorandum presented to the League of Nations Council. This was possible due to Ethiopia's hybrid status; the crisis made it clear that "the rights Ethiopia could claim under the League were weaker and the duties it owed more onerous, compared with the European members of the League."<sup>223</sup> The Italians stated that "Ethiopia has shown that she does not possess the qualifications necessary to enable her to obtain, through participation in the League, the impulse required to raise her by voluntary efforts to the level of the other civilised nations."<sup>224</sup> This demonstrates that anti-slavery within the international community came with an agenda. In this context, Italy (a colonial power) sought to use the question of slavery and suppression as a standard of civilisation for her own ends. Further to this, the status and thus, the protection afforded to Ethiopia was shaped by colonial thought. It is also important to note that while slavery was deemed to be unacceptable to civilised colonial states, the same cannot be said for the practice of forced labour. Forced labour was conceptualised as a practice distinct from traditional chattel slavery whereby, 'a colonial state compelled its subjects not its citizens, to perform labour' as part of the civilising mission.<sup>225</sup> Forced labour was seen to be essential for colonial states to develop in the 'interests of humanity ... the riches and resources of those African countries placed under their sovereignty.'<sup>226</sup> This was supported by the mandate system, which reaffirmed the importance of abolishing slavery while projects central to the civilising mission permitted forced/compulsory labour. Anghie comments that such practices carried an enormous cost for the native population to the point it was uncertain which practice was more devastating, slavery or forced labour in the name of economic development.<sup>227</sup>

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<sup>222</sup> Allain *Op cit* fn196, 201

<sup>223</sup> Parfitt *Op cit* fn220 850

<sup>224</sup> *ibid.*202

<sup>225</sup> Nicholas McGeegan, *Misunderstood and Neglected: the Marginalisation of slavery in international law* (2012) 16, *The International Journal of Human Rights*, 436, 443

<sup>226</sup> League of Nations, Note Submitted to First Sub-Committee of the Sixth Committee by the Portuguese Delegation, General Freire d'Andrade, A.VI/S.C.1/2/1925, 11 September as found in Folder R.67.D.46214 entitled *La question de l'esclavage: Discussions y relatives de la VIe Assemblée*, 1925, 3.

<sup>226</sup> Allain *Op cit* fn196, 105

<sup>227</sup> Anghie *Op cit* fn 195, 594

The final step towards the creation of the 1926 Convention was the establishment of the Temporary Slavery Commission in 1924 as a sub-commission within the Mandates section. The work of the Temporary Slavery Commission constitutes the ‘intellectual DNA’ of the 1926 and 1956 Slavery Conventions,<sup>228</sup> changing the emphasis of the League’s work in relation to slavery from one of monitoring to legislating for international suppression.<sup>229</sup> The Commission was intended to be an independent body which would collect, assess and circulate evidence of slavery. The British Anti-Slavery Society has been designated as a reliable source for ‘unofficial information’ meaning that the Society would be able to continue providing evidence of slavery. However, Ribí comments that the Society predominantly provided the British member Lugard with such evidence making him one of the most active members of the Commission.<sup>230</sup> Therefore, Britain took the lead in the Temporary Commission and in 1925 the Society requested that the Commission recommend that the League of Nations create a definition of modern slavery and also recommended the creation of a new international convention – the 1926 Slavery Convention.<sup>231</sup>

## 6. Past and Present - Connecting Narratives on Abolition

This thesis proposes that the consideration of the history of the abolition and anti-slavery is pertinent when considering contemporary narratives of anti-slavery due to the reliance of contemporary anti-slavery narratives and political rhetoric on the transatlantic slave trade and abolition. Thus, it is important to acknowledge the limitations, and also restrictive effect, such comparisons have on contemporary conceptualisations of exploitation and, therefore, the resulting legal responses. The second point is that there is a central lesson to be learned from the abolition of the Trans-Atlantic slave trade and the long-standing failure, at both a domestic and international level, to sufficiently confront the structural issues. The lesson, which this thesis will demonstrate has gone unheeded, is that anti-slavery is inextricably entangled with political interest. This chapter has so far demonstrated that since the formal inception of the anti-slavery movement in 1887, all the way up to the 1926 anti-slavery initiative, abolition has often been connected or influenced by external factors. As a consequence, it is often used as a guise or a vehicle, for political

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<sup>228</sup> Allain *Op cit* fn197, 200

<sup>229</sup> Allain *Op cit* fn196, 32

<sup>230</sup> Ribí *Op cit* fn193, 104

<sup>231</sup> *ibid* 104

radicalism, foreign policy, self-protection and colonial interest. Through such a guise humanitarian concern or the real issue of exploitation can be sidelined. Thus, it is important to be reflective of this enmeshment and be aware of the consequent limitation of anti-slavery legislation.

What we see is that the use of a historical analogy can create a superficial link between two practices (historical slavery and contemporary slavery and exploitation) which, in legal terms are not the same. Historical analogies can have utility when applied to contemporary events or phenomena. However, lawmakers often misuse them. The predominant reason for this is that people tend to identify analogies on the basis of surface similarities.<sup>232</sup> This is a trend, which can potentially be identified in the comparison of slavery and modern labour exploitation, such as trafficking, where superficial commonalities are identified to benefit the aims of different parties. The utility of an analogy with historical slavery is lost when it becomes ingrained and assimilated into the public consciousness and is, therefore, unquestioned.<sup>233</sup> The reason for this is that analogies are made in order to discover new facts and explanations. The analogy drawn between the contemporary movement against ‘modern slavery’ and the anti-slavery of old has become a statement of fact rather than a tool of discovery.<sup>234</sup> Karen Bravo has commented that the actual utility of an analogy with the trans-Atlantic slave trade would not be in trying to equate trafficking with historical manifestations of slavery. Historical analogies can be useful tools when used to consider the ways in which political and economic structures have caused and aided in the evolution of slavery, and how these patterns can be used to help combat issues of persisting slavery but also trafficking.<sup>235</sup> However, the transatlantic analogy is not used in this manner, Bravo argues that the utilisation of the Trans-Atlantic slave trade analogy exposes "a strong appeal to emotions rather than to intellect",<sup>236</sup> Bravo identifies a number of trends in its use:

- (1) the emotional exhortation to action;
- (2) the diminution of the horror of transatlantic slavery;
- (3) the assumption of the mantle of righteousness;
- (4) distancing of our (enlightened) time from theirs or “how far we’ve come”;

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<sup>232</sup> Karen Bravo, Exploring the Analogy between Modern Trafficking and the Trans-Atlantic Slave Trade (2007) 25(2), Boston University International Law Journal, 207, 211

<sup>233</sup> *ibid*

<sup>234</sup> *ibid* 244

<sup>235</sup> *ibid* 295

<sup>236</sup> Karen Bravo, The Role of the Trans-Atlantic Slave Trade in Contemporary Anti-Trafficking Discourse (2010) 9(2), Seattle Journal for Social Justice, 555, 562

and (5) the “mythic slaying of the dragon,” or the perception of human trafficking as an entirely new form of exploitation. .<sup>237</sup>

The problem with such superficial analysis of the analogy with slavery is that it is self-protective, a determination to not acknowledge the role that political and economic institutions play in the continued existence of slavery and labour exploitation.<sup>238</sup> There is an increasing tendency in all spheres to designate trafficking as ‘modern slavery’ in order to capitalise on the history and the emotive nature of the term and the history of anti-slavery. One reason could be that the language and, therefore, the imagery of trafficking can be viewed as somewhat sterile or clinical in comparison and, because of this, it does not have the same effect as the language of slavery. Using the language of slavery and abolitionism brings with it a particular visual and imagery. The phrase ‘modern slavery’ permeated debates on what became the Modern Slavery Act<sup>239</sup> from the moment Theresa May announced her intention to present a bill on modern slavery in August 2013. This was arguably a strategic move on the part of UK policymakers. The act invoked the memory and spirit of the original abolitionist movement led by William Wilberforce. In a way, which parallels historical narratives on anti-slavery, there is also a complexity to the contemporary modern slavery narrative. There are competing interests from various NGOs such as Anti-Slavery International and FLEX and, there is a genuine humanitarian concern. However, there are also a number of government political interests, which shape the way in which the narrative has affected legal responses to the continuing issue of exploitation. Mike Dottridge, former director of Anti-Slavery International, has commented that for a government which is ideologically committed to the reduction of regulation in business, dislikes trade unions and whose rhetoric is hostile towards migrant workers, the term slavery holds a certain appeal.<sup>240</sup> It allows politicians to "invoke the saintly memory of 19th Century abolitionists while doing little to enable

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<sup>237</sup> *ibid* 562 also see Bravo *Op cit* fn232

<sup>238</sup> Bravo *Op cit* fn236, 244

<sup>239</sup> Modern Slavery Act 2015 C.30

<sup>240</sup> Mike Dottridge, Some implications of using the term ‘modern slavery,’

<https://thetraffickingresearchproject.wordpress.com/2014/02/28/some-implications-of-using-the-term-modern-slavery/> (accessed 15/9/17) for an overview of the Conservatives approach towards dismantling trade unions and weakening the position and protection of workers see Rob Knox, Law, neoliberalism and the constitution of political subjectivity The case of organised labour in ed. Honor Brabazon, *Neoliberal Legality – Understanding the Role of Law in the Neoliberal Project* (Routledge 2016)

the workers who are most in danger of extreme forms of exploitation to exercise their human rights."<sup>241</sup> The reason the use of this imagery is problematic is that it allows lawmakers to use the analogy of slavery in a way that creates a myth, trafficking always equates to slavery, even though it is a practice which is, at best, *related* to slavery.

## 7. Lessons of Abolition

In conclusion, this chapter demonstrates that throughout the 18th Century and the early 19th Century up until the creation of the 1926 Slavery Convention, Britain took the lead in the fight against the slave trade and the institution of slavery on a global level. This chapter has demonstrated that historical anti-slavery was more complicated than some traditional narratives would suggest, it was not simply a case of overwhelming moral fervour. Anti-slavery has not been driven by straightforward humanitarian concern but rather, complicated webs of competing political interests; this is something, which carries over to contemporary narratives of 'modern slavery.' Historically anti-slavery and abolitionism have been used as a way to disguise expansionist policy decisions of colonial powers.

The later discussion in this chapter on the League of Nations highlights the power held by non-governmental actors to influence not only the general policy priorities but also the direction of anti-slavery policies within the League and by extension the international community. This is demonstrated by the power the Anti-Slavery Society came to wield in the context of the League of Nations in the early 20th Century. This is highlighted by the influence exerted by the Society and John Harris in relation to the mandates system, the Ethiopia crisis and the Temporary Slavery Society. This is a trend, which can be identified, in contemporary debates surrounding the concept of 'modern slavery'. In a similar fashion to how the Society shaped the agenda of the League of Nations, contemporary NGOs have shaped and wielded the concept of 'modern slavery' to rebrand the offence of trafficking, mobilise the public and guide the passage of legislation.<sup>242</sup>

Historical narratives are instrumentalised in the contemporary setting. Bravo's framework on anti-trafficking analogies provides a valuable insight into the potential

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<sup>241</sup> *ibid*

<sup>242</sup> Chuang *Op cit* fn698 629

application of historical anti-slavery to the 'modern slavery' paradigm. The following chapter will continue to build on this argument by opening up the discussion on the history of the anti-trafficking movement and the parallels of this narrative in contemporary discussions on modern slavery.

## Chapter 2: History and Legal Definition of Trafficking

### 1. Introduction

While the Palermo Protocol<sup>243</sup> is regarded as the first international legal document to provide a definition of trafficking, the issue of trafficking was first confronted in the 19<sup>th</sup> Century with the introduction of anti-white slavery legislation in Britain.<sup>244</sup> However, the trans-national crime of human trafficking has been viewed in recent decades as an escalating problem in the light of globalisation and the decline of the power of nation-states and border controls.<sup>245</sup>

This chapter will consider the development of the legal framework on trafficking – one of the central components of the ‘modern slavery’ narrative. The chapter will first assess the history of the anti-trafficking movement, considering its historical and social roots. It will then evaluate the legal definition of trafficking as provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol).<sup>246</sup> This section will explore the three elements listed in the Palermo Protocol: the methods or act, means and purpose of trafficking. The aim of this is to demonstrate that, contrary to the prevailing narrative of modern slavery, although the two practices of slavery and trafficking are linked, in legal terms, the process of trafficking is not only nominally but also substantively distinct from slavery.

### 2. The Historical Emergence of the Anti-Trafficking Movement

#### 2.1 White Slavery, Prostitution and Moral Panic

While the slavery abolition movement has its roots in the Transatlantic Slave Trade, the practice of trafficking and the contemporary anti-trafficking regime can ultimately be traced back to efforts to combat the white slave trade in the 20<sup>th</sup> Century (which

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<sup>243</sup> UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

<sup>244</sup> Laura Lammasniemi, Anti-White Slavery Legislation and its Legacies in England (2017) 9, *Anti-Trafficking Review*, 65, 64-65

<sup>245</sup> Louise Shelly, Human Trafficking as a form of Transnational Crime in Human Trafficking in ed. Maggy Lee, *Human Trafficking* (Taylor and Francis 2013) 116

<sup>246</sup> Palermo Protocol fn 243

would become known as trafficking in persons), which emerged from prostitution and demand for sexual labour in colonial territories.<sup>247</sup> The concepts of trafficking and ‘white slavery’ arose in the context of the 19<sup>th</sup> Century discourses on prostitution – regulation and abolition.<sup>248</sup> The creation of the first international anti-trafficking regime was partly "a reaction to the shift in the organisation of prostitution from pre-modern, small-scale forms to a modernised, bureaucratised, and international industry in the 1800's".<sup>249</sup> The catalyst for this shift can be located in the military and colonial interest in “the domestic and sexual needs of military men and men in the colonies”.<sup>250</sup> Stephanie Limoncelli states that:

"The heterosexual and masculinised gender ideology of European countries held that abstinence was not an option for single men or for men who were married but away from their wives for extended periods. Alternative sexual outlets, from masturbation to homosexuality, were widely thought to be physically and morally deleterious. Many state officials, therefore, believed it was necessary to allow, or at times to provide, what they perceived to be safe and appropriate heterosexual outlets, especially for European men."<sup>251</sup>

These outlets usually took the form of concubinage as a cheaper alternative than ‘importing’ European women to the colonies. However, Limoncelli comments that, during the later stages of the colonial era, “other arrangements for women’s sexual labour were provided by allowing marriage and the migration of European women, including wives and families.”<sup>252</sup> With the advent of technological advances in transportation and the wake of the industrial revolution, there was a subsequent increase in female migration.<sup>253</sup> However, in the latter stages of colonialism, there was a perceived danger of the increased mobility of women across Europe providing sexual labour. This fear was borne out of the subsequent growth in the number of white women in colonial areas, who in trying to support themselves and their families could turn to prostitution. Moreover, a fear also developed of the possibility of

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<sup>247</sup> Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013) 325

<sup>248</sup> Jo Doezema, Lose or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women (1999) 18(1), *Gender Issues*, 23, 26

<sup>249</sup> Stephanie A. Limoncelli, *The Politics of Trafficking* (Stanford University Press 2010) 19

<sup>250</sup> *ibid* 20

<sup>251</sup> *ibid*

<sup>252</sup> *ibid*

<sup>253</sup> Nicole J Siller, Human Trafficking in International Law Before the Palermo Protocol (2017) 64(3), *Netherlands International Law Journal*, 407, 410

relationships forming between white women and men of colour.<sup>254</sup> There were also emerging concerns regarding the establishment of an “international rotation of prostitutes and the reported spread of venereal disease.”<sup>255</sup> The solution was, therefore, to advocate prostitution as an acceptable form of labour, with the State ultimately being involved in intensifying the supply of women in prostitution in both colonial and metropolitan areas.<sup>256</sup> This is not to say that prostitution did not already exist; however, prior to colonisation, prostitution tended to be organised on a small scale with "in-kind exchanges; a more expansive relationship in which women might also provide food, bathing and conversation in addition to a sex act; or both."<sup>257</sup> There were also increasing concerns about the sexual health of the women involved in prostitution and the subsequent spread of disease to the colonial armed forces due to greater mobility. This led to the creation of state-regulated prostitution (domestically and in the colonies) through imposed brothel registration and compulsory and intrusive sexual health checks for women involved in prostitution.<sup>258</sup> Ultimately, then it is clear that this move to establish state-regulated prostitution was driven by concerns for the well-being of colonial forces and the success of the colonial project, rather than any concern for the women themselves.

Limoncelli stresses that it is vital to understand the role undertaken by the state in the expansion of prostitution in colonial territories concerning both demand and supply.<sup>259</sup>

State mediated political and economic projects contributed to the demand for women's sexual labour in the 1800s. The building of nation-states and empires required large groups of men to serve as military troops, labourers and administrators. In both metropolitan and colonial areas, brothels were set up by military officials in port cities, and garrison towns to service military men, and then extended to the civilian population in order to service labourers. Trafficking emerged as women were moved to meet the demand of large groups of labourers in colonial and frontier areas.<sup>260</sup>

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<sup>254</sup> Limoncelli *Op cit* fn249, 20

<sup>255</sup> Siller *Op cit* fn253, 410

<sup>256</sup> Limoncelli *Op cit* fn249, 23

<sup>257</sup> *ibid* 22

<sup>258</sup> Gillian Wylie, *The International Politics of Human Trafficking* (Palgrave Macmillan 2016) 46

<sup>259</sup> Limoncelli *Op cit* fn249, 22

<sup>260</sup> *ibid*

Limoncelli argues that the decision to create state-regulated prostitution created new problems for officials as it also "provided the institutional mechanisms for the traffic in women".<sup>261</sup> The rise of migratory prostitution coincided with the growth of regulation. Therefore, the point of contention was whether regulation contributed to trafficking.<sup>262</sup> The International Abolitionist Federation argued to the League of Nations that "traffickers would not undertake the expense and risk of conveying their victims to foreign countries unless they were assured of a market in which to dispose of the merchandise. That market exists wherever houses of debauchery are licensed and protected by the Government."<sup>263</sup> Essentially, it was the existence of so-called legal or tolerated brothels in colonial areas that created a demand, which could then be supplied through the illegal traffic of women and children.

It was within the context of regulation that the narrative on 'white slavery' emerged, Doezema comments that:

the discourse on "white slavery" was never monolithic, nor was it inherently consistent. For some reformers, "white slavery" came to mean all prostitution; others saw "white slavery" and prostitution as distinct but related phenomena (Malvery and Willis, 1912). Others distinguished between movement within a country for prostitution (not white slavery) and international trade (white slavery) (Corbin, 1990, p. 294). Nonetheless, it is possible to establish some elements in perceptions of white slavery that were common to almost all interpreters of the phenomenon. "White slavery" came to mean the procurement, by force, deceit, or drugs, of a white woman or girl against her will, for prostitution.<sup>264</sup>

Prostitution was perceived to be an apparent necessity for the European military and labourers; as such, demand was created for European women to work in colonial brothels to contain sexual relations within racial categories.<sup>265</sup> During this time, political turmoil, war and pogroms led to the mass migration of vulnerable women throughout Europe; "Russian and Polish Jewish women were disproportionately likely to be found in foreign brothels from the late 1800s through the interwar period".<sup>266</sup>

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<sup>261</sup> Limoncelli *Op cit* fn249, 38

<sup>262</sup> *ibid*

<sup>263</sup> *ibid*

<sup>264</sup> Doezema *Op cit* fn248, 25

<sup>265</sup> Wylie *Op cit* fn258, 28

<sup>266</sup> Limoncelli *Op cit* fn249, 23

The demand for sexual labour created a response of illegal movement of women and children.

The terms 'white slavery' and 'trafficking' developed out of the melee of regulationist and abolitionist ideals. The logic behind the systems of regulation put in place during the later colonial period was of prostitution as a "necessary evil".<sup>267</sup> On the other hand, abolitionism arose as a specific response to the Contagious Diseases Acts of the 1860s.<sup>268</sup> Consequently, the first movement against trafficking was primarily concerned with abolishing state-regulated prostitution and confronting the sexual double standard of social condemnation of women involved in prostitution without targeting buyers and organisers of the sex trade.<sup>269</sup> The early anti-trafficking movements sought to protect all women and children entering into the sex trade. However, the pro-regulation International Bureau for the Suppression of the Traffic in Women and Children was mainly concerned with the 'involuntary' entry of white women and children into prostitution.<sup>270</sup> It is at this time that the emergent advocacy surrounding trafficking or 'white slavery' materialised with the work of Josephine Butler, for example, and the International Abolitionist Federation and The Women's Christian Temperance Union.<sup>271</sup> Butler's repeal movement opposed the labelling of prostitutes as "fallen women" and "sexual deviants".<sup>272</sup>

In relation to the construction of the female victim of white slavery, Doezema comments that:

[A]n essential aspect of the abolitionist campaign against 'white slavery' was to create sympathy for the victims. Neither the pre-Victorian "fallen women" nor the Victorian "sexual deviant" was an ideal construct to elicit public sympathy. Only by removing all responsibility for her own condition could the prostitute be constructed as a victim to appeal to the sympathies of the middle-class reformers, thereby generating public support for the end goal of abolition.<sup>273</sup>

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<sup>267</sup> Limoncelli *Op cit* fn249, 26

<sup>268</sup> There were three Contagious Diseases Acts – 1864, 1866, 1869, which aimed to control prostitution through medical supervision, see Limoncelli *Op cit* fn249 25, Doezema *Op cit* fn248 26-27

<sup>269</sup> Wylie *Op cit* fn258, 46

<sup>270</sup> *ibid* 46

<sup>271</sup> *ibid*

<sup>272</sup> Doezema *Op cit* fn248, 27

<sup>273</sup> Doezema *Op cit* fn248, 28

The advocacy of women's movements and white slavery campaigns in the 19<sup>th</sup> Century were intertwined with the rise of investigative journalism. As women began to migrate across Europe, stories of 'white slavery' began to emerge. The narrative of 'white slavery' was constructed and exaggerated in the frame of white slave traffic with journalists of the time reporting stories of young women being drugged, kidnapped and sold to foreign sources. There were a number of so-called investigative exposés on sex trafficking published during this period. Such reports emphasised the innocence of the victim utilising rhetorical devices of purity, youth and virginity.<sup>274</sup> Gillian Wylie draws attention to "*The Maiden Tribute of Modern Babylon*" written by W.T. Stead, commenting that it was both "the most famous and the most infamous" of these pieces. This report drew attention to an alleged trade in young girls in London. This report drew attention to an alleged trade in young girls in London.<sup>275</sup> Stead linked the controversial issues of 'white slavery' and 'child prostitution'; this so-called "sensationalist series" claimed to provide the audience with evidence of young English girls who had been "deceived, coerced and/or drugged into prostitution".<sup>276</sup> However, only white women were deemed to be victims in the ideology of the abolitionist movement, "campaigners against the 'white slave trade' from Britain to Argentina were not concerned about the situation of native-born prostitutes."<sup>277</sup> The dominant discourse regarding trafficking and white slavery was thus constructed around a "crude juxtaposition of dangerous, foreign men and innocent, white women."<sup>278</sup>

There are a number of parallels, which can be drawn between the original and contemporary anti-trafficking movements. Doezema argues that contemporary accounts of trafficking in women "vie" with stories of the white slave trade in their sensationalist nature.<sup>279</sup> Doezema comments, that contemporary trafficking narratives have "performed a macabre 'zombie magic', rousing the corpses of the Victorian imagination from their well-deserved rest."<sup>280</sup> This reanimation can be identified through the use of rhetorical devices of the 19<sup>th</sup> Century – innocence, youth and

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<sup>274</sup> *ibid* 28

<sup>275</sup> Wylie *Op cit* fn258, 46

<sup>276</sup> Doezema *Op cit* fn248, 28

<sup>277</sup> *ibid* 30

<sup>278</sup> Lammasniemi *Op cit* fn244, 67

<sup>279</sup> Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (Zed Books 2010)

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<sup>280</sup> *ibid* 50

virginity, deception and violence - <sup>281</sup> in contemporary accounts. This itself resonates with the narrative and imagery surrounding the contemporary anti-slavery movement of Eastern European women being the primary victims of trafficking and slavery.

Figure 1 Images taken from a Google search for the keywords human trafficking (20/07/2018)



Figure 1 depicts the presence of such rhetorical devices in contemporary anti-trafficking imagery. Upon a simple Google image search for the keywords ‘human trafficking’, without any reference to sex trafficking or women, you are presented with a plethora of images depicting ‘innocent’ women in chains subjected to violence and coercion. The depiction of human trafficking by the media, particularly the film and entertainment industry, also conforms to stereotypical tropes of trafficking. For example, films like *Taken* (2008) and *Trafficked* (2017) focus on sex trafficking rings and the abduction and exploitation of young, white and beautiful or, in other words, ‘idealised’ victims. Across both narratives “pop culture and the media, toy with details of innocence and ruin of the victim coupled with the demonisation of foreign men.”<sup>282</sup>

It has also been noted by Radhika Coomaraswamy, the former United Nations Special Rapporteur on Violence against Women, that historically “anti-trafficking movements have been driven by perceived threats to the purity or chastity of certain populations of women, notably white women”.<sup>283</sup> Lammasniemi has observed that the issue of race

<sup>281</sup> *ibid* 31

<sup>282</sup> Lammasniemi *Op cit* fn244, 67

<sup>283</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Radhika Coomaraswamy, submitted in accordance with Commission on*

also intersected with ideas of class, nationality and perceived purity.<sup>284</sup> Lammasniemi states that:

Prostitution was viewed by many vigilance campaigners as demeaning and de-whitening. Stories of English prostitutes who had non-white clients or boyfriends were told with particular horror and disdain. The NVA<sup>285</sup> went so far as to state that the ‘cheapening’ of white women in this manner ‘must result [in] some cheapening of prestige’ of the British Empire.<sup>286</sup>

Thus, the focus on ‘whiteness’ within the white slavery/trafficking discourse was more than a biological statement but also “a way to determine purity and patriotism.”<sup>287</sup>

This account of ‘white slavery’ has been disputed by other scholars and described as “mythical in nature”.<sup>288</sup> Doezema acknowledges that colonial narratives on the ‘white slave trade’ have been criticised by a number of contemporary historians, who have questioned the true extent of the so-called trade during the 19<sup>th</sup> Century.<sup>289</sup> Doezema remarks: “...the narratives of “white slavery” become something other than factual accounts of women's experiences. Rather, “white slavery” becomes a metaphor for a number of fears and anxieties in turn of the century European and American society.”<sup>290</sup> Thus, the idea of ‘white slavery’ acted as a vehicle for a range of social and moral fears in British Victorian Society.

This continuing idea of the myth of ‘white slavery’ is an issue, which resonates with the construction of the contemporary concept of ‘modern slavery’ and the debates that surround it. Trafficking in women and children for sexual exploitation (the white slave trade) became the focal point for the emergent local and transnational women’s movements during the 19<sup>th</sup> Century. It is submitted that this was a somewhat uncontroversial issue for women’s activists to converge upon “dealing as it did in emotive claims about morality and the abuse of female bodies rather than the tougher

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*Human Rights resolution 1997/44. Addendum: Report on the mission to Haiti, 27 January 2000, E/CN.4/2000/68*

<sup>284</sup> Lammasniemi *Op cit* fn244, 67

<sup>285</sup> The National Vigilance Association (NVA) was a social purity organisation in Victorian Britain

<sup>286</sup> Lammasniemi *Op cit* fn24468

<sup>287</sup> *ibid*

<sup>288</sup> *ibid* 24

<sup>289</sup> See Doezema *Op cit* fn248, 25-26

<sup>290</sup> *ibid*

political question of demand for women's suffrage".<sup>291</sup> In contrast, the contemporary concept of modern slavery has become the vehicle for lawmakers and activists alike to deal with issues relating to exploitation without confronting central structural issues. Doezema remarks that the parallels between the two can be demonstrated in "a single static image."<sup>292</sup> Produced in 1913 "The White Slave",<sup>293</sup> a sculpture by Abastenia St. Leger Eberle, depicts "a nearly nude woman in chains" and was viewed as representative of the fall of innocence of the victim of the 'white slave trade'.<sup>294</sup> Doezema draws a connection between this image and that of the contemporary movement against 'modern slavery', citing a poster created by the International Office for Migration in Lithuania.<sup>295</sup>, in which a young woman is depicted hung on strings by barbed hooks in her skin to resemble a marionette, with the warning "you will be sold like a doll." This represents "a single static image" which narrates the myth of modern slavery and its connection to trafficking. The 'white slave trade' campaign of the 19<sup>th</sup> Century was tied up in the 'anti-prostitution' movement. However, while the contemporary modern slavery campaign is inextricably tied to the historical ideas of slavery and trafficking, it is rooted similarly in the desire to control migration, therefore, blurring the lines between slavery and trafficking and once again focussing on only a narrow cross-section of exploitation. As the social purity reformers of the 19<sup>th</sup> Century realised the "rhetorical power of white slavery",<sup>296</sup> it would seem that the trafficking as 'modern slavery' narrative equally serves the purposes of anti-trafficking campaigners, politicians and a neo-liberal economy.

## 2.2. Anti- Trafficking Before Palermo:

The foundations for anti-white slavery/trafficking legislation were laid domestically in 1881 with the creation of a House of Lords Select Committee tasked with investigating the protection of young girls, specifically in relation to the 'traffic' of women.<sup>297</sup> However, the first international instrument adopted in this area would not arrive until the 1904 International Agreement for the Suppression of the White Slave

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<sup>291</sup> *ibid* 45

<sup>292</sup> Doezema *Op cit* fn279, 53

<sup>293</sup> Susan P Casteras, Abastenia St. Leger Eberle's White Slave (1986) 7(1), *Women's Art Journal*, 32

<sup>294</sup> Doezema *Op cit* fn279, 53

<sup>295</sup> *ibid*

<sup>296</sup> *ibid* 61

<sup>297</sup> Silvia Scarpa, *Trafficking in Human Beings* (Oxford University Press 2008) 50

Traffic.<sup>298</sup> With the realisation that the cross-border movement of women must be addressed, the Agreement was aimed at collecting information from the contracting parties on “the procurement of women and girls for immoral purposes abroad and at guaranteeing controls, especially in railways stations or ports to identify victims of the white slave traffic”.<sup>299</sup>

The 1904 Agreement was followed up in 1910 by the International Convention for the Suppression of the White Slave Traffic<sup>300</sup>. The 1910 Convention bound all parties to punish those who gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.”<sup>301</sup> The Convention moved away from the aim of monitoring the movement of ‘victims’ to punishing the perpetrator. The Convention stated under Articles 1 and 2 that contracting parties were obligated to punish those who “in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes”<sup>302</sup> or “has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl *overage*, for immoral purposes.”<sup>303</sup> In addition, the different elements of the offence could be committed in different countries, therefore, introducing the possible dimension of a cross-border or trans-national element to the regime of anti-trafficking. Jean Allain comments that the drafting of the Convention reflected prevailing ideas about women, prostitution and morality of the time. Article 1 and 2 reflect the dichotomy between the ‘fallen woman’ who may have consented and the ‘chaste’ woman that has been procured by deception or threat.<sup>304</sup>

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<sup>298</sup> International Agreement for the Suppression of the "White Slave Traffic," 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83, entered into force 18 July 1905.

<sup>299</sup> Scarpa, *Op cit* fn 297 50, see Articles 1-3 International Agreement for the Suppression of the "White Slave Traffic 1904

<sup>300</sup> International Convention for the Suppression of the "White Slave Traffic," May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, entered into force June 21, 1951.

<sup>301</sup> *ibid* Article 1

<sup>302</sup> *ibid* Article 1

<sup>303</sup> *ibid* Article 3

<sup>304</sup> Allain *Op cit* fn 247 342

A further two instruments came into existence during the League of Nations Era, running parallel to developments relating to the regime on slavery. The first was the International Convention for the Suppression of the Traffic of Women and Children,<sup>305</sup> followed by the International Convention for the Suppression of the Traffic in Women of Full Age.<sup>306</sup> Following a number of reports linking the regulation of prostitution and trafficking, the League of Nations adopted a more abolitionist position in the drafting of the 1933 Convention.<sup>307</sup> Subsequently, the Convention contradicted the assertions of the 1904, 1910 and 1921 agreements that an individual may consent to prostitution. Wylie comments that this move served to condone “a key abolitionist principle”<sup>308</sup> and move the narrative further away from regulation.

Post-World War II, the United Nations assumed responsibility for the anti-trafficking framework. However, trafficking was no longer viewed as an important international issue. A 1959 United Nations Report on the international status of prostitution and the threat posed to them stated:

there is reason to believe that in many countries today the prostitute is a freer person, less regimented and in general less subject to coercion ... the trend appears to be towards a freer prostitute whose relationship with those living on her earning is more or less voluntary.<sup>309</sup>

Thus, the concern and impulse to monitor and control the mobility of women, and the occurrence of sexual relationships across racial and national boundaries were no longer viewed as a priority. Instead, Limoncelli argues that attention instead turned to national prostitution as “new psychological discourses began to emphasise the deviance of women in prostitution and the need to rehabilitate and “re-educate” prostitutes.”<sup>310</sup>

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<sup>305</sup> International Convention for the Suppression of the Traffic in Women and Children, 13 September 1921, see Allain *Op cit* fn247, 341

<sup>306</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 11 October 1933, see Allain *Op cit* fn247, 341-2

<sup>307</sup> Wylie *Op cit* fn258, 47

<sup>308</sup> *ibid*

<sup>309</sup> United Nations, Study in Traffic in Persons and Prostitution, Department of Economic and Social Affairs 59.IV.5 (1959)

<sup>310</sup> Limoncelli *Op cit* fn249, 90

In 1950, the United Nations did manage to develop the regime on trafficking by passing the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>311</sup> The Convention originated in a draft created by the League of Nations in 1937 and made all procurement, with or without consent either within or between countries, punishable.<sup>312</sup> Allain comments that the 1950 Convention essentially aimed to put an end to State-organised prostitution by establishing a global regime against trafficking.<sup>313</sup> Perhaps, more importantly, is the shift in the tone of the Convention. Rather than continuing to focus the narrative on the exploitation of women and children, the 1950 Convention discusses the exploitation of 'persons'. This could be regarded as a conceptual shift in thinking on victimhood and trafficking. However, this expansion is nominal rather than substantive with Article 1 continuing to focus on prostitution of women and young girls.<sup>314</sup>

The early anti-trafficking efforts of the League of Nations and the United Nations created a set of agreed-upon principles for states to follow. Limoncelli argues that the kind of normative framework laid out in these instruments had the potential to influence state policy and practices. The following section builds on this historical perspective by considering the drafting and substance of the Palermo Protocol, the contemporary accepted international legal framework for trafficking.

### **3. Defining Trafficking in Contemporary Legal Instruments**

#### **3.1 Human Trafficking and the Palermo Protocol**

On 15 November 2000, the United Nations General Assembly adopted the Palermo Protocol<sup>315</sup> in order to “prevent and combat trafficking in persons” more effectively.<sup>316</sup> During the intervening period between the 1950 Trafficking Convention and the 1970s, there was somewhat of a pause in advocacy and legal action against slavery. During this period the issue of trafficking was not deemed to be an international priority. This period was dominated by Cold War politics, which

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<sup>311</sup> UN General Assembly, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949, A/RES/317

<sup>312</sup> *ibid* article 1

<sup>313</sup> Allain, *Op cit* fn247 345, also see Limoncelli *Op cit* fn249, 92

<sup>314</sup> UN Trafficking Convention fn 311 article 1

<sup>315</sup> Palermo Protocol fn 243

<sup>316</sup> Jean Allain, No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol (2014) 7 Albany Government Law Review, 111, 113

saw the restriction of human movement between the East and the West through the creation of highly militarised boundaries.<sup>317</sup> The Palermo Protocol itself is the culmination of work undertaken by the United Nations in the field of Organised Transnational Crime since the mid-1990s.<sup>318</sup> During the early 1990s, the UN's remit on trafficking focused primarily on guns and cars. However, following the 1994 Naples Conference on Organised Transnational Crime and the proposal to create a new convention on Transnational Organised Crime, it has been observed that cars and guns vanished, and women and children appeared once more in the trafficking narrative.<sup>319</sup> A new convention on organised crime was proposed by Poland, followed by a General Assembly resolution to establish an open-ended intergovernmental Ad Hoc Committee against transnational organised crime. The task of the committee was to submit a draft convention and to discuss the elaboration of international mechanisms addressing trafficking in women and children.<sup>320</sup> The committee held 11 meetings from January 1999 until October 2000 with 120 states represented at the sessions; NGOs were then consulted in separate sessions.<sup>321</sup> The final text of the Palermo Protocol is the result of three prevailing approaches to trafficking: migration, criminal justice and human rights.<sup>322</sup> The protocol is primarily a law enforcement instrument intended to ensure cross-border co-operation. However, it also provides a widely accepted definition of the crime of trafficking.<sup>323</sup> Article 3 of the Palermo Protocol defines trafficking as the following:

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>324</sup>

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<sup>317</sup> Wylie *Op cit* fn258, 50

<sup>318</sup> Dominika Borg Jansson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Brill Nijhoff 2014) 68

<sup>319</sup> Wylie *Op cit* fn258, 59

<sup>320</sup> Jansson *Op cit* fn318, 74-74

<sup>321</sup> Scarpa *Op cit* fn299, 55

<sup>322</sup> *ibid* 74

<sup>323</sup> Bridget Anderson, Andrijasevic, Rutvica, 'Sex, Slaves and Citizens: The Politics of Anti-Trafficking' (2008) 40, *Soundings*, 135

<sup>324</sup> Palermo Protocol fn 243

This definition as provided by the Palermo Protocol consists of three constituent elements: the act; the means by which the action occurs or is made possible; and, a purpose to the action, which is specified as a form of exploitation. The first element of the definition forms part of the *actus reus* of trafficking consisting of the practices of recruitment, transportation, transfer, harbouring or receipt of persons. The actions stated in the definition can be neutral in and of themselves. However, the incorporation of the means and the purpose cause the action to take on a different character. The *mens rea* of the crime of trafficking is provided by the inclusion of “for the purpose of exploitation”.<sup>325</sup> The broad wording of Palermo has led to much divergence with many of the 147 signatories interpreting the definition into domestic legislation.<sup>326</sup> However, this section will focus on the international baseline provided by Palermo, exploring the constituent elements of Article 3 using the travaux préparatoires and academic literature. This analysis will provide a starting point for exploration of the legal definition of slavery. It will also lay the foundations for the exploration of the premise that trafficking has come to subsume the practice of slavery from a legal point of view.

### *The Action:*

The crime of trafficking is best presented as a process, the first part of which is an act. Dominica Borg Jansson describes the act as a trade measure against another person,<sup>327</sup> which can also be thought of as the procurement stage of the trafficking process. In accordance with Article 3 of the Protocol, such acts can include recruitment, transportation, transfer, harbouring and receipt of an individual or group of individuals.<sup>328</sup> It is unclear whether Article 3 provides an exhaustive list of the methods that can be utilised by traffickers. There is no additional guidance in the *travaux préparatoires* as to this element of trafficking.<sup>329</sup> Without elucidation from the preparatory texts as to what acts fall within Article 3,<sup>330</sup> it is difficult to state

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<sup>325</sup> The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol (UNODC 2015) 24

<sup>326</sup> Christina Seideman, The Palermo Protocol: Why It Has Been Ineffective in Reducing Human Sex Trafficking (2015) 9(5), Global Tides, 1, 2

<sup>327</sup> Jansson *Op cit* fn318, 81

<sup>328</sup> Palermo Protocol fn 243

<sup>329</sup> Travaux Préparatoires for the negotiations for the elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto, Part 2, 317-419 accessed at ([https://www.unodc.org/pdf/crime/final\\_instruments/383a1e.pdf](https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf))

<sup>330</sup> Palermo Protocol fn 243

comprehensively what may or may not count as an act of trafficking. Ultimately, what is classified as an ‘action’ is dependent on how domestic legislation resorts to implementing the Protocol. There is a wide range of methods that may be utilised by traffickers, and it will often be dependent on a number of factors such as culture, geography, individual and financial circumstances, and, ultimately each act of trafficking is unique within its own context.<sup>331</sup> Given the lack of clarification provided in the *travaux*, it is helpful to turn to research in the area of trafficking for guidance. For example, studies into trafficking in Central Asia indicate that recruitment is usually carried out by women utilising tourist visas and the promise of work in the hospitality, catering and entertainment industries.<sup>332</sup> Further to this, there are numerous contexts in which recruitment will occur. Data collected from interviews with trafficked women indicate that key recruitment contexts include travel and employment agencies, adoption from orphanages, kidnappings and forced marriages (primarily with minors) and the second wave, the use of already trafficked women to lure new women.<sup>333</sup> There have also been studies carried out in the European context (particularly East and South-East Europe). One study carried out by Ewa Morawska demonstrates that while recruitment takes place in a number of ways, 30% of trafficked women are recruited through the initiative of a friend or an acquaintance. The most common form of recruitment for around 60% of those trafficked is the use of deceptive offers of assistance with visas and travel across the border with the incentive of a job.<sup>334</sup> One method is the ‘lover boy’ recruitment scheme as discussed by Paola Monzini, which usually involves a promise of marriage and the organisation of travel across the border.<sup>335</sup> A second popular method targeted at women is the use of an elderly woman recruiter who will promise safe and secure employment in Western Europe.<sup>336</sup>

To sum up, the recruitment stage is variable dependent on the targeted victim and the context in which the recruitment measure takes places. However, research indicates that particularly in Eastern Europe and Central Asia, the use of women in the high-risk recruitment stage is on the rise with more than three-fourths of those convicted of

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<sup>331</sup> Jansson *Op cit* fn318, 81

<sup>332</sup> Liz Kelly, A conducive context: Trafficking of persons in Central Asia in Human Trafficking in ed Maggy Lee *Human Trafficking* (Willan 2007) 75

<sup>333</sup> *ibid* 76 see, 76-76 for a case example of recruitment in the Central Asian context.

<sup>334</sup> *ibid* p.101

<sup>335</sup> Paola Monzini, *Sex Traffic. Prostitution, Crime and Exploitation*, (Zed Books 2005) 76

<sup>336</sup> Kelly *Op cit* fn332, 100

trafficking offences being female.<sup>337</sup> It is possible to commit an act of trafficking without being involved directly in recruitment and the giving and receiving of payments. The element of the act only ends once the victim is delivered to a person or group who will carry out the subsequent exploitation. This means that there are various points of the victim's journey at which multiple perpetrators may be responsible for transferring or harbouring a victim.<sup>338</sup>

### *The Means*

The second element of the trafficking definition is the means which, unless the victim is a minor, must be employed by the trafficker.<sup>339</sup> Therefore, in order to form the *actus reus* of trafficking, the consent of the victim is irrelevant when any of the means are present. In accordance with Article 3 of the Protocol the means can include the use of force or threat thereof, 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. In the trafficking context, the term coercion is used to refer to numerous behaviours including threats, deceit and the abuse of a position of vulnerability.<sup>340</sup> The Protocol refers to “threats and use of force and other forms of coercion”.<sup>341</sup> This creates a separation between what the United Nations Office on Drugs and Crime refer to as direct and less direct means to facilitate exploitation, with deception and fraud being examples of less direct means.<sup>342</sup> The *travaux préparatoires* and interpretative notes for the Palermo Protocol provide little information regarding the threshold criteria for coercion, deception and fraud.

One specific element of the means open to discussion is the abuse of vulnerability. At the time of the drafting process that concept of abuse of a position of vulnerability

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<sup>337</sup> Jansson *Op cit* fn318, 82

<sup>338</sup> *ibid*

<sup>339</sup> Palermo Protocol fn 243, article 3(b)

<sup>340</sup> Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons – Issue Paper, p.17 (UNODC 2013) see for example, European Parliament Resolution on trafficking in human beings, Resolution A4-0326/95 of 18 January 1996, OJ C 032, Feb. 5, 1996 (“deceit or any other form of coercion”); Council of Europe 1997 Joint Action on Trafficking (“coercion, in particular violence or threats, or deceit”); 2000 Committee of Ministers Recommendation (“coercion, in particular violence or threats, deceit, abuse of authority or a position of vulnerability”)

<sup>341</sup> Palermo Protocol fn 243 article 3

<sup>342</sup> Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons – Issue Paper, (UNODC 2013) 17

was unique to the Palermo Protocol.<sup>343</sup> The interpretive notes for the approved text state that an abuse of a position of vulnerability refers to “any situation in which a person involved has no real and acceptable alternative but to submit to the abuse involved”.<sup>344</sup> With regard to who may potentially qualify as a vulnerable individual, at the fourth session of the Ad Hoc Committee, it was proposed by Belgium that Article 3(2) should include the phrase “through the abuse of the particular vulnerability of an alien due to that person’s illegal or precarious administrative status”.<sup>345</sup> Further to this, in the preamble of the Protocol, it is made clear in the notes by the Secretariat that the vulnerabilities of women and children are distinct in nature.<sup>346</sup> The concept of abuse of vulnerability as a means of trafficking was introduced late in the drafting process in October 2000 supposedly reflecting the desire of the Drafting Group to include “the myriad more subtle means of coercion by which people are exploited.”<sup>347</sup> However, it should be noted that the limited discussions in the *travaux* and interpretative notes are directly related to vulnerability as a form of susceptibility to trafficking rather than the abuse of vulnerability as a means to perpetrate trafficking.<sup>348</sup> The interpretive notes state that it is essential to distinguish between vulnerability as a means and vulnerability in terms of susceptibility:

The mere fact of a person’s vulnerability to trafficking (because of poverty, gender, etc.) is sometimes taken as evidence or even proof that the requisite means element of the trafficking definition has been established. Conversely, the apparent absence of initial vulnerability may lead to the conclusion that a person has not, in fact, been trafficked.”<sup>349</sup>

The lack of clarification in the *travaux* and the interpretative guide leave all elements of the means of trafficking listed in the Protocol’s definition undefined. Perez has argued that the concept of vulnerability was inadequately dealt with by the Protocol: “It fails to consider, for instance, whether the ‘acceptability’ of the alternative is

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<sup>343</sup> *ibid*

<sup>344</sup> *Travaux Préparatoires* for the negotiations for the elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto, Part 2, 347 accessed at ([https://www.unodc.org/pdf/crime/final\\_instruments/383a1e.pdf](https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf))

<sup>345</sup> *ibid* p.355

<sup>346</sup> *ibid* p324

<sup>347</sup> UNODC fn 342, 18

<sup>348</sup> *ibid*, 15

<sup>349</sup> *ibid*

measured by (undefined and unknown) external parameters or if it is shaped by the understanding of each potential victim.”<sup>350</sup>

As far as the wording of the Protocol tells us, the existence of vulnerability itself is not of material importance for the establishment of a case for trafficking. The Protocol states that vulnerability must be exploitation to the extent that consent is vitiated.<sup>351</sup> However, Perez states that this is problematic, as “vulnerability is most often viewed not as one of the means used to traffic people but simply as a greater susceptibility to being recruited.”<sup>352</sup>

Related to this second element of the Palermo Protocol's definition of trafficking is the concept of consent. As previously mentioned, the presence of any of the means listed in Article 3 could invalidate any consent that may have been given by a potential victim. The Protocol establishes that the consent of an adult victim is irrelevant if any of the listed means are present. However, the consent of a child victim will always be irrelevant to establishing the occurrence of trafficking.<sup>353</sup> As with the means of trafficking, there was little substantive discussion in the *travaux* until the definition of trafficking was finalised.<sup>354</sup> There was an agreement amongst the participating States that consent was not to be an issue in determining the establishment of the crime of trafficking as was confirmed in Article 3(b) of the Protocol.<sup>355</sup> The 2009 United Nations Office on Drugs and Crime Model Law on Trafficking in Persons provide some guidance as to how Article 3(b) operates:

[O]nce the elements of the crime of trafficking, including the use of one of the identified means (coercion, deception, etc.), are proven, any defence or allegation that the victim "consented" is irrelevant. It also means, for example, that a person's awareness of being employed in the sex industry or in prostitution does not exclude such person from becoming a victim of trafficking. While being aware of the nature of the work, the person may have been misled as to the conditions of work, which have turned out to be exploitative or coercive. This provision restates existing international legal norms. It is logically and legally impossible to "consent" when one of the

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<sup>350</sup> Julia Lima de Perez, A Criminological Reading of the Concept of Vulnerability: A Case Study of Brazilian Trafficking Victims (2015) 25(1), *Social & Legal Studies*, 23, 24

<sup>351</sup> Palermo Protocol fn 243

<sup>352</sup> *ibid* 25

<sup>353</sup> Palermo Protocol fn 243 3(b)

<sup>354</sup> The Role of ‘Consent’ in the Trafficking in Persons Protocol – United Nations Office on Drugs and Crime Issue Paper (UNODC 2014)

<sup>355</sup> See fn 26 *Travaux Préparatoires* for the negotiations for the elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto (2006)

means listed in the definition is used. Genuine consent is only possible and legally recognised when all the relevant facts are known, and a person exercises free will.<sup>356</sup>

This statement on consent reflects the foreseen dangers in relation to trafficking; the Member States had feared the possibility of consent becoming the first line of defence for perpetrators of trafficking-related offences.<sup>357</sup> Given the breadth of exploitation covered by the definition, there was a particular danger where victims may have consented to migrate for work or engage in prostitution. However, Elliot argues that the central flaw of the debate about consent in the context of trafficking is that it relies on the supposition that there are only two potential options: coercion or consent.<sup>358</sup> In reality, coercion and consent exist on a spectrum, and the “inherent ambiguity of consent means that it is simply not useful in the delineation of the law itself.”<sup>359</sup> Elliot is correct to note that if “the terms are to be interpreted inclusively, the putative victim benefits, and the pool of recognised victims is wider. If the terms are to be interpreted exclusively and stringently, then the reach of the anti-trafficking regime is more limited.”<sup>360</sup>

The question of how severe the interference with consent must be to constitute trafficking is left unanswered by the Protocol. Therefore, the scope of its applicability is also left open to debate.

### *The Purpose*

The final element of the trafficking definition is the purpose of the act, which should be exploitative in nature. The Protocol states that at a minimum exploitation includes 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>361</sup> Jansson suggests that the wording of Article 3(a) “for the purpose of” implies that “direct intent to exploit is necessary at all stages of the trafficking chain”.<sup>362</sup> However, the concept of exploitation utilised by the Protocol did not

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<sup>356</sup> UODC, Model Law against Trafficking in Persons (2009) 33-34

<sup>357</sup> *ibid* 34

<sup>358</sup> Jessica Elliot, *The Role of Consent in Human Trafficking* (Taylor and Francis) 148

<sup>359</sup> *ibid*

<sup>360</sup> *ibid* 151

<sup>361</sup> Palermo Protocol fn 243 article 3(a),

<sup>362</sup> Jansson *Op cit* fn318

develop in a legal or political vacuum.<sup>363</sup> The Palermo Protocol does not provide a definitive definition of exploitation, instead offering an open-ended list of examples.<sup>364</sup> Therefore, exploitation, as defined by the Protocol, is a non-exhaustive term; forms of exploitation not listed in Article could also be captured under the definition. The forms of exploitation listed in the Article 3(a) are not defined in the Protocol itself but are defined in other international instruments.<sup>365</sup> Trafficking is a crime of specific intent; the crime can be established if the perpetrator intended that the action (one of the stipulated means) would lead to the exploitation of another individual.<sup>366</sup> Therefore, there is no requirement for exploitation to have occurred in the trafficking chain. The legislative guide for the Palermo Protocol tells us that the crime of trafficking is established under the Protocol once the elements of the act and purpose occur alongside the intention to exploit.<sup>367</sup>

The *travaux préparatoires* indicate that discussions on the element of exploitation formed a significant part of the negotiations. Throughout the negotiation, process concerns were raised regarding the potentially narrow definition of the purpose of trafficking. A number of different approaches were tabled during the negotiation: from excluding an exploitative purpose altogether to focusing the definition of the act and the means<sup>368</sup> to making a broad reference to ‘any’ or ‘all’ forms of exploitation.<sup>369</sup> The agreed text settled on the inclusion of exploitation as a purpose of trafficking in a flexible manner to act as a compromise ensuring maximum coverage but also providing some indication of the nature of exploitation being addressed by the Protocol.<sup>370</sup> In addition, consideration of the *travaux* indicates that a number of forms of exploitation proposed for inclusion in Article 3 were not accepted in the final draft. The International Labour Organisation lobbied for the expansion of trafficking for

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<sup>363</sup> The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol (UNODC 2015) 21-23 for further explanation on the general development of exploitation

<sup>364</sup> Palermo Protocol fn 243 article 3(a)

<sup>365</sup> For an explanation of the legal definitions and the relevant legal instruments of the enumerated forms of exploitation see fn 363, 27-40

<sup>366</sup> *ibid* 24, see UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (2009), Module 1, 4–5 accessed at (<http://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>)

<sup>367</sup> *ibid* 24, see UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols*, 268–269 accessed at ([https://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf))

<sup>368</sup> *Travaux Préparatoires* for the Organized Crime Convention and Protocols (UNODC 2006) 334, 357 accessed at ([https://www.unodc.org/pdf/ctoccp\\_2006/04-60074\\_ebook-e.pdf](https://www.unodc.org/pdf/ctoccp_2006/04-60074_ebook-e.pdf))

<sup>369</sup> *ibid*, 337

<sup>370</sup> UNODC fn363 25

labour exploitation, specifically forced labour and serfdom.<sup>371</sup> Additionally, practices such as the making or distribution of child pornography, purchase and sale of children, forced adoption, forced marriage, adoption and debt bondage were considered, but eventually discarded with the implication that the proposed practice could be potentially incorporated into one or more of the specified forms and by the fact that the practices listed were "at a minimum".<sup>372</sup>

Sexual exploitation was a particularly contentious issue at the state level. Once again the United Nations Office on Drugs and Crime Model Law provides some further clarification on the issue of exploitation. It notes that while the concept of exploitation is not given a specific definition in the Protocol, it is a concept, which is associated with "particularly harsh and abusive conditions of work or conditions of work inconsistent with human dignity".<sup>373</sup> The UNODC Model Law restates the non-exhaustive nature of exploitation. However, it states that, in the event that States decide to include other forms of exploitation, they should avoid imprecision, as the principle of legality requires precise definition in law.<sup>374</sup>

### 3.2 Trafficking Outside the Scope of Palermo – Europe and Beyond

Joy Ezeilo, the former UN Special Rapporteur on Trafficking in Persons, has remarked that Palermo was "a watershed in galvanising the global movement against human trafficking."<sup>375</sup> The discussion in this section has explored how the Palermo Protocol frames and defines the crime of trafficking. Allain notes that Palermo represented an "unstated invitation to legislators around the world to modify its provisions."<sup>376</sup> Thus far, there are 147 States that are signatories to the Palermo Protocol; the Protocol gives discretion to the national legislators on how to implement and define trafficking.<sup>377</sup> Allain argues that in certain instances the discretion provided when it comes to the domestic implementation of the Protocol has meant

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<sup>371</sup> Travaux Préparatoires for the Organized Crime Convention and Protocols fn344, 354

<sup>372</sup> UNODC fn fn363 25

<sup>373</sup> UNODC, *Model Law against Trafficking in Persons*, (2009) 36 accessed at ([https://www.unodc.org/documents/humantrafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/documents/humantrafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf))

<sup>374</sup> *ibid* 35

<sup>375</sup> Joy Ezeilo, *Achievements of the Trafficking Protocol: Perspectives from the former UN Special Rapporteur on Trafficking in Persons* [2015] No 4 *Anti-Trafficking Review*, 144

<sup>376</sup> Allain *Op cit* 393

<sup>377</sup> UN General Assembly, *United Nations Convention against Transnational Organized Crime* : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25, article 11

that States have “strayed away” from the initial intent of the drafters, in addition, such discrepancies create barriers to the effectiveness of co-operation when it comes to transnational crime.<sup>378</sup> One such key area is the definition of trafficking, the situation post-Palermo is fractured and “multi-varied understanding of what constitutes trafficking in persons.”<sup>379</sup> The key characteristic of Palermo is that it seeks to assist in the suppression and punishment of trafficking as a transnational crime. However, by inviting States to alter their own legal frameworks in light of Palermo as they see fit, “when we speak about trafficking in persons across borders; we are, in essence, speaking different languages”.<sup>380</sup> The following section will consider how the Palermo Protocol has influenced the development of further international anti-trafficking frameworks.

The Palermo Protocol is the leading international instrument for addressing human trafficking. There have, however, been a number of regional instruments adopted in the wake of Palermo, including the Council of Europe Convention on Action Against Trafficking<sup>381</sup> and EU Directive 2011/36.<sup>382</sup> While such instruments have been greatly influenced by the Palermo Protocol there are some distinctions to be made.

### *Council of Europe Convention on Action Against Trafficking*

While the Palermo Protocol takes centre stage in discussions on human trafficking, the Convention is regarded as the “the most complete and advanced existing international instrument dealing with trafficking in persons worldwide.”<sup>383</sup> The Council of Europe Convention (ECAT) emerged post-Palermo in the context of gradually building concern about human trafficking. The Council of Europe has demonstrated its opposition to the crime of trafficking, “the Committee of Ministers and the Parliamentary Assembly—have been active in combating trafficking in persons and have enhanced the basic principle that the victims of this 21st-century

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<sup>378</sup> Allain *Op cit* 393

<sup>379</sup> *ibid*

<sup>380</sup> *ibid*

<sup>381</sup> Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005

<sup>382</sup> European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011

<sup>383</sup> Scarpa *Op cit* fn299, 163

inhuman trade need to be protected.”<sup>384</sup> A proposal on the adoption of an anti-trafficking convention was initially made in 1991 in Council of Europe Recommendation No 11.<sup>385</sup> The recommendation called upon the Member States to:

Consider adopting specific measures to fight against the phenomenon, including the supervision of the activities of artistic, marriage and adoption agencies, the protection of trafficked victims, the introduction of rules on extraterritorial jurisdiction, the exchange of information between countries through EUROPOL and the creation of a European register of missing children.<sup>386</sup>

However, it was not until 2003 that the Committee of Ministers established an Ad Hoc Committee of Experts on Action against Trafficking in Human Beings. This Committee was tasked with drafting what would become the ECAT. Scarpa comments that the Committee of Ministers provided terms of reference to guide the drafting, including that the draft Convention was to take into account existing regional and international anti-trafficking instruments.<sup>387</sup> The Committee placed a particular emphasis on the Palermo Protocol stating that the new Convention should adopt “the same definition of trafficking in persons contained therein, while both improving the protection afforded by it to trafficking victims and comprehensively developing its standards.”<sup>388</sup>

Thus, the definition contained within the final text of the Convention mirrors that of the Palermo Protocol.<sup>389</sup> Article 4 defined trafficking in human beings as:

...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of

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<sup>384</sup> For a detailed overview of action taken by the Council of Europe to combat human trafficking pre ECAT see Scarpa *Op cit* fn299, 141

<sup>385</sup> Council of Europe (Committee of Ministers) ‘Recommendation No R (91) 11 of the Committee of Ministers to Member States concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults’ (9 September 1991) Rec (91)11E.

<sup>386</sup> Scarpa *Op cit* fn299, 141-142

<sup>387</sup> Scarpa *Op cit* fn299, 148

<sup>388</sup> *ibid*

<sup>389</sup> Palermo Protocol fn 243, article 3

others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>390</sup>

However, there is one key difference between the two instruments. ECAT provide a definition of a victim of trafficking. Article 4(e) states that “any natural person who is subject to trafficking in human beings as defined in this article” will be regarded as a victim of trafficking. Further to this, Article 2 states that the provisions apply to any form of human trafficking, “whether national or transnational, whether or not connected with organised crime.” Scarpa argues that Article 2 “is surely one of the most important achievements of the COE Trafficking in Persons Convention, as compared to the UN Trafficking Protocol.<sup>391</sup> The added value of the Convention regarding the definition lies in the fact that the scope of the Conventions definition is wider than that of the Protocol. Due to Article 2 the Convention deals with all forms of trafficking (whether transnational or connected to organised crime or not). Thus, the Palermo Protocol frames trafficking within the lens of transnational crimes. Allain highlights what a transnational crime is understood to be within the UN Convention against Transnational Crime<sup>392</sup>:

By ‘an offence that is transnational in nature’, what is meant is either that it is committed in more than one State or when committed in one State, it “has a substantial effect 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>393</sup>

Consequently, the definition of the Palermo Protocol can embrace instances of trafficking where a victim is not trafficked across a national border. However, it then requires that in such a situation that some element of the crime takes place either, in another state, has a substantial effect on another State or involves organised crime. This, therefore, presents a potential situation whereby trafficking takes place within national borders but lacks the other requisite factors of a transnational crime.

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<sup>390</sup> Council of Europe Convention fn381 article 4

<sup>391</sup> Scarpa *Op cit* fn299, 148

<sup>392</sup> UN Convention Transnational Organised Crime fn377 article 3(2)

<sup>393</sup> Jean Allain, No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol in *The Law and Slavery – Prohibiting Human Exploitation* (Brill 2015) 265

Consequently, the inclusion of Article 2 takes the Convention a step further than Palermo.

### *EU Directive 2011/36*

The EU's Trafficking Directive 2011/36 is the successor to the initial anti-trafficking strategy which took the form of Framework Decision 2002/629/JHA. The Directive was envisaged as being “an integrated, holistic and human rights-based approach to the fight against trafficking in human beings.”<sup>394</sup> One of the key issues with the original Framework Decision in regard to the definition of trafficking is that it related to only labour or sexual exploitation.<sup>395</sup> Consequently, a central aim of the Directive was to expand the bases of exploitation covered by the definition. The Directive, therefore, defines trafficking in human beings as:

1. The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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. 2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved. 3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.<sup>396</sup>

Once again, the definition provided is reminiscent of the Palermo Protocol. There are a few differences which materially expand the scope of trafficking in terms of the enumerated forms of exploitation. The Directive directly references exploitation in the form of forced begging as an element of forced labour. Article 2(3) and Recital 11 of the preamble also includes practices such as illegal adoption and forced marriage as forms of exploitation to be included within the definition.

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<sup>394</sup> Elisavet Symeonidou-Kastanidou, *Directive 2011/36 on Combatting Trafficking in Human Beings - Fundamental Choices and Problems of Implementation* (2016) 7(4), *New Journal of European Criminal Law*, 465, 466

<sup>395</sup> *ibid* 467

<sup>396</sup> EU Trafficking Directive fn 382

## *Trafficking beyond Europe – ASEAN*

Human trafficking affects most areas of the world. The Palermo Protocol offers an international baseline and the European instruments discussed above form the central focus of debates on human trafficking in the Global ‘West’. However, the Palermo Protocol has also had a noticeable effect on domestic approaches to human trafficking beyond Europe. The Association of Southeast Asian Nations (ASEAN) is made up of 10 countries including: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. The ASEAN approach to defining and combatting human trafficking regards trafficking as a “transnational crime and migration issue, without requiring the role of an organised criminal group in its commission.”<sup>397</sup> Historically, ASEAN has struggled meaningfully to confront the issue of human trafficking; problems have been identified with “non-specific anti-human trafficking provisions, unequal gender sensitivity, ambiguous and inadequate anti-human trafficking content and no common human trafficking norms.”<sup>398</sup> Prior to 2015, ASEAN had adopted a number of non-binding instruments dealing with the issue of human trafficking.<sup>399</sup> However, the adoption of the ASEAN Trafficking Convention in 2015 demonstrates a large step towards stronger legally binding anti-trafficking provisions.<sup>400</sup> The ASEAN Convention adopts the definition of trafficking provided by the United Nations Convention against Transnational Organised Crime,<sup>401</sup> thus, replicating the definition provided by the Palermo Protocol. Yursan comments that the “breakthrough” for the ASEAN Convention lies in its adoption of the definition of “victim.”<sup>402</sup> The Convention defines a victim as “any natural person who is subject to an act of trafficking in persons as defined in this convention.”<sup>403</sup> However, unlike the Palermo Protocol and the CoE Convention, the ASEAN Convention definition of trafficking only extends liability to ‘natural persons’ not to ‘legal persons’. This is arguably a key weakness for ASEAN for example, given the

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<sup>397</sup> Rantya Yursan, *The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment* (2018) 8(1), *Asian Journal of International Law*, 258, 260

<sup>398</sup> Naparat Kranrattanasuit, *ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam* (Brill J Nijhoff 2014) 47, see chapter 2 for a detailed discussion of the deficiencies of ASEAN anti-trafficking law and strategy.

<sup>399</sup> see Yursan *Op cit* fn397, 268-272

<sup>400</sup> ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015)

<sup>401</sup> UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25

<sup>402</sup> Yursan *Op cit* fn397, 277

<sup>403</sup> *ibid* 277

prevalence of exploitation in the Thai fishing industry.<sup>404</sup> Thus, given the prevalence of exploitation in Thailand in such industries, the lack of criminal liability for commercial companies creates a large enforcement gap in the ASEAN anti-trafficking framework. Additionally, Yursan notes that it also leaves the ASEAN Convention trailing behind other international frameworks such as COE and the Palermo Protocol.<sup>405</sup>

### 3. Conclusion

This chapter has considered the historical evolution of the concept of trafficking from its roots in the white slave trade and state-sanctioned prostitution to the creation of an international regime to combat what is now recognised as a transnational crime of trafficking in human beings. The legacies of the initial white slave trade movement are unavoidable in the contemporary anti-trafficking narrative. Lammasniemi argues that while the discourse has evolved, the legacies remain “static”.<sup>406</sup> She specifically notes the relationship between anti-trafficking and anti-immigration. Lammasniemi observes: “legislation, policies and campaigns initiated in recent years have had a strong anti-immigration focus at their core. They show that anti-trafficking legislation is closely intertwined with immigration control, and overall, criminalisation of trafficking is interlinked with criminalisation and fears of immigration.”<sup>407</sup>

Trafficking as a concept has evolved from the constituent elements of procurement, immoral purposes and prostitution.<sup>408</sup> The drafters of Palermo were faced with a number of issues including the definition of an offence and the role of consent.<sup>409</sup> The Palermo Protocol is first and foremost an instrument intended “to promote cooperation to prevent and combat crime more effectively.”<sup>410</sup> The Protocol provides a baseline definition of trafficking which consists of three elements, the act, means and purpose. Trafficking, as we have seen, is a stand-alone offence, defined under international law; the crime of trafficking in human beings may or may not be committed for the purpose of slavery. A key issue in the definition of human

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<sup>404</sup> *ibid* 278

<sup>405</sup> *ibid*

<sup>406</sup> Lammasniemi *Op cit* fn244, 73

<sup>407</sup> *ibid* 74

<sup>408</sup> Siller *Op cit* fn253, 446

<sup>409</sup> *ibid* 447

<sup>410</sup> Allain *Op cit* 304, 113

trafficking is the concept and definition of exploitation. The indeterminate nature of the concept across legal instruments means that the legal definition of human trafficking is elastic; it is an ever-expanding umbrella term.

Rijken and Bosma highlight that the anti-trafficking instruments in question do not serve to criminalise exploitation itself. In the trafficking definitions provided across the Palermo Protocol, ECAT and EU Directive, the practice is framed around the ‘act’ rather than the ‘exploitation.’

The means relate to the act and not to the exploitation, and consequently, it criminalises “forced recruitment” for the purpose of exploitation rather than exploitation in and of itself.<sup>411</sup>

While States can choose to criminalise specific exploitation – for example, the Modern Slavery Act 2015<sup>412</sup> – the international anti-trafficking instruments do not create an obligation to do so.<sup>413</sup> As argued by Gallagher, “the evolution of consensus on what constitutes trafficking does not necessarily mark the end of definitional controversy.”<sup>414</sup> Despite the drafting of subsequent instruments, there is still no instrument which provides a cohesive understanding of the three elements of trafficking. The following chapter will continue to explore the legal frameworks surrounding the practices on which the concept of ‘modern slavery’ is built. It will build on the analysis of trafficking by exploring the legal definition of slavery in order to demonstrate how the drafting and judicial interpretation of the legal definition of slavery has facilitated the erosion of the legal boundaries between slavery and trafficking. It is this erosion that creates the legal backdrop for the creation of the ‘modern slavery’ paradigm in which trafficking and slavery are viewed as synonymous practices.

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<sup>411</sup> Alice Bosma, Conny Rijken, Key Challenges in the Combat of Human Trafficking - Evaluating the EU Trafficking Strategy and EU Trafficking Directive (2016) 7(3), *New Journal of European Criminal Law*, 315, 319

<sup>412</sup> Modern Slavery Act 2015 C.30

<sup>413</sup> *ibid*

<sup>414</sup> Anne Gallagher, *The International Law of Trafficking* (Cambridge University Press 2010) 47

## Chapter 3: The Legal Definition of Slavery: Ownership and Blurred Lines

### 1. Introduction

Numerous domestic and international agreements exist containing provisions on slavery. However, the effectiveness of these instruments in the suppression or abolition of the practice or condition of slavery is questionable. In recent years the abolitionist narrative has shifted to focus on the umbrella term of modern slavery; this shift has placed an emphasis on the crime of trafficking in human beings. Nearly 100 years after the abolition of the legal status of slavery, our understanding of what practices constitute slavery and how we identify victims is still arguably in its infancy. The 1926 Slavery Convention<sup>415</sup> and the 1956 Supplementary Convention<sup>416</sup> contain what could be thought of as the DNA of the legal definition. The 1926 Convention provides an accepted understanding of slavery, defining slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>417</sup>

This chapter argues that the definition of slavery as set out in the 1926 Convention combined with the lack of clarity in the understanding of the legal foundation provide the problematic and flexible basis for the current discourse of modern slavery and its focus on human trafficking. The primary aim of this chapter is to establish what the legal definition of slavery is and to explore the issue of definitional clarity with the accepted legal norm for slavery. The purpose of this is to first demonstrate the flaws in the definition provided by the 1926 Slavery Convention and its focus on the concept of ownership. This chapter will then consider how this flawed definition combined with its interpretation by the international courts provides fertile soil for the modern slavery narrative to grow. There are a number of problems with the accepted definition, including the issue of ownership and its application in a *de facto* context, and the meaning of the phrase ‘powers attaching to the right of ownership’. Therefore, this analysis will provide a clearer picture of what the legal definition is, but also of what it fails to do. This will demonstrate that the concept of ownership is a central problem when attempting to identify slavery. This analysis will form the basis for the

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<sup>415</sup> League of Nations, *Convention to Suppress the Slave Trade and Slavery* (signed 26 September 1925 entered into force 9 March 1927)

<sup>416</sup> UN Economic and Social Council (ECOSOC), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956

<sup>417</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

next chapter which will explore the modern slavery paradigm and the way in which definitional flaws discussed in this chapter allow anti-slavery activists and lawmakers to utilise the term in an expansive manner.

This chapter begins with an exploration of the slavery specific instruments in international law: the League of Nations 1926 Slavery Convention and the United Nations Supplementary Convention 1956. The aim of this is to ascertain the origins of the legal definition of slavery and identify the issues of clarity in relation to the concept of ownership. The next section will build on the foundations of the slavery specific instruments by considering human rights instruments. The purpose of this is to assess the incorporation and development of the definition, to what extent these instruments either offer clarity or perpetuate existing problems related to the 1926 Convention. The final stage in charting the legal evolution of the concept of slavery is its inclusion in international criminal law. This section will focus largely on the interpretation of the crime of enslavement as found in the Rome Statute by the International Criminal Tribunal of Yugoslavia. This section will also evaluate the potential expansion of the definition through the inclusion of the practice of trafficking under the crime of enslavement.

This chapter will reflect on how the deficiencies with the legal definition of slavery have left it open to appropriation and expansion by advocates of the modern slavery paradigm. This overarching analysis will underpin the assertion that the legal definitions of trafficking and slavery provide the roots for the establishment of the trafficking dominated narrative on modern slavery in the academic and political narrative.

## **2. Definitions**

### **2.1. Slavery Specific Instruments**

This section will explore the origins of the legal definition of slavery in the 1926 Slavery Convention. This will start with an examination of the legal definition of the 1926 Slavery Convention and the travaux préparatoires in order to highlight potential flaws in the definition. These issues pertain to a lack of interpretive information, but also to the phrasing of the definition itself. The section will then examine Jean Allain's interpretation of the meaning of ownership as contained in the 1926 Slavery

Convention. This section will then move to the 1956 Supplementary Convention, considering the decision to supplement the original convention and the inclusion of servile status within an anti-slavery instrument.

### *2.1.2. 1926 Slavery Convention – League of Nations*

#### *Background*

In 1922, Sir Arthur Maitland submitted two resolutions for consideration by the League of Nations at the insistence of John Harris.<sup>418</sup> The first pertained to slavery in Ethiopia; the second was a request for the League to “refer to the appropriate Committee the question of the recrudescence of slavery in Africa in order that it be considered and propose the best methods for combatting the evil.”<sup>419</sup> The Assembly passed the latter resolution adding slavery to its agenda. One year after this, the Sub-Committee of the Sixth Committee requested that the Council of the League of Nations “entrust to a competent body the duty of continuing the investigation of the question of slavery.”<sup>420</sup> In 1924, the League established The Temporary Slavery Committee; the 1926 definition of slavery emerges from the work of this committee. This work has been described as constituting the “intellectual DNA” of the 1926 and 1956 Slavery Conventions.<sup>421</sup> Consequently, the work of the Committee shifted the emphasis of the League’s work on slavery from one of monitoring to legislating for international suppression.

The Commission was responsible for the exploration and appraisal of a number of areas in relation to the practice of slavery including: the legal status of slavery, slave raiding and similar acts, slave acts, slave dealing, practices restrictive of the liberty of the person, domestic or predial slavery (serfdom), compulsory labour, public or private, paid or unpaid; and transition from servile or compulsory labour to free wage

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<sup>418</sup> John Harris was an activist instrumental in the Anti-Slavery Society which later became the Anti-Slavery and Aborigines Protection Society.

<sup>419</sup> League of Nations, Third Assembly of the League of Nations, Motion proposed by Sir Arthur-Steel Maitland, Delegate for New Zealand on September 1922. 232353 (A/47/1922) as found in Jean Allain's *The Slavery Conventions, The Travaux Preparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008) p.31

<sup>420</sup> League of Nations, Report of the First Sub-Committee of the Sixth Committee, Record of the Fourth Assembly, Meeting of the Committees, VI Minutes of the Sixth Committee (Political Questions), Annex 10 p.40 as found in Jean Allain's *The Slavery Conventions, The Travaux Preparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008) p.31

<sup>421</sup> Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Nijhoff 2013) 162

or independent production.<sup>422</sup> Thus, much of the work carried out by the Commission focussed on ‘lesser’ servitudes. Allain comments that ‘servitude’ is “categorical, not definitional” and as such represents an “amalgamation of a handful of practices.”<sup>423</sup> Practices which were deemed to be ‘lesser’ forms of servitude include debt bondage, serfdom and forced labour. However, the original mandate of the Commission goes far beyond the scope of the final Convention definition of slavery. The reason for this may be intentional in the design of the Commission. Suzanne Miers comments that the Commission was “designed by the colonial powers to have no bite and very little bark” and would set the trend for those that followed.<sup>424</sup> The colonial governments insisted the Commission be temporary and advisory, it did not have the power to undertake investigations and could only use information provided by government-approved non-governmental organisations. The Commission also met in private with the League reviewing its reports before they were published.<sup>425</sup>

The Commission submitted its final report in 1925, two years after its creation. The Commission was unable to provide a complete report on the persisting problem of slavery – the reason for this largely being a lack of information. However, it did call for the gradual abolition of slavery and for the legal status of slavery to be abolished. The most notable recommendation was for the creation of an international convention on slavery, which paved the way for the creation of the 1926 Slavery Convention.

### *Definition*

Article 1 (1) of the 1926 Slavery Convention<sup>426</sup> provides a legal definition of slavery, which was the result of an extensive drafting procedure. The final provision differs from the initial formulation of the British Draft Convention. The Drafting Committee expanded the definition of a “status, in which one person exercises a right of property over another”<sup>427</sup> to the following: “slavery is the status or condition of a person over

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<sup>422</sup> Ved P Nanda, M C Bassiouni, ‘Slavery and Slave Trade: Steps toward Eradication’ (1972) 12(2), Santa Clara Law Review, 424, 429

<sup>423</sup> Allain *Op cit* fn421 145

<sup>424</sup> Suzanne Miers, *Slavery and the Slave Trade as International Issues 1890–1939* (1998) 19(2) Slavery & Abolition, 16, 25

<sup>425</sup> *ibid*

<sup>426</sup> League of Nation Slavery Convention 1926 fn415

<sup>427</sup> 1925 British Draft Protocol Art 1 as found in Jean Allain’s *The Slavery Conventions, The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008) 51

whom any or all of the powers attaching to the right of ownership are exercised.”<sup>428</sup>

The change is rooted in a draft produced by the Chair of the Temporary Slavery Commission, Albrecht Gohr, which had initially read:

Slavery is the status of a person over whom another person or group of persons exercises the power attaching to ownership [proprietaryship]; or is the possession [holding] of a pledge or who is compelled to serve such other person or group for an undetermined period [time].<sup>429</sup>

The *travaux* provide no evidence to indicate why the language initially found in Gohr's draft was favourable to that of the 1925 British Draft Protocol. The concept of ownership is the anchoring point for the 1926 formulation. However, this does not necessarily mean there is a substantive difference between ownership and property. Efforts were made to include lesser servitudes into the 1926 Convention, however, due to objections from the Union of South Africa the scope of the definition was restricted. The Union criticised the definition on the grounds that the Convention was looking not only to place obligations upon states in respect of slavery but also for “domestic slavery and similar conditions.” Such obligations would extend the definition of slavery beyond the scope of the Article 1 test of property or rights of ownership. In response to these concerns a report from Viscount Cecil to the Assembly of the League of Nations in 1926 stated that the obligations which flowed from the 1926 Convention where slavery was concerned were to “bring about the disappearance from written legislation or from the custom of the country of everything which admits the maintenance by a private individual of right over another person of the same nature as the rights which an individual can have over things”.<sup>430</sup> Therefore, as a result of comments made by the Union of South Africa,<sup>431</sup> during the

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<sup>428</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)1(1)

<sup>429</sup> League of Nations, Slavery: Draft Protocol Text proposed by M.Gohr (with handwritten amendments) A.VI/S.C.1/5.1926, 9 September 1925 as found in Folder R.67.D.46214 entitled La question de l’esclavage: Discussion y relatives de la Vie Assemblée 1925 Jean Allain’s *The Slavery Conventions, The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008) 52

<sup>430</sup> League of Nations, Slavery Convention: Report presented to the Assembly by the Sixth Committee, A.104.1926.VI, as found in Publications of the League of Nations VI.B. 5, 24<sup>th</sup> September 1925 pp.1-2, as found in Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013) 113

<sup>431</sup> League of Nations, Draft Convention on Slavery Replies of Governments, Reply from the Government of the Union of South Africa A.10(a).1926.VI.B.3. as found in Jean Allain’s *The Slavery Conventions; The Travaux Préparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 56

drafting process, Article 1 (1) should be read in conjunction with Article 2 (b). Consequently, the emphasis on the definition lies not on the label of the exploitation, but on the substance.<sup>432</sup> Therefore, defining slavery becomes subjective - if the powers attaching to the right of ownership are present, then the practice falls within the scope of the Article 1 (1). The importance of this is that it separates slavery from the label the exploitation is given. The concept of ownership and the powers attached to this right are situated at the centre of the definition of slavery. Thus, the label of the exploitative practice is not what is of significance; a practice will fall under the umbrella of slavery if the powers attaching to the right of ownership are manifest.

This requirement is interesting when we consider the 'modern slavery' paradigm. Contrary to the approach laid out in the Convention, there now appears to be a preoccupation in the narrative around the idea of 'modern slavery' with utilising the term slavery when it does not fit the exploitation in question. A prime example of this is the common labelling of trafficking as slavery. This allows the modern anti-slavery movement to capitalise on the history of the word slavery and the feelings it evokes. Therefore, rather than looking to apply the term only when "powers attaching to the right of ownership" are manifest, what we see now is the use of the word as a general umbrella term for a wide range of exploitative practices depending on the objectives of a specific government or NGO. This legal differentiation between slavery and lesser servitude begins to lay the foundation for an approach to modern slavery rooted in depoliticisation, which focuses on only one end of the spectrum of exploitation.

So what does slavery entail in accordance with the 1926 Convention? First, what are the powers and how do we identify them in order to achieve a uniform interpretation and application of the definition? Secondly, what powers must be manifest? "Any or all" is an imprecise phrase that offers no guidance for classifying exploitative labour practices as slavery. Miers describes slavery as "vaguely defined"<sup>433</sup> with Article 1 failing to detail what the different forms of slavery are. The 1926 Slavery Convention provides no interpretive framework, and the travaux préparatoires fail to elucidate clearly what these 'powers' are. Therefore, it is hard to know if such powers are manifest if there is no explanation as to what the powers are.

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<sup>432</sup> Jean Allain, *The Slavery Conventions; The Travaux Préparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 57

<sup>433</sup> Miers *Op cit* fn424, 28

There is guidance on this matter in the submission of the Union of South Africa:

No exception can be taken to the definition of ‘slavery’ and ‘the slave trade’ contained in Article 1. That definition puts as the test of slavery the status or condition of a person over whom all or any of the powers attaching to the right of ownership are exercised. In other words, a person is a slave if any other person can by law or enforceable custom claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to offer or render his labour or to control the fruits thereof or the consideration therefrom is taken from him. The term also seems to imply a permanent status or condition of a person whose natural freedom is taken away, for from the proprietary interest of the other person in the person to whom that status attaches is implied a right of disposal of sale, gift or exchange. It follows therefore that, if slavery is to be abolished or non-recognised by any community, the right of sale, gift or disposal of persons in a condition of slavery must also be abolished or measures taken that it shall have no recognition by the laws of that community. Article 1 therefore proceeds to define ‘slave trade’ as including all acts involved in the capture, acquisition or disposal of a person with intent that he shall thus become reduced to slavery and therefore as including also all acts involved in selling or exchanging him or any trade or transactions in such persons.<sup>434</sup>

The above offers some substance to the Article 1 definition. The first thing to note is the assertion that a person will be deemed a slave if another person can claim a right of ‘property’, as one might claim over an inanimate object. The result of this claim would be the removal of the individual's ability to freely offer their labour or control the fruits of it. This formulation reverts to the use of the term property, as found in the 1925 British Draft Protocol. The submission continues to discuss the permanent status of the enslaved which results from the proprietary interest held in them. This offers evidence that the concepts of property and ownership are used synonymously within the 1926 definition. The indefinite temporal nature of this status means that there is a right of disposal, sale, gift or exchange, as the ultimate decision in these areas rests with the ‘owner’. Thus, according to Article 1(1), an individual is a slave if a right of property can be exercised over them.<sup>435</sup> In practice, this means an individual can be reduced to the status of a possession or an inanimate object with no freedom over

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<sup>434</sup> League of Nations, Draft Convention on Slavery Replies of Governments, Reply from the Government of the Union of South Africa A.10 (a).1926.VI.B.3. as found in Jean Allain’s *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) emphasis added, 55

<sup>435</sup> League of Nation Slavery Convention 1926 fn415

their labour power. The status of a slave is permanent in nature, meaning that they are a property that is transferable from one owner to another.

The concept of ownership is central to the Article 1 definition of slavery, but it is unclear what ownership means in this context. This lack of clarity is a central flaw with the definition and its application in a contemporary context. It is unclear because, while ownership underpins the legal definition, it is a status over another person which the law no longer recognises. It is not disputed that ownership continues to exist in a *de facto* nature. However, due to the more pervasive nature of this status in the context of modern exploitation, a lack of precision in the legal understanding presents two potential problems. First, one point of view could be that that issues with clarity will make it more difficult to identify actual instances of slavery as evidenced in the jurisprudence of the European Court of Human Rights: secondly, the lack of precision leaves the concept of slavery wide open to expansion via the use of the notion ‘modern slavery’. This expansion allows for the blanket inclusion of trafficking within the legal definition of slavery, creating the legal basis for a contemporary discourse on slavery and exploitation which places the focus squarely on the practice of trafficking. The lack of precision in Article 1 itself is compounded by the fact that the travaux fail to explain what ownership means. This lack of information is an integral flaw of the definition. Therefore, in the absence of being able to point to the exercise of a legal right of property, we must have a clear understanding of what *de facto* ownership entails.

### *Interpretations of the Concept of Ownership*

As discussed in the preceding section, the definition of slavery as contained in the 1926 Slavery Convention<sup>436</sup> is vague in nature due to the inclusion of the concept of ownership and the subsequent failure to define what this means in the context of the Convention. Ownership has been a somewhat elusive concept in law. This section will first briefly explore the bundle of rights approach to defining ownership before examining the predominant interpretations of 1926 Convention provided by Jean Allain<sup>437</sup> and J.E. Penner,<sup>438</sup> which have been influenced by the bundle of rights

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<sup>436</sup> 1926 Slavery Convention fn415

<sup>437</sup> Jean Allain, Robin Hickey, ‘Property and the Definition of Slavery’ (2012) 61(4), *International Comparative Law Quarterly*, 915

approach to ownership. This section will conclude with an examination of the concept of control, a central element within Allain's interpretation and how this may be incorporated in the 1926 Convention.

### *Hohfeld and Honore – The Bundle of Rights Approach*

It has been observed that for the greater part of the history of the common law, it did not provide a definition of ownership.<sup>439</sup> Allain states that it was not until the 1700s when Blackstone's Commentaries published a definition of property as "a despotic relation of control between person and thing"<sup>440</sup> that interest began to bloom, but still a definition of ownership itself was not provided. There was no identifiable interest in the concept until the 19<sup>th</sup> Century when common law jurists began to write on the topic of legal rights for the first time.<sup>441</sup>

A M Honore provided the most influential analysis of ownership in 1961.<sup>442</sup> Honore's approach is what can be categorised as a 'bundle of rights' approach.<sup>443</sup> Other approaches to ownership have developed over time; including the boundary and exclusive approaches, however, this section will focus on the bundle of rights approach due to the reliance on Honore's formulation, which can be identified in Allain's work.<sup>444</sup> This approach theorises that property is not centred on a concept of sole dominion. Thus, it "involves not just 'one man' and his 'external things,' but multiple parties tied together in relationships."<sup>445</sup> Therefore, the bundle of rights reading of ownership focuses not on the relationship between a person and a thing, but on multiple relationships, both social and legal in nature, between multiple parties. Thus, Jane Baron argues, that property "is not about the connection between people

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<sup>438</sup> J E Penner, *The Concept of Property and the Concept of Slavery*, in Jean Allain's *The Legal Definition of Slavery: From Historical to the Contemporary* (Oxford University Press 2012)

<sup>439</sup> Jean Allain, *Seeking to Understand the Definition of Slavery*, in ed. Jean Allain's *The Legal Definition of Slavery: From Historical to the Contemporary* (Oxford University Press 2012) 227, see F. Pollock and F.W. Maitland, *History of English Law* (2nd edn, Cambridge University Press 1923) vol II, 149 for information on the lack of information on ownership in the early periods of the common law

<sup>440</sup> Allain *Op cit* fn, fn421 223

<sup>441</sup> See Allain fn fn421 224, one of the first studies of ownership was published by Sir William Markby

<sup>442</sup> A.M. Honore, *Ownership in Oxford Essays in Jurisprudence* A.G. Guest (Oxford University Press 1961)

<sup>443</sup> Geoffery M. Hodgson, 'Editorial Introduction to 'Ownership' by A. M. Honore' (1961) (2013) 9(2) *Journal of Institutional Economics*, 223, 225

<sup>444</sup> For a critical discussion on the bundle of rights approach and an explanation of the alternative boundary and exclusivity approaches see Larissa Katz, *Exclusion and Exclusivity in Property* (2008) 58, *University of Toronto Law Journal*, 275

<sup>445</sup> Jane B Baron, *Rescuing the Bundle of Rights Metaphor in Property Law* (2014) 82(1), *University of Cincinnati Law Review*, 57, 58

and things, but about the connections between and among people.”<sup>446</sup> This approach is a combination of Wesley Hohfeld’s analysis on rights and Honore’s account of incidents of ownership.<sup>447</sup>

Penner states that Hohfeld’s interpretation of rights demonstrates that any rights that can be exercised against a ‘thing’ (a right in rem), in fact, equals “a myriad of personal rights between individuals”.<sup>448</sup> According to Penner:

My ownership of a car should not be regarded as a legal relation between me and a thing, the car, but as a series of rights I hold against all others, each of whom has a correlative duty not to interfere with my ownership of the car, by damaging it, or stealing it and so on.<sup>449</sup>

Thus, Penner states that the logical if not obvious conclusion of this is that all rights, are really against persons, rather than rights vested in a belonging itself.<sup>450</sup> Hohfeld’s contribution to the bundle of rights approach can be illustrated by the following example from his work:

Suppose, for example, that A is fee-simple owner of Blackacre. His "legal interest" or "property" relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. First, **A** has multital legal rights, or claims, that *others*, respectively, shall not enter on the land, that they shall not cause physical harm to the land, etc . . . Second, **A** has an indefinite number of legal privileges of entering on the land using the land, harming the land, etc . . . Third, A has the power to alienate his legal interest to another... to create a life estate in another . . . to create a privilege of entrance in any other person **by** giving "leave and licence" . . . Fourth, **A** has an indefinite number of legal immunities . . . Thus **A** has the immunity that no ordinary person can alienate A's legal interest or aggregate of jural relations to another person...<sup>451</sup>

The Blackacre example demonstrates that from Hohfeld’s perspective, property and, therefore, ownership is a ‘complex aggregate of rights, privileges, powers and immunities’ that are held against a large indefinite class of people (multital rights).

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<sup>446</sup> *ibid* 59

<sup>447</sup> J E Penner, The “Bundle of Rights” Picture of Property (1996) 43(3) *UCLA Law Review*, 711, 712

<sup>448</sup> *ibid*

<sup>449</sup> *ibid*

<sup>450</sup> *ibid*

<sup>451</sup> Wesley H Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning and other Legal Essays* (Walter W Cook ed. 1923) 96-97

For Hohfeld this aggregation of rights does not necessarily relate to a tangible thing, ‘property’, “if anything, it is a bundle of rights”.<sup>452</sup>

As previously stated, A.M. Honore built on the framework provided by Hohfeld and the idea of property and ownership constituting a myriad of rights held against another or others. In his essay *Ownership*, Honore discusses what he calls the liberal concept of ownership.<sup>453</sup> He argues:

If ownership is provisionally defined as the greatest possible interest in a thing which a mature system of law recognises, then it follows that, since all mature systems admit the existence of ‘interests’ in ‘things’, all mature systems have, in a sense, a concept of ownership.<sup>454</sup>

Honore states that in such a mature legal system it is possible to find certain legal incidents of ownership which can be identified across different systems: “Ownership, dominium, propriety, eigentum and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular systems.”<sup>455</sup> Honore identifies these common features as incidents of ownership which are “the necessary ingredients of the notion of ownership.”<sup>456</sup> Therefore, ownership consists of eleven such incidents: “the right to possess, the right to use, the right to manage, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary.”<sup>457</sup> Within such an approach these eleven incidents of ownership constitute a ‘bundle of rights’ held by the ‘owner’ against other people. Therefore, the existence of such incidents or a bundle of rights indicates the existence of ownership.

#### *Ownership and the Bundle of Rights Approach*

The problematic element of the 1926 definition when it comes to defining slavery is that of ownership, the concept on which the definition hinges upon. An established

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<sup>452</sup> Penner *Op cit* fn447, 730

<sup>453</sup> Honore *Op cit* fn442 108

<sup>454</sup> *ibid*

<sup>455</sup> *ibid*

<sup>456</sup> *ibid* 112

<sup>457</sup> *ibid* 113 see Honor *Op cit* fn453, 113-124, Allain *Op cit* fn439, 226-230 for an elaboration on the different incidents of ownership.

way of dealing with this issue is to apply the idea of ownership within property law as proposed by Allain and Robin Hickey in order to provide an operational definition.

In seeking to understand and explain ownership, jurists old and new have laid their emphasis on what the owner of something is entitled to have, do or expect in respect of that thing. Formulations vary, but it is fairly uncontroversial to suggest that the owner of a tangible thing might possess and use her thing; she might make decisions about how it can be used by others; she might enjoy income produced by the thing, sell it to realize its capital value, or simply give it away, including to those who survive her as her heirs. We might also say that she is entitled to a certain measure of security. We would not expect her thing to be taken from her without cause, whether by a fellow citizen or the government; and correlatively we would expect her ownership to endure until such time as she decided to stop being the owner, whether by transferring the thing away, or by consuming or destroying it altogether.<sup>458</sup>

The legal framework for Allain's interpretation and the description of ownership provided above can be located in the work of A.M. Honore. The description of the owner provided above was constructed from the account of ownership provided by Honore and Hohfeld in the bundle of rights approach.<sup>459</sup> As discussed, Honore elucidated what he described as eleven incidents of ownership, which include: the right to possess use and manage income, to capital, security and disposal.<sup>460</sup> Allain argues that by building this picture of the owner as a "person in charge of a given resource",<sup>461</sup> it is possible to employ the language of property to understand what forms of exploitation fall within Article 1 of the Convention. Therefore, the argument constructed by Allain and Hickey rests upon the idea of "rights, powers, liberties or immunities, which might be exercised by the owner of something tangible."<sup>462</sup>

Therefore, within Allain's interpretation, an owner will have an exercisable legal claim right on their property which is enforceable in a court of law; it is in Allain's words a "defining characteristic of private law ownership".<sup>463</sup> However, *de jure* ownership of one person over another is today in most societies a legal impossibility. Therefore, Allain believes that in the context of the 1926 Convention, possession

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<sup>458</sup>Allain *Op cit* fn 437, 925

<sup>459</sup> see Honore *Op cit* fn453, 113

<sup>460</sup> *ibid*

<sup>461</sup> *ibid*

<sup>462</sup> *ibid*

<sup>463</sup> *ibid*

manifest as control equals ownership in a *defacto* setting.<sup>464</sup> When a legal claim right exists, Allain argues that ownership operates negatively to create a sphere of freedom for the owner which allows them to use their property and prevent interference with their control.<sup>465</sup> Within this sphere, an owner can exercise other features of ownership including what Allain describes as powers and immunities. A power is the ability to change the legal relation between the owner and others.<sup>466</sup> For example, the owner may give permission for another to make use of their property by granting a license for use or the owner could permanently alter the legal relations by transferring the property.<sup>467</sup> A further element would be immunity via a claim right, for example, due to the negative sphere created around the property, there is an absence of powers external to the owner to disrupt ownership, meaning that ownership is potentially limitless.<sup>468</sup> Allain argues that the absence of a legally enforceable claim right by a ‘slave-holder’ does not disrupt the existence of the sphere of freedom. Allain explains:

... in the general circumstances of exploitation, and notwithstanding the legal protection available in theory to S (slave) and the absence of any such protection for SH( slave-holder), it remains possible in fact for one person to exercise over another sufficiently close analogues of the liberty of-dealing associated with ownership. So SH might continue to control and use S by exploiting her services or labour, as where she is used for sexual gratification or to provide domestic services. S might be moved from one place to another; her ties to a particular culture, society or religion may be severed against her will; her means of access to state support or authority may be curtailed. And eventually, when her purpose is exhausted, she might be disposed or discarded, as a thing no longer worth keeping. *These circumstances which might be occasioned by SH, whilst they cannot formally be regarded as flowing from the exercise of any liberty associated with ownership, are nevertheless sufficiently similar, and in many respects exactly the same, as consequences which may follow from de jure ownership.*<sup>469</sup>

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<sup>464</sup>Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013) 128

<sup>465</sup> Allain *Op cit* fn 437, 926

<sup>466</sup> *ibid*

<sup>467</sup> *ibid* 927

<sup>468</sup> *ibid*

<sup>469</sup> *ibid*

For Allain, the bridge between this property law approach and slavery is the existence of control.<sup>470</sup> Therefore, what Allain is describing above is the existence of *de facto* ownership via the existence of control. Ultimately in Allain’s interpretation and application of property law concepts of ownership in the context of the 1926 Slavery Convention, “ownership implies such a background relationship of control, where a slave is concerned, this control is tantamount to possession. It is control exercised in such a manner as to significantly deprive that person of their individual liberty”.<sup>471</sup> Allain argues that if this degree of possession is present, then any or all of the powers attaching to the right of ownership can be exercised.<sup>472</sup> As previously stated Allain’s interpretation is influenced by the work of Honore, therefore, other powers that could then be exercised would be: the power to buy or sell a person, the ability to use a person, the power to manage a person, the ability to transfer a person, to use or profit of the person.<sup>473</sup> However, it is possible for such powers to be exercised and the exploitation in question not to be classified as slavery.

Article 1 directs us to the substance of slavery not to its form. In a given case we need to satisfy ourselves that any or all of the powers attaching to the right of ownership is exercised in circumstances of control tantamount to possession. Where such control is not present, even though the behaviours in view are exploitative and certainly wrong, yet they are not slavery, inasmuch as they fail to exhibit the core meaning of slavery.<sup>474</sup>

Therefore, Allain’s position on ownership in the context of the 1926 Convention definition is that it refers to *de facto* ownership. In order to formulate this understanding, it is necessary to rely on property law concepts of ownership which relate to claim rights, powers and privileges. Allain argues that this helps to provide an operational understanding of Article 1 by focussing attention on manifestations of ownership, rather than the new non-existent legal right of ownership.<sup>475</sup>

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<sup>470</sup> Jean Allain, *Contemporary Slavery and its Definition in Law* in Jean Allain’s *The Legal Definition of Slavery: From Historical to the Contemporary* (Oxford University Press 2012) 39

<sup>471</sup> *ibid*

<sup>472</sup> *ibid*

<sup>473</sup> See Allain *Op cit* fn470, 39-42 for an explanation of the powers attaching to the right of ownership

<sup>474</sup> Allain *Op cit* fn 437, 241

<sup>475</sup> *ibid*

### *Refuting Allain's Interpretation*

The most notable challenge to Allain's interpretation is provided by Penner.<sup>476</sup> Similar to Allain and Hickey, Penner adopts property law understandings of ownership. However, he reaches a different position to that outlined above. Penner states that the concept of powers attaching to the right of ownership in relation to slavery is problematic as "normally lawyers think in terms of the 'incidents' of ownership, or incidents of title, not only the powers that go with having a title."<sup>477</sup> Superficially it can be seen how these incidents of ownership may be compatible with the idea of slavery. However, Allain is arguably trying to fit square pegs into round holes by creating this link. Penner's foremost concern with Allain's approach is the conflation of incidents and powers of ownership as synonymous when in law we must draw a distinction between these two concepts.<sup>478</sup> Penner states:

In law the difference is important. While it is one of the incidents of my title to the laptop I am writing this with that I have the right to immediate and exclusive possession of it, when I take advantage of that right to write this essay I am not exercising a power of ownership of any kind. 'Power' has a specific meaning in law; it refers to an ability in law to alter the legal norms (rights, duties, liabilities, other powers, and so on) of oneself or others. I do not do this when I simply take advantage of my rights, by typing on my laptop, for that is merely doing something I am entitled to do. By contrast, if I let you use my laptop, I am exercising a power in law. By authorising your use of it, I am granting you a licence to use it. I am permitting you to do what would otherwise be a trespass on your part, and so by giving my permission I am exercising a power in law in that I have altered your rights by doing so. Prior to my grant of permission, you had the obligation not to do anything, which conflicted with my right exclusively to possess my laptop, but afterward you did not. The sorts of powers that go with ownership of a tangible, like land or chattels, are typically (in the common law) to permit access, to transfer possession of it to another (a 'bailment'), to transfer title to it by way of gift or contract, and to declare a trust over it."<sup>479</sup>

Penner asserts that Allain takes the phrase powers attaching to the right of ownership to equal to the concept of incidents of ownership. The problem with such an approach is that an incident of title refers to the way in which you may personally use your property via the exercise of a claim. Whereas, Penner has observed that a power refers

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<sup>476</sup> Penner *Op cit* fn 438

<sup>477</sup> *ibid* 243

<sup>478</sup> Penner *Op cit* fn 438, 242

<sup>479</sup> *ibid* 243

to the ability of the person exercising it to alter legal norms, for example, rights, duties, liabilities.<sup>480</sup> Again to distinguish the two, an incident would simply be an individual taking advantage of the rights they possess, in other words doing something they are already entitled to do via their claim right. Whereas, Penner explains that the types of powers associated with ownership of a tangible possession in common law would be: to permit access, to transfer possession, to transfer title and to declare a trust over it.<sup>481</sup> Penner provides the above example of how his claim right of a computer allows him to type on it; this would be an incident of ownership.

Penner contends that the central issue with this position is that if “powers attaching to ownership’ is glossed to mean ‘incidents of ownership’ of all kinds one must do “positive violence” to the Convention definition”.<sup>482</sup> In such a situation, when a literal interpretation is applied, the identification of any one of the incidents discussed by Honore would indicate the existence of slavery. For example, in any given employer-employee relationship, the right to income, the right to manage and the right to capital can all be identified.<sup>483</sup> To circumvent these issues, as discussed above, Allain has argued that the definition is to be read as “the condition of a person in respect of whom another has sufficient of the incidents of ownership so as to give that other control of the person tantamount to possession”.<sup>484</sup> Penner argues that although this interpretation presents us with a somewhat functional definition, yet there is a way to interpret the definition without reading powers to mean incidents. Penner argues that to say possession is the most basic feature of ownership is not quite correct; rather it would be truer to say that the right to immediate exclusive possession is the true hallmark of ownership.

Though something may be out of my actual physical possession—my slaves may be about my business elsewhere—this does not diminish my *right* to possess them, which is ongoing, and this is why anyone else who does anything inconsistent with my right to immediate, exclusive possession, say by interfering with or taking possession of my slave without my permission, violates my rights as owner.<sup>485</sup>

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<sup>480</sup>Allain provides the same understanding of what a power attaching to the right of ownership is.

<sup>481</sup> *ibid* 244

<sup>482</sup> *ibid* 250

<sup>483</sup> Allain *Op cit* fn 437, 915

<sup>484</sup> Penner *Op cit* fn438, 248

<sup>485</sup> *ibid* 251

In applying the caveat of ownership tantamount to possession Allain and Hickey are able to provide an operational definition utilising the idea of incidents of ownership as powers attaching to ownership. Penner reasons that in establishing that *de facto* control tantamount to possession amounts to *de facto* slavery, Allain and Hickey “characterise the case of anyone who commits false imprisonment, as well as most cases of parental control over babies and very young children.”<sup>486</sup> Therefore, as Allain and Hickey’s approach is unworkable, to establish the existence of *de facto* slavery, one must establish a *de facto* right to immediate, exclusive possession.

Penner also moves beyond this focus on the legal aspect of slavery to take into account the social context necessary for slavery to exist. As we are dealing with instances of *de facto* slavery and ownership, it would be appropriate to consider such factors. Orlando Patterson observed that slavery has never existed in a social vacuum, it exists only with the support of a community, and the relationship requires at least the tacit support of those not directly involved with it.<sup>487</sup> The importance of this is that one individual alone cannot necessarily make somebody a slave, you can imprison, torture or kill another individual, but that alone would not make you an owner. It is the recognition of your *de facto* right to immediate exclusive possession which means ownership exists.<sup>488</sup> However, a sociological perspective provides an argument that not only is ownership the wrong measuring stick for identifying modern slavery, but that it is also a mistake to apply it to traditional slavery. Orlando Patterson argues that other characteristics are key to the identification such as natal alienation and dishonour.<sup>489</sup> Patterson argues that ownership does not reach the heart of what it means to be enslaved. For example, there are instances where people are owned today in the sense they can be bought and sold as objects, for example, professional athletes. What separates this situation in most cases from enslavement are the fundamental features that are not encompassed by ownership, for example, unequal power dynamics, origins of power and the alienation of the slaves. Consequently, a problem emerges of how to formulate a meaningful interpretation of the Convention definition, in a context where legal ownership does not exist. The solution may be to incorporate sociological considerations such as ‘social death’ with the idea of ownership.

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<sup>486</sup> *ibid*

<sup>487</sup> Orlando Patterson, *Slavery and Social Death* (Harvard University Press 1982) 10

<sup>488</sup> Penner *Op cit* fn438, 253

<sup>489</sup> Patterson *Op cit* fn487, 1-14

### *Control and Ownership*

The interpretation of the 1926 Convention definition provided by Allain is the prevailing academic approach to understanding the relevance of Article 1 in relation to ‘modern slavery’. As discussed, this approach relies upon the concept of powers attaching to the right of ownership. While this approach is widely accepted, work conducted by Penner does provide some critical insight into the approach. However, there are further issues with what Jean Allain considers to be an operational definition due to his use of the concept of control.

Many of the practices considered to fall within the boundaries of slavery place limitations on the individual physically and mentally, which ultimately means that there is a transfer of power between the two parties. The practice of slavery deprives the victim of their free will. One might consider the individual's loss of control over their life and labour as a central identifying characteristic of slavery, meaning that control is inherent in this process.<sup>490</sup> The wording of the 1926 Convention is ambiguous on this matter, as there is no indication given as to how absolute control must be, or what the nature of the control the owner exercises must be. Traditional slavery is often referred to as “chattel slavery”, particularly when discussing the institution of antebellum slavery. The reason for this is that owners exercised such a significant degree of control, that slaves were seen as possessions no different from livestock or furniture. However, as discussed legal ownership over another individual is now rare if not impossible. Because of this Bales and Robbins argue that that concept of ownership may obscure some characteristics of slavery related to control.<sup>491</sup>

The definition could pose two potential problems. First, the ambiguous phrasing expands what could be meant by control relating to ownership, therefore, stretching the parameters of slavery to include practices that do not manifest the absolute control associated with *de jure* slavery. On the other hand, it is not possible for control to manifest itself to a sufficient degree when *de jure* ownership is no longer permissible. A second issue with the phrasing is that there is no explanation as to what form of control falls within the scope of Article 1(1). Control could mean any number of

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<sup>490</sup> Allain, Hickey Op cit fn 437, 28

<sup>491</sup> *ibid*

things; neither the definition nor Allain's interpretation informs us whether it is necessary for the means used to secure this control to be in line with the traditional idea of violent coercion. Traditionally, control would be interpreted as indicating coercion via violence or intimidation, therefore meaning overt forms of violence such as beatings, torture and threats.<sup>492</sup> However, there is no indication that control could be interpreted in a broader sense acknowledging that control can be obtained by psychological or economic means. The label of slavery is applied not only to instances of *de facto* slavery but also to contemporary narratives on labour exploitation and the issue of trafficking. Therefore, is it pertinent for any interpretation of the Convention definition, such as Allain's, to consider whether or not economic motivations, such as poverty or debt, constitute an example of force. This is important when considering the legal status of practices involving sexual exploitation, such as prostitution or the issue of migrant workers.<sup>493</sup> Consequently, the argument is whether or not entry into these states is voluntary but instead if it is the result of a lack of other alternatives or duress. This, therefore, means that there is a lack of free will. For example, Kathleen Barry argues that a state of consensual prostitution cannot exist and purports that all prostitution is forced whether it is the result of a physical threat or economic pressures.<sup>494</sup> Therefore can economic pressures such as poverty, which create vulnerability, equal force or coercion? In addition, can a lack of physical constraint in relation to force or violence, mean that an exploitative practice cannot be defined as slavery? It is possible that such debates feed into the 'modern slavery' paradigm and the expansion of the legal definition of slavery. Taking an expansive view in relation to what will constitute force potentially widens the net to include practices such as prostitution under the guise of slavery. Neither the 1926 Convention nor Allain's interpretation provide clarity on this issue. Therefore, it is necessary to move beyond the 1926 Convention and consider the subsequent instruments.

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<sup>492</sup> *ibid* 32

<sup>493</sup> Kathleen Barry, *The Prostitution of Sexuality* (New York University Press 1995)

<sup>494</sup> *ibid* 29

### *2.1.2. 1956 United Nations Supplementary Convention*

#### Background

The 1956 Supplementary Convention<sup>495</sup> saw the expansion of the scope of application of the 1926 Convention. The definition itself remained the same, but the 1956 Convention also created and defined four forms of servitude which potentially come within the scope of Article 1(1) of the 1926 Convention.<sup>496</sup> The first thing to consider is why, at this juncture, the United Nations did not take the opportunity to revisit the definition of slavery. The General Assembly Economic and Social Council requested that the problem of slavery be investigated. This request saw the establishment of the Ad Hoc Committee of Experts whose task it was to investigate the existence of slavery and other institutions/customs analogous to slavery. The overall aim of the Committee was to suggest possible methods for confronting the problem.<sup>497</sup> The Committee also had to consider the adequacy of the 1926 Slavery Convention and whether it was desirable to create a new convention on slavery.<sup>498</sup> This section first considers why the 1926 Convention definition was held to be sufficient, and second why servitude was included as a separate practice in a slavery specific instrument; what is the link between the practices?

#### Adequacy of the 1926 Convention definition

The remit of the Committee was:

- 1) To survey the field of slavery and other institutions or customs resembling slavery;
- 2) To assess the nature and extent of these several problems at the present time;
- 3) To suggest methods of attacking these problems;

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<sup>495</sup> 1956 Supplementary Convention fn416

<sup>496</sup> League of Nation Slavery Convention 1926 fn415

<sup>497</sup> Nanda *Op cit* fn422, 431

<sup>498</sup> Allain *Op cit* fn437, 208

- 4) Having regard to the recognised fields of competence of the various bodies within the framework of the United Nations to suggest an appropriate division of responsibilities among these bodies [...]<sup>499</sup>

The Secretary-General suggested the possible creation of a new Convention and with it a new definition of slavery, asking the Committee to consider the adequacy of the 1926 definition.<sup>500</sup> Regarding the drafting of a new treaty, the Committee indicated there was reason to believe a supplementary convention would be favourable: ‘certain modifications of the International Slavery Convention of 1926 appeared to be necessary and that it might prove desirable to draft a new convention broader in scope, or alternatively, to draw up an instrument supplementary to the existing Convention’.<sup>501</sup> The Supplementary Convention was also to affirm the 1926 Convention as a whole and to be ‘more precise than that instrument in defining the exact forms of servitude dealt with’.<sup>502</sup> The travaux indicate that the Committee's motivation to move towards a supplementary convention was more than a belief in the inadequacy of the 1926 Convention. It was remarked that the Committee “should confine itself to the drafting of a further instrument to supplement the 1926 Convention”. There was fear that a new instrument would raise more problems than the creation of a supplementary convention.<sup>503</sup> According to the Committee, the creation of a new instrument “might entail certain dangers, in the light of diplomatic experiences it seemed preferable to profit by the fact that 42 states had signed the old

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<sup>499</sup> Economic and Social Council Resolution 238(IX), 20 July 1949. as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 207

<sup>500</sup> Economic and Social Council, Notes on the Terms of Reference of the Ad Hoc Committee on Slavery (Memorandum submitted by the Secretary General), UN Doc.E/AC/33/4, 3 February 1950 as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 208-210

<sup>501</sup> United Nations Economic and Social Council, Report of the First Session of the Ad Hoc Committee on Slavery to the Economic and Social Council, UN Doc E/AC.33/9 27 March 1950, p. 11. as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 211

<sup>502</sup> United Nations Economic and Social Council, Report of the Ad Hoc Committee on Slavery (Second Session), UN Doc E/1998, E/AC.33/13, 4 May 1951, pp. 16–17 as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008) 212

<sup>503</sup> United Nations Economic and Social Council, Ad Hoc Committee on Slavery, First Session: Summary Record of the Twenty-Seventh Meeting, UN Doc. E/AC.33/SR.27,21 March 1950, p. 5 as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 211

convention.”<sup>504</sup> The notion that the decision not to create a new convention, but to only supplement the original instrument was profitable, could lead one to conclude that this is not a purely legal decision. One view could potentially be that the Committee did not wish to draft a new instrument that may not be favoured by some of the 42 states party to the 1926 Convention. This means that the Supplementary Convention was approved, not because of definitional or legal clarity, but because of political interests.

The new convention reaffirmed the 1926 Convention in its entirety and the definition contained in Article 1(1) was to ‘continue to be accepted as an accurate and adequate definition of the term’.<sup>505</sup> It was recommended that a set of principles be embodied in a Supplementary Convention. This Convention was “to undertake to abolish at the earliest possible date the following institutions and practices analogous to slavery or resembling slavery in some of their effects in so far as they are not already covered by Article 1 of the International Slavery Convention.”<sup>506</sup> This means that, regardless of whether or not these practices would be covered by Article 1 (1) and 2 (b) of the 1926 Convention, they were to be included within a slavery specific instrument.<sup>507</sup> This becomes an issue when thinking about definitional clarity; first, it could be argued that the Supplementary Convention is expanding the scope of the concept of slavery by including practices of servitude within a slavery specific instrument. It is also possible to conclude that the Supplementary Convention has identified a gap in the 1926 Convention; this gap is bridged through the inclusion of the servitudes in the Supplementary Convention. The implication of this is not that the concept of slavery is expanding, but that the 1926 Convention failed to take into account practices that could be deemed as slavery. If the idea of profiting from the fact that 42 states had acceded to the original Convention was also taken into consideration, the drafting of a new convention, which included these practices might not be agreeable to the initial state parties. Therefore, such practices were labelled as analogous to slavery and included in a manner that would allow the United Nations to take action against them

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<sup>504</sup> *ibid*

<sup>505</sup> Economic and Social Council, Report of the *Ad Hoc* Committee on Slavery (Second Session), UN Doc. E/1988, E/AC.33/13, 4 May 1951, pp. 5–7. as found in Jean Allain’s *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 510

<sup>506</sup> *ibid* 212

<sup>507</sup> League of Nation Slavery Convention 1926 fn415

without labelling them as slavery. This, therefore, allowed the Supplementary Convention to maintain the support of the 1926 Convention's state parties.

Despite an explicit statement that the 1926 definition was adequate and accurate, the Committee moved to expand the list of practices covered in the new convention. This was not merely a reaffirmation of the original Convention, but an expansion in some respects. This provides evidence to support the idea that the Article 1 definition does not provide a comprehensive picture of the status of 'slave'. It would appear that there was a political and practical focus on the number of states who had already ratified the original convention, which was deemed to be more important than clarity and efficiency. Rather than merely clarifying the definition, the Supplementary Convention confuses the definition of slavery by introducing the term servitude as a related practice. The central problem addressed in this section is that the Supplementary Convention is a slavery specific-instrument, yet, the United Nations chose to include a prohibition on servitude in isolation from the existing prohibition on slavery.

#### Definition: Slavery and Servile Status

The 1956 Supplementary Convention states that “slavery means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status”.<sup>508</sup> The 1951 Report of the Commission on Slavery provided a rationale for the decision to retain the 1926 definition: “the rather loose present-day usage of the term slavery that characterises not only the most recent studies of the subject but also much of its discussion during the last hundred years or so arises in part from the fact that the nature of the institution the conditions which surrounded it and the public attitudes toward it are undergoing constant change”.<sup>509</sup> When looking to define slavery in a way that would meet modern day requirements the Committee turned to Article 1 believing that the definition could be improved or expanded using more contemporary thinking. This belief was influenced particularly

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<sup>508</sup> 1956 Supplementary Convention fn416 article 7(a)

<sup>509</sup> Economic and Social Council, Report of the *Ad Hoc* Committee on Slavery (Second Session), UN Doc. E/1988, E/AC.33/13, 4 May 1951, pp. 5–7 as found in Jean Allain’s *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 494

by the drafting of Article 4 of the Universal Declaration of Human Rights,<sup>510</sup> and the report of the International Commission of Enquiry into the Existence of Slavery and Forced Labour in Liberia of 1930. The Committee agreed with the conclusion reached by the International Commission that "slavery is so various in its forms that it hardly admits of a strict definition and that there is little prospect of formulating a definition of it which will be so precise and comprehensive as to embrace all types of servitude in all societies."<sup>511</sup>

At this point, it can be seen that the definition of slavery still retains the ambiguities created in the drafting of the 1926 Convention. There appears to have been some sense of reluctance to draw solid boundaries around the definition of slavery with the Committee favouring the most flexible approach of the International Commission. The concept of ownership remains central to what may or may not be defined as slavery. The most authoritative source of information on what constitutes powers attaching to the right of ownership is a report from the Secretary-General to the Economic and Social Council. The report confirms that there is no precise meaning of ownership to be found in the 1926 travaux. Nonetheless, in the absence of this knowledge, it may be reasonably assumed that the basic concept guiding the drafting was that of *dominica potestas*.<sup>512</sup> The term is used to characterise the authority of a master over their slave in Roman law. The roots of this word are found in the structure of the Roman household; this included the wife, the children, the clients and the slaves. All members of the household came under the supreme authority of the *pater familias* (male head of the household). This power was divided with *dominica potestas* specifically referring to an owner's authority over his slaves.<sup>513</sup> This form of authority or ownership was absolute, the master could "utilise the services of the slave in his house or on his land, the children of the slave also belonged to the master, and he could sell them separately from their mother and father."<sup>514</sup> Within this form of ownership, the master never has towards his slave the obligations that an employer

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<sup>510</sup> Universal Declaration of Human Rights (adopted 10 December 1948) 1948 UNGA Res 217 A(III) (UDHR)

<sup>511</sup> *ibid*

<sup>512</sup> *ibid*

<sup>513</sup> William Linn Weternann, 'Between Slavery and Freedom' (1945) 50(2), *The American Historical*, 213, 220

<sup>514</sup> *ibid*

has today towards his employee.<sup>515</sup> The report views *dominica postetas* as the guiding principle of the 1926 Convention, concluding that the following factors characterised the powers attaching to the right of ownership:

- 1) the individual of servile status may be made the object of a purchase;
- 2) the master may use the individual of servile status, and, in particular, his capacity to work in an absolute manner, without any restriction other than that which might be expressly provided by law;
- 3) the products of the labour of the individual of servile status become the property of the master without any compensation commensurate in the value of the labour;
- 4) the ownership of the individual of servile status can be transferred to another person;
- 5) the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
- 6) the servile status is transmitted *ipso facto* to descendants of the individual having such status.<sup>516</sup>

This characterisation of the powers attaching to ownership is something that cannot be found when looking at the travaux for the 1926 Convention. It provides some insight into what is meant by slavery within the Supplementary Convention. Many of the factors discussed by the Secretary-General allude to property law concepts of ownership and parallel the incidents of ownership considered by Honore.<sup>517</sup> An individual may be purchased or transferred, making them subject to the same transactions as an inanimate possession. The owner can use the individual, particularly his or her labour in an absolute and virtually unrestricted manner and any product of this labour will become the property of the owner without the requirement of compensation for the individual. The status of a slave is permanent and cannot be terminated by the individual subject to it. Therefore, the enslaved is unable to assert

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<sup>515</sup> United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, pp. 26–28 as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 496

<sup>516</sup> United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, pp. 26–28 as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 497

<sup>517</sup> Honore *Op cit* fn 453

free will to bring about a change in their status and gain freedom from ownership. Additionally, the permanence of the status is demonstrated by the transmissibility of the slave status to descendants of the enslaved. This creates a picture of the enslaved as an individual who cannot exercise free will. They are stripped of liberty or freedom both in their ability to remove themselves from the position they are in and the ability to control any aspect of their life. There is also permanence to slavery, resulting from the loss of free will and a reduction in the level of a possession that can be sold and traded at the owner's will.

The distinction between slavery and servitude remains unclear. One might argue that the concept of ownership is absent from the practices of servile status and, therefore, the Supplementary Convention is expanding the notion of slavery. However, this is not necessarily the case. The above characterisation of the powers attaching to ownership repeatedly references the term servile status in relation to slavery, blurring the line between the two. Servile status is defined in Article 7(b) as a "person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention."<sup>518</sup> The term emerged late on in the drafting process. However, the Committee had sought to differentiate slavery from servitude from the start. When looking to define the practice of servitude, it was discovered that when the United Nations attempted to "define these forms of servitude that a great deal of confusion had arisen because different names were applied to these practices in different regions of the world and even in different countries. It, therefore, discarded the existing nomenclature for the time being and instead attempted to describe these forms of servitude by reference to their particular characteristics".<sup>519</sup> The Convention enumerates a specific list of servitudes: debt bondage, serfdom, exploitative practices concerning women involving arranged/forced marriage and exploitative practices involving children. This list arguably limits the scope of what servile status can mean within the scope of Article 1, potentially indicating that servitude/servile status within the Supplementary Convention was not intended to be an expansive term.

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<sup>518</sup> Supplementary Convention fn416 article 7(b)

<sup>519</sup> Economic and Social Council, Report of the *Ad Hoc* Committee on Slavery (Second Session), UN Doc. E/1988, E/AC.33/13, 4 May 1951, p. 8 as found in Jean Allain's *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 513

The Supplementary Convention fails to clarify the relationship between slavery and servile status. The Committee questioned whether the definition laid down in Article (1) was robust enough to embrace all the forms of servile status the abolition of which was being promoted. This was an issue that divided the opinion of the Committee. Some members expressed the view that these forms of exploitation did, in fact, fall, within the scope of Article 1(1). While others pointed out that these forms of servile status could not have been present in the minds of all the governments that signed the Slavery Convention. Therefore, it would be more reasonable both on legal and practical grounds to consider these forms of servitude as involving a status analogous to slavery.<sup>520</sup> When considering the omission of domestic slavery and similar conditions from the 1926 Convention, the Rapporteur of the Sixth Committee stated that:

It was believed that such conditions came within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary. This applies not only to domestic slavery but to all those conditions mentioned by the Temporary Slavery Commission . . . i.e., ‘debt slavery’, the enslaving of persons disguised as the adoption of children, and the acquisition of girls by purchase disguised as payment of dowry, etc. Even if, as is possible, these last practices do not come under the definition of slavery as it is given in Article 1, the Commission is unanimously of the opinion that they must be combated.<sup>521</sup>

This point indicates that during the drafting of Article 1(1) of the 1926 Slavery Convention, there was an intention to include forms of servitude beyond chattel slavery within the definition created.<sup>522</sup> The Rapporteur stated that Article 2 of the Convention aimed to bring about the disappearance of any practice which manifests “maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things.”<sup>523</sup> This gives weight to the comments of the Union of South Africa that an emphasis should be placed not on the label given to any particular practice but to the substance of the exploitation in

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<sup>520</sup> *ibid* 495

<sup>521</sup> United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, pp. 26–28 as found in Jean Allain’s *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 496

<sup>522</sup> League of Nation Slavery Convention 1926 fn415

<sup>523</sup> *ibid*

question.<sup>524</sup> Therefore, defining slavery is not a task that should be preoccupied with the notion of chattel slavery, there are other practices that manifest the exercise of rights over another individual that are analogous to legal property rights. This suggests that the four servitudes enumerated in the Supplementary Convention could fall within the scope of the Article 1 definition of slavery created in 1926. A manifestation of servitude, including the practices contained in the 1956 Convention falls within Article 1 of the 1926 Convention if “any or all powers attaching to the right of ownership” are manifest. This can, therefore, be extended to any form of exploitative labour practice that may be included under the mantle of ‘modern slavery’.

The Supplementary Convention expands our understanding of the idea of slavery by introducing practices, which confer servile status - deemed by the United Nations as being analogous to slavery itself. In practice, are instances of servile status or servitude actually distinct from slavery? If one were to apply the reasoning of the Rapporteur to the Sixth Committee, the answer would not necessarily be yes. What this demonstrates is that the requirements of Article 1 of the 1926 Convention can be met when considering servile statuses. The definition requires that *any or all* powers attaching to ownership be exercised. It could be argued that this lack of clarity in relation to slavery and servile status is an additional flaw in the definition of slavery. This raises questions about whether classifications such as servitude and servile status are necessary on purely legal grounds in order to identify slavery. The importance of this issue will be highlighted in the following section when assessing slavery provisions in human rights instruments. The deciding factor of ownership to separate slavery from related practices also becomes increasingly apparent when looking at the judgements of the European Court of Human Rights.

## 2.2. Human Rights Instruments

This section will assess the inclusion of slavery in various human rights instruments, focussing specifically on the International Bill on Human Rights and the European Convention on Human Rights. The aim of this is to assess the incorporation and

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<sup>524</sup> League of Nations, Draft Convention on Slavery Replies of Governments, Reply from the Government of the Union of South Africa A.10(a).1926.VI.B.3. as found in Jean Allain’s *The Slavery Conventions; The Travaux Preparatoires of 1926 League of Nations Convention and the 1956 United Nations Convention*, (Martinus Nijhoff Publishers 2008) 55-56

development of the 1926 Convention definition and evaluate to what extent these instruments either offer clarity or perpetuate existing problems related to the 1926 Convention. This section will provide analysis of the judgments of the European Court of Human Rights and the role they have played in demonstrating the weaknesses of the original Slavery Convention definitions by blurring the lines between the legally distinct practices of slavery and trafficking.

### *2.2.1 International Bill of Human Rights*

#### Universal Declaration of Human Rights 1948

The United Nations Charter makes no direct reference to slavery. Article 4 of the 1948 Universal Declaration of Human Rights states: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."<sup>525</sup> The General Assembly debate in December 1948 indicates the catalyst for the drafting of the Declaration. The Declaration was created as a consequence of the experiences of World War II. The French representative stated that "the last war had taken on the character of a crusade for human rights and the Declaration was the most vigorous and the most urgently needed of humanity's protest against oppression."<sup>526</sup> Thus it was the "barbarous doctrines of Nazism and fascism"<sup>527</sup> that was the inspiration for the drafters due to the need to "reaffirm those rights after violation during the war."<sup>528</sup> The Preamble of the Declaration places emphasis on this motivation, stating that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind."<sup>529</sup> There are issues to consider relating to Article 4, first, what is meant by slavery – does Article 4 merely reiterate the existing definition? Second, what does servitude mean? We have seen in relation to the Supplementary Convention that this term is potentially problematic; to a large extent, the Declaration fails to provide any clarity on this term.

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<sup>525</sup> Universal Declaration of Human Rights (adopted 10 December 1948) 1948 UNGA Res 217 A(III) (UDHR) article 4

<sup>526</sup> Verbatim Record of the Hundred And Eightieth Plenary Meeting (of the General Assembly) Held at Palais de Chaillot, Paris on Friday 9 December 1948 at 8:30 pm A/PV.180 as found in *The Universal Declaration of Human Rights, The Travaux Preparatoires Volume III* ed. William A Schabas (Cambridge University Press 2013) 3032

<sup>527</sup> *ibid* 3026

<sup>528</sup> Verbatim Record of the Hundred And Eighty-First Plenary Meeting (of the General Assembly) Held at Palais de Chaillot, Paris on Friday 10 December 1948 at 10:45 am A/PV.181 as found in *The Universal Declaration of Human Rights, The Travaux Preparatoires Volume III* ed. William A Schabas (Cambridge University Press 2013) 3056

<sup>529</sup> Universal Declaration of Human Rights fn416 article 4 preamble

## Definition

In the first session of the Drafting Committee on an International Bill of Human Rights, it was recommended that the Declaration include an article stating, “slavery in all its forms being inconsistent with the dignity of man shall be prohibited by law.”<sup>530</sup> Slavery is defined in relation to the Art 1(1) 1926 Slavery Convention, so there is no expansion of the original concept.<sup>531</sup> However, the provision includes the term servitude. The inclusion of this term demonstrates how the context of fascism and war affected the drafters’ understanding of slavery, and, therefore, Article 4. Nina Lassen comments that there was never a question that the Declaration would reiterate anti-slavery standards of pre-existing instruments.<sup>532</sup> However, a problem emerges within the human rights framework. The use of the term servitude suggests that there is a link between the two practices to afford inclusion. There is no certainty of what this link is to provide inclusion within an anti-slavery provision.

The addition of servitude was deemed necessary, as there were ‘attenuated forms of slavery which were vigorous in practice’.<sup>533</sup> While it has been made clear in previous instruments that slavery proper is represented at one end of the spectrum in relation to the right of ownership (de jure or de facto), we do not have the same clarity when trying to situate servitude. Cassin describes practices of ‘servitude’ as ‘attenuated’ forms of slavery; this could be interpreted to suggest slavery but to a lesser degree. The Merriam Webster Dictionary defines servitude as “a condition in which one lacks liberty especially to determine one’s course of action or way of life.”<sup>534</sup> The etymology of the word servitude is the Latin ‘servus’ which itself means slave. It would seem that there are no clearly defined boundaries for the use of the term servitude. This lack of clarity is a further obstacle to overcome when seeking to identify what is or is not slavery within the definition of slavery. The Universal Declaration does not define the concept of servitude.<sup>535</sup> Cassin commented that the term was intended to cover certain forms of slavery such as that imposed on prisoners

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<sup>530</sup> Report of the First Session of the Drafting Committee of the Commission on Human Rights E/CN.4/AC.1/21 as found in as found in *The Universal Declaration of Human Rights, The Travaux Préparatoires Volume III* ed. William A Schabas (Cambridge University Press 2013)

<sup>531</sup> League of Nation Slavery Convention 1926 fn415 article 1(1)

<sup>532</sup> Nina Lassen, Article 4 in ed. Guðmundur S. Alfreðsson, Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers 1999) 105

<sup>533</sup> Johannes Morsink, *Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press Inc 2000) 41

<sup>534</sup> Merriam Webster Dictionary accessed at (<https://www.merriam-webster.com/dictionary/servitude>)

<sup>535</sup> Universal Declaration fn 529

of war by the Nazis and the traffic in women and children.<sup>536</sup> One argument to be made is that the phrase servitude was used to describe practices that would challenge traditional conceptions of slavery but were still on the agenda of the UN.

#### International Covenant on Civil and Political Rights 1976

Article 8 of the Covenant emulates the Universal Declaration in discussing freedom from slavery. The provision is largely a reiteration of Article 4. It states: “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude. No one shall be required to perform forced or compulsory labour.”<sup>537</sup> Article 8 is an absolute and non-derogable right to freedom from enslavement. The drafters of the Covenant pointed out that slavery and servitude were two different concepts which should be dealt with in two separate paragraphs<sup>538</sup> – slavery was a limited and technical notion related to ownership whereas servitude is a more generalised term for holding dominion over another person.<sup>539</sup> Another way to articulate the difference is by characterising slavery within Article 8, as a situation where a human being effectively owns another, allowing the former to exploit the latter without impunity. Whereas, servitude refers to other forms of grievous economic exploitation, or dominance exercised by one person over another, or, ‘slavery-like practices’.<sup>540</sup> The ICCPR, therefore, offers some indication as to what the drafting committee for the UDHR envisioned the relationship between slavery and servitude to be. We can see the start of polarisation within the human rights framework, with slavery as the pinnacle of exploitative labour practices. Looking at the commentary provided by the Secretary-General on the drafting of the ICCPR further illustrates this point. The commentary references the UDHR when considering how to define these two terms. They are deemed to be two separate concepts which should be dealt with in separate paragraphs.<sup>541</sup> Further to this, it is

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<sup>536</sup> *ibid* 41

<sup>537</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966 entered into force 23 March 1976) Article 8, note that 8(3) is subject to exemption in sub-paragraphs (a)-(c)

<sup>538</sup> Commission on Human Rights, 5<sup>th</sup> Session (1949), 6<sup>th</sup> Session (1950), 8<sup>th</sup> Session 1952) as found in M. J. Bossuyt’s *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, (Martinus Nijhoff 1987) 164

<sup>539</sup> Lassen *Op cit* fn532, 109

<sup>540</sup> Sarah Joseph, Mellissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press 2013)

<sup>541</sup> Draft International Covenants on Human Rights: annotation / prepared by the Secretary-General, UN Doc. A.2929, (1 July 1955) 91

pointed out that slavery is the best known and worst form of bondage. However, other forms of bondage existed in a modern society which tended to reduce the dignity of man.<sup>542</sup> The travaux suggest that slavery at one end of the spectrum destroys the juridical character of an individual. Whereas, servitude is a general term which is used in relation to a general notion of all domination which reduces the dignity of an individual.<sup>543</sup> This implies that the drafters of the Covenant viewed the terms to be distinct from each other, with slavery relating to ownership being seen as a more serious violation of human rights than servitude.

### *2.2.2. European Convention on Human Rights 1953*

The European Convention on Human Rights contains a prohibition on slavery and servitude;<sup>544</sup> this prohibition is absolute under Article 15 meaning there are no limitations or exceptions built in. The prohibition on slavery and servitude in article 4(1) is also non-derogable under article 15 of the Convention. This fact was confirmed in the 2005 case of *Siliadin v France* when the court stated that Article 4 enshrines "one of the fundamental values of democratic society ... Article 4 makes no provision for an exception, and no derogation from it is permissible. Article 4 also contains a prohibition on forced or compulsory labour under article 4(2). This prohibition, unlike the prohibition on slavery and servitude, is not absolute. There are exceptions outlined in article 4(3).

With article 4, once again, we see a separation of slavery and servitude yet, similar to the Universal Declaration and the ICCPR, there is no explanation as to the basis of such a separation and how these two terms differ. Jochen Moerman comments that it is unclear whether we are meant to understand the terms as two synonyms or as two separate concepts. This means that Article 4 of the ECHR could be dealing with two names for one status. The problem of the relationship between slavery and servitude arises again. Analysis of the interpretation of Article 4 by the European Court of Human Rights will demonstrate how the ambiguities and flaws inherent in the 1926 Slavery Convention have left the definition open to expansive and unsound judicial interpretations.

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<sup>542</sup> *ibid* 92

<sup>543</sup> *ibid*

<sup>544</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, article 4

## Definitions

Article 4 (1) of the Convention states that “no one shall be held in slavery or servitude”.<sup>545</sup> Certain affinities can be identified between Article 4 and Article 8 of the ICCPR. Ed Bates comments that the work of the UN Commission of Human rights greatly influenced the Committee of Legal Experts of the Council of Europe. This means that there was a "cross-fertilisation between the ECHR and what would be the ICCPR."<sup>546</sup> Therefore, in light of the prior consideration of the ICCPR, we already have some understanding of how to get to grips with the relationship between these two terms in the context of Article 4(1).

### *Siliadin and Rantsev: Slavery, Trafficking and Judicial Confusion*

This section will assess the judicial interpretations of the European Court of Human Rights of slavery in the context of Article 4 ECHR<sup>547</sup>. This section will consider two judgements: *Siliadin v France*<sup>548</sup> and *Rantsev v Cyprus and Turkey*<sup>549</sup>. Analysis of the interpretation of the 1926 Convention in the context of Article 4 ECHR will demonstrate how the weak points of the legal definition facilitate the blurring of boundaries between two distinct legal concepts: slavery and trafficking.

The European Court has had cause to interpret Article 4 to find guidance on the meaning of concepts such as slavery and ownership within the context of the Convention. In the case of *Siliadin v France*,<sup>550</sup> the Court found that the applicant's treatment constituted forced labour and servitude but not slavery. The case concerned a Togolese girl who had been brought across the French border at the age of 15 and forced to perform domestic labour without payment. At this juncture, the ECtHR had existing jurisprudence on forced/compulsory labour, but this was the first judgement involving slavery and servitude. When addressing the definition of slavery or servitude, it was noted that the 1926 Slavery Convention definition located in Article 1 (1) corresponds to the traditional meaning of slavery.<sup>551</sup> The Court concluded "although the applicant was, in the instant case, clearly deprived of her personal

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<sup>545</sup> ECHR fn 544

<sup>546</sup> Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 84

<sup>547</sup> ECHR fn 544

<sup>548</sup> *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005

<sup>549</sup> *Rantsev v Cyprus and Turkey* Application no. 25965/04 (ECtHR 7th January 2010)

<sup>550</sup> *Siliadin* fn548

<sup>551</sup> League of Nation Slavery Convention 1926 fn415

autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words, that Mr and Mrs B exercised a genuine right of legal ownership over her thus reducing her to the state of an object."<sup>552</sup> Rebecca J Scott comments that the reasoning applied by the Court is somewhat puzzling and perpetuates the question if slavery is mutually exclusive to a right of ownership, how can the term slavery be applied to contemporary exploitative practices such as a domestic situation similar to the facts of *Siliadin*<sup>553</sup> When considering servitude, the Court deduced that the prohibition was targeted at a "particularly serious form of denial of freedom". Such a denial would include "in addition to the obligation to perform certain services for others ... the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition."<sup>554</sup>

Therefore, servitude refers to an obligation imposed by the use of coercion to provide one's services which can be linked with the concept of slavery.<sup>555</sup> This interpretation of slavery hinges upon a narrow interpretation of the 1926 Convention, which reduces slavery to simply relating to a proprietary right of ownership. Such a requirement would render the definition of slavery confirmed in subsequent instruments functionally meaningless and without utility.<sup>556</sup> Allain argues that the Court isolated the words 'right of ownership' from the rest of the definition taking them to mean 'legal' ownership. Moreover, if the definition had been read in full, it would have considered de facto slavery. Thus, the issue once again lies with the interpretation of ownership; in choosing to take a narrow approach and equate slavery to legal ownership, the Court effectively rules out the possibility of potential victims being able to claim for breaches of Article 4 in relation to enslavement. Such an approach does not take into account the fine line between slavery and servitude.<sup>557</sup> Therefore, in negating the factor of "powers attaching to the right of ownership," the Court

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<sup>552</sup> *ibid* para 122

<sup>553</sup> Rebecca J Scott, Under Colour of Law in ed. Jean Allain, *The Legal Understanding of Slavery – From the Historical to the Contemporary* (Oxford University Press 2012) 153-154

<sup>554</sup> *ibid* 123

<sup>555</sup> *ibid* 124

<sup>556</sup> Holly Cullen, Contemporary International Legal Norms on Slavery in ed. Jean Allain *The Legal Understanding of Slavery – From the Historical to the Contemporary* (Oxford University Press 2012) 309

<sup>557</sup> see discussion on Supplementary Slavery 2.1.2. 1956 United Nations Supplementary Convention

contradicts the conclusions reached by the United Nations Economic and Social Council, failing to recognise that servitude can, in fact, equate to slavery<sup>558</sup>.

The judgment of the ECtHR in *Siliadin* demonstrates the pitfalls of the reliance on ownership when it comes to identifying slavery. The lack of clarity provided by the 1926 Convention and its preparatory documents led to an interpretation of the concept of ownership in the context of the Convention definition which concludes that in the absence of legal ownership, it is impossible for an individual to be held in a state of slavery. The judgment thereby rules out the possibility of *de facto* slavery by essentially designating legal ownership as the central characteristic of slavery.

The interpretation of *Siliadin* can be contrasted with the later case of *Rantsev v Cyprus and Turkey*<sup>559</sup>, in which the Court had the opportunity to rethink its approach. Consideration of the judgment in *Rantsev* demonstrates the tangled web that ownership casts when it comes to defining slavery in two ways. First, the interpretation of the 1926 Convention definition in the *Rantsev* judgment is the polar opposite to that in *Siliadin* in which the Court proclaimed that slavery corresponded to the existence of a genuine right of ownership. Secondly, the somewhat unclear boundaries of the definition are not simply expanded but fundamentally redrawn through the Court's inclusion of trafficking within Article 4 ECHR.<sup>560</sup>

The case concerned the death of a Russian woman working in Cyprus on an 'artiste' visa which allows employers to extend a high level of control over employees. The victim began work on 16 March 2001 but expressed her desire to return to Russia. She died in ambiguous circumstances two weeks later following an attempt to escape from her employer. It was argued that the evidence pointed to an attempted escape. The case arguably falls within the scope of human trafficking under the Palermo Protocol.<sup>561</sup> The ECHR does not include an explicit prohibition on the practice of

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<sup>558</sup> United Nations Economic and Social Council fn 521

<sup>559</sup> European Court of Human Rights, *Rantsev v Cyprus and Turkey* (Application no. 25965/04) 7 January 2010

<sup>560</sup> ECHR fn544

<sup>561</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15<sup>th</sup> November 2000 entered into force 25<sup>th</sup> December 2003) Article 3(a) defines trafficking as: "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

trafficking. This case, therefore, provided the Court with the opportunity to augment Article 4 and, consequently, the definition of slavery to develop the law on trafficking. The Court found in this instance that the Applicant had in fact been subjected to exploitation within the scope of Article 4.<sup>562</sup> Further to this, the Court's interpretation of the law, in this case, extended the boundaries of Article 4 to include human trafficking. Holly Cullen points out that this willingness to interpret trafficking in the context of Article 4 is not surprising given an increasing tendency to link trafficking and slavery as synonymous practices.<sup>563</sup> This observation is in line with the current trend in the use of the term modern slavery and its conflation of slavery and trafficking. The courts are expansively interpreting the concept of slavery, as we see in *Rantsev* - which contradicts a position, which was initially too restrictive in *Siliadin*.

Given the confusion and conflation in the European Court's approach, it is difficult to see how we can expect those within the political arena to form clear boundaries around the concept of slavery.

There is a clear departure in *Rantsev* from the requirement of a genuine right of ownership to identify the existence of slavery. This represents a step forward in the Court's understanding of ownership in relation to the definition of slavery. The Court looked beyond the 1926 Convention to the case of *Kunarac*,<sup>564</sup> decided by the International Criminal Tribunal for the former Yugoslavia. The definition of slavery was refocused to mirror the 1926 Slavery Convention and the exercise of *any or all powers attaching to the right of ownership*.<sup>565</sup> In this instance, the Court failed to identify which element of Article 4 had been violated. Instead, it concluded that trafficking, as defined under Article 3(a) of the Palermo Protocol<sup>566</sup> and Article 4(a) of the Anti-Trafficking Convention<sup>567</sup> falls within the scope of Article 4 of the ECHR.

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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 organ".

<sup>562</sup> ECHR fn 544

<sup>563</sup> Cullen *Op cit* fn556, 309

<sup>564</sup> Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001

<sup>565</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

<sup>566</sup> Palermo Protocol fn 561

<sup>567</sup> European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human*

In doing so, the Court failed to identify what forms of exploitation constitute the violation in question. Thus, the Court once again demonstrates an inability to engage with the definition in the context of Article 4 ECHR.<sup>568</sup> This position could be on the one hand, a reluctance to identify state liability in relation to slavery or on the other, a problem relating to the interpretation of the concept of slavery in relation to “powers attaching to the right of ownership.” The Court justifies its identification of trafficking as slavery on the basis that trafficking commodifies human beings.<sup>569</sup> This expansive interpretation poses a problem when considering the definition; it provides scope for the designation of trafficking as an act of slavery.

It has been argued by Vladislava Stoyanova that a number of factual and legal peculiarities are present in the analysis undertaken by the Court.<sup>570</sup> When considering the facts of the case, there is nothing to suggest that the victim was subject to abuse which could be equated with slavery, servitude or forced labour. The Court, in fact, states, when considering the applicant’s arguments under the prohibition of torture and other ill-treatment, Article 3, that “there is no evidence that Mrs Rantsev was subjected to ill-treatment prior to her death”.<sup>571</sup> Stoyanova argues that although this statement was made in relation to Article 3 rather than Article 4, its significance lies in the question of how in the absence of any allegations of ill-treatment prior to death can the issue of Article 4 be raised. The answer lies in the fact that Mrs Rantseva was alleged to be a victim of trafficking.<sup>572</sup> This assertion was predicated on two bases. First, the victim entered Cyprus on an artistes visa; a report by the Council of Europe Commissioner for Human Rights links these visas to high incidents of trafficking and prostitution.<sup>573</sup> Stoyanova argues that such reports allowed the Court to assume the existence of trafficking in this case easily. Second, there are a number of inconsistencies with the subsequent analysis in the judgement. As previously stated

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*beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011

<sup>568</sup> ECHR fn 544

<sup>569</sup> *Rantsev*, fn 549 para 281

<sup>570</sup> Vladislava Stoyanova, *Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case* (2012) 30(2) *Netherlands Quarterly of Human Rights*, 163,167

<sup>571</sup> *Rantsev* fn 549 para 252

<sup>572</sup> Stoyanova fn 570, 167

<sup>573</sup> Follow-up Report of 26<sup>th</sup> March by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations (CommDH(2006)12) para.57 also see Report of 12 December 2008 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus on 7-10 July 2008 (CommDH(2008)36) para 45-48

the Court determined that the practice of trafficking as defined in Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention fall within the scope of Article 4 ECHR.<sup>574</sup>

The peculiar element of the judgement of the Court when it comes to trafficking and the scope of Article 4, is that a determination is made without exploring these three elements of the legal definition of trafficking. In fact “one might try to diligently search for a quotation of the definition of human trafficking and of its constitutive elements” yet such efforts “are doomed to fail”.<sup>575</sup> In addition to the failure to explore the definition of trafficking, the Court proceeds to determine that trafficking is “based on the exercise of powers attaching to the right of ownership”.<sup>576</sup> In making this statement that trafficking in its aim of exploitation relies upon the powers attaching to ownership, the Court did in fact implicitly make a determination that trafficking falls within the scope of the 1926 definition of slavery.<sup>577</sup> If one turns to the Palermo Protocol, it can be seen that exploitation is an undefined term, which can equate to but is not limited to slavery. Therefore, the analysis of the Court is fully disconnected from the legal definition of trafficking and slavery, revealing that the Court has not truly engaged with the legal distinctions between the two concepts.<sup>578</sup>

Further to the Court's determination, an additional issue is its failure to define how trafficking fits into the framework of Article 4.<sup>579</sup> The *Rantsev* judgement essentially provides a blanket inclusion of trafficking. Allain comments that the judgement also raises issues, at a normative level, around the way in which the Court has engaged with Article 4.<sup>580</sup> The wording of Article 4 and the case law of the Court, make it difficult to come to a conclusion on where the distinction lies between slavery and its related practices. The more recent case of *Rantsev* would suggest that there are three separate concepts within Article 4. Allain comments that the judgement is “deeply flawed”.<sup>581</sup> This problem results from the decision to recognise trafficking as a

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<sup>574</sup> For a detailed discussion of the definition of human trafficking see Chapter 3. Defining Trafficking in Contemporary Legal Instruments

<sup>575</sup> Stoyanova *Op cit* fn570, 170

<sup>576</sup> *Rantsev* fn 549 para 181

<sup>577</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

<sup>578</sup> Jean Allain, ‘Rantsev v. Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10(3) Human Rights Law Review, 546

<sup>579</sup> ECHR fn 544

<sup>580</sup> *ibid* 550

<sup>581</sup> *ibid*

violation of Article 4 but also the Court's failure to normatively distinguish practices. This demonstrates an unwillingness to engage normatively with what the Court calls the three types of proscribed conduct. This statement expands the scope of the prohibition beyond its written limits potentially making it applicable to any form of exploitation. However, on the other hand, Nicholas McGeehan disagrees with Allain's critique, arguing that there is in fact evidence to suggest that the Court does not agree with the normative hierarchy that states there are three separate practices. This argument is predicated on the explicit support the Court voices for the interpretation by the ICTY in *Kunarac* which rejected such a hierarchy.<sup>582</sup> However, the unwillingness of the Court to identify which element of the prohibition has been violated creates a definitional black hole. Stoyanova comments that the Court could have taken a different approach and focussed on the elaboration of slavery, servitude and forced labour within its jurisprudence by clarifying the scope of the thresholds rather than refusing to identify how the provision had been violated.<sup>583</sup> The Court states that it 'considers that trafficking in human beings, by its very nature and aim of exploitation, is based on [slavery].'<sup>584</sup> However, if one were to accept the Court's determination that trafficking is based on the exercise of a power attached to the right of ownership, Allain asks is it possible to understand trafficking for the removal of organs or prostitution as slavery.<sup>585</sup>

Therefore, the judgement in *Rantsev* provides the legal context for the creation of a narrative which conflates trafficking and slavery under the label of modern slavery. It has been noted by Romana Vijayarasa and Jose Villarino that the risk of this is a judicial interpretation of slavery and trafficking alien to their meaning in international law.<sup>586</sup> This interpretation has potentially aided the proliferation of the current trend to associate trafficking in all its manifestations with slavery, which creates a judicial precedent for the concept of modern slavery. The critiques of the judgements in *Rantsev* and *Silladin* explored in this section are drawn from a small pool of academics. There is a prevailing sense in the literature that the judgement signals a

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<sup>582</sup> Nicholas Lawrence McGeehan, *Misunderstood and Neglected: The Marginalisation of Slavery in International Law* (2012) 16(3) *The International Journal of Human Rights*, 436, 442

<sup>583</sup> Stoyanova *Op cit* fn570, 194

<sup>584</sup> *Rantsev* para 181

<sup>585</sup> Allain *Op cit* fn578, 554

<sup>586</sup> Romana Vijayarasa, 'Kose Miguel Bello Y Villarino, Modern Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev (2012) 8(2), *Journal of International Law and International Relations*, 217,47

positive advancement for the neo-abolitionist movement against modern slavery. It is argued by Virginia Mantouvalou that slavery is a multi-faceted concept and the living instrument approach taken by Court in *Rantsev*<sup>587</sup> allows it to be adapted to fit contemporary circumstances.<sup>588</sup> This, arguably non-critical approach, exemplifies the general acceptance of the judgment, which Allain had predicted human rights advocates would take. They, he argued, would try to use it to a good effect without reflecting critically on its deeply flawed nature.<sup>589</sup>

Ownership is once again an issue as it is the criterion which the distinction between slavery and 'related practices' hinges upon. A hierarchy of offences appears in the interpretation of the concept of slavery in legal instruments. There is a polarisation with slavery placed on one end of the spectrum as the gravest offence, and other related practices are seen to reach a minimum level of severity allowing them to fall within the scope of the prohibition. The idea of there being a less offensive form of slavery is problematic and appears to centre on the concept of ownership. However, this idea is arguably contrary to the wording of the 1926 definition itself. As previously discussed the Convention requires no more and no less than the manifestation of any or all powers attaching to ownership.<sup>590</sup> To literally interpret this provision it would mean that the manifestation of only one power is required, and this could be any of the powers attaching to ownership. On this basis, the legal definition of slavery is potentially applicable to practices of servitude and forced labour. This is important when we consider the issue of 'modern slavery', first, as it allows us to identify certain exploitative labour practices present in contemporary society, such as trafficking, and potentially designates these as slavery under the legal definition. However, perhaps the more pressing issue is the vulnerable position the concept of slavery is left in following this analysis of the main body of human rights instruments. If lawmakers or abolitionists adopt an interpretation of the 'powers attaching to the right of ownership' in line with Allain's position, it would require that only one power attaching to the right of ownership is necessary to identify slavery, and it is possible to utilise the concept in a very expansive manner with legal support. This ultimately

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<sup>587</sup> The living instrument doctrine was developed in the case law of the ECHR, the judgement of *Tyrer v United Kingdom* described the ECHR as "a living instrument, which must be interpreted in the light of present-day conditions".

<sup>588</sup> Virginia Mantouvalou, *The Many Faces of Slavery: The Example of Domestic Work* (2013) 14:2, *Global Dialogue*, 72, 75

<sup>589</sup> Allain *Op cit* fn464, 554

<sup>590</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

means that the term slavery remains applicable in political but also legal terms to a wide range of practices which do not necessarily manifest *de facto* ownership to a sufficient degree.

### 2.2.3 Beyond the ECHR and UDHR:

After the adoption of the European Convention on Human Rights in 1950, the development of regional human rights standards was continued with the adoption of the American Convention on Human Rights<sup>591</sup> and the African Charter on Human and Peoples Rights<sup>592</sup>.

#### The American Convention on Human Rights 1969

The American Convention on Human Rights<sup>593</sup> contains a prohibition on slavery similar to that found in other human rights instruments. Article 6 (1) states that “no one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.” While the wording largely mirrors previous instruments, there is also the explicit introduction of trafficking in women. Thus, within the context of Article 5 of the Convention, this places trafficking firmly within the scope of anti-slavery provisions. Under the heading of freedom from slavery, Article 6 also deals with forced or compulsory labour,<sup>594</sup> in a manner similar to the ECHR. Holly Cullen has commented that the Organization of American States has engaged only to a small degree with the definition of slavery. There have only been 5 cases in which the Inter-American Court of Human Rights has issued a decision on Article 6 of the Convention.<sup>595</sup> The most recent the case of *Hacienda Brasil Verde Workers v. Brazil* was the first decision on the right to be free from slavery and trafficking.

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<sup>591</sup> American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, adopted 22 November 1969 entered into force 18 July 1978), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)

<sup>592</sup> African Charter on Human and Peoples' Rights, (adopted 27 June 1982 entered into force 21 October 1986) (1992) 21 ILM 58

<sup>593</sup> American Convention on Human Rights fn591

<sup>594</sup> *ibid* article 6 (2)

<sup>595</sup> *Case of Ituango Massacres vs. Colombia*, Series C No. 148, Inter-American Court of Human Rights 1 July 2006, *Case of Hacienda Brasil Verde Workers v. Brazil*. On-side procedure. Order of the Acting President of the Inter-American Court of Human Rights of February 23, 2016, *Case of Rio Negro Massacre v Guatemala*, Inter-American Court of Human Rights September 4, 2012, *Case of Pollo Rivera et al. v Peru*, Inter-American Court of Human Rights, October 21, 2016, *Case of Expelled Dominicans and Haitians v Dominican Republic*, August 28, 2016

In the case of the *Ituago Massacres v Columbia*,<sup>596</sup> the Court considered a violation of Article 6 finding that the case was one of forced labour. In order to ascertain how the Inter- American Commission defines slavery, it is helpful to look at the 2009 report on contemporary slavery in Bolivian Chaco.<sup>597</sup> The Commission refers to the 1926 Convention and the concept of powers attaching to the right of ownership, the Supplementary Convention and the Rome Statute.<sup>598</sup> However, alongside this recognition of powers attaching to the right of ownership, the Commission also includes the idea of control which “results in a state marked by the loss of free will where a person is forced through violence to give up the ability to sell freely his or her own labour power”.<sup>599</sup> This concept of control is influenced by the work of Kevin Bales: the report describes three dimensions of slavery – control, appropriation of labour power, use of threat or violence.<sup>600</sup> The Commission goes on to discuss and include these dimensions in their own interpretation of slavery stating that when analysing the characteristics of contemporary slavery or practices similar to slavery the following factors should be taken into account:

“(i) the degree of restriction of the individual’s inherent right to freedom of movement; (ii) the degree of control of the individual’s personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.”<sup>601</sup>

The report also distinguishes forced or compulsory labour from slavery on the grounds that the practice does not include the element of ownership but states that there is a restriction of individual liberty similar to slavery that may be imposed through violence.<sup>602</sup> Therefore, what we can see is that the American Commission has been influenced in its interpretation of slavery by the instruments previously discussed. The concepts of ownership and property are still central. However,

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<sup>596</sup> *Case of Ituango Massacres vs. Colombia*, Series C No. 148, Inter-American Court of Human Rights 1 July 2006

<sup>597</sup> Organisation of American States, Inter-American Commission on Human Rights, *Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, OEA/Ser.L/V/II, Doc. 58, 27 24 December 2009, 50

<sup>598</sup> *ibid* 14

<sup>599</sup> *ibid*

<sup>600</sup> *ibid*

<sup>601</sup> *ibid* 15

<sup>602</sup> *ibid*

consideration is also given to the notion of control, something that the predecessors of the American Convention did not take into account.

In its most recent decision regarding Article 6, the Inter-American Court has also engaged with the crime of trafficking but also the concept of ‘modern slavery’. The case of the *Hacienda Brasil Verde Workers*<sup>603</sup> concerned the ‘slavery-like’ working conditions of workers on a cattle ranch in Brazil. The ranch employed workers from low-income communities promoting the belief they would be paid good salaries for the work performed. Upon arrival, the workers were forced into surrendering legal documentation and subsequently subjected to excessive working hours, violence, poor working conditions and in some circumstances the withholding of wages.<sup>604</sup> The *Hacienda* case represents a long-standing issue in Brazil with complaints dating to 1989; numerous inspections and investigations were conducted with around 340 workers removed from the ranch between 1989 and 2000.<sup>605</sup> The Inter-American Commission brought the case before the Inter-American Court in March 2015.<sup>606</sup> This was following the unsatisfactory engagement of the Brazilian Government with a series of recommendations made in 2013 following the Commission’s finding of a breach of Article 6. The Court ruled that the workers had been subjected to slavery and human trafficking. When interpreting Article 6(1), the Court considered the definitions of slavery and servitude. The Court stated that the definition of slavery now transcends the exercise of a right of ownership against another person, referring to the interpretation in judgements such as *Siliadin* and *Rantsev*. Thus the Court chose to interpret slavery in relation to control “exercised over a person that significantly restricts or deprives them of the individual freedom with the intent to exploit them through use, management, benefit, transfer or divestment of their person.”<sup>607</sup> The concept of control as previously discussed is open to interpretation, the Court’s interpretation refers to a degree of control that will invalidate the integrity or personality of the victim, and is usually maintained or obtained through violence,

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<sup>603</sup> *Case of Hacienda Brasil Verde Workers v. Brazil*. On-side procedure. Order of the Acting President of the Inter-American Court of Human Rights of February 23, 2016

<sup>604</sup> *ibid* para 164-171

<sup>605</sup> Irit Weiser, Case Comment, Inter-American Court Issues its First Decision on Modern Day Slavery: Case of Hacienda Brasil Verde, PKI Global Justice J4 (2018) accessed at <http://www.kirschinstitute.ca/hacienda-brasil-verde/>

<sup>606</sup> *ibid*

<sup>607</sup> *ibid*

deception and/or coercion.<sup>608</sup> However, the Court remarked that the threshold of exploitation involves stricter elements than forced labour or debt bondage, “, namely, situations of serious and persistent violations affecting the victim’s self-determination, where control represents an expression of property rights over the workers.”<sup>609</sup> This pronouncement serves to attempt to limit the interpretation in the context of *de facto* slavery by stating that the control in question must represent a *de facto* expression of property rights over another. Additionally, for the first time, the Court engaged with the wording of Article 6 regarding the “trafficking in slaves and women.” If taken at face value the Conventions inclusion of trafficking with the scope of Article 6 is focussed on trafficking for the purposes of slavery but also trafficking in women in general. The Court stated that Article 6 (1) must be interpreted in a way that transcends its literal meaning and be taken to include all forms of trafficking as defined by the Palermo Protocol.<sup>610</sup>

#### African Charter on Human and Peoples Rights 1981

Article 5 of the Charter provides a prohibition on all forms of slavery and the slave trade.<sup>611</sup> Although such a prohibition is in keeping with the previous human rights instruments the framing of this provision is different by nature. First, a link is made between respect for dignity and the prohibition of exploitation and degradation. The Charter then complicates matters through the inclusion of slavery, the slave trade, cruel/inhuman and degrading punishing under the banner of exploitation and degradation.<sup>612</sup> When finding a violation of Article 5, the Commission often does not distinguish failure to respect dignity and exploitation and degradation; this makes it difficult to understand the boundaries of the different elements of Article 5. It is important to bear in mind the legacy left on African society by the slavery and the slave trade. It has been estimated that around 12,521,335 Africans were enslaved and transported across the Atlantic.<sup>613</sup> However, there is also the question of domestic slavery. Evelyn Ankuma has commented that that aim of the provision on slavery

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<sup>608</sup> *ibid*, fn603 para 268-272

<sup>609</sup> Tatiana Gos, *Hacienda Brasil Verde Workers v. Brazil: Slavery and Human Trafficking in the Inter-American Court of Human Rights* (OxHRH Blog, 24 April 2017) accessed at (<http://ohrh.law.ox.ac.uk/hacienda-brasil-verde-workers-v-brazil-slavery-and-human-trafficking-in-the-inter-american-court-of-human-rights>)

<sup>610</sup> *Hacienda Brasil* fn603 para 288-289

<sup>611</sup> African Charter fn 592

<sup>612</sup> *ibid* article 5

<sup>613</sup> see fn70<sup>70</sup>

may be to address forms of contemporary slavery which are customary in nature. For example, practices of trokosi, almadu, forced marriage, marital servitude and child labour.<sup>614</sup> However, enforcement of this provision is difficult, as violations cannot be easily traced to states. Violations are primarily carried out by individuals, and the practices are rooted in traditional and religious customs which governments pledge to protect, meaning that states are preserving vestiges of domestic African slavery.<sup>615</sup> This does not preclude state liability for failure to adopt or enforce legislation prohibiting slavery under Article 1 of the Charter.<sup>616</sup> However, it still stands that its history further complicates the identification of slavery in this context. Complaints to the Commission are rare and findings of slavery even more so, making it difficult to ascertain what is meant by slavery, in the African Charter context. Cases relating to the African Charter are complicated by the fact that there are continued practices, which are not purely *de facto* in nature. Benedetta Rossi observes that the Western conceptualisation of slavery is incapable of capturing the distinctions of status in the African landscape.<sup>617</sup> There is a certain status that emerges from kinship systems slavery “ex-slaves leading independent lifestyles have struggled with names that tie them to their past identity and carry a stigma for them and their children.”<sup>618</sup> Rossi comments that for example, in Nigeria there are cases of traditional masters turning “persistent ties to their ex-slaves into a lucrative business by selling girls of slave descent to wealthy businessmen.”<sup>619</sup> While technically illegal, the masters will claim to receive a bridewealth to be passed on to the father, instead of keeping the money “which signifies the transfer of rights over their slave who becomes the payer’s concubine.”<sup>620</sup> This makes the use of the 1926 Convention problematic.<sup>621</sup>

The African Commission on Human and Peoples Rights had cause to consider the interpretation of Article 5 in the joined applications against Mauritania.<sup>622</sup> Amidst

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<sup>614</sup> Evelyn A Ankuma, *The African Commission on Human and Peoples Rights: Practice and Procedures* (Martinus Nijhoff 1996)

<sup>615</sup> Vincent Obisienunwo, Orlu Nmehielle, *The African Human Rights System: Its Laws, Practices and Institutions* (Martinus Nijhoff 2001) 89

<sup>616</sup> African Charter fn 592

<sup>617</sup> Benedetta Rossi, *Reconfiguring Slavery: West African Trajectories* (Oxford University Press 2016)

<sup>618</sup> *ibid*

<sup>619</sup> *ibid*

<sup>620</sup> *ibid*

<sup>621</sup> Cullen *Op cit* fn556, 311

<sup>622</sup> Communication 54/91, Malawi African Association v Mauritania; Communication 61/91, Amnesty International v Mauritania; Communication 98/93, Ms Sarr Diop, Union Interafricaine des Droits de l’Homme and RADDHO v Mauritania; Communications 164/97 & 196/97, Collectif des Veuves et

allegations that slavery still existed despite legal abolition, the Commission found that descendants of slaves still worked without remuneration for those who had been the masters of their ancestors. These practices were deemed to be analogous to slavery. However, no reference was made to the 1926 Convention definition or the concept of powers attaching to the right of ownership.<sup>623</sup>

Clarification of what slavery means in relation to Article 5 of the Charter can be found by looking at the landmark case of *Hadijatou Mani Karaou v The Republic of Niger*.<sup>624</sup> This case was heard by the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) on the grounds of a state violation of Article 5 of the African Charter. Helen Duffy comments that this judgment is monumental as it is one of the first cases of slavery to succeed at an international level – but further to this, it also exposed the ongoing practice and the complicity of the state of Niger through its denial of the practice<sup>625</sup>. Hadijatou Mani was sold to a tribal chief at the age of 12 as his “fifth wife.”<sup>626</sup> The purchase took place under an ongoing practice in Niger called *Wahiya* – where a young girl is forced into servile status taking on the role of a domestic servant concubine.<sup>627</sup> Over a period of nine years Mani was subjected to sexual and violent abuse bearing four children – in 2005 she received manumission. The Court makes no in-depth attempt to establish a definition, relying instead on the judgments of the ICTY in *Kunarac*, referring to the idea of powers attaching to the right of ownership.<sup>628</sup> The judgment stated that recognition of slavery without denunciation is a form of acceptance or tolerance of a crime/offence for which the national judiciary had an obligation to bring a criminal prosecution.<sup>629</sup> ECOWAS adopted the idea of powers attaching to the right of ownership and followed the reasoning of the ICTY as the ECtHR had done in *Rantsev*. It is interesting to note, then, that unlike the ECtHR when interpreting a

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Ayants-droit v Mauritania; Communication 210/98, Association Mauritanienne des Droits de l’Homme v Mauritania, Report of the African Commission on Human and Peoples’ Rights, 11 May 2000

<sup>623</sup> Cullen *Op cit* fn5563, 11-112

<sup>624</sup> *Hadijatou Mani Karaou v The Republic of Niger* No. ECWICCIJUD/0608 (ECOWAS Cour de Justice Oct. 27, 2008) para 11

<sup>625</sup> Helen Duffy, *Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court* (2009) 9(1) Human Rights Law Review, 151,152

<sup>626</sup> A fifth wife is a female who is taken as a wife but cannot be acknowledged as such under Islamic law.

<sup>627</sup> Jean Allain, Case Note: *Hadijatou Mani v Republic of Niger* (2009) 103(2), *American Journal of International Law*, 311, 312

<sup>628</sup> *Hadijatou Mani* fn 624 para 80

<sup>629</sup> *ibid* para 83-84

prohibition on slavery the ECOWAS found in favour of the applicant that there had been a slavery-related violation. Duffy comments that the case of Hadijatou Mani did not challenge the boundaries of the definition of slavery.<sup>630</sup> What we see is a clear-cut case of 'traditional' slavery which is easily identifiable as a relationship of control exercising the powers attaching to the right of ownership. It would be harder to imagine a clearer example of slavery in a contemporary context. Perhaps, what can be taken from the case of Hadijatou Mani is that only when Courts are presented with obvious instances of powers attaching to ownership will they be able or even willing to determine the existence of slavery, particularly when dealing with state liability.

#### ***2.2.4. Human Rights Ownership and Slavery***

Analysis of the contribution of human rights instruments to our understanding of slavery demonstrates that there is a degree of clarification from institutions on the potential meaning of the phrase "powers attaching to the right of ownership." However, inclusion in instruments such as the ECHR serves to reveal the dangers of the unclear definition provided in the Slavery Convention. It also offers further confusion regarding the legal boundaries surrounding the status of slavery.

The interpretation of the 1926 Convention in the context of the ECHR has provided two starkly opposed interpretations of ownership and slavery. In addition, the consequent blanket inclusion of trafficking within the boundaries of Article 4 and the European Court's interpretation of the 1926 Convention poses a blurring of the lines between two related but distinct practices. As discussed in the previous chapter and at length throughout this section trafficking is a practice legally defined in its own right, a process for the purpose of exploitation, which may or may not, depending on the circumstances amount to slavery.

### **2.3. International Criminal Law**

This section will assess how the status of slavery is defined within the scope of the crime of enslavement. The aim of this is to evaluate the incorporation of the 1926 Convention definition into the interpretation of enslavement mainly by the International Criminal Tribunal of the former Yugoslavia, whose judgement in

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<sup>630</sup> Duffy *Op cit* fn625, 160

*Kunarac*<sup>631</sup> has become authoritative within the realm of human rights – as seen in the *Rantsev* judgement of the ECtHR. This section will also consider the implications of the potential expansion and of the 1926 definition through the inclusion of the practice of trafficking under the crime of enslavement.<sup>632</sup>

### 2.3.1 Rome Statute of the International Court

#### Background to Slavery in International Criminal Law

Enslavement is included as a crime against humanity in the Rome Statute. Darryl Robinson comments that the evolution of the concept of crimes against humanity within customary international law has not been orderly. A definition was first put forward in the Nuremberg Charter.<sup>633</sup> However, it is unclear whether this created a new crime or simply articulated a crime already embedded within the fabric of customary international law.<sup>634</sup> For the purpose of the Charter, crimes against humanity include, but are not limited to:

...murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>635</sup>

Further mention of enslavement as a crime against humanity can be found in Allied Control Council Law No. 10.<sup>636</sup> This provision enacted by the body governing Allied occupation zones in Germany post World War II allowed occupying authorities to try suspected war criminals in their respective occupation zones; this led to the subsequent Nuremberg trials.<sup>637</sup> Under Control Council Law No. 10, slave labour is classified as a war crime constituting a violation of the laws or customs of war and

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<sup>631</sup> International Criminal Tribunal for the Former Yugoslavia, *Kunarac et als* (IT-96-23/1-A)

<sup>632</sup> Rome Statute of the International Criminal Court 1998 Rome Statute (adopted 17 July 1998 entered into force 1 July 2002) article 7 (2)(C)

<sup>633</sup> United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945

<sup>634</sup> Darryl Robinson, 'Defining Crimes against Humanity at the Rome Conference' (1999) 93(1), *The American Journal of International Law*, 43, 44

<sup>635</sup> Nuremberg Charter fn633 article 6 (c)

<sup>636</sup> Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, 3 *Official Gazette Control Council for Germany* 50-55 (1946).

<sup>637</sup> Kevin Jon Heller, *The Nuremberg military tribunals and the origins of international criminal law* (Oxford University Press 2011)

enslavement is included as a crime against humanity.<sup>638</sup> Cases under Control Council Law No. 10 noted that “compulsory uncompensated labour constituted slavery”, however, no substantive discussion on the issue took place.<sup>639</sup> Jurisdiction for the crime against humanity of enslavement was also designated to the International Criminal Tribunal for the Former Yugoslavia<sup>640</sup> and the International Criminal Tribunal of Rwanda.<sup>641</sup>

## Definition

Under the Rome Statute, the International Criminal Court was given jurisdiction over crimes against humanity. For the purpose of the statute a “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: .... (c) Enslavement ... (g) Sexual Slavery ...”<sup>642</sup> The statute provides that, “enslavement means the exercise of *any or all of the powers attaching to the right of ownership* over a person and includes the exercise of such power in the course of *trafficking in persons*, in particular women and children.”<sup>643</sup> First, where the travaux préparatoires for the 1926 Convention are silent on the issue of powers attaching to the right of ownership, the same cannot be said for the Rome Statute. The Elements of Crime detail what the powers attaching to ownership may consist of: “the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”<sup>644</sup> Iris Haenan suggests that the use of the words ‘such as’ and ‘a similar deprivation of liberty’ indicate that this list is not exhaustive; instead, it is illustrative and open-ended.<sup>645</sup> Footnote 11 of the Elements of Crimes adds depth to this description of the powers attaching to the ownership, stating that “it is understood that such deprivation of

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<sup>638</sup> Nuremberg Charter fn636, Article 2(b)-(c)

<sup>639</sup> Allain *Op cit* fn464, 262

<sup>640</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, article 5(c)

<sup>641</sup> Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, article 3(c)

<sup>642</sup> Rome Statute fn 632 article 7 (2)(C)

<sup>643</sup> *ibid*

<sup>644</sup> ICC Elements of Crimes Art 7(1)(c)

<sup>645</sup> Iris Haenen, The Parameters of Enslavement and the Acts of Forced Marriage (2013) 13(4), *International Criminal Law Review*, 895, 901

liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”<sup>646</sup> Heenan comments that, although it is generally accepted that enslavement also encompasses contemporary forms of slavery as opposed to only chattel slavery, it is apparent that the central indicia of slavery remain the idea of powers attaching to the right of ownership.<sup>647</sup> A further step forward made by the Elements of Crime was the definition given to the crime of sexual slavery. Prior to this, slavery instruments and provisions had failed to come to terms with the practice. It is defined as a crime against humanity under Article 7 of the Rome Statute and as a war crime under Article 8.<sup>648</sup> The first element of sexual slavery is the definition of enslavement.<sup>649</sup> The second element is that the perpetrator has caused the person or persons to engage in one or more acts of a sexual nature while under the exercise of the powers of ownership.<sup>650</sup> Therefore, sexual slavery should not be seen as separate but as enslavement with a sexual element.<sup>651</sup> This mirrors the approach taken by Gay McDougall in a 1998 report to the United Nations Sub-Commission on the Promotion and Protection of Human rights. McDougall wrote that the term sexual should be used as an adjective to describe a form of slavery rather than defining a separate crime.<sup>652</sup>

### Interpreting Enslavement and Blurring the Boundaries between Slavery and Trafficking

Perhaps the most important point of reference when considering the definition of slavery within international criminal law is the case of *Kunarac* which was heard by the International Criminal Tribunal for the former Yugoslavia.<sup>653</sup> In establishing a test for enslavement, the judgement serves to blur the lines between the concepts of slavery and trafficking. The case concerned detention centres where women were

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<sup>646</sup> ICC Elements of Crimes Footnote 11

<sup>647</sup> *ibid* 902

<sup>648</sup> Rome Statute fn 632

<sup>649</sup> ICC Elements of Crime Article 7(1)(g) (1), article 8 (2) (xxii) (1)

<sup>650</sup> *ibid* Article 7 (1) (g) (1), ), article 8 (2) (xxii) (2)

<sup>651</sup> Allain *Op cit* fn464, 266

<sup>652</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, Systematic rape, sexual slavery and slavery-like practices during armed conflict : final report / submitted by Gay J. McDougall, Special Rapporteur, 22 June 1998, E/CN.4/Sub.2/1998/13, para 9,

<sup>653</sup> *Kunarac* fn631 para 539

subjected to systematic sexual violence. The charges brought against the defendants came under Article 5 of the Statute for the International Criminal Tribunal for the former Yugoslavia. Article 5(c) gave the Tribunal the power to prosecute for the crime against humanity of enslavement during armed conflict.<sup>654</sup> The Trial Chamber identified the governing legal framework; first, concluding that, in the light of customary international law, enslavement is a crime against humanity consisting of “the exercise of any or all of the powers attaching to the right of ownership over a person”. The Trial Chamber established the actus reus of “exercise of any or all powers attaching to the right of ownership over a person” and the men's rea of “intentional exercise of such powers.”<sup>655</sup> The Trial Chamber provided a set of indicia for the identification of slavery:

Indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.<sup>656</sup>

The indicia provided by the Tribunal are wide-ranging, using both control and ownership as the anchoring points for understanding enslavement. Allain draws attention to the fact, that while the Trial Chamber stated that the acquisition or disposal of an individual for monetary or other compensation is not a necessary factor, it is a “prime example of the right of ownership over someone.”<sup>657</sup> In applying the indicia to the facts of the case, the conviction for enslavement was based upon the sexual exploitation of victims. This finding was evidenced in the sale of victims to fellow soldiers – the transfer of the victims for 200 Deutschmarks constituted a

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<sup>654</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 as amended (adopted 25<sup>th</sup> May 1993 by Resolution 827, article 5(c)

<sup>655</sup> Kunarac fn631 para 539-40

<sup>656</sup> *ibid* para 542

<sup>657</sup> Allain *Op cit* fn464 268

degrading attack on their dignity.<sup>658</sup> The Trial Chamber stated that it was insufficient to merely have the ability to buy, sell or trade an individual to commit the crime of enslavement. In this case, the victim was reduced to the state of property by the perpetrators.<sup>659</sup> The Trial Chamber had concluded that the victims were treated as the personal property of the accused and were subjected to coercion.

On appeal, Kunarac and Kovac submitted that the definition of the Trial Chamber was too broad. The Appeals Chamber found that the Trial Chamber had not committed an error of law and that “enslavement as a crime against humanity must be given a broader definition because of its diverse contemporary manifestations.”<sup>660</sup> The Appeal Chamber stated:

[T]he chief thesis of the Trial Chamber is that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery,” has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.<sup>661</sup>

The Appeals Chamber goes on to consider the *de facto* status of slavery and enslavement:

The Appeals Chamber will however observe that the law does not know of a “right of ownership over a person.” Article 1(1) of the 1926 Slavery Convention speaks more guardedly “of a person over whom any or all of the powers attaching to the right of ownership are exercised.” That language is to be preferred.<sup>662</sup>

The Chamber stated that in situations of contemporary enslavement that although in the absence of *de jure* ownership the victims are “subject to the extreme rights of ownership there is a destruction of the juridical character of the victim”.<sup>663</sup> While such destruction may be greater in the instance of traditional chattel slavery, “the

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<sup>658</sup> *Kunarac* fn para 756

<sup>659</sup> *ibid* para 738-739.

<sup>660</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002 para 112

<sup>661</sup> *ibid* para 117

<sup>662</sup> *ibid* para 118

<sup>663</sup> *ibid* para 117

distinction is a matter of a degree.”<sup>664</sup> The Chamber concluded that whether or not a particular practice will be deemed as enslavement be based on:

The control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.<sup>665</sup>

The Appellants contended that an absence of “resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent.”<sup>666</sup> The Appeals Chamber rejected this contention stating that “enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime.”

McGeehan argues that the interpretation of the Tribunal “laid down the gauntlet to human rights law.”<sup>667</sup> The most important aspect, for him, is the pronouncement of the Appeal Chamber that slavery has evolved to the point that it is a condition, not a legal status. Thus, to view slavery in relation to a right of ownership is not only restrictive but a misinterpretation which fails to treat the 1926 Slavery Convention as a living instrument.<sup>668</sup>

The understanding of enslavement hinges upon the interpretation of the 1926 Slavery Convention thus, international criminal law, bases its understanding on “powers attaching to the right of ownership”.<sup>669</sup> However, there is an expansion in the parameters of the concept of slavery in international criminal law to include the practice of trafficking. The possibility of prosecuting traffickers before the International Criminal Court is a topic garnering increasing academic attention.<sup>670</sup> In

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<sup>664</sup> *ibid* para 119

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<sup>666</sup> *ibid* 120

<sup>667</sup> McGeehan *Op cit* fn582, 440

<sup>668</sup> The living instrument doctrine was developed in the case law of the ECHR, the judgement of *Tyrer v United Kingdom* described the ECHR as “a living instrument, which must be interpreted in the light of present-day conditions”.

<sup>669</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

<sup>670</sup> Jean Allain. The Definition of “Slavery” in General International Law and the Crime of Enslavement within the Rome Statute in Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Nijhoff 2012), Anne Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010) Tom Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System (2005) 54(2), *The International and Comparative Law Quarterly*, H. Van der Wilt, *Trafficking in Human Beings*,

both, the definition of enslavement found in the Statute of the International Criminal Court<sup>671</sup> and the Elements of Crimes<sup>672</sup> reference is made to the practice of human trafficking. Allain states that reference to trafficking in both documents led to two different conclusions on when trafficking can be deemed enslavement.<sup>673</sup> First, the Rome Statute includes trafficking within the definition in a narrow sense, stating that enslavement may manifest in the course of trafficking when all of the powers attaching to the right of ownership are present.<sup>674</sup> However, the case differs when considering the Elements of Crimes; where it is stated that:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.<sup>675</sup>

Allain contends that this very different proposition equates enslavement with trafficking in all of its forms, thus, “by the stealth of a footnote, include within the jurisdiction of the International Criminal Court lesser types of exploitation where trafficking is present.”<sup>676</sup>

There are two diverging groups of thoughts on the potential interpretation of the Palermo Protocol in such an event. There are those who argue that trafficking is included as an element of enslavement. Thus enslavement and, therefore, trafficking are encompassed under the umbrella term slavery.<sup>677</sup> On the other hand, in relying on the legal definition of trafficking, there are those who argue that the crime of slavery or in this case enslavement represents only a potential form of exploitation resulting

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Enslavement, *Crimes Against Humanity: Unravelling the Concepts* (2014) 13(2) *Chinese Journal of International Law*, 297, Nicole Siller, *The Prosecution of Human Traffickers? A Comparative Analysis of Enslavement Judgments Among International Courts and Tribunal* (2015) 2(3) *European Journal of Comparative Law and Governance*, 236

<sup>671</sup> Rome Statute of the International Criminal Court 1998 Rome Statute (adopted 17 July 1998 entered into force 1 July 2002) article 7 (2)(C)

<sup>672</sup> ICC Elements of Crimes Art 7(1)(c)

<sup>673</sup> *Kunarac* fn657 286

<sup>674</sup> Rome Statute fn 632

<sup>675</sup> ICC Elements of Crimes Art 7(1)(c) fn 11

<sup>676</sup> *Kunarac* fn657 288

<sup>677</sup> Siller *Op cit* fn670, 236, .238 also see; Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press, 2008) 80, Alison Brysk and Austin Choi-fitzpatrick, ‘Rethinking Trafficking’ in ed. Alison Brysk and Austin Choi-Fitzpatrick *From Human Trafficking to Human Rights* (University of Pennsylvania Press, 2012)

from trafficking.<sup>678</sup> This in itself is problematic for clarity when understanding the definition of slavery.

It can be seen that the Statute explicitly borrows from the 1926 Convention the language of powers attaching to the right of ownership.<sup>679</sup> This inclusion suggests that the International Law Committee expressly intended to expand the definition of slavery beyond the limits of the 1926 Convention. This raises issues when looking to define slavery, as although trafficking is a related concept, it is not synonymous with slavery. Numerous instruments have dealt with the concept of trafficking of human beings, but it was the Palermo Trafficking Protocol which established a definition of the practice.<sup>680</sup> The biggest impediment to understanding the connection between trafficking and enslavement in the context of the Rome Statute is the lack of understanding of the substantive delineation between enslavement and trafficking.<sup>681</sup> It has been argued by Melanie O'Brien that although the laws on slavery and trafficking have different origins, Article 7(2)(c) provides for the unqualified ability to prosecute traffickers before the ICC since it is an 'example' of enslavement.<sup>682</sup> There are many different instances in which trafficking can occur where slavery does not manifest. For example, trafficking can occur where the exploitation will involve prostitution or the removal of organs. This makes the generalised inclusion of trafficking in the Rome Statute a problem in terms of definitional clarity. When looking strictly at Article 1(1) of the 1926 Convention of slavery, the act of trafficking will not necessarily always equate to a manifestation of slavery.<sup>683</sup>

The key element of the crime of enslavement in Article 7 is the manifestation of powers attaching to the right of ownership, which echoes the 1926 Convention. Tom Obokata states that such an argument is consistent with the ICTY judgment in *Kunarac*.<sup>684</sup> In *Kunarac* it was held that it was insufficient to merely have the ability to buy, sell or trade an individual to commit the crime of enslavement. In this case, the victim was reduced to the state of property by the perpetrators. Obokata argues

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<sup>678</sup> Allain *Op cit* fn464, 286

<sup>680</sup> Palermo Protocol fn 561 article 3(a)

<sup>681</sup> Siller *Op cit* fn 670 242

<sup>682</sup> Melanie O'Brien, Prosecuting Peacekeepers in the ICC for Human Trafficking (2006) 1, Intercultural Human Rights Law Review, 281, 285

<sup>683</sup> League of Nation Slavery Convention 1926 fn415

<sup>684</sup> Obokata *Op cit* fn 670 449

that this provides evidence of the need for something that goes beyond transportation and, this would be a fair assumption as exploitation, which amounts to slavery, must be present.<sup>685</sup> However, this argument is flawed as it is premised on the continuous exercise of ownership by the trafficker, and the exploitation of the victim. Further to this, the element of exploitation by its very definition is not synonymous with slavery. Not all forms of exploitation to which victims are subjected will actually equate to slavery but fall elsewhere on the continuum of exploitation. Secondly, if ‘ownership’ is terminated once the destination is reached the trafficking cannot be regarded as slavery. Ultimately, trafficking itself lacks the element of permanence which seems to be necessary when identifying slavery. A further flaw in this argument is the attempt to identify an alternative base for establishing trafficking as a crime against humanity. This is predicated on the assertion that not all trafficked individuals will end up delivered to some form of exploitation.<sup>686</sup> This in itself is fundamentally flawed as one of the constituent elements of the crime is delivery into exploitation. The process of trafficking involves many different steps: recruitment, transportation within or across borders, through legal or illegal channels of migration for the purchase, sale, transfer, receipt or harbouring of a person, using deception or coercion to deliver the victim into exploitation.

It could be argued that in some respects the key to establishing trafficking as a crime against humanity is exploitation. Trafficking can amount to slavery but only under the circumstances that fall within Art 1(1) 1926 Convention<sup>687</sup>. In such a case it would be a fair assessment to say the process of trafficking could fall under the scope of crimes against humanity as part of a more extensive process which leads to ‘enslavement’. However, the inclusion of trafficking in a general sense indicates an expansion in the parameters of the definition, moving away from the accepted norm of 1926. It also further perpetuates the prevailing yet legally incorrect blanket assumption that trafficking is the new slavery. Therefore, while trafficking in human beings seems to be a wider legal concept which encompasses slavery as a subset, judicial interpretations in relation to the Rome Statute do not reflect this.

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<sup>685</sup> *ibid*

<sup>686</sup> *ibid* 450

<sup>687</sup> League of Nation Slavery Convention 1926 fn415

### *Enslavement and Ownership:*

International criminal law provides a clearer picture in relation to what the powers attaching to ownership may be. However, at the same time, the inclusion of trafficking within the Article 7(2) (c)<sup>688</sup> definition of enslavement serves to put the task of identifying a definition of slavery two steps backwards. It expands the definition by including a crime which is already defined in its own right, as including slavery as one of many potential elements. This essentially opens the door for a more expansive approach to defining slavery with trafficking being labelled in the media as the ‘new slavery’. The interpretation of the ICTY in *Kunarac* provided the basis for the expansive approach adopted by the ECtHR in *Rantsev*. This only serves to further confuse an already unclear legal definition. It could be argued that the lack of precision in the 1926 definition is a weak point which leaves the concept of slavery vulnerable and open to exploitation and expansion by different political actors or non-governmental organisations. This creates a problem as judicial interpretation feeds into a ‘modern slavery’ narrative; it creates the backdrop for a conceptualisation of slavery which is driven by the idea of human trafficking. While the two practices are related, they are not synonymous. It is possible for trafficking to equate to slavery or enslavement in the circumstance that “any or all of the powers attaching to the right of ownership” are present. However, to completely erode the boundaries and treat the two as if they are the same opens the door to including lesser forms of exploitation within anti-slavery norms.

### **3. Conclusion: What is Slavery?**

Analysis of the evolution of anti-slavery instruments demonstrates that the definition of slavery originally developed in the 1926 Slavery Convention remains the accepted legal authority.<sup>689</sup> Although the definition has been opened up to negotiation numerous times the essence of it has remained the same. The manifestation of ownership characterises slavery as a concept that is reiterated time and time again in anti-slavery instruments and provisions. Potential flaws with the definition have been reassessed by the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia. Ultimately, a practice can and is deemed to be

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<sup>688</sup> Rome Statute fn 632

<sup>689</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

slavery if any or all of the powers attaching to the right of ownership can be identified. However, via the inclusion of the definition of slavery within human rights and international criminal law a new problem has been created. Through the spirit of interpreting the definition in a broader sense to circumvent a lack of legal ownership the boundaries between slavery and trafficking have been eroded.

The analysis of the instruments and provisions that deal with slavery make it apparent that ownership is central to the definition. As previously discussed ownership is about control, when thinking about the powers attaching to the right of ownership, the definition is focussed on the ability of the owner to control the slave. Therefore, what can they do and how absolute is the authority they exert. When considering control in relation to slavery Allain, describes it as an element which "deprives a person in a significant manner of their liberty or autonomy; and ultimately, that this control is meant to allow for exploitation and is typically maintained through coercion or violence".<sup>690</sup>

It would appear that the law has struggled most in creating a clear and unified picture of what slavery is in relation to the 1926 definition, however, it may not be possible to create this coherency. Allain comments that one only needs to look at the 1926 definition in order to set a "firm boundary within which we find slavery and where beyond such parameters instances that fail to meet the threshold of slavery can be excluded as falling short of the legal definition."<sup>691</sup> According to Allain, these boundaries can be drawn by engaging with all components of the definition and being consistent with its property paradigm. While such a task may sound simple, the ambiguities of the definition of slavery make this more complicated. As this chapter has already identified, the concept of ownership in relation to slavery is not straightforward, particularly given its vague usage in the 1926 Convention.<sup>692</sup>

The first stumbling block is ownership in a more general sense. The problem is with the use of a concept that embodies a legal right of ownership to something that is no longer a legal status but a social condition. Ownership over another person is not legally permissible. Therefore, if we acknowledge that ownership exists when another person recognises your right to immediate exclusive possession, slavery becomes a

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<sup>690</sup> Allain *Op cit* fn464, 120

<sup>691</sup> *ibid* 121

<sup>692</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

purely socio-economic construct. Jean Allain asserts that the 1926 Convention addresses a legal right of ownership, but, in practice, this is not a possibility as such a right is no longer legally permissible. Therefore, the importance of the definition must be in its applicability to de facto slavery. As demonstrated by the ECtHR in *Siliadin*, there has been difficulty when trying to engage with the concept of ownership in relation to de facto ownership. In *Siliadin*, the Court interpreted ownership in a way that necessitated the manifestation of a genuine right of ownership.

The key question, and possibly the most difficult one to answer, is what are powers attaching to the right of ownership? These unspecified powers are central in all of the instruments and provisions that have been considered, yet the guidance provided for ascertaining what these powers are is virtually non-existent. Since slavery is now de facto in nature it, therefore, follows that the powers in question must also be de facto, as powers that manifest from a right of property in a person cannot be legally recognised. As discussed in this chapter there is no clear pronouncement in either the 1926 Convention or the 1956 Supplementary Convention. The best sources of information are the comments of the United Nations Secretary-General in 1953 and from the Elements of Crimes created in relation to the Rome Statute in 2002. The elements of these expositions on powers attaching to ownership speak closely to property law conceptions of ownership and Honore's characterisation of incidents of ownership.

The definition of slavery as it stands hinges upon the application of a clear understanding of powers attaching to the right of ownership to de facto manifestations of ownership. This chapter has demonstrated that the core problem of the reliance on ownership is the use of powers attaching to ownership as the focal point of Article 1 and its inclusion in subsequent instruments. Further to this, there is a problem with the lack of information in the *travaux préparatoires* to provide insight into the intentions of the drafters of the 1926 Slavery Convention. With each of the instruments subsequent to 1926 using Article 1 as the anchoring point for a definition of slavery a problem emerges.<sup>693</sup> It is arguably difficult for these instruments to aid in the suppression of slavery if there is no clear understanding of what the accepted definition means. There is some guidance on the interpretation of this term in relation

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<sup>693</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

to the drafting of the 1956 Supplementary Convention, the Rome Statute and also in the case law of the ICTY.

The second issue explored in this chapter is how the reliance on ownership has led to a blurring of the lines between the concepts of slavery and trafficking. As demonstrated in the analysis of the *Siliadin* and *Ranstev* judgements, the 1926 Conventions reliance on ownership led to two starkly different determinations in relation to Article 4.<sup>694</sup> The first of these required the existence of a genuine right of ownership and the second interpreted the definition so widely that the ECtHR facilitated the blanket inclusion of trafficking under Article 4. This is problematic in itself from a doctrinal point of view, with the ECtHR and the ICTY both distorting the boundaries of two distinct practices. However, it is also problematic from a practical perspective, the inclusion of trafficking within anti-slavery norms introduces the risk of heightening the threshold of expected harm in trafficking cases. The analogy of human trafficking and slavery is utilised by NGOs and policymakers for a reason; it creates a strong visual of the most extreme degradation and control, reinforced by the imagery of shackles and chains. Thus, by creating such an all-encompassing connection between slavery and trafficking, the possibility is introduced of an expectation of harm, which in many cases will be completely divorced from the requirements of the human trafficking definition.

A single-minded focus on definitional clarity seems cyclical due to the problematic issue of ‘ownership’. It is more important to consider how a preoccupation with the concept of slavery means that the narrative of modern slavery, developed with the help of international judicial interpretation of slavery, creates a barrier to effectively combatting both the most extreme and lesser forms of exploitation. By focussing on the establishment of a singular definition, which according to Allain must utilise the concept of ownership, we feed into the prevailing narrative of modern slavery and the idea that slavery in the form of trafficking should be the primary focus when dealing with the issue of labour exploitation. The effect of this is simultaneously to continue to place importance on a legal definition of slavery which facilitates the use of the term modern slavery, giving prominence to some forms of exploitation, while sidelining other forms in the legislative arena. The legal analysis in this chapter will form

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<sup>694</sup> European Convention on Human Rights fn 544

the basis of the next chapter's exploration of the 'modern slavery' paradigm. The analysis will focus on the way in which the flaws in the legal definition allow modern anti-slavery activists to apply the term slavery expansively to the detriment of the other forms of exploitative labour practices which do not fall beneath the banner of trafficking.

## Chapter 4: Critiquing Modern Slavery

### 1. Introduction

You keep referring to “victims of trafficking”. We know one of the problems with the previous legislation was it was very difficult to convict under “trafficking”, and we were hopeful it would be easier to convict under “slavery”. Why do you use the word “trafficking” and not “slavery”?<sup>695</sup>  
(*Frank Field Chair of Work and Pensions Commons Select Committee*)

Over the last ten to fifteen years there has been a surge in the use of the term ‘modern slavery’ across the legal, political and civil society. Yet, this has coincided with a shift in the parameters of anti-trafficking legal frameworks; “this shift has not been immediate or seismic. It has been a gradual shift, and what was once advocated for as a specific practice of trafficking is now associated with, and at times used interchangeably with, slavery and forced labour.”<sup>696</sup> This has the result of reshaping the legal landscape so that these specific concepts “no longer retain their individuality.”<sup>697</sup> This has ultimately resulted in anti-trafficking undergoing something of a makeover, the key component of which is being rebranded as ‘modern slavery’.<sup>698</sup> The term modern slavery has entered into commonplace usage, and it is used not only synonymously but also interchangeably with trafficking. The concept of ‘modern slavery’ has no set legal definition in either regional or international instruments. Thus, the term has, at best, become an elastic umbrella, used to describe many forms of practices deemed to be exploitative. The development and subsequent utilisation of the concept of modern slavery, therefore, arguably represents domain

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<sup>695</sup> Work and Pensions Committee, Oral Evidence: Victims of Modern Slavery HC 803, Chair Frank Field, Evidence Presented by I: Baroness Elizabeth Butler-Sloss GBE, Trustee, Human Trafficking Foundation; Kate Roberts, Head of Office, Human Trafficking Foundation; and Louise Gleich, Senior Policy Officer, Human Trafficking, Christian Action Research and Education. II: Tatiana Gren-Jardan, Victim Support and Partnerships Adviser, Office of the Independent Anti-Slavery Commissioner; and Kevin Hyland OBE, Independent Anti-Slavery Commissioner, Office of the Independent Anti-Slavery Commissioner, Q137

<sup>696</sup> Nicola Piper, Marie Segrave and Rebecca Napier-Moore, Editorial: What’s in a Name? Distinguishing forced labour, trafficking and slavery (2015) 5 *Anti-Trafficking Review*, 1

<sup>697</sup> Nicole Siller, ‘Modern Slavery’, Does International Law Distinguish between Slavery, Enslavement and Trafficking? (2016) 14(2), *Journal of International Criminal Justice*, 405

<sup>698</sup> Janie A Chuang, The Challenges and Perils of Reframing Trafficking as “Modern Day Slavery” (2015) 5 *Anti-Trafficking Review*, 146

expansion<sup>699</sup> or exploitation creep<sup>700</sup> within the relevant legal frameworks. This has happened in three stages. There has, first, been an expansion of anti-trafficking frameworks to include a broad range of practices and perspectives.<sup>701</sup> Subsequently, the practice of trafficking has been folded into anti-slavery norms and legal frameworks, ultimately subsuming trafficking in its entirety within the legal definition of slavery.<sup>702</sup> Finally, this blurring of the boundaries between the practices of slavery and trafficking has been formalised with the concept of ‘modern slavery’, which frames human trafficking as slavery in the contemporary context.

The quotation that opens this chapter is taken from the House of Commons Work and Pensions Select Committee evidence session on victims of ‘modern slavery’.<sup>703</sup> The evidence session discusses the issue of whether or not those who receive a positive decision from the National Referral Mechanism (NRM) should be granted automatic leave to remain. The question “why do you use the word trafficking, not slavery”,<sup>704</sup> was posed by Frank Field MP (chair of the Select Committee) to Tatiana Gren-Jardan a Victim Support and Partnerships Adviser for the Office of the Independent Anti-Slavery Commissioner. The quote implies that trafficking is slavery and slavery is trafficking. It is legally impossible for human trafficking to equate to slavery in accordance with the legal definitions provided in the 1926 Slavery Convention<sup>705</sup> and the United Nations Palermo Protocol.<sup>706</sup> However, much of the academic literature in this area is unconcerned about the doctrinal hurdles to the construction of the concept. There is a tendency in the literature to deem a preoccupation with legal accuracy on

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<sup>699</sup> Joel Best, *Rhetoric in Claims-Making: Constructing the Missing Children Problem* (1987) 34, *Social Problems*, 101, 104

<sup>700</sup> Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, (2014) 108(4), *American Journal of International*, 609, 611

<sup>701</sup> Austin Choi-Fitzpatrick, *From Rescue to Representation: A Human Rights Approach to the Contemporary Anti-Slavery Movement* (2015) 14, *Journal of Human Rights*, 486

<sup>702</sup> *Rantsev v. Cyprus and Russia*, Application no. 25965/04 (ECtHR 7 January 2010)

<sup>703</sup> House of Commons Work and Pensions Committee, *Oral Evidence: Victims of Modern Slavery*, HC 803 (11 January 2017) Q137

<sup>704</sup> *ibid*

<sup>705</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, article 3

<sup>706</sup> League of Nations, *Convention to Suppress the Slave Trade and Slavery* (signed 26 September 1925 entered into force 9 March 1927) article 1

this issue to be either unnecessary and/or unhelpful,<sup>707</sup> or even “sneering and dismissive” and akin to an “attempt to define slavery out of existence”.<sup>708</sup>

There is a sense that being critical of the use of the concept of modern slavery is perceived as tantamount to being critical of the work of NGOs and the broader new abolitionist movement.<sup>709</sup> As a consequence, the literature is often uncritical of the term due to a large number of academics and institutions working in the area being willing to “readily consolidate and/or advocate the amalgamation of the substantive concepts of slavery and enslavement within international legal and political rhetoric.”<sup>710</sup> This chapter will explore what modern slavery is understood to mean in academic literature and probe the potential dangers of the use of this phrase within legal responses to exploitation, slavery and trafficking. This chapter will, therefore, consider the apparent blurring of the boundaries between slavery and trafficking. It will assess whether the use of the term can serve to harm rather than protect those it addresses.

The first section will examine the blurred boundaries between trafficking and modern slavery. It will examine two case studies, which will illustrate why it is necessary to question and reflect critically on the use of the term ‘modern slavery’. The first example is a failed trafficking case from the United States in which the prosecution illustrated a synonymous connection between the crimes of slavery and trafficking. This case exemplifies the raising of the threshold of trafficking frameworks due to heightened expectations of harm fostered through the ‘modern slavery’ paradigm. The second example will utilise the working conditions in Amazon Fulfilment Centres to demonstrate the blind spots in relation to labour exploitation created by the modern slavery paradigm. The second section of the chapter will examine the meaning of ‘modern slavery’. It will explore the appearance of ‘modern slavery’ within the lexicon of exploitative practices. In this section, the focus will turn to the work of

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<sup>707</sup> Fiona David, *When it Comes to Modern Slavery do definitions Matter* (2015) 5, *Anti-Trafficking Review*, 150

<sup>708</sup> Rahila Gupta, *Defining Modern Slavery out of Existence: Who Benefits?*, *Open Democracy* – 50.50 Gender, Sexuality and Social Justice (3<sup>rd</sup> February 2016) accessed at (<https://www.opendemocracy.net/5050/rahila-gupta/defining-modern-slavery-out-of-existence-who-benefits>)

<sup>709</sup> *ibid*

<sup>710</sup> Siller *Op cit* fn697, 406

Kevin Bales. Bales, a sociologist and anti-slavery activist, has been instrumental in bringing the concept of ‘modern slavery’ into modern usage. This section will attempt to grasp what the undefined term ‘modern slavery’ is understood to mean in the academic literature that has shaped the use of the concept. The final section of this chapter will build on the discussion in the previous section and utilise the reflective and critical literature on modern slavery to consider whether or not victims of ‘modern slavery’ benefit from the current construction of the concept and its increasingly flexible boundaries. The Modern Slavery Act 2015<sup>711</sup> places a heavy emphasis on the concept, yet fails to provide a definition or legal clarity of its boundaries.

## **2. Modern Slavery and Trafficking: Blurred Boundaries**

Each of the following cases studies can be situated within the ‘modern slavery’ narrative. The discussion will also illustrate the harm which may be associated with the use of the term ‘modern slavery’. These case studies will exhibit the significance of understanding what the boundaries of ‘modern slavery’ are, and what the term is currently understood to mean. Two potential strands of critique will be introduced: first, there is the practical effect of blurring the boundaries between slavery and trafficking, as demonstrated in the *Tanedo* case. Second, there is the issue of misdirection of anti-slavery/trafficking efforts to focus on organised and individual criminal behaviour to the detriment of addressing the broader causes of exploitation and vulnerability across the continuum of exploitation.

### **2.1. Tanedo – How could you Possibly be Trafficked?**

Despite the focus on ‘modern slavery’ both internationally and domestically, the concept remains undefined in both international and domestic law. There is, however, a conflation of anti-slavery and trafficking frameworks in the ‘modern slavery’ narrative. The use of ‘slavery’ and its related, emotive history has been a successful vehicle for numerous NGOs working within the anti-trafficking framework. Supporters of the ‘modern slavery’ campaign have argued that “characterising the targeted practices as anything less emotive than ‘slavery’ deploys euphemisms that

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<sup>711</sup> Modern Slavery Act 2015 C.30

justify lesser responses.”<sup>712</sup> Yet, the conflation of the two practices presents a possible risk of diluting anti-trafficking frameworks and raising the threshold of expected harm in human trafficking cases. The currency on which the ‘modern slavery’ paradigm trades is exploiting the emotive narrative of the history of slavery, in particular, that of the Trans-Atlantic slave trade. This brings with it potential negative impact for victims of exploitative practices brought under the umbrella of trafficking via domain expansion.<sup>713</sup>

The association with slavery introduces the danger of raising “the legal threshold for trafficking by creating expectations of more extreme harms than anti-trafficking norms require”.<sup>714</sup> If we return to the spectrum of exploitation and the definition of trafficking, slavery represents only one potential outcome of the process of human trafficking and the most extreme formulation at that. Human trafficking, can by definition, involve varying degrees of a number of different elements. For example, the means may involve less extreme forms such as deception or fraud, non-violent coercion (financial pressures), abuse power or transfer of payments and finally violent coercion. Exploitation can range from prostitution, domestic servitude, forced labour, forced organ harvesting or, of course, slavery.<sup>715</sup> Thus, not every occurrence of trafficking will consist of exploitation, which could be categorised as *de facto* slavery. Yet, the trafficking as ‘modern slavery’ narrative “dredges up a tragic past and harsh imagery of people labouring in fields, sometimes in chains, and beaten into submission”.<sup>716</sup> The risk this paradigm runs is creating an extreme divergence between public opinion of what is imagined to be trafficking, and what trafficking is in law.<sup>717</sup>

The question that this raises is how one can be trafficked if the situation does not mirror that of slavery? Chuang asserts that this danger is not merely theoretical, but that its effects can already be identified in trafficking cases in the USA.<sup>718</sup> This rising

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<sup>712</sup> Chuang *Op cit* fn700, 629

<sup>713</sup> Best *Op cit* fn699, 104

<sup>714</sup> *ibid*

<sup>715</sup> See UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000,

<sup>716</sup> *ibid*

<sup>717</sup> *ibid*

<sup>718</sup> Chuang *Op cit* fn698

threshold of expected harm can be identified for example in the *Tanedo*<sup>719</sup> case. This case was a class action lawsuit bought on behalf of a group of 300 Filipino teachers under the United States Trafficking Victims Protection Act.<sup>720</sup> Within this case, the escalating threshold can be identified. The applicants were recruited and offered \$17,000 to teach in Louisiana for a year (four times the annual salary in the Philippines) on an H-1B Visa (which allows US employers to employ foreign workers in speciality occupations). However, the applicants were charged a \$5000 recruitment fee. In addition, the recruiter demanded an additional \$7,500 before departure under the threat of forfeiting the initial \$5000 fee. Upon arrival, the applicants were then threatened with deportation unless they agreed to work an additional year in the post (they would also lose 10% of their salary and recruitment fees). The workers were also forced to pay the recruiters above market value for (substandard) accommodation, leaving the applicants struggling under mounting debt. Chuang comments that this was a suitable case for a trafficking prosecution under the national framework. However, the defence counsel capitalised on the connection with slavery, stating that “trafficking, in its form—in its real form exists when a worker . . . becomes a virtual slave to the employer. The more she works in the cotton fields, in the lettuce fields, in the strawberry fields.”<sup>721</sup> In this instance, the reliance on the modern slavery paradigm raised expectation and resulted in further harm to the victims in question. Chung further explores the outcome of the case remarking:

The jury rejected the trafficking claim, apparently unable to comprehend how the teachers, who had conceded their love of teaching and fondness for their students, could possibly be ‘trafficked.’ Slavery imagery helped implicitly raise the trafficking threshold by obscuring the core of what trafficking laws are intended to address—situations of exploitation from which individuals cannot escape. The case thus provides a cautionary tale of how pushing conceptions of trafficking into the slavery rubric risks undercutting social service providers’ and law enforcement authorities’ ability to identify victims, prosecutors’ willingness to prosecute traffickers, and juries’ willingness to find the trafficking threshold met and to award trafficked persons the relief sought.<sup>722</sup>

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<sup>719</sup> *Tanedo vs. East Baton Rouge Parish School Board*, No. SACV10-01172 JAK, 2012WL 5378742 (C.D.Cal.2012)

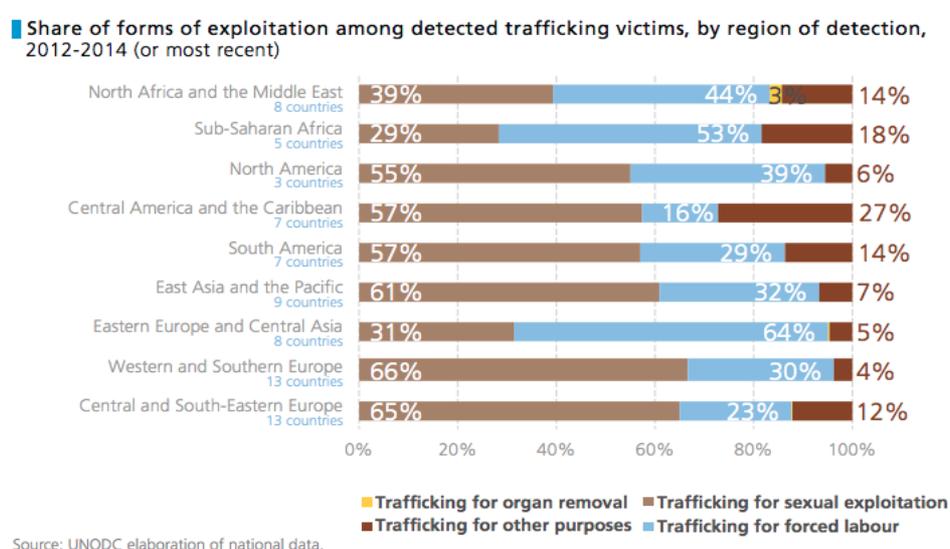
<sup>720</sup> United States of America: Victims of Trafficking and Violence Protection Act of 2000 [United States of America], Public Law 106-386 [H.R. 3244]

<sup>721</sup> *Tanedo* fn719at 166

<sup>722</sup> *Chuang Op cit* fn700, 635

Such a conflation blurs the concepts and thus, obfuscates the agency of victims; yet most trafficking victims are not enslaved. The UNODC 2016 Global Report on Trafficking in Persons<sup>723</sup>, highlighted the predominant forms of exploitation in trafficking cases.

Figure 1 Forms of exploitation among trafficking victims by region 2012-2014 taken from UNODC Global Report on Trafficking in Persons 2016<sup>724</sup>



The most common forms of exploitation identified in the specified period are sexual exploitation and forced labour. As forms of exploitation, these terms are broad descriptors, which themselves exist on spectrums. For example, forced labour is a broad concept, as defined by the ILO, it is "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily."<sup>725</sup> Thus, forced labour can span from practices such as debt bondage, prostitution, to labour in the sectors of domestic work, agriculture, construction, manufacturing and entertainment,<sup>726</sup> and, finally, *de facto* slavery.

<sup>723</sup> UNODC Global Report on Trafficking in Persons 2016 (United Nations -Publication, Sales No. E.16.IV.6)

<sup>724</sup> *ibid* 8

<sup>725</sup> ILO Forced Labour Convention 29, 28 June 1930, Art 2

<sup>726</sup> Axel Marx, Jam Wouters, Combating Slavery, Forced Labour and Human

Forced labour is, therefore, on a spectrum and when it occurs in the context of trafficking, not all victims will have faced potential enslavement.

As in the *Tanedo* case, they exercise agency and can find themselves in a situation that meets the legal requirements of trafficking even if it resembles legal employment. This situation does not resemble the imagery created through the outright comparison of trafficking to slavery. The imagery creates a divergence between the expectation and the reality of trafficking and anti-trafficking frameworks. Related to this particular critique, Ramona Vijeyarasa has commented: “equating trafficking and slavery a priori disallows consideration of the idea of autonomous decision making or the pursuit of economic betterment.”<sup>727</sup> The result of this incongruence and the neglect of victim agency is the heightening of expectations to fulfil the necessary legal requirements to be classified as a victim of trafficking.

## **2.2. Slavery? What about Labour Exploitation - Amazon Fulfillment Centers and Geographies of Containment**

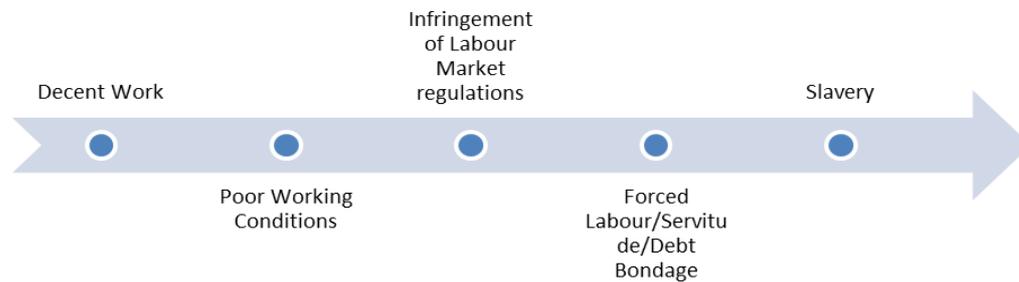
The ‘modern slavery’ narrative is constructed in such a manner that it negates the fact that exploitation exists on a continuum or a spectrum. If we return to the spectrum of exploitation, we are reminded that labour exploitation manifests itself in forms beyond enslavement, and also that exploitation exists outside of the human trafficking framework.

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Trafficking. Are Current International, European and National Instruments Working? (2017) 8(4), Global Policy Volume, 495, 496

<sup>727</sup> Ramona Vijeyarasa et al, *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and its Victims* (Taylor and Francis 2016) 50

Figure 2 Representation of the spectrum of exploitation based on the concept of a continuum of exploitation <sup>728</sup>



The reality is that the legal framework of human trafficking means that in the process of trafficking, exploitation can manifest itself at a number of different points on the spectrum (see figure 1). This exploitation does not always equate with slavery. This reinforces the point that slavery and trafficking are related but legally distinct categories. Further to this, the movement of persons (as required by anti-trafficking frameworks) is not necessary in order for a person to be exploited. Ultimately, exploitation also exists outside of the anti-trafficking frameworks. The modern slavery paradigm, therefore, obscures forms of exploitation taking place within mutually agreed working relationships. Exploitation in such contexts has the potential to increase precarity. Thus, in certain situations, exploitation can escalate across the spectrum. For example, occurrences of sub-standard or exploitative working conditions, which can often be the result of enforcement gaps, do not conform to the perception of exploitation existing solely in the realm of organised crime and individual criminal behaviour. This, therefore, represents how the use of binaries plays into a narrative of depoliticisation

One example of sub-standard or exploitative working practices in the contemporary setting is the employment conditions of agency workers in Amazon Fulfillment Centres. In recent times, the working conditions for staff employed in Fulfillment Centres has received increasing attention from the media.<sup>729</sup> Staff in Fulfillment

<sup>728</sup> Klara Skrivankova, *Between Decent Work and Forced Labour Examining the Continuum of Exploitation* (Joseph Rowntree Foundation 2010)

<sup>729</sup> Harriet Algerholm, 'Amazon workers working 55-hour weeks and so exhausted by targets they 'fall asleep standing up'', *The Independent* (27<sup>th</sup> November 2017) accessed at (<https://www.independent.co.uk/news/uk/home-news/amazon-workers-working-hours-weeks->

Centres in the UK are employed primarily via agency recruitment – PMP Recruitment and ADECCO UK.<sup>730</sup> Up to March 2017, Amazon had used the recruitment agency Transline Group, which had been paying their agency staff below the minimum wage.<sup>731</sup> The first thing to note is that agency workers form a large section of the precarious workforce in the UK. In 2016 alone, it was reported that more than 7 million people in Britain were in precarious forms of employment.<sup>732</sup> Precarity refers to “lives characterised by uncertainty and instability”.<sup>733</sup> James Bloodworth has documented the experience of workers in the Centres.<sup>734</sup> Bloodworth’s comments that subsisting on a wage of £245 per week for thirty-five hours work was theoretically feasible in Rugeley (the location of one of Amazon’s UK Fulfillment Centres). However, during time undercover as an agency worker, he explains that the payment of wages to agency staff by Transline left him and other workers underpaid on a regular basis.<sup>735</sup>

At the end of the first week instead of being paid £245 I was paid £185.20. I expected to be taxed but not as heavily as £60 on a wage of less than £250. On seeking out a Transline rep to speak to about the discrepancy, I was preempted by a, ‘Yeah, yeah we know about that, as soon as I opened my mouth ... At the end of week two, I was underpaid again. This time I received just £150: almost £100 short. It turns out that I had again been taxed at a higher rate; however, Transline has also underpaid me along with every other picker, including the migrant workers.’<sup>736</sup>

Bloodworth also revealed that the ‘pickers’ employed via Transline were on temporary zero-hours contracts, never receiving an employment contract, being told by an agency rep that “a contract did not exist because I was on a zero hours

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[conditions-targets-online-shopping-delivery-a8079111.html](https://www.retailgazette.co.uk/blog/2017/11/amazon-controversy-warehouse-working-conditions/) ), Elias Jahsan, Amazon Dragged into Controversy over warehouse conditions, *The Retail Gazette* (27<sup>th</sup> November 2017) accessed at (<https://www.retailgazette.co.uk/blog/2017/11/amazon-controversy-warehouse-working-conditions/>), Hilary Osborne, Amazon accused of ‘intolerable conditions’ at Scottish warehouse, *The Guardian* (12<sup>th</sup> December 2016) accessed at (<https://www.theguardian.com/technology/2016/dec/11/amazon-accused-of-intolerable-conditions-at-scottish-warehouse>)

<sup>730</sup> Amazon Jobs – Fulfillment Centre Operative accessed at

([https://www.amazon.jobs/en/landing\\_pages/warehouse-operative](https://www.amazon.jobs/en/landing_pages/warehouse-operative))

<sup>731</sup> Simon Goodley, Employment agency at centre of Sports Direct scandal axed by Amazon, *The Guardian* (13<sup>th</sup> March 2017)

<sup>732</sup> Robert Booth, More than 7m Britons now in precarious employment, *The Guardian* (15<sup>th</sup> November 2016)

<sup>733</sup> Hannah Lewis, Peter Dwyer, Stuart Hodgkinson, Louise Waite, *Precarious Lives – Forced Labour, Exploitation and Asylum* (Policy Press 2015) 11

<sup>734</sup> James Bloodworth, *Hired: Six Months Undercover in Low-Wage Britain* (Atlantic Books London 2018)

<sup>735</sup> *ibid* 65

<sup>736</sup> *ibid* 67

contract.”<sup>737</sup> Agency reps then exploited the precarity of the employment situation for agency workers at the Fulfillment Centres; most workers would not make it past the nine month mark - to be given a permanent contract, agency workers needed to be in possession of a “coveted blue badge”.<sup>738</sup> Bloodworth observes: “I was told by several employees that the prospect of attaining a blue badge was often used to coax workers into doing things they would not have otherwise entertained.”<sup>739</sup>

The temporary nature of the type of contracts discussed by Bloodworth speaks to O’Connell Davidson’s comments on the differentiation between agency and autonomy in free wage labour.<sup>740</sup> Workers are told their position is temporary, but also precarious as there are “about 70 people waiting for these jobs” and only the “best performing staff are kept on”.<sup>741</sup> They are offered a temporary job with the potential reward of permanent employment, facing them with a choice of starvation and carrying out difficult work under precarious conditions that they “would not otherwise agree to perform.”<sup>742</sup>

The alleged working conditions of Amazon workers highlights further the flaws in the modern slavery paradigm. Guy Standing has defined the precariat (those described as precarious) as lacking labour related security including: labour market security, employment security, job security, work security, skill reproduction security, income security and representation security.<sup>743</sup> In this situation, the workers are indeed in a voluntary working relationship, and they are paid; however, agency and autonomy are different things. Agency workers are precarious<sup>744</sup> as they do not have permanent contracts and cannot entirely rely on receiving a full weeks’ worth of working hours or even full wages for the work completed. In November 2017, a Sunday Mirror exposé uncovered the reality of the harsh work conditions suffered by staff employed

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<sup>737</sup> *ibid* 19

<sup>738</sup> *ibid* 20

<sup>739</sup> *ibid*

<sup>740</sup> Julia O’Connell Davidson, *New Slavery, Old Binaries: Human Trafficking and the ‘borders of freedom’*, (2010) 10(2), *Global Networks*, 244, 246

<sup>741</sup> Bloodworth *Op cit* fn734, 20

<sup>742</sup> R Steinfeld. *Coercion, Contract and Free Labour in the Nineteenth Century* (Cambridge University Press 2001) 14

<sup>743</sup> see Guy Standing, *The Precariat – A New Dangerous Class* (Bloomsbury 2011) chapter 1

<sup>744</sup> *ibid*

by Amazon.<sup>745</sup> Alan Selby, a journalist, worked undercover as a picker in the company's Essex centre. Describing the work as “relentless”, Selby recounts:

Timed toilet breaks, impossible targets and exhausting, 'intolerable' working conditions are frequent complaints. Staff have been paid less than the living wage, and it even emerged drivers had faced fines for 'early' deliveries ... Cameras watched my every move and a screen in front of me offers constant reminders of my “units per hour” and exactly how long each has taken ... I had nine seconds to grab and process an item to be sent for packing – a target of 300 items an hour, for hour after relentless hour.<sup>746</sup>

During his time at the Rugeley Centre, much like Selby, Bloodworth learned that workers' time was intensively micro-managed; workers, he says, were told on a daily basis not to take too much idle time. Echoing the account given by Selby, idle time mostly consisted of breaks and bathroom visits, which were heavily monitored “as if the need to perform bodily functions would eventually melt away in the name of productivity.”<sup>747</sup> Amazon has recently patented wearable technology that will allow them to monitor and control the actions and movements of all warehouse workers to increase productivity. This will allow the degree of control that an employer can exercise over precarious agency workers to grow exponentially. However, it would appear that, for someone in voluntary ‘legitimate’ employment, the label of exploitation is more difficult to apply.<sup>748</sup>

The scenario in Amazon centres is reminiscent of Stephanie Camp's discussion of ‘geographies of containment’ on antebellum plantations.<sup>749</sup> Camp states that “at the heart of the process of enslavement was a spatial impulse: to locate bonds people in plantation space and to control, indeed to determine their movements and activities.”<sup>750</sup> Consequently, exploitation took place in the context of a “theory of

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<sup>745</sup> Alan Selby, Undercover at Amazon: Exhausted humans are inefficient so robots are taking over, *The Mirror* (26<sup>th</sup> November 2017) accessed at (<https://www.mirror.co.uk/news/uk-news/undercover-amazon-exhausted-humans-inefficient-11593145>)

<sup>746</sup> *ibid*

<sup>747</sup> Bloodworth *Op cit* fn734, 50

<sup>748</sup> Heather Kelly, Amazon's idea for employee-tracking wearables raises concerns, *CNN Technology*, (2<sup>nd</sup> February 2018) accessed at (<https://money.cnn.com/2018/02/02/technology/amazon-employee-tracker/index.html>)

<sup>749</sup> Stephanie Camp, *Closer to Freedom: Enslaved Women and Everyday Resistance in the Plantation South* (University of North Carolina Press 2004)

<sup>750</sup> *ibid* 12

mastery at the centre of which was the restriction of slave movement”.<sup>751</sup> Therefore, it was not simply legal ownership which defined the enslavement and facilitated exploitation; it was also these ‘geographies of containment’. Such restraints included the ability to “define bond people’s proper location” allowing the slaveholder to dictate spatial control.<sup>752</sup> Thus, a geography of containment consisted of “laws, customs and ideals [that came] together in a systematic constriction of slave movement that helped to establish slaveholders sense of mastery.”<sup>753</sup> This geography then enabled and legitimated some forms of movement and not others.<sup>754</sup>

The control of time was a central element of captivity and restraint, people were punished for straying “by a single hour, by night or day as well as by a single mile” as “time measured movement, and it also regulated work”.<sup>755</sup> The management of time was aided by technological advancements produced by an “age of improvement.”<sup>756</sup>

Innovations in the uses of time and timepieces were a part of the movement for scientific agriculture. The clock was a tool that promised to somewhat rationalise the agricultural workday otherwise governed by nature. The beginning and the end of the workday as well as any breaks were increasingly announced by the soundings of bells and horns.<sup>757</sup>

Camp asserted that “no moment in the day, including breaks and meals, was too small to merit attention and direction.”<sup>758</sup> Such a degree of control of time, movement and location via the use of technological innovation is reminiscent of the descriptions of control depicted in Bloodworth’s experience as an agency worker in the Amazon Fulfillment Centre. A chord is struck in particular in the management of agency workers’ time. Of course this is to be expected, to an extent; after all, it is the role of the employer to dictate the job role, its parameters and the tasks the employee must fulfil. However, the extent to which this manifests in the context bears parallels to the intense management of time on the plantation. For example, Bloodworth’s

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<sup>751</sup> *ibid* 13

<sup>752</sup> *ibid* 17

<sup>753</sup> Sandra R Joshel, ‘Geographies of Slave Containment and Movement’ in Michael George (ed.) *Roman Slavery and Roman Material Culture* (University of Toronto Press 2013) 100

<sup>754</sup> *Camp Op cit* fn749

<sup>755</sup> *ibid* 19-20

<sup>757</sup> *ibid* 20

<sup>758</sup> *ibid* 22

examination of the minimisation of idle time is revelatory in the light of the high targets set within a certain time frame. Bloodworth remarks:

I was picking around 180 items a session and averaging about ninety items per hour. My score wasn't particularly impressive either – the red haired Romanian girl who claimed to 'hate' the job was hitting 230 items per session. Nimral approached me at lunch on the second day with a wider grin than usual to boast about how he was hitting forty items an hour. I didn't have the heart to tell him just how bad that was, so instead I lied, telling him I had just about managed fifty.<sup>759</sup>

To contextualise this, the Fulfillment Centre in Rugeley is described as a 70,000 square foot labyrinth. Bloodworth would walk around 10 miles per shift. Time was managed to an extreme degree whereby toilet breaks were scheduled and idle time would be logged for breaks to locate the nearest bathroom or water machine.<sup>760</sup>

Bloodworth describes the working conditions as:

Like a totalitarian state, rules were laid down that it was impossible not to flout. Dashing around was obligatory if you wanted to meet the exacting targets set for every worker. Similarly, water breaks were permitted, but to go off in search of a water dispenser was to run the risk of 'idling', another transgression you were often warned about.<sup>761</sup>

While this discussion of geographies of containment is not intended to suggest that workers in Amazon warehouses are enslaved, the frameworks of control, which are a hallmark of exploitation, appear familiar. However, within the current modern slavery narrative, such systems of labour abuse do not appear to merit attention. The concept of modern slavery does not recognise that exploitation exists on a spectrum. Furthermore, contemporary discussions of modern slavery are oblivious to the fact that while workers consent to work, in places such as Amazon Fulfillment Centres, their choice to remain there in the face of exploitative practices, which bear the hallmarks of control within geographies of containment, is not necessarily a free and autonomous choice, due to the precarious nature of their employment.

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<sup>759</sup> Bloodworth *Op cit* fn734 46

<sup>760</sup> *ibid* 44

<sup>761</sup> *ibid* 48

### 3. What is Modern Slavery: Defining an Undefined Term

The *Tanedo* case and the conditions in Amazon Fulfilment Centres illustrate potential flaws or blind spots in the formulation of the concept of ‘modern slavery’. This section will not seek to offer a single definition of what ‘modern slavery’ is, and there is no unified legal understanding of what falls within its scope. The Modern Slavery Act 2015 demonstrates this.<sup>762</sup> The Act uses the concept of ‘modern slavery’ as an umbrella term, failing to place the concept on a solid legislative footing by providing a clear definition. In this respect, it, therefore, contrasts with the legal definitions of slavery and trafficking and other related forms of exploitation. Instead, this section will explore how the term is conceptualised and used in academic literature. This discussion will demonstrate that ‘modern slavery’ is an elastic and ever-expanding term.

#### 3.1 The Beginning of Modern Slavery: Globalisation and Disposable People

The concept of ‘modern slavery’ entered into the academic discourse of slavery and exploitation in the late 1990s and early 2000s. The term began its ascent to prominence with the publication of Kevin Bales’ *Disposable People* in 1999.<sup>763</sup> In his early work, Bales identifies two broad categorisations of slavery, ‘new slavery’ and ‘old’ slavery. Bales writes that “we might think that slavery is a matter of ownership, but that depends on what we mean by ownership. In the past slavery entailed one person legally owning another, but modern slavery is different.”<sup>764</sup> From the offset Bales establishes that even though there are differences between the terms ‘old’ and ‘new or modern slavery’, it can be said that “the total control of one person by another for purpose of economic exploitation” characterises both forms.<sup>765</sup>

Bales conceptualises ‘new or modern slavery’ by looking to distinguish it from what he calls ‘old slavery’. Bales asserts that while, over the years, slavery has persisted it has taken different forms and changed in crucial ways.<sup>766</sup> The central distinction between new and old slavery is the absence of legal ownership; contemporary

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<sup>762</sup> Modern Slavery Act 2015 C.30

<sup>763</sup> Kevin Bales, *Disposable People*, (3<sup>rd</sup> Edition, University of California Press 2012)

<sup>764</sup> *ibid* 29

<sup>765</sup> *ibid*

<sup>766</sup> *ibid* 34

slaveholders “have all the benefits of ownership without the legalities.”<sup>767</sup> Bales, therefore, argues that in the absence of legal ownership, which, from his perspective characterised and facilitated enslavement, there are two key factors that have led to the rise of ‘new/modern slavery’. The first factor is rapid global population growth post World War II. Bales highlights that areas such as South-East Asia, South America and Africa that have experienced the largest population growth are also the areas where ‘new/modern slavery’ is most prevalent.<sup>768</sup>

Over half the population in some countries is under the age of fifteen. In countries that were already poor, the sheer weight of numbers overwhelms the resources at hand. Without work and with increasing fear as resources diminish, people become desperate, and life becomes cheap. Especially in those areas where slavery had persisted or was part of the historical culture, the population explosion radically produced a glut of potential slaves.<sup>769</sup>

Bales contends that areas in which poverty already existed as a factor in precarity, it is exacerbated through population growth; this then heightens vulnerability to exploitation as scarcity of resources and infrastructure increases. Bales, thus, characterises over-populated states as fertile ground for exploitative practices.

Second and concurrently, Bales factors in the processes of globalisation and modernisation. These processes have brought great wealth to some but for many continued or increased poverty has been the result. Bales comments that, although globalisation can bring certain improvements, governments place an emphasis on “economic growth that is not just in their collective self-interest but required by global financial institutions, little attention is paid to sustainable livelihoods for the majority.”<sup>770</sup> Therefore, the rapid increase in populations combined with inequitable economic systems led to ‘new or modern slavery’.

Bales creates two ‘ideal types’ of slavery based on this proposition, stating that the relationship between the enslaved and the slaveholder has been changed due to societal and economic factors; this, in turn, has created a new form of slavery.

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<sup>767</sup> *ibid* 29

<sup>768</sup> *ibid* 33

<sup>769</sup> *ibid*

<sup>770</sup> *ibid* 31

Figure 3 Depicting the distinction between old/new slavery taken from Bales 2012 <sup>771</sup>

OLD SLAVERY	NEW SLAVERY
Legal Ownership	Legal Ownership Avoided
High Purchase Cost	Very Low Purchase Cost
Low Profits	Very High Profits
Shortage of Potential Slaves	Glut of Potential Slaves
Long-term Relationship	Short Term Relationship
Slaves Maintained	Slaves Disposable

Figure 3 is taken from *Disposable People* and illustrates Bales' early thinking on the distinctions between the two types of slavery his work identifies. The form of 'old slavery' is based on American Antebellum plantation slavery, whereby slaves were expensive, yielded low profits, and, due to legal ownership, enslavement was a long-term status. Taking into account Bales' arguments about the root causes of 'modern/new slavery', it can be seen that it is characterised in direct opposition to 'old slavery'. Thus, 'new/modern slavery' is characterised by a lack of legal ownership, an abundance of potential slaves and, therefore, a low purchase cost and ultimately disposability of the enslaved. Bales roots most of his work not only in *Disposable People* but also in later publications in global qualitative case-studies, for example: sex slavery in Thailand, chattel slavery in Mauritania and the brick kiln industry in India and Pakistan<sup>772</sup>.

Bales continues his exploration of 'old' and 'new/modern slavery' in later work, considering the possibility of a definition encompassing all forms of slavery – 'modern slavery'. The conceptualisation of 'new slavery' is gradually replaced by 'modern slavery'. He observes: "Modern slavery is globalised, meaning that forms of

<sup>771</sup> *ibid* 35

<sup>772</sup> see Bales *Op cit* fn780 Chapter 2 considers brothels in Thailand, Chapter 3 vestiges of chattel slavery in Mauritania, Chapter 4 batterias (charcoal marking camps) in Brazil, Chapter 5/6 Brick Kiln Industry in India and Pakistan

slavery in different parts of the world are becoming more alike.”<sup>773</sup> Bales begins to apply the label of ‘modern slavery’ to the differentiations made in Figure 1. The key to defining or understanding what ‘modern slavery’ is, Bales says, is to look beyond the packaging to the key characteristics of the enslaved experience. This definition is formulated by considering the “economic exploitation and the maintenance of violent control.”<sup>774</sup> To focus on legal ownership is to obscure the reality of enslavement. Further to this, the underlying nature of modern slavery (its outward appearance does not correspond to ‘old slavery’) makes a clear definition essential.<sup>775</sup> Therefore, Bales defines slavery as: “A relationship in which one person is controlled by another through violence, the threat of violence, or psychological coercion, has lost free will and free movement, is exploited economically and is paid nothing beyond subsistence.”<sup>776</sup>

Thus, according to Bales’ definition of modern slavery, if one can walk away from the exploitative situation, it ceases to be a case of enslavement. Bales states that globally there are four common forms of ‘modern slavery’ – chattel slavery, debt bondage/bonded labour, contract slavery, forced labour.<sup>777</sup> Hence, Bales uses the concept of ‘modern slavery’ as an umbrella term, under which practices he deems to fall within the definition provided will fall. However, Bales also introduces the crime of human trafficking into his discussion on ‘modern slavery’, stating that “trafficking is the crime of carrying someone into slavery by force or fraud.”<sup>778</sup> Thus, trafficking is a mechanism or conduit, which delivers people into enslavement. Bales states that a majority of the world’s enslaved population are “sedentary” and that trafficking plays no role in their exploitation.<sup>779</sup> However, he also contends “human trafficking and the demand for trafficked people shape modern slavery”.<sup>780</sup> Bales does not expand on the relationship between trafficking and slavery, so, his work offers no clarification as to what degree the concept of ‘modern slavery’ subsumes the human trafficking framework.

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<sup>773</sup> Kevin Bales, Zoe Trodd, Alex Kent Williamson, *Modern Slavery: The Secret of 27 Million People* (One World 2009)

<sup>774</sup> *ibid* 30

<sup>775</sup> *ibid* 30-31

<sup>776</sup> *ibid* 31

<sup>777</sup> See Bales *Op cit* fn773 33-35

<sup>778</sup> *ibid* 39

<sup>779</sup> *ibid* 35

<sup>780</sup> Kevin Bales, *Understanding Global Slavery: A Reader* (University of California Press 2005) 23

Bales most recent work continues to utilise the concept of ‘modern slavery’ to frame his discussion on contemporary exploitation. In *Blood and Earth*,<sup>781</sup> he explores a hypothesised link between ‘modern slavery’ and environmental destruction. However, Bales does not offer an explanation as to what ‘modern slavery’ means in this context, let alone slavery full stop. The concept of ‘modern slavery’, therefore, remains an elastic term within Bales work. It is an umbrella term developed from the creation of the ‘old’/‘new’ slavery binary under which any form of labour exploitation can fall.

Aspects of this line of thinking are problematic. The forms that slavery or labour exploitation may have taken historically have been subject to change. However, as demonstrated through a discussion on the legal definition of slavery, the core nature of slavery is ownership and consequently control for the purpose of profit. Therefore, the actual form that slavery takes is not the defining characteristic; instead it is the relationship of control and dominance that allow the exploitation for profit to take place. Orlando Patterson has argued, in this regard, that the distinctions drawn by Bales in relation to ‘new’ and old ‘slavery’ are underpinned by one fundamental error. According to Patterson, this error is “equating what he calls the “old slavery” with the capitalistic slave systems of the Americas, especially the United States South.”<sup>782</sup> The Antebellum system represents only one model of slavery and exploitation across the entire history and geography of enslavement.<sup>783</sup> Therefore, given Bales’ focus on the global nature of slavery facilitated by globalisation in the contemporary context, it is surprising to “confine” ‘old slavery’ in such a way.<sup>784</sup>

Bales has himself reflected on the flaws in his development of the old and new slavery binaries:

If there was one thing I would change in this book it is the emphasis I gave to the idea of “old” and “new” slavery. In the late 1990s, I was comparing the slavery I was finding in the field with my admittedly limited understanding of

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<sup>781</sup> Kevin Bales, *Blood and Earth: Modern Slavery, Ecocide and the Secret to Saving the World* (Random House 2016)

<sup>782</sup> Orlando Patterson, ‘Trafficking, Gender and Slavery: Past and Present’ in Jean Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press 2012) 330

<sup>783</sup> *ibid*

<sup>784</sup> *ibid*

historical slavery. In my mind I was building typologies in order to help me and others make sense of what I was seeing. Not surprisingly my categories, as a first stab at understanding, were simplistic ... But like a lot of simple ideas, the notion of “old” and “new slavery” became popular with journalists. The tidy contrast helped to illustrate and explain how so many people could be in slavery at the beginning of the twenty-first century even though slavery was a thing of the past. The result was that this flawed conceptual tool became common currency, something I regret.<sup>785</sup>

Bales observes that that use of simplistic binaries reflects neither the plethora of historical and contemporary modes of exploitation nor the continuum, both historical and theoretical, on which exploitation exists. However, while Bales recognises the limitations of binaries and attests to his regret that such concepts have become “common currency”, his work continues to utilise the concept of modern slavery. While he may have long abandoned the terminology of ‘old’ and ‘new’, the use of the concept of ‘modern slavery’ itself represents a binary; it suggests that slavery and exploitation today are in opposition to historical slavery. Throughout his work, Bales recognises that the basic foundation of slavery remains the same. Therefore, the question to consider is why must we package contemporary exploitation as modern slavery?

### 3.2 Modern Slavery and the Trafficking Make Over

The popularisation of the problematic concept of ‘modern slavery’ is indisputable. The concept was loose and undefined in the work of Bales, characterised as it was by the social and global phenomena of population growth and globalisation. The concept has developed a momentum of its own, without definitional confinement. Rather it has expanded to include, perhaps even to synonymise, the concept of human trafficking. This section will consider how the concept of ‘modern slavery’ has come to intersect with the crime of human trafficking. The discussion will focus on the key literature that demonstrates the exploitation creep that has taken place within the ‘modern slavery’ discourse. This section will highlight how the literature discusses slavery and trafficking as synonymous concepts. Romana Vijeyarasa has described this shift towards the modern slavery/trafficking narrative as a “domino effect”.<sup>786</sup>

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<sup>785</sup> Bales *Op cit* 763 19

<sup>786</sup> Ramona Vijeyarasa et al, *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and its Victims* (Taylor and Francis 2016) 7

### 3.2.1. Domain Expansion and Exploitation Creep – Slavery, Trafficking and Modern Slavery

The construction of the concept of ‘modern slavery’ arguably represents a domain expansion of the social problem of ‘slavery’. Joel Best writing on the area of claim-making in relation to social problems comments that “perhaps the most fundamental form of claims-making is to define a problem-to give it a name.”<sup>787</sup> Ultimately claim-makers aim to persuade their audience that “X is a problem that Y offers a solution or that policy Z should be adopted to bring that solution to bear”.<sup>788</sup> In the instance of modern slavery, what we see is the categorisation of a new problem as a case of a familiar problem.<sup>789</sup> A definition will identify a given phenomenon and set the boundaries, in order to determine what will and will not fall inside the issues domain.<sup>790</sup> However, these boundaries are not definitive and can shift, Best refers to this as ‘domain expansion’ and ‘domain contraction’.<sup>791</sup>

Domain expansion involves redefining a social problem by extending the category’s boundaries, thereby increasing what is considered part of the problem.<sup>792</sup> Part of the attraction of domain expansion may be its relative simplicity. Once a category gains broad acceptance, it is probably easier to argue that its domain should be expanded to encompass other troubling conditions, than it would be to successfully mount a campaign to arouse concern for a new social problem. If people understand that child abuse is bad, and if X is understood to harm children, then why not agree that X, too, is a form of child abuse?<sup>793</sup>

This process of expanding the boundaries of a social issue has also been characterised as “exploitation creep.”<sup>794</sup> According to Chuang, “[e]xploitation creep...has been expressed through efforts to expand previously narrow legal categories—at least in terms of rhetoric and policy, but in some cases also in hard law—in a strategic bid to subject a broader range of practices to a greater amount of public opprobrium.”<sup>795</sup>

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<sup>787</sup> Best *Op cit* fn699 104.

<sup>788</sup> *ibid* 102

<sup>789</sup> *ibid* 20

<sup>790</sup> *ibid* 104

<sup>791</sup> *ibid* 20

<sup>792</sup> Joel Best, *Threatened Children: Rhetoric and Concern about Child-Victims* (University of Chicago Press 1990)

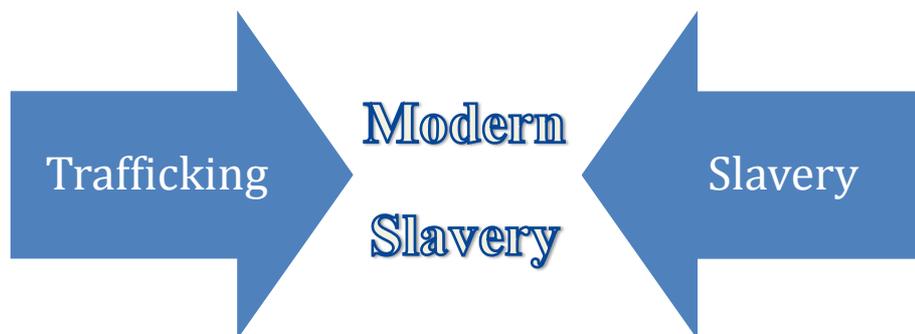
<sup>793</sup> Best *Op cit* fn699, 20700

<sup>794</sup> Chuang fn62 611

<sup>795</sup> *ibid* 611

The human trafficking framework itself has been expanded both in academic literature and legal agreements to include a broad range of practices; however, the focus of this thesis is the reverse – how human trafficking has been caught within an expanding modern slavery framework. Domain expansion or exploitation creep comes in the construction of the modern slavery narrative and the merging of trafficking and slavery into one domain.

Figure 4 The depiction of the convergence of trafficking and slavery - this is representative of the second stage of domain expansion of the legal definition to include trafficking.



The analysis in the following section of this chapter will demonstrate how this expansion has materialised in the academic literature and will critically reflect on the legal consequences of such an expansion as well as the potential effects that the use of this term may have.

### *3.2.2. Trafficking in Human Beings as Modern Slavery*

It is worth recalling our basic definitions. Slavery, according to the 1926 definition, “is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>796</sup> Trafficking in persons is characterised by three elements: the act (transportation or movement), the means (threats, force, deception etc) and the purpose (exploitation).<sup>797</sup> These definitions are open to criticism, and are, as has been demonstrated not without problem; however, one thing

<sup>796</sup> 1926 Slavery Convention fn 706 article 1

<sup>797</sup> Palermo Protocol fn705 article 3

is clear. These are different phenomena. In short, slavery is a condition whereas trafficking is a process.

In the last decade, there has been a “rebranding of global anti-trafficking” as ‘modern slavery’<sup>798</sup> in legal and academic discourse. As previously discussed, slavery and trafficking are related but not synonymous practices; they remain legally distinct. However, developments in the literature surrounding the two concepts have served to blur the lines and create a sense of interchangeability between the two terms.

‘Modern slavery’ as used by NGOs, practitioners, lawyers and lawmakers does not have any legal foundation or definition. Nicole Siller comments that this does not appear to inhibit its use in any way to include slavery, enslavement and trafficking in persons.<sup>799</sup> Siller observes: “[A] vast number of scholars, as well as various institutions (including United Nations’ bodies), working in this realm readily consolidate and/or advocate the amalgamation of the substantive concepts of slavery and enslavement with trafficking within international legal and political rhetoric.”<sup>800</sup>

Anne Gallagher has considered the use of international prohibitions on slavery, servitude and forced labour to protect trafficking victims.<sup>801</sup> Although Gallagher does not make use of the term ‘modern slavery’, she does discuss the relationship between slavery and trafficking frameworks stating that:

The link between trafficking and traditional chattel slavery is immediately obvious. Both practices involve the large-scale movement of individuals across national borders for exploitative purposes. Both are primarily conducted by private entities for private profit. Both systems seek to secure control over individuals by minimising personal autonomy. Neither system can be sustained without massive and systematic violations of human rights.<sup>802</sup>

Gallagher sees links between the concepts – their roots in exploitation, the objective of profit, the operationalisation through control and the attendant violation of human

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<sup>798</sup> Chuang *Op cit* fn700, 146–149

<sup>799</sup> Siller *Op cit* fn697, 406

<sup>800</sup> *ibid*

<sup>801</sup> Anne Gallagher, Using International Human Rights Law to Better Protect Victims of Trafficking: Prohibitions on Slavery Servitude, Forced Labour and Debt Bondage in *Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (Brill 2008) see also Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010)

<sup>802</sup> *ibid* 401

rights. However, despite these linkages and the “evidence of a widening of the norm” to include new practices within prohibitions on slavery, Gallagher argues that analysis of international legal frameworks makes it “difficult to sustain an absolute claim that trafficking in all its modern manifestations” can be equated with slavery.<sup>803</sup> Siller recognises Gallagher’s statement that “the current practice of international law equating ‘trafficking as slavery’ is presently ‘in a state of flux.’<sup>804</sup> Therefore, she considers whether or not international law should differentiate between the two practices.<sup>805</sup> On an analysis of international legal frameworks, Siller concludes: “each instrument demonstrates that the legal concepts of slavery and enslavement are distinct from trafficking.”<sup>806</sup> However, due to the judicial engagement with such frameworks, for example, by the ICTY in *Kunarac*, “boundaries between the offences of trafficking and enslavement become indistinct.”<sup>807</sup>

The boundaries of the concept of ‘modern slavery’ were assessed in a report authored by Gary Craig and others in 2007 for the Joseph Rowntree Foundation.<sup>808</sup> The report initially states that exploitative practices, which fall under the term ‘modern slavery’, entail three elements: “they involve severe economic exploitation; the absence of any framework of human rights; the maintenance of control of one person over another and the prospect or reality of violence.”<sup>809</sup> Further to this, the report states that it is essential to distinguish poor (or appalling) working conditions from slavery.

It is also important to be able to distinguish what are poor – or even appalling – working conditions (that occur in the UK not infrequently) from slavery. The key aspect of slavery, as the Palermo Protocol makes clear is that of coercion. Coercion exists “in any situation in which the person has no real and acceptable alternative but to submit to the abuse involved” Abuse in turn refers to the treatment of one person by another specific person (covering one or more of the six indicators of forced labour devised by the International Labour Organization [ILO]), and needs to be distinguished from the situation

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<sup>803</sup> *ibid* 442

<sup>804</sup> Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) 191.

<sup>805</sup> Siller *Op cit* fn697

<sup>806</sup> *ibid* 418

<sup>807</sup> *ibid* 423

<sup>808</sup> Gary Craig et al, *Contemporary Slavery in the UK: Overview and Key Issues* (Joseph Rowntree Foundation 2007)

<sup>809</sup> *ibid* 12

of people being forced into dangerous or difficult work by economic circumstances or other impersonal forces.<sup>810</sup>

By regarding trafficking as slavery rather than distinct practices, the above quote demonstrates a complete blurring of the lines between human trafficking and slavery. When considering definitions for the concept of ‘modern slavery’, the authors consider the international legal definitions of slavery, however, an emphasis is placed on human trafficking and forced labour and the requisite legal frameworks.<sup>811</sup> Thus, the report seems to place the practice of trafficking firmly within the boundaries of ‘modern slavery’, without considering the potential limits to creating an all-encompassing link between the two concepts. However, given the nature of this type of publication, it should be recognised that there is less scope for in-depth analysis of the doctrinal distinctions between human trafficking and slavery.

Silvia Scarpa has explored the concept of ‘modern slavery’ and the subsequent relationship between the practices of trafficking and slavery in more depth.<sup>812</sup> Scarpa has commented that human trafficking is a “slavery-like practice of our time.”<sup>813</sup> She initially conceptualises human trafficking as a slavery-like practice and a form of modern slavery. She surveys the legal frameworks for slavery and trafficking to ascertain whether there is sufficient protection for trafficking victims. Scarpa frames the relationship between slavery and trafficking in a number of ways. Allain, commenting critically on Scarpa’s work, captures her characterisation as follows:

The author first states that trafficking is a ‘slavery-like practice’, then goes on to argue that trafficking in persons is a ‘new form of slavery’; later that trafficking equates to the slave trade; and finally moves to say that trafficking in persons amounts to slavery when it meets the definitional criteria of slavery.<sup>814</sup>

Allain is rightly unconvinced of Scarpa’s attempt to recast trafficking as slavery. While attempting to verify the status of trafficking as the new slavery on a more concrete footing, Scarpa, in fact, succeeds in further blurring the lines. Indeed Allain

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<sup>810</sup> David Weissbrodt, *Anti-Slavery International, Abolishing Slavery and its Contemporary Forms* (United Nations, New York, Geneva 2002)

<sup>811</sup> *ibid* 15-18

<sup>812</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford Scholarship Online 2008)

<sup>813</sup> *ibid* 3

<sup>814</sup> Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill 2015) 202

states that it is quite legally impossible for trafficking to be a new form of slavery as, “that would require the snake to swallow its own tail.”<sup>815</sup> Trafficking is a process, defined under both the Palermo Protocol<sup>816</sup> and the Council of Europe Trafficking Convention.<sup>817</sup> Scarpa’s argument would require that “other forms of exploitation must also be swallowed up by the definition of slavery.”<sup>818</sup> This is the case because in both instruments – Palermo and the CoE Convention – slavery is one of many forms of exploitation related to trafficking in human beings. Trafficking cannot be a new manifestation of slavery as it “is but one example of eight component parts (examples of exploitation) of one of three elements (the means, the method and the purpose) of the definition of trafficking.”<sup>819</sup> However, Scarpa’s argument ultimately settles on the thesis that trafficking amounts to enslavement.<sup>820</sup>

As highlighted by Siller, the development of the international criminal law on slavery as a crime against humanity has served to blur the lines between trafficking and slavery.<sup>821</sup> Through analysis of the *Kunarac* judgement, Scarpa concludes “trafficking in persons may be included in the definition of slavery given by the Slavery Convention if the elements listed by the ICTY are met”.<sup>822</sup> However, Allain refutes Scarpa’s conclusion that in certain circumstances trafficking may be considered a form of slavery. Allain states:

Now, it is conceded that where the elements of the definition of trafficking in persons overlap with the definition of slavery, then the act of trafficking will breach a *jus cogens* norm, but not because it is manifestly an act of trafficking in persons, but because it is slavery.<sup>823</sup>

Therefore, in the circumstances that an act of trafficking overlaps with the legal definition of slavery, the exploitation does not fall into the realm of slavery because

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<sup>815</sup> *ibid.* 204

<sup>816</sup> UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

<sup>817</sup> Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197

<sup>818</sup> Allain *Op cit* fn814 204

<sup>819</sup> *ibid* 204

<sup>820</sup> see Scarpa *Op cit* fn812 chapter 2

<sup>821</sup> see Siller *Op cit* fn 697

<sup>822</sup> *ibid* 80

<sup>823</sup> Allain *Op cit* fn814, 206

trafficking amounts to slavery, but because the *jus cogens* norm prohibiting slavery has been breached. In other words, trafficking can be prosecuted as slavery when it amounts to or entails slavery. On this crucial distinction between trafficking and slavery, Allain and Bales point out:

A person might be taken into slavery by many paths, but the means of enslavement, the vehicle by which a person arrives in the state or condition of slavery, while important for understanding the particular nature of a case of slavery, does not determine that state, it is simply the means by which a person arrives under the control of another.<sup>824</sup>

Therefore, it is not that trafficking equals slavery, but that the process of trafficking *may* deliver an individual into enslavement. Thus, the subsequent enslavement would breach the norm. Scarpa attempts to use the legal frameworks to make slavery and trafficking synonymous. However, while attempting to place the status of trafficking as the ‘new slavery’ on a more concrete footing, Scarpa, in fact, succeeds in further blurring the lines

Dominica Borg Jansson comments, “the international community “defines the phenomenon (of trafficking) as a modern form of slavery”<sup>825</sup> Jansson undertakes a comparative study of the transposition of the Palermo Protocol into domestic legal systems in Poland, Russia and Sweden. Jansson draws attention to the shortcomings of domestic implementation, considering the role of inadequate transposition in insufficient prosecutions. However, despite the initial pronouncement that trafficking equates to modern slavery, Jansson does not offer any form of argument to support this assertion. Therefore, the author’s work feeds into the academic narrative that often makes surface claims about the status of trafficking as slavery.

Despite placing the concept of ‘modern slavery’ at the forefront of the book by choosing to give it the title, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons*, Jansson gives little consideration as to what modern slavery is or whether trafficking in its entirety will always equate to slavery. Jansson makes four

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<sup>824</sup> Jean Allain and Kevin Bales, ‘Slavery and its Definition’ (2012) 14(2), *Global Dialogue*, 6 cited in Siller fn697

<sup>825</sup> Dominica Borg Jansson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Brill 2014) 1

pronouncements throughout the book that slavery is the new trafficking, offering no further explanation and even going as far as to state that:

While writing this book, I found it interesting that trafficking was repeatedly referred to as a modern form of slavery. This statement was made in scholarly works, case law of the ECtHR, governmental writing as well as in policy documents of international organisations such as the OSCE, the UN and the EU Commission. In view of this statement, is it the best solution to have a provision on human trafficking? Since trafficking is considered a modern form of slavery, perhaps it would be better if the provisions on trafficking and slavery could be merged into (where only one or both terms are used).<sup>826</sup>

Jansson suggests that since slavery and trafficking are discussed in a way that collapses the boundaries into the concept of “modern slavery”, trafficking and slavery should form one offence. She proposes that anti-slavery legal frameworks and international norms should apply to trafficking, as defined by the Palermo Protocol in its entirety, ultimately a blanket inclusion.<sup>827</sup>

As Chuang observes:

The creep toward slavery is thus rationalised as the strategic deployment of crucial and rare political will in the service of trafficked and forced labourers who have long suffered from inadequate protections under the law. And as wielded by states, NGOs, and the “charitable-industrial complex” alike, rebranding forced labour and trafficking as slavery has indeed been extremely effective in motivating states to pass legislation, foundations to donate funds, and the broader populace to take up the “anti-slavery” cause.<sup>828</sup>

The rebranding of trafficking as slavery is framed as a strategic move by what Chuang calls the “charitable-industrial complex.” This rebranding carries important political currency and, therefore, blurring the legal boundaries of different practices is deemed to be a worthwhile tradeoff. The suggestion made by Jansson to merge human trafficking and slavery frameworks under the label of ‘modern slavery’ demonstrates the obliviousness of actors within the ‘modern slavery’ abolition movement towards the implications of both insufficient rigour in understanding the meaning of terms and of legal imprecision. For these actors, it seems, “[t]he finer

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<sup>826</sup> *ibid* 341

<sup>827</sup> Palermo Protocol fn705, article 3 provides a non-exhaustive list of forms of exploitation which can fall within the trafficking definition

<sup>828</sup> *ibid*

distinctions between the concepts of forced labour, slavery, or human trafficking have limited if any relevance.<sup>829</sup>

There is a somewhat clear approach to navigating the boundaries of the legal definition of slavery provided in the work of Jean Allain<sup>830</sup>, J. E. Penner<sup>831</sup> and the Bellagio-Harvard Guidelines on the Legal Parameters of Slavery.<sup>832</sup> The existing interpretations for example, by the ICTY and the ECtHR, are evidence that the door has been opened to the collapse of the legal boundaries within the judicial interpretation of the practices. The interpretation of the courts has seen the practice of trafficking subsumed by international anti-slavery provisions in the ECHR and Rome Statute. Such interpretations have, thus, fed into the academic discourse of ‘modern slavery’. For example, Scarpa utilises the interpretation of the ICTY in *Kunarac* to establish that trafficking equates to enslavement, due to the Tribunal’s inclusion of trafficking.<sup>833</sup> However, while slavery is the practice of a form of exploitation the same cannot be said for trafficking. Unlike slavery, trafficking, as discussed, is a process, which may or may not result in one of many forms of exploitation rather than a single form of exploitation. The Palermo Protocol provides the definition of trafficking, framing the crime as a process consisting of the action (movement or transportation), the means and the purpose; it is not necessary for exploitation (as defined under the Protocol) to take place to fulfil the definition’s requirements. The definition creates a minimum threshold of exploitative practices but does not provide an exhaustive list of practices, which may be included in the definition. When reflecting on the legal framework, it can be seen that the Palermo Protocol designates slavery as one of many forms of exploitation that may form the ‘ends’ or ‘purpose’ of

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<sup>829</sup> David *Op cit* fnError! Bookmark not defined.

<sup>830</sup> Jean Allain, Contemporary Slavery and its Definition in Law in Jean Allain’s *The Legal Definition of Slavery: From Historical to the Contemporary* (Oxford University Press 2012), Jean Allain, Robin Hickey, ‘Property and the Definition of Slavery’ (2012) 6(4)1, *International Comparative Law Quarterly*, 915

<sup>831</sup> J E Penner, The Concept of Property and the Concept of Slavery, in Jean Allain’s *The Legal Definition of Slavery: From Historical to the Contemporary* (Oxford University Press 2012) 248

<sup>832</sup> Bellagio-Harvard Guidelines on the Legal Parameters of Slavery - from Slavery in International Law 2012 in Jean Allain Slavery in *International Law: Of Human Exploitation and Trafficking*, (Marinus Nijhoff 2013) 371-378

<sup>833</sup> see Scarpa fn 812 114, 115

trafficking.<sup>834</sup> In addition, as observed by Siller, “the purpose of the trafficker (exploitation) need not be achieved to qualify as ‘trafficking in persons’”.<sup>835</sup>

Consequently, to then merge trafficking and slavery - given the scope of exploitative practices covered by the legal definition and the possibility of formulating the crime in the absence of actual exploitation - to borrow the words of J. E. Penner, not only obliterates the legal boundaries but requires us to do “positive violence”<sup>836</sup> to the legal definitions of both practices. Through the conflation of trafficking and slavery “the key elements that distinguish the two concepts are often lost.”<sup>837</sup>

#### 4. Do Victims Benefit from ‘Modern Slavery’ and does Legal Accuracy Matter?

Chuang has observed that the “anti-trafficking field is a strikingly “rigour-free zone” when it comes to defining the concept’s legal parameters.”<sup>838</sup> However, it has been suggested by Fiona Davis that no harm comes from collapsing the boundaries between the practices of slavery and trafficking and that the legal distinctions discussed above have no real significance. Some such as Rahila Gupta have regarded the critical literature on the concept as unhelpful in the fight against ‘modern slavery’.<sup>839</sup> Labelling certain practices as slavery acts as a powerful claim-making statement, the use of such a historically and emotively loaded term necessitates greater responses from policy setters and lawmakers “especially in a world where exploitation, particularly of migrants, has become normalised”<sup>840</sup> Yet who benefits, then, from critiquing the concept of modern slavery?<sup>841</sup> There are more pressing questions, however, such as who benefits from exploitation creep or domain expansion? Do victims benefit from the concept of ‘modern slavery’, or does the concept cause further harm?

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<sup>834</sup> Palermo Protocol fn705, article 3

<sup>835</sup> Siller *Op cit* fn697

<sup>836</sup> Penner *Op cit* fn831, 250

<sup>837</sup> Ramona Vijayarasa, Jose Miguel Bello Y Villarrino, Modern-Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev (2012) 8(2), *Journal of International Law and International Relation*,38, 39

<sup>838</sup> Chuang *Op cit* fn698, 609

<sup>839</sup> Gupta fn708

<sup>840</sup> Chuang *Op cit* fn698 629

<sup>841</sup> Gupta *Op cit* fn708

The trafficking as ‘modern slavery’ ideology dilutes anti-slavery norms, but it can also cause damage to the human trafficking framework and its application. This is so because, if we consider the spectrum of exploitation, slavery as an exploitative practice sits clearly towards one end of the spectrum of exploitation.

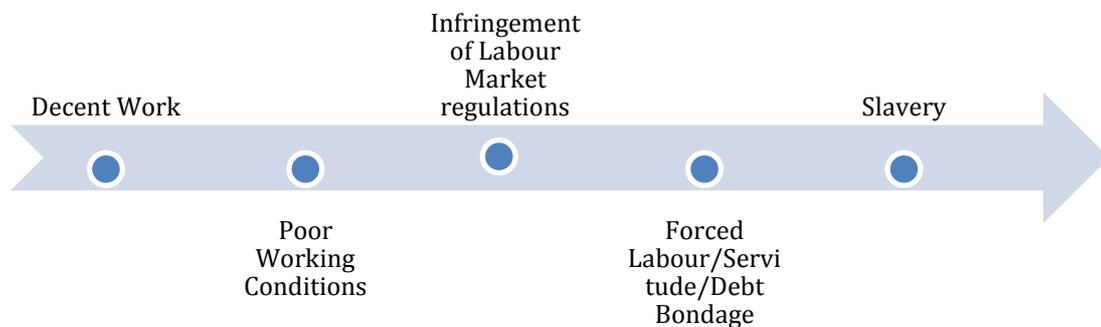


Figure 5. Representation of the spectrum of exploitation based on the concept of a continuum of exploitation<sup>842</sup>

In reality, and as codified in the legal framework of human trafficking, in the process of human trafficking, exploitation can manifest itself at a number of different points on the spectrum (as illustrated in figure 5). All these forms of exploitation do not equate with slavery. This once again reinforces the point that slavery and trafficking are related but legally distinct categories.

However, the trend, not only in academic discourse but also in policy and legal responses, to enmesh slavery and trafficking as one entity “risks undermining the effective application of the relevant legal regimes.”<sup>843</sup> The reality is that every form of exploitation which exists on the spectrum is a distinct category, with a distinct legal framework, response and remedy. In relation to human trafficking, specifically, one of the biggest perils of the ‘modern slavery’ paradigm comes in the form of “raising the threshold for what counts as trafficking.”<sup>844</sup> Yet, as previously mentioned the incorporation of trafficking in all of its forms within anti-slavery norms would risk undermining its *jus cogens* status and the ability of the international community to prosecute actual instances of slavery.<sup>845</sup>

<sup>842</sup> Skrivankova fn728

<sup>843</sup> Janie Chuang *Op cit* fn700, 634

<sup>844</sup> *ibid*

<sup>845</sup> Chuang *Op cit* fn698, 634

The expansion of the prohibition of slavery such that the category collapses into trafficking risks affecting the identification of real instances of slavery. Chuang argues that “[a] flexible or indeterminate definition” also poses the risk of infringing upon the rights of the accused. She remarks: “A flexible or indeterminate definition of slavery would also risk violating the rights of those accused, for crimes and punishments need to be clearly defined in law (*nullum crimen sine lege, nulla poena sine lege*).”<sup>846</sup>

However, the modern slavery narrative also poses the risk of diluting anti-trafficking frameworks and raising the threshold of expected harm. Joel Quirk argues that “recent efforts to both conceptualise and combat trafficking have been profoundly flawed and have consequentially ended up doing more harm than good in multiple occasions.”<sup>847</sup> The current approach to trafficking within the ‘modern slavery’ narrative has been described as a “maximalist version” which sees human trafficking as synonymous “with all forms of ‘modern’ or ‘contemporary’ slavery.” and results in a situation where “trafficking increasingly means everything and nothing”.<sup>848</sup> Gallagher has commented that “it is difficult to identify a ‘contemporary form of slavery’ that would not fall within the generous parameters” of the trafficking definition.<sup>849</sup> Human trafficking can involve a range of exploitative practices, and the actual occurrence of exploitation is not necessary in order for the requirements of the definition to be met. Therefore, the so-called ‘maximalist’ approach to human trafficking via the concept of ‘modern slavery’ creates the risk of raising the threshold of expected harm.

As any number of commentators have observed, trafficking has never been easy to define or apply. Not everyone uses the concept in the same way, and even in cases where a definition has been agreed upon, there remains scope to disagree over whether or not individual cases meet the thresholds.<sup>850</sup>

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<sup>846</sup> *ibid*

<sup>847</sup> Joel Quirk, Annie Bunting, *Contemporary Slavery – Popular Rhetoric and Political Practice* (UBC Press 2018) chapter 3

<sup>848</sup> *ibid* chapter 3

<sup>849</sup> Anne Gallagher, *Human Rights and Human Trafficking – Quagmire of Firm Ground? A Response to James Hathaway* (2009) 49, *Virginia Journal of International Law*, 814

<sup>850</sup> Quirk *Op cit* fn847 chapter 3

One of the critical issues with this approach and the expectation of harm is located in the relationship between trafficking, migration and the obscuring nature of the link with slavery. Chuang has argued that the act of labelling a trafficked persons as ‘enslaved’ or ‘slave’ has the effect of recasting “them as perennial victims who, like trans-Atlantic slaves, must have been kidnapped or otherwise brought to the destination countries against their will.”<sup>851</sup> This is problematic as it obscures the reality of trafficking and the experience of the trafficked person. A large number of “trafficked persons’ narratives begin with an act of agency—a desire to move or to search for a livelihood.”<sup>852</sup> Julia O’Connell Davidson has commented on this perspective stating, “human trafficking is described as a process that reduces its victims to objects of trade – merely things or commodities to be bought, used and discarded.”<sup>853</sup> The reality is that victims are often portrayed as “naive” and “gullible” and that the “dominant discourse on ‘trafficking as modern slavery’ glosses over the start of the story, skipping quickly to the point at which the victim finds herself trapped and abused.”<sup>854</sup> This resonates with the argument advanced by Vijyerasa regarding the obfuscation of ‘victim’ autonomy and agency by the modern slavery paradigm.<sup>855</sup>

This hypothesis is brought to bear in the *Tanedo* case where the jury deemed victims of what Chuang describes as a strong trafficking case, not to be victims of trafficking at all. There was one central contributing factor to this decision, the supposed connection between human trafficking and Trans-Atlantic slavery, which was emphasised in the case.<sup>856</sup> In light of the expectation of “kidnapping”, abductions<sup>857</sup> and exploitation comparable with plantation slavery, it appeared unfathomable for the jury to identify trafficking when the victims had exercised agency and expressed enjoyment of teaching.<sup>858</sup> Quirk adds further weight to the arguments expressed by Davidson that “the vast majority of individuals who come to be defined as trafficking

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<sup>851</sup> Chuang *Op cit* fn698, 636

<sup>852</sup> *ibid*

<sup>853</sup> Julia O’Connell Davidson, *The Margins of Freedom: Modern Slavery* (Palgrave Macmillan 2015) 109

<sup>854</sup> *ibid*

<sup>855</sup> Vijeyarasa *Op cit* fn 727

<sup>856</sup> *Tanedo* fn 719

<sup>857</sup> Quirk *Op cit* fn847

<sup>858</sup> see Chuang *Op cit* fn722, 635

victims actually migrate voluntarily yet do so on the basis of imperfect or fraudulent information.”<sup>859</sup>

Ultimately, the slavery makeover also makes over the trafficking victim, or at least the idealised vision of a trafficking victim, raising the legal threshold. Trafficked persons are characterised not as acting subjects but as passive victims. After all, if one sees slaves as “objects and eternal victims, one can pity [them] more unreservedly than . . . those whom we see as authoring and controlling their own destiny.”<sup>860</sup>

However, this concept of raising the expectation of harms suffered extends beyond human trafficking frameworks and is symptomatic of the “discourse of depoliticisation”,<sup>861</sup> permeating the concept of ‘modern slavery’. If we return once again to the spectrum of exploitation, we are reminded that labour exploitation is an issue broader than slavery, and also that exploitation exists outside of the human trafficking framework. The forcible movement of persons is not necessary in order for a person to be exploited. Furthermore, the ‘modern slavery’ paradigm obscures forms of exploitation taking place within mutually agreed working relationships, which in some cases may have the potential to increase precarity and escalate exploitation across the spectrum towards enslavement. Therefore, the solution to combatting slavery and human trafficking is also located beyond criminal justice measures.

This demonstrates how the use of binaries plays into a narrative of depoliticisation.<sup>862</sup> This narrative represents a shift in accountability from power structures and key actors by diverting attention towards one specific idealised outlet of social concern – organised crime and human trafficking.<sup>863</sup> O’Connell Davidson comments that:

Despite all the cant about trafficking in human beings as a human rights violation, states have defined it as, first and foremost, a security and criminal justice issue, and even international organisations that emphasize the need to

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<sup>859</sup> Quirk *Op cit* fn847 chapter 3

<sup>860</sup> Chuang *Op cit* f700, 636

<sup>861</sup> Julia O’Connell Davidson, *New Slavery, Old Binaries: Human Trafficking and the ‘borders of freedom’* (2010) 10(2), *Global Networks*, 244, 245

<sup>862</sup> *ibid*

<sup>863</sup> *ibid* 245

protect the human rights of victims of trafficking often lay equal stress on the threat trafficking poses to the central power.<sup>864</sup>

Thus, the problem lies in how the binaries of slavery and freedom are conceptualised. Laura Brace argues that liberal thinkers tend towards a preoccupation to try and ‘draw bright lines between “slavery as a wrong or a logical impossibility and individual autonomy as a good and a right”’.<sup>865</sup> However, Julia O’Connell Davidson contends that in a contemporary free market system, this is not a straightforward task.<sup>866</sup> The key characteristic that is used to differentiate slavery from freedom is ‘powers attaching to ownership’ and the ability of the slaveholder to treat another as property.<sup>867</sup> Allain’s interpretation that hinges upon the incidents of ownership does not help provide clarity on this issue. The reason for this is that “some of the powers attaching to the right of ownership are also often exercised over spouses, employees and children.”<sup>868</sup> Further to this, Davidson argues that it is not possible to draw a clear line between slavery and ‘free wage labour’ by reference to the voluntary nature of the labour performed. This is so because:

[W]hen we speak of labour compulsion – whether slavery or modern free wage labour – we are normally ‘talking about situations in which the compelled party is offered a choice between disagreeable alternatives and chooses the lesser evil’. The slave’s labour is not usually elicited ‘through overpowering physical force’, but rather ‘by forcing slaves to choose between very unpleasant alternatives, such as death, torture and endless confinement on the one hand, or back-breaking physical labour on the other’. Likewise, the labour of free wage workers is exacted by offering them a choice, for example, between starvation and undertaking difficult and dangerous work they would not otherwise agree to perform.<sup>869</sup>

Therefore, a real danger exists in the construction of the modern slavery paradigm in its ability to obscure exploitative practices occurring in mutually agreed employment relationships. This was demonstrated in the discussion of the working conditions of

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<sup>864</sup> Julia O’Connell Davidson, *Decanting Trafficking in Human Beings – Re-Centering the State* (2016) 52(1), *The International Spectator*, 58, 68

<sup>865</sup> Laura Brace, *The Politics of Property: Labour Freedom and Belonging* (Edinburgh University Press 2004)

<sup>866</sup> Davidson *Op cit* fn861, 245

<sup>867</sup> *ibid*

<sup>868</sup> *ibid*

<sup>869</sup> R Steinfeld, *Coercion, Contract and Free Labour in the Nineteenth Century* (Cambridge University Press 2001) 14

agency workers in Amazon Fulfillment Centres. The focus on criminal justice measures and individual criminal behaviour reflects a ‘discourse of depoliticisation’. Wendy Brown has commented that depoliticisation involves “construing inequality, subordination, marginalisation, and social conflict, which all require political analysis and political solutions, as personal and individual, on the one hand, or as natural, religious, or cultural on the other.”<sup>870</sup>

The final element of critique to consider is the jarring dissonance between modern slavery and immigration narratives and policies; another strategy of depoliticisation. As the modern slavery narrative places the process of human trafficking at its centre, this means that the legal responses will focus on criminal justice and immigration and border controls. Davidson, reading Bales, says:

Say the words “slave trade” and most people picture wooden ships leaving Africa for the New World, Kevin Bales remarks, but he continues it has evolved and transmuted – the ‘modern version uses false passports and airline tickets. It packs slaves into trucks and bribes border guards. It covers its tracks, with false work contracts and fraudulent visas. The solution, Bales says, is tighter border controls and more intensive policing which allow slaves to be identified and rescued and, work to drive slavers out of business.’<sup>871</sup>

Davidson views the migration-focused solution proposed by Bales with doubt. Taking a more restrictive approach to borders and migration may appear to be a logical solution to combat a problem such as trafficking.<sup>872</sup> However, perhaps ironically the kind of controls suggested by Bales have in fact led to situations whereby those who want or need to migrate have “little choice to make extraordinarily perilous sea journeys in flimsy wooden boats.”<sup>873</sup> Such individuals are often very aware of the perils that await them. The raising of the bridge in relation to toughening migration policies<sup>874</sup> and the “dwindling opportunities for legally authorised international migration has prompted the expansion and diversification of markets for clandestine migration services.”<sup>875</sup> Therefore, the narrative, in fact, serves to push those already vulnerable into the hands of those who will traffic and exploit them. Further to this,

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<sup>870</sup> Davidson *Op cit* fn861, 257

<sup>871</sup> Davidson *Op cit* fn853 109

<sup>872</sup> *ibid* 110

<sup>873</sup> Davidson, *Op cit* fn861, 254 1

<sup>874</sup> Davidson *Op cit* fn853 109

<sup>875</sup> *ibid* 120

the link between immigration policy and the vulnerability of migrant workers to forced labour is stark. According to Lewis: “[i]mmigration policy and insecure immigration status is further known to provide environments conducive to exploitation by employers and the lack of, or highly conditional access to legal work and/or welfare is also important in rendering migrants who have few other choices susceptible to exploitation.”<sup>876</sup>

Quirk comments that the drive towards political and legal responses to human trafficking under the guise of ‘modern slavery’ forms one strand “of a larger series of institutional responses to – and popular anxieties over – the global movement of peoples particularly from developing to developed countries.”<sup>877</sup> Thus the anti-trafficking/‘modern slavery’ movement acts as “rhetorical ammunition for efforts to curb ‘undesirable’ migration.”<sup>878</sup> Such an approach heightens the vulnerability and precarity of many migrants - particularly those with the wrong passport or immigration status – to exploitation.<sup>879</sup> This can manifest itself through the knowledge that seeking legal protection may lead to “protracted immigration detention, criminal prosecution and removal.”<sup>880</sup>

One such example of this can be seen in the study conducted by Michael Potter and Jennifer Hamilton on the vulnerability of migrant workers to forced labour in the agricultural sector in Northern Ireland.<sup>881</sup> Potter and Hamilton observed that:

[W]orkers engaged in mushroom picking are often employed well below their qualifications and experience levels, are subject to excessive social isolation due to the industry being largely unregulated, invisible and located in remote areas, and that the pay tends to be well below the minimum wage. Workers often do not receive overtime pay or holiday pay, but are expected to work long hours, often subject to 24-hour call-out. Documentation problems are widely reported, such as lack of contracts and issues around tax, Work Permits and Pay-Related Social Insurance (PRSI), and poor or unsafe working conditions have been noted, including accidents due to fatigue, strain or poor

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<sup>876</sup> Lewis et al *Op cit* fn733, 22

<sup>877</sup> Quirk *Op cit* fn847 chapter 3

<sup>878</sup> *ibid*

<sup>879</sup> see Quirk fn733, Catherine Dauvergne, *Making People Illegal, What Globalisation Means for Migration and Law* (Cambridge University Press 2008), Craig McGill, *Human Traffic: Sex, Slaves and Immigration* (Vision 2003)

<sup>880</sup> Quirk *Op cit* fn733 chapter 3

<sup>881</sup> Michael Potter, Jennifer Hamilton, Picking on Vulnerable Migrants: Precarity and the Mushroom Industry in Northern Ireland (2014) 28(3), *Work, Employment and Society*, 390

health and safety arrangements, and illness due to exposure to chemicals or fungal spores.<sup>882</sup>

According to the study, more than half of the subjects were initially undocumented, and a third remained so at the time of interview.<sup>883</sup> The majority of subjects did not realise the implications of being undocumented and agencies and employers had withheld information “as a mechanism to prevent workers considering alternative options making them reliant on a single place of work”.<sup>884</sup> This, therefore, represents the possibility of restrictive immigration policies acting to allow employers to exploit vulnerable migrant workers. As Potter and Hamilton put it: “at best employers did not feel obliged to give them the same terms and conditions of employment as a local person, and at worst, consciously exploited their vulnerability”.<sup>885</sup> In such situations “governments play a key role in enabling and encouraging the exploitation of migrants, yet their role tends to be overshadowed by a focus on criminals and illicit movements.”<sup>886</sup> Julia O’Connell Davidson characterises this duality as Orwellian doublespeak;<sup>887</sup> the modern slavery narrative calls for the protection of victims of human trafficking and the use of coercive pressure against ‘victims’, but works ‘simultaneously to endorse the application of ever more coercive pressures on migrants by states, often in the name of protecting them from ‘modern slavery’”.<sup>888</sup>

## 5. Modern Slavery: What’s in a name?

To return to the question, which opened this chapter, “why do you use the word “trafficking” and not “slavery”?<sup>889</sup> This chapter demonstrates that legal accuracy matters as it has a direct effect on victims of the exploitation in question and offers a multi-level critique of the term in its current form.

In the absence of an established legal definition, this chapter has reviewed what modern slavery is regarded to mean and how it has developed in the academic

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<sup>882</sup> *ibid* 394-395

<sup>883</sup> *ibid* 397

<sup>884</sup> *ibid* 397

<sup>885</sup> *ibid* 401

<sup>886</sup> Quirk *Op cit* fn733 chapter 3

<sup>887</sup> Davidson *Op cit* fn 853, 255

<sup>888</sup> *ibid*

<sup>889</sup> Work and Pensions Committee, Oral Evidence: Victims of Modern Slavery HC 803 accessed at (<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/victims-of-modern-slavery/oral/45281.pdf>)

literature. The term has been demonstrated to have evolved through what this chapter has termed domain expansion/exploitation creep. The academic literature widely regards human trafficking to be ‘modern slavery’. This means that the legal definition of slavery subsumes human trafficking. As demonstrated, this, however, is a legal fallacy. It is entirely legally impossible for human trafficking to equate to slavery in accordance with the legal definition provided in the 1926 Slavery Convention. However, the majority of academic literature does not consider the doctrinal hurdles to the construction of the concept and further to this, deems insistence on legal accuracy to be at best unnecessary and unhelpful<sup>890</sup> and at worst to be ‘sneering and dismissive’ and “an attempt to define slavery out of existence.”<sup>891</sup>

This chapter has also considered the concept of modern slavery in a critical light while accepting the great utility of the term to numerous NGOs and activists; it poses the question of whether the concept of ‘modern slavery’ may also inherently inflict damage upon those it may or may not refer to. The critique of the concept in this chapter is threefold. First, it looks to the legal inaccuracy of the merging of slavery and trafficking, and the obliteration of the legal boundaries of the two practices. While it may be suggested, as long as exploitation is recognised and victims are identified, that legal clarity is not important, the argument proposed by Chuang,<sup>892</sup> that the portrayal of trafficking as slavery heightens expectations of harm in trafficking cases, bears weight. The case of *Tanedo* shows the negative effect on human trafficking frameworks and subsequent harm caused to victims of trafficking and exploitation. Second, critical reflection of the modern slavery paradigm also raises issues regarding its ability to obscure broader issues of labour exploitation in free wage labour situations. Modern slavery, in contemporary usage, is unable to account for the fact that exploitation exists on a spectrum which must be addressed at all points. Finally, a human trafficking centred concept may affect legal responses. The modern slavery paradigm necessitates a specific response, particularly in relation to mobility. If the movement of persons via trafficking is the key focus, an obvious answer is to create heightened immigration controls. However, the perhaps unintended consequence of the modern slavery paradigm is that such controls actually

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<sup>890</sup> David *Op cit* fn fn**Error! Bookmark not defined.**

<sup>891</sup> Gupta *Op cit* fn708

<sup>892</sup> Chuang *Op cit* fn 700, 635

serve to heighten the vulnerability of migrants by closing down legal routes of entry and leading to a proliferation 'illegal routes' which have the potential to deliver individuals into situations of exploitation. Thus, the exploitation of the history of anti-slavery throughout the 'modern slavery' paradigm may prove to be a successful claim-making vehicle for a variety of NGOs and activists. However, critical reflection on the concept of modern slavery and the merging of slavery and trafficking leads to an uneasy conclusion that the paradigm may have the potential to cause more harm than good when it comes to legal responses to slavery, trafficking and exploitation.

## Chapter 5 - The Modern Slavery Act 2015: A Case Study

### 1. Introduction

The emphasis of this chapter moves away from assessing the international legal frameworks and narratives underpinning the construction of the phenomenon of ‘modern slavery’ to consider the effect these factors have had on legal and policy responses in the area in the context of England and Wales.<sup>893</sup> In recent years there has been a revitalisation of the idea of anti-slavery. This renewed interest is the result of increasing political and social awareness, as well as advocacy, surrounding the issue of trafficking and ‘modern slavery’.<sup>894</sup> As highlighted by Chuang the “charitable-industrial complex” has experienced great success in operationalising the concept of ‘modern slavery’.<sup>895</sup> This chapter will focus on the response in England and Wales to the problem of ‘modern slavery’ and human trafficking. It builds on the previous discussion of the legal definitions of slavery and trafficking and the blurring of the lines between these two concepts evidenced in the judgments of *Rantsev*<sup>896</sup> and *Kunarac*<sup>897</sup> and academic and political thought surrounding modern slavery.

The Modern Slavery Bill 2013 came into existence partly due to a response of growing concern surrounding the phenomenon of ‘modern slavery’ and partly due to the looming expiration of the transposition date for the EU Trafficking Directive<sup>898</sup> on 6 April 2013. On 26 March 2015 the Modern Slavery Act 2015<sup>899</sup> received Royal Assent and was proclaimed by Theresa May, the then Home Secretary, to be a world-leading piece of legislation. However, Gary Craig has argued persuasively, that, while such claims are reminiscent of those of Wilberforce in 1897, they seem "hyperbolic given that several European countries—such as Finland and the Netherlands,

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<sup>893</sup> Modern Slavery Act 2015 C.30

<sup>894</sup> Austin Coi-Fitzpatrick, From Rescue to Representation: A Human Rights-Based Approach to the Contemporary Anti-Slavery Movement (2015) 14, *Journal of Human Rights*, 486

<sup>895</sup> Janie Chuang, Exploitation Creep and the Unmaking of Human Trafficking Law, (2014) 108(4), *American Journal of International Law*, 609, 629

<sup>896</sup> *Rantsev v. Cyprus and Russia*, Application no. 25965/04 (ECtHR 7 January 2010)

<sup>897</sup> *International Criminal Tribunal for the Former Yugoslavia, Kunarac et als (IT-96-23/T) (IT-86-23/1-T)*(February 2001)

<sup>898</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

<sup>899</sup> Modern Slavery Act 2015, Chapter 30

prompted by the Palermo Protocol— had already introduced many key elements of state anti-slavery law.”<sup>900</sup> Prior to the creation of the MSA, the UK also already had pre-existing provisions in place dealing with trafficking and slavery-related offences scattered across a range of statutes.<sup>901</sup>

This chapter will, therefore, focus on the Modern Slavery Act 2015 (MSA) and argue first, that the influence of the prevailing concept of trafficking as modern slavery impedes the MSA from being a truly effective tool to address slavery and trafficking. The tensions between anti-slavery and other key policy areas encumber the Act when it comes to providing sufficient victim protection and support. Thus, while perhaps on the right track, the MSA represents a missed opportunity to meaningfully confront the real issue of labour exploitation and efficient victim support and protection.

The first section of this chapter explores the road to the Modern Slavery Act. This section will chart the political climate surrounding the drafting of the Act and analyse the arguments that influenced Parliament. This analysis casts doubt on the primary concerns of the MSA, highlighting the contradictory and divergent impact of distinct policies. The analysis will focus on the juxtaposition between the anti-slavery sentiments expressed by the Government, and its clear anti-immigration and pro-deregulation platform. Caroline Robinson comments that the moral narrative surrounding the Act has been used by politicians to offset the impact of their own questionable responses to immigration and labour market regulation.<sup>902</sup>

The central problems with the use of the concept of ‘modern slavery’ are in relation to the framing of the Modern Slavery Act 2015, in particular, the link made between slavery and trafficking. Essentially, the modern slavery paradigm merges the practices of slavery and trafficking as established in international law, blurring the lines of legal definitions. This section demonstrates that this blurring of lines creates a practical problem. There is a danger that if the practices are viewed as synonymous, a situation is created where forms of labour exploitation that do not fit into the trafficking model of slavery are disregarded as less significant.

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<sup>900</sup> Gary Craig, *The UK’s Modern Slavery Legislation: An Early Assessment of Progress* (2017) 5(2), *Social Inclusion*, 16

<sup>901</sup> Coroners and Justice Act 2009 C.25 s71, Sexual Offences Act 2003 C.42 , s59(a), Asylum and Immigration 2004 C.19, s4

<sup>902</sup> Caroline Robinson, *Claiming Space for Labour Rights within the United Kingdom Modern Slavery Crusade* (2015) 5, *Anti-Trafficking Review*, 129

The second section of this chapter will evaluate particular aspects of the Act to critique its effectiveness as an anti-slavery tool. This analysis will focus on three elements: criminal justice, victim protection; and regulation of supply chains. This analysis will be used to demonstrate the impact of the ‘modern slavery’ narrative on legal and policy responses. The conclusion is that due to the blurring of the lines between slavery and human trafficking that the Modern Slavery Act and related policy responses do not place enough emphasis on the victim. Further to this, the trafficking focus of the concept is evident in the emphasis placed on criminal justice and the Act’s silence on workplace labour exploitation. The current approach in the UK focuses on criminalisation:

This approach perceives the core problem to be criminals and the solution to be police enforcing laws and lawyers taking cases to court. More sophisticated approaches focus on the ways corruption and complicity undermine the rule of law, but even this reading prioritises court processes and criminal justice efforts. With its focus on the passage and enforcement of laws, this approach relies on arrest to serve as a deterrent for those engaged in slavery and trafficking.<sup>903</sup>

However, the difficulty with this approach lies in the assumption that the solution to exploitation is located solely in the drafting and enforcement of criminal law, thus overlooking “issues of power and inequality that give rise to exploitation in the first place.”<sup>904</sup> It is arguably more important that the overall response addresses the factors that lead to vulnerability rather, than merely prosecuting and punishing once exploitation has occurred. Criminal prosecutions are only a concern if anti-slavery strategies are not working effectively. In other words, rather than focussing on increasing the number of successful prosecutions, the strategy should also aim to bring about a reduction in the number of individuals subject to exploitative labour. The creation of effective policies which address the structural and institutional causes of vulnerability would complement criminal justice measures. Further to this, the intense focus on a criminal-justice-based response dilutes the necessary strength of any provisions intended to target exploitation in the commercial setting. The concept

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<sup>903</sup> *ibid* 491

<sup>904</sup> *ibid*

of ‘modern slavery’ as trafficking, and the idea that exploitation takes place within the context of commercial production are incongruous. Thus, the concept and consequently the Act serves to further normalise the routine exploitation of workers. In addition this section will finally explore how the Modern Slavery Act has interacted with the regulation of supply chains.

The Modern Slavery Act has been described as a “splendid piece of legislation”<sup>905</sup> However, this chapter will argue that while the Act is an improvement, the mechanisms for enforcement, effective protection of victims and measures to protect the most vulnerable fall short of the mark. In addition, due to the influence of the ‘modern slavery’ narrative, the Act represents a missed opportunity to address the legal and institutional structures create precarity and facilitate exploitation.

## **2. Contemporary Anti-Slavery Initiatives in the UK: The Modern Slavery Act 2015.**

### **2.1. The Development of Contemporary Anti-Slavery in the UK: Immigration and Modern Slavery.**

This section will consider the political and social background that led to the revitalisation of anti-slavery sentiment in the UK. It will draw out the tension between the creation of concurrent legislation and policies by the Conservative government that appears to offer protection to those who are most vulnerable. This vulnerability intersects with two issues, first restrictive immigration policies and second poor labour market regulation.

The interest in modern slavery in the UK is closely connected to the creation of the Anti-Trafficking Monitoring Group (ATMG). The ATMG is a coalition that was set up in 2009 to monitor the UK Governments compliance with European anti-trafficking legislation<sup>906</sup> - the Council of Europe Convention on Action against Trafficking in Human Beings<sup>907</sup> and later on in 2011 the EU Trafficking Directive.<sup>908</sup>

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<sup>905</sup> In June 2018 the Government announced plans for an new independent review of the Modern Slavery Act and its implementation, it will be led by Baroness Butler Sloss, Frank Field MP and Maria Miller MP accessed at (<https://www.gov.uk/government/news/government-commissions-independent-review-of-the-modern-slavery-act-2015>)

<sup>906</sup> See the following <https://www.antislavery.org/what-we-do/uk/anti-trafficking-monitoring-group/>

<sup>907</sup> Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005

The European Convention has been pivotal in shaping the UK's response to the issue of human trafficking prior to the MSA. The Convention has required the UK to engage with issues related to the identification of victims, protection and support,<sup>909</sup> leading to the creation of mechanisms such as the NRM and the pre-existing victim support policies. The ATMG consists of eleven of the UK's largest anti-trafficking organisations: AFRUCA, Amnesty International UK, Anti-Slavery International, Bawso, ECPAT UK, Focus on Labour Exploitation (FLEX), Helen Bamber Foundation, Kalayaan, POPPY project, TARA project and UNICEF UK. The advocacy of the ATMG for the improvement of the UK's response to trafficking and the implementation of international anti-trafficking frameworks can be seen in several reports published since 2009.<sup>910</sup> The role played by NGOs in the contemporary anti-slavery movement is not a novel occurrence. Previous discussions on historical abolition movements (both anti-slavery and anti-trafficking) have demonstrated the pivotal role played by NGOs. Historically the role of NGOs was focussed on political agenda driving, this is demonstrated through the vital role played by both the Society for the Abolition of the Slave Trade<sup>911</sup> and the British Anti-Slavery Society<sup>912</sup> respectively in pursuing and shaping the political direction of the abolition of the British Slave Trade and international prohibition of the status of slavery. Further to this, the role played by organisations such as the International Abolitionist Federation and the Women's Temperance Union, highlight the way in which NGOs have in the past hijacked phenomena such as human trafficking to further other agendas.<sup>913</sup> The work of the ATMG demonstrates a further evolution in the function of NGOs to not simply shaping political and legal agendas but to monitoring the implementation and operation of the anti-slavery/trafficking frameworks.

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<sup>908</sup> European Union: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011

<sup>909</sup> The Convention imposed obligations in relation to identification mechanisms (art 10), assistance and support (art 12/13) and residency (art 14).

<sup>910</sup> See the following for more information for ATMG reports on anti-trafficking compliance [http://www.antislavery.org/english/what\\_we\\_do/trafficking/anti\\_trafficking\\_monitoring\\_group/atmg\\_reports\\_briefings.aspx](http://www.antislavery.org/english/what_we_do/trafficking/anti_trafficking_monitoring_group/atmg_reports_briefings.aspx)

<sup>911</sup> see Chapter 1 Section 2. The Transatlantic Slave Trade, Chapter 3. Abolition of Trans-Atlantic Slavery: The First Wave of Anti-Slavery

<sup>912</sup> see Chapter 5. The League of Nations and Ethiopia

<sup>913</sup> see Chapter

## 2. The Historical Emergence of the Anti-Trafficking Movement

Alongside the advocacy of NGOs and partly as consequence of their activities and campaigns, there has also been an increasing broader social awareness of the issue posed by labour exploitation in contemporary society; this is reflected in the increased media interest in the problem of modern slavery. There has been a substantial shift in the focus of media coverage of slavery in recent years. As far back as 2006, there has been recognition of the fact the slavery did not cease to exist with the abolition of the British involvement in the Trans-Atlantic slave trade in 1807.<sup>914</sup> Yet, the main focus of coverage was on the idea of commemorating slavery and remembrance of abolition, or the idea of persisting slavery in lands far away from the UK<sup>915</sup>.

A key stage on the road to the Modern Slavery Act, that ran parallel to work carried out by the ATMG was a report conducted by the Centre for Social Justice (CSJ) in March 2013.<sup>916</sup> Aidan McQuade, the Chief Executive of Anti-Slavery International, has commented that the work carried out by the CSJ was greeted with a warmer reception than that of the ATMG.<sup>917</sup> Although the CSJ is an independent think-tank, it was established by Conservative MP Iain Duncan Smith.<sup>918</sup> Smith is the former leader of the Conservative Party, and under the Coalition Government while involved with the CSJ was a prominent Cabinet member in charge of the Department for Work and Pensions.

The Modern Slavery Bill was announced later in 2013 and was heavily influenced by the work of the CSJ. The report made a number of recommendations including improved victim support and identification, the need for the removal of responsibility

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<sup>914</sup> Madeleine Bunting, A modern-day slavery is flourishing in Britain, and we just avert our eyes, *The Guardian* (18<sup>th</sup> December 2006) accessed at (<http://www.theguardian.com/commentisfree/2006/dec/18/comment.immigration>), UK Action Plan on Tackling Human Trafficking (Home Office 2007) 4 accessed at ([https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/uk\\_action\\_plan\\_on\\_tackling\\_human\\_trafficking\\_en\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/uk_action_plan_on_tackling_human_trafficking_en_1.pdf))

<sup>915</sup> Peter Walker, Niger guilty in landmark slavery case, *The Guardian* (27<sup>th</sup> October 2008) accessed at (<http://www.theguardian.com/world/2008/oct/27/niger-slave-court>), Nick Meo, Half a million African slaves are at the heart of Mauritania's presidential election, *The Telegraph* (12<sup>th</sup> July 2009) accessed at (<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/ghana/5805113/Half-a-million-African-slaves-are-at-the-heart-of-Mauritanias-presidential-election.html>), Mike Pflanz, Darfur civilians 'seized as slaves by Sudan military', *The Telegraph* (16<sup>th</sup> December 2008) (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/3795607/Darfur-civilians-seized-as-slaves-by-Sudan-military.html>)

<sup>916</sup> Centre for Social Justice, It Happens Here: Equipping the United Kingdom to fight Modern Slavery (March 2013) accessed at (<https://www.centreforsocialjustice.org.uk/library/happens-equipping-united-kingdom-fight-modern-slavery>)

<sup>917</sup> Aidan McQuade, Truth Uncovered Webinar: The End of the Beginning The UK's Modern Slavery Act, 28<sup>th</sup> May 2015 accessed at (<https://www.youtube.com/watch?v=Wri8drmKxUU>)

<sup>918</sup> *ibid*

for human trafficking from the Minister for Immigration and also the promotion of the role of business in anti-trafficking and the importance of transparency in supply chains. Thus, the Modern Slavery Act<sup>919</sup> was proposed in order to:

- Consolidate all trafficking and slavery-related offences.
- Offer a defence for victims of trafficking to ensure they are not prosecuted for crimes committed as a consequence of their exploitation.
- Create a legal obligation to identify victims of trafficking
- Create a new role of Anti-Slavery Commissioner, who can launch independent investigations into compliance with anti-trafficking frameworks.<sup>920</sup>

This growing interest in the persisting issue of slavery reached a critical point at the Conservative party conference in 2013. There was, at this point, a timely intersection with the imminent expiration of the EU Trafficking Directives transposition deadline on 6 April 2013. The 24<sup>th</sup> Report of the House of Commons European Scrutiny Committee demonstrates that the Government believed the Directive provided no “added value” to UK’s existing anti-trafficking arrangements.<sup>921</sup> The Committee stated that:

it was not evident that opting in would provide much "added value" to the UK, as it would not make "a significant practical difference" to the way in which the UK tackled trafficking and supported victims.<sup>922</sup>

Despite the belief that the UK was already compliant with the Directive GREAs<sup>923</sup> first evaluation report of the implementation of ECAT stated that the UK was bound to give legal effect to the requirements for victim compensation and non-criminalisation of victims.<sup>924</sup> Further to this, the report made a number of

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<sup>919</sup> Modern Slavery Act 2015 chapter 30

<sup>920</sup> Centre for Social Justice, *Op cit* fn916 18-27

<sup>921</sup> House of Commons European Scrutiny Committee – 24<sup>th</sup> Report HO 32616 Trafficking in Human Beings (2010-2011) 3.7 accessed at (<https://publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xxii/428xxii.pdf>)

<sup>922</sup> *ibid*

<sup>923</sup> GRETA is responsible for monitoring the regional implementation Council of Europe Convention against Trafficking in Human Beings.

<sup>924</sup> GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom – First Evaluation Round (2012) 12 accessed at (<https://www.coe.int/en/web/anti-human-trafficking/united-kingdom>)

recommendations related to the implementation of ECAT including: reform of the NRM, special provision of child trafficking victims, compensation, non-punishment and codification of offences.<sup>925</sup> Thus, in 2013 the then Home Secretary, Theresa May, announced that the Coalition government would be introducing a new Modern Slavery Bill. May stated that this Bill would tackle the “confusing array of human trafficking offences” by giving new powers to authorities to investigate, prosecute and punish perpetrators.<sup>926</sup> However, this speech is the perfect example of the competing interests in the political sphere. Although it was this speech which declared the then, Conservative-led Coalition government’s intention to tackle the problem of ‘modern slavery’, the very same speech made the Conservative party’s stance on immigration clear – this stance is in direct opposition to May’s overtures of anti-slavery sentiments. The speech also paved the way for the announcement of the Immigration Bill, targeted at “making it easier to get rid of people with no right to be here”.<sup>927</sup> This speech sets out the playing field for the development of anti-slavery under a Conservative-led Coalition government. The main issue when considering the development of anti-slavery legislation is the continuous tension with Conservative party immigration policies.

As already alluded to, the rhetoric of modern slavery of the Coalition and the Conservative government is tenuous. It has been highlighted that around the time of the 2013 party conference the Conservatives were increasingly aware that immigration would be a significant deciding issue in the 2015 General Election.<sup>928</sup> With the looming popularity of the UK Independence Party (UKIP) and its restrictive stance on immigration, the Conservatives sought to tackle immigration by putting in place tougher barriers to the welfare system in order to create a more hostile environment for undocumented workers.<sup>929</sup> Theresa May demonstrated these intentions at the 2013 conference with the announcement of the Immigration Bill. The Immigration Act<sup>930</sup> was promoted as being a landmark piece of legislation that made fundamental changes to the immigration system. The overall aim of this Act was to allow the government to reduce net migration. This was a key priority for the

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<sup>925</sup> *ibid* Appendix 1

<sup>926</sup> Theresa May 2013 Speech to Conservative Party Conference (October 2013) accessed at (<http://www.ukpol.co.uk/theresa-may-2013-speech-to-conservative-party-conference/>)

<sup>927</sup> *ibid*

<sup>928</sup> Robinson *Op cit* fn902, 130

<sup>929</sup> *ibid*

<sup>930</sup> Immigration Act 2014 C. 19

Conservatives given the significant increase in net migration to 298,000<sup>931</sup> which ran contrary to the Conservatives 2010 election promise to reduce the figure to below 10,000. Thus, Robinson argues that the Modern Slavery Act is a tool created to "soften the blow for a core section of its electorate".<sup>932</sup> The Act allows the party to continue targeting both legal and illegal migration while delivering an outward facing image of a party that priorities the protection and support of 'vulnerable' migrants. This serves to further the political narrative of good and bad migration and those who are deserving of assistance. Thus, May's 'personal crusade' against modern slavery was central to the party's success.<sup>933</sup>

It is important to note that the Modern Slavery Act was a cross-party effort and that, at the time of the election all of the major political parties placed emphasis on the issue of immigration. In the lead up to the 2015 General Election, the Labour party also attempted to address the growing concerns of the public regarding immigration. In April 2014, Yvette Cooper launched a consultation on "the laws around exploitation and the undercutting of wages and jobs".<sup>934</sup> Therefore, the Labour party's position on immigration became linked to the issue of labour exploitation: "too many low-skilled migrant workers is bad both for migrant workers who are being exploited, and for British workers who are having their wages undercut".<sup>935</sup> Caroline Robinson argues that at this point the Labour party tied its position on immigration to the issue of labour exploitation as a way to disguise the fact that the party's immigration policies had shifted to the right. In other words, the idea of a Modern Slavery Bill with cross-party support to be enacted before the May 2015 General Election made good political sense, as, essentially, everyone was a winner.<sup>936</sup>

There was a sense of urgency in the creation of the Modern Slavery Act from the day of its announcement with assurances the Bill would be introduced and passed before the next General Election. It can be seen that there are a number of motivating factors

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<sup>931</sup> Office for National Statistics (ONS), 'Migration Statistics Quarterly Report, February 2015', ONS, 2015, retrieved 26 February 2015 accessed at (<http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/february-2015/index.html>)

<sup>932</sup> Robinson *Op cit* fn902, 130

<sup>933</sup> *ibid*

<sup>934</sup> *ibid*

<sup>935</sup> Yvette Cooper, 'Labour's Approach to Immigration—Speech by Yvette Cooper MP,' Labour Party, 2014 accessed at

([http://www.yvettecooper.com/labour\\_s\\_approach\\_to\\_immigration\\_speech\\_of\\_18th\\_november\\_2014](http://www.yvettecooper.com/labour_s_approach_to_immigration_speech_of_18th_november_2014))

<sup>936</sup> Robinson *Op cit* fn902, 131

for this urgency. However, arguments have been made by various NGOs that such responses to trafficking are misguided due to their act-first-think-later mindset.<sup>937</sup> In a report by the Global Alliance against Traffic in Women (GAATW)<sup>938</sup>, two findings are of particular interest. First, anti-trafficking frameworks can cause harm to victims. Such harm can be inflicted in a number of ways. For example, conditional assistance – in other words, co-operation with law enforcement agencies, the restriction of movement by being confined to detention centres or finally being sent back to their country of origin where they continue to be vulnerable. Therefore, there is a fear that such individuals will be more reluctant to be identified as a victim of trafficking to avoid becoming a victim of anti-trafficking.<sup>939</sup> The second issue raised is the routine misuse of the phrase trafficking in the name of human rights enforcement to further governmental political agendas. The GAATW highlight that this is particularly problematic when it comes to the issue of immigration. Mike Dottridge states that by focussing on the issue of trafficking – as we see in the discourse of modern slavery in the UK – governments can claim they are rescuing and helping victims of trafficking when, in reality, no consideration is given to their wishes and that they are forcibly repatriated.<sup>940</sup> Further to this, the focus on trafficking allows government officials to imply that the cases of labour exploitation in question do not involve violations of basic labour rights. The insinuation is that trade unions have no role to play in defence of these individuals and their rights.<sup>941</sup> The conclusion reached is that this focus on trafficking is unsurprising given the emphasis placed on immigration in industrialised countries. This means that efforts are ultimately focused on preventing the illegal movement of migrants rather than focussing on exploitation occurring within their own borders.<sup>942</sup>

It would be difficult to argue that such sentiments cannot be applied to the creation of the Modern Slavery Act. It is evident that immigration concerns have played a large role in shaping the political context in which the MSA was created. The fact that

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<sup>937</sup> *ibid*

<sup>938</sup> Global Alliance Against Traffic in Women, *Collateral Damage - The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007) accessed at ([https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring\\_protection\\_070909/collateral\\_damage\\_gaatw\\_2007.pdf](https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring_protection_070909/collateral_damage_gaatw_2007.pdf))

<sup>939</sup> *ibid* 14

<sup>940</sup> *ibid* 16

<sup>941</sup> *ibid*

<sup>942</sup> *ibid* 17

immigration controls are central was demonstrated further throughout the drafting of the Act. On 17 September 2015, the Conservative government introduced the Immigration Bill 2015 to the House of Commons. The aim of this Bill was once again made clear by former Home Secretary Theresa May at the Conservative Party Conference. In the face of a building migrant crisis resulting from the conflict in Syria, her answer was to create a hostile environment in the UK to irregular migrants in order to "build a cohesive society."<sup>943</sup> The Bill carried with it the capacity to completely undermine positive elements of the MSA by targeting the most vulnerable members of the labour market. The issue has been effectively summarised by Paul Bloomfield: Theresa May described the MSA as a piece of legislation which ensures that victims know they are not alone and the Government is there to help them. While, on the other hand, David Cameron's speech announcing the Immigration Act in May 2015 promised the public that the Government would tackle immigration abuses which damage the UK labour market and to punish undocumented workers.<sup>944</sup> The central issue here is that the Immigration Act 2015 casts undocumented workers – who are usually those most at risk of labour exploitation due to their irregular immigration status – as the villains in a tale where the jobs of hard-working citizens in the UK are stolen by those entering the country illegally.<sup>945</sup> Therefore, they should be punished. However, much criticism was levelled at the Act. First, was the contention that it presents the possibility of creating a situation which will risk forcing undocumented workers into exploitative employment to avoid criminal prosecution. However, more troublesome than this is the fact that the Act could serve as a tool for abusive employers to coerce and control employees with irregular status.<sup>946</sup>

## **2.2 The Impossible Task of balancing immigration policy and anti-slavery:**

The political backdrop of the Modern Slavery Act 2015 mirrors that of historical abolition. The thesis has explored how anti-slavery sentiment is inextricably caught

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<sup>943</sup> Michael Wilkinson, Theresa May's 'chilling and bitter' measures to send illegal migrants home, The Telegraph 6<sup>TH</sup> October 2015 accessed at (<http://www.telegraph.co.uk/news/politics/conservative/11913723/david-cameron-conservative-conference-2015-live.html>)

<sup>944</sup> Paul Bloomfield, The Immigration Bill 2015: creating the conditions for exploitation?, Open Democracy – Beyond Slavery and Trafficking (11<sup>th</sup> December 2015) accessed at (<https://www.opendemocracy.net/beyondslavery/paul-blomfield/immigration-bill-2015-creating-conditions-for-exploitation>)

<sup>945</sup> *ibid*

<sup>946</sup> *ibid*

up in a tangled web of competing interest. The effect of this is usually the limitation or muting of effective legal responses.<sup>947</sup> Similarly, analysis of the backdrop of the MSA demonstrates that once again competing interests and incongruent policy objectives are at play. The effect of this is to undermine or perhaps dilute legal and policy responses. In addition, not *all* of the motivation was related to concern for victims but encompassed other factors too. The road towards the MSA was paved by immigration policy concerns combined with the legal obligations imposed upon the Government by the ECAT. The Act arguably carries perhaps unintended consequences. It first detracts attention from controversial immigration policies, particularly for the Conservative party and their 2013 Immigration Act. The second consequence served by the MSA is that in some respects the Government is able to deal with undocumented workers via the focus on the trafficking in the ‘modern slavery’ paradigm. It allows authorities to identify workers with irregular immigration statuses and repatriate them to their country of origin. However, at the same time, it acts as a cloak for further questionable policies as demonstrated by the introduction of the Immigration Bill 2015. It has been demonstrated through the exploration of historical abolition and anti-slavery movements that such issues are deeply enmeshed in complicated webs of political interests both in the hands of NGOs and national governments.<sup>948</sup> Thus in much the same way that colonial political and economic interests shaped the historical approach to anti-slavery and anti-trafficking, the same trends can be identified in the construction of the concept of ‘modern slavery’ and legislative action to combat slavery and trafficking in the contemporary setting.

This section has set up the central dynamic of anti-slavery in the UK: the head-on collision between effective anti-slavery strategies and immigration policies. The early draft of the Bill was viewed as a very weak attempt to tackle the perceived issue of exploitation. Craig remarks that this has led to a “prolonged, detailed and highly critical process of scrutiny.”<sup>949</sup> It has been remarked by Gary Craig that:

The final form of the Act indeed left most active NGOs—which had been key policy actors in the original lobbying for the Act and in terms of its final shape—and many Parliamentarians disappointed at the exclusion or watering-

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<sup>947</sup> see Chapter 1: The Road to International Abolition and the 1926 Slavery Convention: Chapter 2: History and Legal Definition of Trafficking

<sup>948</sup> *ibid*

<sup>949</sup> Craig *Op cit* fn900 19

down of key clauses (see final section below), although there is no doubt that it has placed the issue of modern slavery firmly on the British political agenda, providing important leverage for campaigners in the years to come.<sup>950</sup>

The following analysis will explore a number of key provisions in the Modern Slavery Act in light of the ‘modern slavery’ critique in order to ascertain what effect the concept has on the efficacy of the Act, specifically on victim protection and support.

### 3. The Modern Slavery Act

The Modern Slavery Act is underpinned by improvements made to the UK's criminal justice response to modern slavery. The criminal justice focus is first reflected through the codification of existing slavery and trafficking offences in one text to ensure clarity and an increase in prosecutions. Before the creation of the Act, it had been pointed out that there was much room for improvement in the UK when it came to identifying victims and prosecuting perpetrators of slavery. The weaknesses of the previous system were highlighted by the ATMG in the 2013 report ‘In the Dock.’<sup>951</sup> However, it is important to highlight that such comments about identification and prosecution are made in relation to victims identified via the National Referral Mechanism (NRM). The NRM is the gateway to support and protection for victims. However, it is also voluntary, and therefore, identified victims may not always enter the system.

In 2014, research undertaken by the Chief Scientific Adviser Bernard Silverman and others on behalf of the Home Office estimated there were somewhere between 10,000-13,000 potentially unidentified victims of the phenomena of modern slavery.<sup>952</sup> This figure was produced by applying a multiple systems estimation to NRM statistics, thus producing what is labelled as the ‘dark figure’ of potentially unidentified victims. Silverman, the then Chief Scientific Adviser to the Home Office,

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<sup>950</sup> *ibid*

<sup>951</sup> Rachel Annison, The Anti-Trafficking Monitoring Group: In the Dock – Examining the UK's Criminal Justice Response to Trafficking (June 2013) accessed at ([http://www.antislavery.org/wp-content/uploads/2017/01/in\\_the\\_dock\\_final.pdf](http://www.antislavery.org/wp-content/uploads/2017/01/in_the_dock_final.pdf))

<sup>952</sup> Bernard Silverman, Modern Slavery: an application of Multiple Systems Estimation (Home Office 2014) accessed at (<https://www.gov.uk/government/publications/modern-slavery-an-application-of-multiple-systems-estimation>)

pointed out that these figures should be regarded as tentative because the methodology relies on assumptions that cannot be verified, meaning the data has limitations.<sup>953</sup> However, if we compare this estimation with the number of referrals made to the NRM, it can be seen that there is a large gap between the estimated number of victims and those identified. In the NRM Statistics for 2017, there were 5,145 individuals referred to the NRM; this represents a 35% increase in the referral figure from 2016. Despite this increase, the gap between the estimate and the actual figures of identification are staggering. This then links to what is perceived to be a more significant problem with the criminal justice system. From 2014 to 2015, the Crown Prosecution Service dealt with 197 cases involving human trafficking offences, but there were only 39 convictions for slavery and human trafficking as the principal offence.<sup>954</sup> One concern related to the CPS raised by these figures is that given the estimation of potential victims of trafficking (which does not take into account those exploited without illegal movement) and considering the statistics for identification from the NRM, that there is a disproportionate number of successful prosecutions.

### **3.1. The Modern Slavery Act: Criminal Justice at the expense of Victim Protection**

Criminal justice is a central tenet of the anti-slavery response in the UK. This section assesses the elements of the Modern Slavery Act aimed at strengthening the criminal justice response to modern slavery in the UK. In section one of this chapter, it was proposed that a genuinely effective anti-slavery strategy must take a holistic approach, which places the victim at the centre. The two elements should be viewed as two sides of the same coin rather than in competition. This section will demonstrate how the current approach in the UK fails to do this. There is a disproportionate emphasis placed on the criminal justice response in the UK, to the extent that victim support and identification are viewed as tools to support the criminal justice system. The following section will go on to demonstrate that there are large gaps in the UK's response to modern slavery when it comes to offering effective victim support.

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<sup>953</sup> *ibid*

<sup>954</sup> Home Office, Independent Anti-Slavery Commissioner: Strategic Plan 2015-2017 (October 2015) 20 accessed at ([https://www.antislaverycommissioner.co.uk/media/1075/iasc\\_strategicplan\\_2015.pdf](https://www.antislaverycommissioner.co.uk/media/1075/iasc_strategicplan_2015.pdf))

Further to this, the gaps and silences which are evident in the Act and related policy responses are conditioned by the ‘modern slavery’ narrative.

### *3.1.1. Consolidation of Previous Offences*

It had been established in numerous reports from both the Home Office and NGOs<sup>955</sup> alike that there were deficiencies in the criminal justice response to the issue at hand. There was a belief that these shortcomings were a central cause of ‘modern slavery’ offences in the UK. It has been highlighted by the former Anti-Slavery Commissioner Kevin Hyland that ‘driving an improved law enforcement and criminal justice response’ is crucial. The first step towards an improved response is the supposed strengthening of the legal framework. This aim is achieved via consolidation of pre-existing offences but also the changes made to penalties for modern slavery offences, primarily higher custodial sentences.

The initial basis for anti-trafficking legislation can be found in the UN Palermo Protocol<sup>956</sup> which established the definition of trafficking at an international level. This definition was reproduced in the Council of Europe Trafficking Convention<sup>957</sup> and the EU Trafficking Directive.<sup>958</sup> Both Article 18 of the Convention and Article 2 of the Directive oblige states including the UK to establish offences related to trafficking. The anti-trafficking and slavery legislation in England and Wales had been developed on a piecemeal basis in several pieces of legislation.<sup>959</sup> The Sexual Offences Act 2003 (SOA) came into force on 1 May 2004 replacing the “stop-gap measure”<sup>960</sup> of Section 145 of the Nationality, Immigration and Asylum Act 2002. The SOA covered trafficking for sexual exploitation in Sections 57-59. Sexual exploitation in the context of trafficking includes 50 offences such as rape, sexual

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<sup>955</sup> Annison *Op cit* fn951, Myrium Cherti, Jenny Pennington, Eliza Galos, The UK’S Response to Human Trafficking: Fit For Purpose? (Institute for Public Policy Research 2012) accessed at (<https://www.ippr.org/publications/the-uks-response-to-human-trafficking-fit-for-purpose>)

<sup>956</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime 2000

<sup>957</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series No. 197, 2005. Hereinafter known as the “Convention.”

<sup>958</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [OJ L 101 of 15.4.2011]

<sup>959</sup> The anti-trafficking and slavery legislation in Scotland and Wales differ slightly: see ATMG ‘Class Acts – Examining Modern Slavery Legislation Across the UK’ (October 2016) accessed at ([http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg\\_class\\_acts\\_report\\_web\\_final.pdf](http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf))

<sup>960</sup> Annison *Op cit* fn951, 28

assault, causing a person to engage in sexual activity without consent, soliciting, causing or inciting prostitution for gain and controlling prostitution.<sup>961</sup> There was a distinction in the legislation between sexual and non-sexual exploitation. The AIA<sup>962</sup> defined non-sexual exploitation in four streams: exploitation related to article 4 ECHR, committing an offence under the Human Organs Transplants Act 1989, labour trafficking, exploitation deriving from mental or physical disability, of youth or family relationship.<sup>963</sup> The final element is that of slavery, servitude and forced or compulsory labour. Section 71 of the Coroners and Justice Act 2009 stated that the practices were to be understood in relation to Article 4 ECHR.

As a consequence of this collection of statutory provisions the UK's legislative response to the threat of trafficking and slavery was disparate, and prior to the enactment of the Modern Slavery Act there had been many calls for a comprehensive legal framework. As previously stated GRETA had highlighted the disjointed nature of the legal framework and recommended consolidation in a piece of legislation dedicated to human trafficking.<sup>964</sup> The case was made for one Act that would clear up the confusion for those tasked with the implementation of the legislation. One of the central concerns was that the distinction between sexual exploitation (SOA) and non-sexual exploitation (AIA) could lead police, prosecutors, judges and the jury to believe that any trafficking which does not fall within the scope of SOA is a matter of immigration and not criminal law.<sup>965</sup> The Anti-Trafficking Monitoring Group in 2013 put a similar case forward. The ATMG argued against the Government's view at the time that "whilst introducing a new human trafficking bill to consolidate existing legislation into one Act would be administratively neater, the UK Government does not consider it necessary or proportionate to effectively bring to justice those who seek to exploit others."<sup>966</sup> The ATMG put forward a number of arguments: first, that the overwhelming majority of participants interviewed for its report (90%) stated that a consolidated Act would eliminate discrepancies between domestic and international

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<sup>961</sup> *ibid* 28

<sup>962</sup> Immigration and Asylum Act 1999 C.33

<sup>963</sup> Annison *Op cit* fn951, 28

<sup>964</sup> GRETA fn924 see Appendix 1.1

<sup>965</sup> *ibid* 155

<sup>966</sup> Home Office, Report on the Internal Review of Human Trafficking Legislation (May 2012) accessed at (<https://www.gov.uk/government/publications/human-trafficking-legislation-report-on-internal-review>)

law. Second, the offences prior to the MSA lacked prominence in that legislation in which they were housed.<sup>967</sup>

The MSA consolidates all relevant existing offences into one comprehensive statute.<sup>968</sup> As previously discussed, the aim is to facilitate a clearer understanding of the law in order to ensure increased prosecutions. However, the efficiency of this consolidation is questionable for those implementing the legislation due to the fact the umbrella nature of ‘modern slavery’ as a concept, leaves it open to broad interpretation.

It is helpful to determine what parameters the Modern Slavery Act sets around the offences, which fall under the umbrella ‘modern slavery’ within the UK. The accepted international legal definitions and judicial interpretations carry with them a number of issues.<sup>969</sup> The following section argues that such issues make it easier for the Act to apply a misleading analogy facilitating the inclusion of practices under the banner of ‘modern slavery’, which, in itself, is a flawed concept.

### *3.1.2. Slavery, Servitude and Forced Labour*

The first issue of importance in relation to the definitions of these practices is the fact that they are conflated together into a single category. The relevant provision of the Act, Section 1, replaces the pre-existing offence of slavery, servitude and forced or compulsory labour found in the CJA.<sup>970</sup> Section 71 of the CJA stated that the practices were to be understood in relation to article 4 ECHR. It would seem that Section 1 (1) of the new Act simply reproduces the offence found in the CJA. The offence is still to be understood in relation to the ECHR and by extension its jurisprudence. The MSA, therefore, incorporates the interpretations of the ECtHR in *Siliadin*<sup>971</sup> and *Rantsev*<sup>972</sup>. One thing to consider is that the CJA perpetuates the hierarchy of exploitation established by human rights law with a clear gradation of severity. Article 4 of the ECHR creates a normative hierarchy of offences; this is something that appears to be enforced by the ECtHR in *Silladin* and *Rantsev*, with the Court defining and dealing

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<sup>967</sup> Annison fn951, 26

<sup>968</sup> Modern Slavery Act 2015 C.30, s 1

<sup>969</sup> See Chapter 4 2.1. Tanedo – How could you Possibly be Trafficked?

<sup>970</sup> Coroners and Justice Act 2009, s.71

<sup>971</sup> *Siliadin v. France*, Application 73316/01 (ECtHR 26 July 2005)

<sup>972</sup> *Rantsev v. Cyprus and Russia*, Application 25965/04 (ECtHR, 7 January 2010)

with each of the elements in isolation. There is a tendency in human rights instruments to place the three practices on a sliding scale, with slavery being the pinnacle of exploitation and servitude or forced labour as being to some extent less severe.<sup>973</sup> Article 4 ECHR remains somewhat ambiguous.<sup>974</sup> In *Siliadin*,<sup>975</sup> the Court presented an interpretation of slavery that relied upon the existence of a genuine right of legal ownership (a legal impossibility); whereas, *Rantsev*<sup>976</sup> refocused the understanding of slavery within the scope of the 1926 Slavery Convention, but failed to provide guidance on how the exploitation in question was a breach of Article 4.<sup>977</sup> A further issue is that the Court brought trafficking within the scope of Article 4 without feeling it necessary to clarify how it fitted into the framework of slavery, forced/compulsory labour and servitude. Therefore, what we are left with following *Rantsev* is a judicial interpretation of slavery and trafficking divorced from the 1926 Slavery Convention. At this point, we already have a conflation of slavery and its related practices with trafficking blurring the lines between two distinct offences.

There is one particularly concerning element of Section 1 when it comes to legal clarity and the distinction between slavery and trafficking in the MSA. Under section 1 of the MSA, when considering the offences of slavery, servitude and forced or compulsory labour, regard may be given to any work or services by the person which would constitute exploitation within Section 3(3) to (6).<sup>978</sup> This legal development is of particular concern as the relevant sections come under the explanation of the element of exploitation, within the practice of trafficking. While slavery itself is included as a form of exploitation,<sup>979</sup> trafficking can involve a broad range of exploitation which would not fall within the parameters of the legal definition of slavery. What the Act essentially does is start by saying that slavery, servitude and forced or compulsory labour can be established within the understanding of the ECHR, to move then to expanding the understanding beyond those boundaries. This seemingly conflates trafficking with slavery and its related practices. Such a conflation is a particularly concerning development as it widens the scope of

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<sup>973</sup> *Siliadin* fn971 para 103-105

<sup>974</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

<sup>975</sup> *ibid* para 122

<sup>976</sup> *Rantsev* fn972

<sup>977</sup> League of Nation Slavery Convention 1926 fn415, article 1(1)

<sup>978</sup> Modern Slavery Act 2015 s1(4)(b)

<sup>979</sup> *ibid* s3(2)

applicability of section 1 when identifying slavery. The risks of such an approach to slavery and trafficking were discussed at length in Chapter 4 of this thesis.<sup>980</sup> One of the chief concerns being that by erosion of the boundaries between two distinct legal categories the expectation of harm suffered by the victim may be raised leading to failed convictions as seen in the *Tanedo* case.<sup>981</sup>

If this group of exploitative practices is to be interpreted in light of Article 4 of the ECHR, what does this mean for the Act's understanding of slavery and by extension servitude and forced or compulsory labour? First, Section 1 mirrors the construction of Article 4 in the connection made between the three practices. As discussed, the jurisprudence of the ECtHR on Article 4 has been confusing. Therefore, the application of ECtHR interpretations and any confusion or inconsistencies will be extended to the domestic understanding of what these practices are. As the MSA is utilised as a tool to combat modern slavery, practitioners, law enforcement officers and NGOs will look to the interpretation of the UK courts in order to determine where the boundaries of Section 1 lie. It is possible that the developing case law in the UK will shape the way in which victims are identified and which indicators are viewed as being symptomatic of slavery, servitude and forced or compulsory labour. This issue has been highlighted in the judgement *Secretary of State for the Home Department v MS (Pakistan)*.<sup>982</sup> This Court of Appeal judgement involved a negative NRM decision regarding the status of a trafficking victim. The Competent Authority accepted that although *MS* had been subject to the act and means of the trafficking definition, the individual did not fulfil the criteria for exploitation. The Court cited the Competent Authority stating:

[W]hilst you may have been subjected to a degree of manipulation, this did not amount to exploitation in the form of 'forced labour'- the work you did was not exacted under the menace of any penalty but was rather done out of pure economic necessity.<sup>983</sup>

Thus, the rising threshold for expected harm as evidenced in *Tanedo* can be identified in the UK's approach to defining exploitation in the context of human trafficking.

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<sup>980</sup> see Chapter 4, 3.2 Modern Slavery and the Trafficking Make Over 4. Do Victims Benefit from 'Modern Slavery' and does Legal Accuracy Matter?

<sup>981</sup> See Chapter 4 2.1. *Tanedo* – How could you Possibly be Trafficked?

<sup>982</sup> *Secretary of State for the Home Department v MS (Pakistan)* [2018] EWCA 594

<sup>983</sup> *ibid* para 10

Consequently, as a result of the blurring of the boundaries between slavery and trafficking the relevant authorities are unable to conceptualise exploitation in the context of trafficking in a broader sense, as intended by the non-exhaustive. Further to this, the requirement, of the menace of any penalty allows those involved in human trafficking to potentially fall through the net and escape liability. Due to the reliance on article 4 ECHR, the MSA starts with a disadvantage due to the confused jurisprudence of the ECtHR, which is further hampered by the new developments in the MSA. Both further blur the lines between slavery and exploitation associated with trafficking.

### *3.1.3. Trafficking*

It is clear that the practice of trafficking is often conflated with slavery within contemporary anti-slavery discourse. This is important to take into account because the way in which we think about an issue such as labour exploitation is conditioned by the language we use to discuss it. It would be naive to think that the way in which trafficking is included in the Modern Slavery Act will not produce a specific effect and shape the way we think about these two terms. The first issue to take note of is the detail provided for the offence of trafficking in comparison to the section 1 coverage of slavery. The discussion in the previous section highlights the cursory attention given to slavery which fails to provide a definition, simply choosing to reference the ECHR. While on the other hand, the Act provides a detailed overview of all the constituent elements of trafficking. Section 2 of the Act provides for a single offence of human trafficking<sup>984</sup> and replaces two existing offences under Section 59(a) of the Sexual Offences Act<sup>985</sup> and section 109 of the Protection of Freedoms Act.<sup>986</sup> The effect of this is to remove the distinction between sexual and non-sexual exploitation. The reason for this is purely administrative; the aim is to make it simpler for investigators and prosecutors to bring forward human trafficking prosecutions.<sup>987</sup> An initial conclusion that can be drawn from this is that a central motivation for the creation of the Act is to increase prosecutions for the offence of trafficking. While a rise in prosecutions may not appear to be an undesirable effect of this Act, later

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<sup>984</sup> Modern Slavery Act 2015 C.30

<sup>985</sup> Sexual Offences Act 2003

<sup>986</sup> Protection of Freedoms Act 2012

<sup>987</sup> Modern Slavery Act 2015, Explanatory Notes, 4 accessed at ([http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpgaen\\_20150030\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpgaen_20150030_en.pdf))

discussion on the level of victim protection offered by the Act will demonstrate that there is a disproportionate emphasis on the notion of criminal justice in the MSA.

The definition of trafficking in Section 2 provides explanations of each element, including the stages of recruitment, transportation, and exploitation.<sup>988</sup> The UK's legislation on trafficking has been shaped in recent years through the ratification of the United Nations Convention against Transnational Organised Crime (Palermo Protocol)<sup>989</sup> and the implementation of the EU Trafficking Directive<sup>990</sup> and ECAT.<sup>991</sup> The EU directive<sup>992</sup> was targeted at the preventing and combating of trafficking within the EU, by adopting and expanding the obligations and definitions of the Palermo Protocol. The scope of the directive is broader in the sense that it does not apply only to the transnational process of trafficking but also the national process. Therefore, both the directive and the MSA focus on trafficking in a holistic sense by combatting both national and trans-national movement of individuals for the purposes of exploitation. This development is significant as it evidences recognition that these forms of abuse and criminality are taking place not only outside of national borders but also from within. The directive also applies to trafficking in circumstances that do not involve organised crime. This is potentially significant when considering the MSA as Section 2 of this chapter highlighted there is a belief that 'modern slavery' offences are largely but not exclusively the result of organised crime.<sup>993</sup>

This section has already touched upon one potential hazard in the treatment of human trafficking and slavery within Section 1. However, the emphasis placed on the practice of trafficking demonstrates the pervasiveness of the 'modern slavery' discourse as discussed in Chapter 4.<sup>994</sup> Thus, the Modern Slavery Act perpetuates a

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<sup>988</sup> Modern Slavery Act 2015 C.30

<sup>989</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000

<sup>990</sup> Council of the Europe, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU

<sup>991</sup> Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197

<sup>992</sup> European Union Directive 2011/36/EU fn958

<sup>993</sup> Modern Slavery Strategy November 2014 (Crown Copyright 2014) 26 accessed at (<https://www.gov.uk/government/publications/modern-slavery-strategy>)

<sup>994</sup> see Chapter 4

### 3. What is Modern Slavery: Defining an Undefined Term

conceptualisation of the issue which, as highlighted by O'Connell Davidson, prioritises security and criminalisation and neglects the structures and existing legal factors that create vulnerability.<sup>995</sup>

#### ***3.1.4. Modern Slavery Offences: Clarity or Confusion***

Thus far, the discussion has highlighted that one of the overriding aims of the MSA was the codification of disparate 'modern-slavery' crimes. This codification was aimed at the creation of a comprehensive and clear tool for law enforcement, prosecutors and NGOs. It cannot be disputed that superficially Sections 1 and 2 of the MSA achieve this goal, with the amalgamation of the relevant offences. The same cannot be said when it comes to legal clarity on what constitutes these practices, particularly when it comes to exploitation under Section 1 of the Act. Given the continued reliance on Article 4 ECHR and the new clarifications added to section 1 of the MSA, there is the potential for continued legal uncertainty about where the boundaries between slavery and trafficking lie.

#### **3.2. Prevention and Disruption: Reversing the Low Risk and High Pay-out Dynamic**

One of the central aims of the MSA is to function as a deterrent to those who may participate in slavery and trafficking activities. This function is performed by the establishment of higher penalties for offences under Sections 1 and 2 of the MSA. Alongside the codification of offences to ensure increased prosecutions, the introduction of higher penalties evidences the belief in the political arena that the answer to the issue of modern slavery and labour exploitation is to focus on prosecution. The reasoning behind this focus is that if perpetrators are not relentlessly pursued they will continue to exploit vulnerable victims. The following discussion highlights the elements of the MSA targeted at providing the law enforcement and the Criminal Prosecution Service with the necessary tools to disrupt criminal activity and prosecute perpetrators.

However, arguably the ambition of increasing prosecutions is to raise the UK's profile on the world stage in the fight against slavery. This idea of setting the trend or being

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<sup>995</sup> see fn864 for O'Connell Davidson on this point

seen as a pioneer when it comes to combating modern slavery seems to be entrenched in the drafting of the Act. For example, the evidence review of the Modern Slavery Bill presented to the Home Secretary in 2013 was titled, "*Establishing Britain as a world leader in the fight against modern slavery*."<sup>996</sup> The report makes numerous references to Britain becoming a world leader in the area of modern slavery, at one point stating "we are on the verge of a new era, the Bill provides a unique opportunity to make Britain once again a world leader in the fight against slavery."<sup>997</sup> The combination of this sentiment with the language linking the Modern Slavery Act to what the report called the first anti-slavery Act – the 1807 Slave Trade Act. There appears to be a conscious effort to link the MSA and the newest wave of anti-slavery actions in the UK to the original abolitionists. It could be argued that the motivation for this is to reclaim Wilberforce's mantle and again be remembered as a country which led the charge against slavery, at the same time distancing the state from its role in contemporary labour exploitation.

### *3.2.1 Custodial Sentences*

Due to the small number of prosecutions for modern slavery offences, taking part in such activities is viewed as a low-risk high pay-out choice.<sup>998</sup> In the Anti-Trafficking Monitoring Groups 2013 report, according to the Ministry of Justice figures, the UK had a low conviction rate for trafficking offences where it was the principal offence. Further to this, the rate of convictions has decreased over the years to a success of only 7% in sex trafficking case and 0% in labour trafficking in 2011.<sup>999</sup> Before the drafting of the Modern Slavery Bill, the CSJ highlighted the need for effective investigation and prosecution to bring perpetrators to account and "change the equation of fear and power," meaning that traffickers become increasingly afraid of the consequences of their actions and that victims become less vulnerable.<sup>1000</sup> This has not succeeded as a strategy; it could be argued that in order for victims to truly be

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<sup>996</sup> Baroness Butler-Sloss, Frank Field MP (Chair), Sir John Randall MP, Report of the Modern Slavery Bill Evidence Review - Establishing Britain as a global leader in the fight against modern slavery, (16<sup>th</sup> December 2013) accessed at

(<http://www.frankfield.co.uk/upload/docs/Modern%20Slavery%20Bill%20Evidence%20Review.pdf>)

<sup>997</sup> *ibid* 15

<sup>998</sup> Independent Anti-Slavery Commissioner fn 954, 20

<sup>999</sup> Annison *Op cit* fn951, 73

<sup>1000</sup> Centre for Social Justice fn916, 50

less vulnerable the strategies should be victim centred, focussing on protection and support, supplemented by criminal justice measures.

The Act increases the maximum sentence for the most serious offences under part 1 of the Act from 14 years to life imprisonment.<sup>1001</sup> The Act adds Section 1 and 2 offences to the list of offences in Schedule 15 of the Criminal Justice Act (CJA).<sup>1002</sup> In accordance with Section 224(a) of the Criminal Justice Act, a court is obliged to impose a life sentence on any offender aged over 18 for offences under Sections 1 and 2 of the Modern Slavery Act. There are further requirements that the offence must be serious enough to justify a sentence over 10 years or that the offender has a previous conviction for any offence under Schedule 15 which carried a sentence of 10 years or more. Section 226(a) of the CJA provides for extended sentences for adults in relation to sexual and violent offences, and amendments to the Act extend this provision to Sections 1 and 2 of the Modern Slavery Act. Since March 2015 and the enactment of the MSA, there has been a drive to charge and prosecute perpetrators. However, it will take time for the effectiveness of this change as a deterrent to become apparent. Given the nature of modern slavery offences and the obvious motivation of money and profit, it is still open to question whether increasing prosecutions will act as a deterrent. This is particularly the case if we take into account the role played by labour exploitation in supply chains. The focus on criminal justice evidences the belief that modern slavery in the UK is the product of organised crime. However, exploitation in supply chains is something that cannot be effectively targeted by increased criminal sanctions when, due to the nature of the dynamic between businesses in the UK, supply chains will often be located outside the jurisdiction of the MSA. Though, it may be possible that the development in the MSA in relation to transparency in supply chains may act as a more appropriate tool to target this form of exploitation.

### *3.2.2. Asset Recovery and Financial Deterrence*

The notion of disruption of profit from criminal exploitation and redistribution of profit in the form of compensation to victims is the next element of the criminal justice strategy. The former Independent Anti-Slavery Commissioner Kevin Hyland

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<sup>1001</sup> Modern Slavery Act 2015 C.30 s.6

<sup>1002</sup> Criminal Justice Act 2003 C.44

stated that in order for this to be achieved proactive policing and rapid and sustained responses are necessary.<sup>1003</sup> One element of disruption is driving improved investigations and increasing prosecutions as discussed in the previous section. It has already been previously highlighted that there is a belief that perpetrators participate in ‘modern slavery’ offences due to the low risk high pay-out nature of the crime. One way in which the Home Office intends to target this issue is via confiscation of illegal profits of modern slavery. The MSS states that research shows that ‘modern slavery’ is one of the largest and most lucrative crime industries. The International Labour Organisation (ILO) estimates that the total illegal profits obtained from the use of forced labour alone amount to over \$150 billion (US) per year.<sup>1004</sup> The MSS proposed to make the UK a “hostile environment” for slavers and traffickers by attacking the profits made from modern slavery offences. Interestingly, as was acknowledged above, the term “hostile environment” is one also used in relation to immigration policy. This will be achieved through the use of investigation and asset recovery tools utilised in other organised crime strategies. The MSA aims to make it harder for criminals to move, hide and use the proceeds of trafficking and slavery. In order to achieve this aim The Serious Crime Act<sup>1005</sup> amends the Proceeds of Crime Act<sup>1006</sup> (POCA) to enable law enforcement agencies to recover criminal assets in a shorter time frame and to deal with gaps in the POCA, for example, offences falling under Section 1 MSA. The Modern Slavery Act makes the offences of slavery, servitude, forced or compulsory labour and trafficking criminal lifestyle offences for the purposes of the POCA<sup>1007</sup>. The effect of this is that if an individual is convicted of an offence under Sections 1 or 2 of the MSA, the court will be able to assume that any assets held by the individual over a period of six years are the proceeds of crime.

The use of asset recovery prior to the Act can be seen to have been successful in *R v Connors* with £4 million identified as recoverable proceeds of crime.<sup>1008</sup> However, there is evidence to suggest that the scheme may not be so successful in a broader sense. In a report carried out in 2014 by the Public Accounts Committee on the

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<sup>1003</sup> Independent Anti-Slavery Commissioner fn 998 20

<sup>1004</sup> International Labour Organisation, *Profits and Poverty: The Economics of Forced Labour* (2014) accessed at (<http://www.ilo.org/global/topics/forced-labour/publications/profits-of-forced-labour-2014/lang-en/index.htm>)

<sup>1005</sup> The Serious Crime Act 2015 C.9

<sup>1006</sup> Proceeds of Crime Act 2002 C.29

<sup>1007</sup> Modern Slavery Act 2015 s7

<sup>1008</sup> *R. v. Connors* [2013] EWCA Crim 324

effectiveness of confiscation orders, it was stated clearly that while it is without question that crime should not pay, there are far too many criminals subject to confiscation orders choosing to spend extra time in prison rather than pay what is owed. At the time of the report, it was estimated that there was £490 million owed in confiscation orders. This suggests that financial sanctions are not working and further to this custodial sentences offer little deterrence.<sup>1009</sup> However, the report states that this is largely owing to the poor implementation of orders. Therefore, with the amendments made to POCA to improve the recovery framework, it can be hoped that the same issues will not apply to the MSA. Evidence in favour of this can be seen in the recent prosecution of a trafficking gang in west London who have been sentenced to 16 years in prison for trafficking with a proceeds of crime hearing to take place in due course.<sup>1010</sup> It is essential that the issues identified in the Public Accounts Committee are not present in the MSA use of confiscation orders, given the underpinning role the confiscation of assets is set to play in the drive for criminal justice. Further to this, the broader statistic of £490 million in unpaid orders in favour of extended prison sentences does not bode well for the idea of transforming ‘modern slavery’ offences from a low risk high pay-out business.

### *3.2.3. Slavery and Trafficking Prevention and Risk Order*

In order to support the MSS' drive to prevent individuals from entering into modern slavery activities, the MSA introduces Slavery and Trafficking Prevention and Risk Orders. These orders aim to once again empower law enforcement agencies in their task to disrupt and prevent modern slavery in the UK. Although the anti-slavery strategy describes these orders as tools to prevent the harm caused by modern slavery, the orders reinforce the criminal justice ethos of the Modern Slavery Act, by focussing on the actions of the perpetrators.<sup>1011</sup> The orders contained in Part 2 of the Act are civil and can apply to individuals who are deemed to pose a risk of harm by committing ‘modern slavery’ offences.<sup>1012</sup> Any court can impose a prevention order

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<sup>1009</sup> Public Accounts Committee – Fourty-Ninth Report (5<sup>th</sup> March 2014 House of Commons) accessed at (<https://publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/942/94202.htm>)

<sup>1010</sup> Salina Patel, West London Trio Jailed for Trafficking Thai Nationals for Prostitution Ring ( Get West London, 21<sup>st</sup> January 2016) accessed at (<https://www.getwestlondon.co.uk/news/west-london-news/west-london-trio-jailed-trafficking-10768271>)

<sup>1011</sup> Modern Slavery Strategy fn993, 48

<sup>1012</sup> Home Office, Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015 (July 2015) 7 accessed at

when there has been a conviction for a human trafficking or slavery offence. However, the orders only apply to offences in England and Wales in Schedule 1 of the Act. Alternatively, an order can also be imposed in the absence of a conviction for reasons of insanity<sup>1013</sup> or a mental or physical disability.<sup>1014</sup> Before a prevention order can be given the court must satisfy the following requirements. First, the court must perceive a risk that the defendant may reoffend in relation to the MSA. Second, there is a necessity to make the order so as to prevent the infliction of psychological or physical harm if a situation occurred whereby the defendant does re-offend.<sup>1015</sup>

It is also possible for a prevention order to be imposed in the absence of a conviction on application to a magistrate's court by a chief of police, an immigration officer or the NCA.<sup>1016</sup> For an order to be made on application under Section 15(2) the court must be satisfied that the individual is a relevant offender, This means that there must be a conviction, a caution or the individual must be the subject of a finding within the UK or an equivalent offence outside the UK. Further to this under Section 14(3) the defendant must have acted in such a way that there is a risk they will commit a 'modern slavery' offence, or there is a necessity to prevent any harm an offence would cause. The content of a prevention order will be tailored to fit the individual defendant but can include prohibitions from participating in specific forms of business, working with children or travelling to a particular location. The orders will apply both in and outside the UK.<sup>1017</sup>

The slavery and trafficking risk orders (STRO) operate on a similar statutory footing as the prevention orders. However, they do not require a previous conviction. Under Section 23 of the Act, a magistrate's court may impose a risk order on application by the same authorities capable of applying for a prevention order, with the same conditions, which must be satisfied by the court in question. The Modern Slavery Strategy described the risk orders as tools to target those on the periphery of organised crime when behaviour could be a potential risk, but there is not enough

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([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/610015/110417 - statutory guidance part 2 - GLAA updates- Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/610015/110417_-_statutory_guidance_part_2_-_GLAA_updates- Final.pdf))

<sup>1013</sup> Modern Slavery Act (2015) s14(1b)

<sup>1014</sup> *ibid*

<sup>1015</sup> *ibid* s14(2)

<sup>1016</sup> *ibid* s15(1)

<sup>1017</sup> Home Office fn1012 7

evidence to secure a prosecution.<sup>1018</sup> The orders are packaged as tools that will allow law enforcement agencies and courts alike to respond to the risk of modern slavery in a flexible manner, by tailoring the prohibitions to fit the exploitation and the individual.<sup>1019</sup>

The STROs and STPOs were the subjects of intense scepticism during the evidence review of the Modern Slavery Bill. The central aim of the orders is to control and limit the movement of modern slavery offenders or place prohibitions on their activities. There were a number of issues raised by the Joint Committee, first in relation to the lack of specificity in the Modern Slavery Bill about the prohibitions which can be included in the STPO.<sup>1020</sup> There is a contrast to be made with the terrorism prevention orders which include a list of specified actions that may be imposed on the individual. In response to the concerns expressed by the Joint Committee, the Government stated that they were reluctant to undermine the effectiveness of the orders by specifying the type of restrictions which may be imposed on sentencing or application.<sup>1021</sup> Therefore the MSA retains this lack of specificity due to the fact that the orders are designed to be flexible.<sup>1022</sup>

Further to this, the Joint Committee advocated the removal of STRO from the Bill. The logic behind this suggestion is that the STRO are designed to be imposed on individuals who have not been convicted of a ‘modern slavery’ offence, therefore, infringing on individual liberty. The Joint Committee highlighted the White Paper position that STRO could be imposed “only where a court is satisfied that the individual presents a *sufficiently serious risk* to others”, however, the draft Bill imposes a lower threshold of the defendant having *acted in a way* which makes it *necessary* to make the order.<sup>1023</sup> The central issue is the lack of legal certainty in the provision. Acceptance of the rule of law necessitates that an individual should be able

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<sup>1018</sup> Modern Slavery Strategy fn993 48

<sup>1019</sup> *ibid*

<sup>1020</sup> Joint Committee on the Draft Modern Slavery Bill Report, Session 2013/14 (8<sup>th</sup> April 2014) 51 accessed at

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/610015/110417 - statutory guidance part 2 - GLAA updates- Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/610015/110417_-_statutory_guidance_part_2_-_GLAA_updates- Final.pdf))

<sup>1021</sup> The Government Response to the report from the Joint Committee on the Draft Modern Slavery Bill 2013-14 HL Paper 166 / HC 1019 (Crown Copyright, June 2014) accessed at

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/318771/CM8889DraftModernSlaveryBill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/318771/CM8889DraftModernSlaveryBill.pdf)) 10

<sup>1022</sup> *ibid*

<sup>1023</sup> Joint Committee on the Draft Modern Slavery Bill Report fn1020, 54

to know in advance what the legal consequences of an action are before committing themselves to it.<sup>1024</sup> The Joint Committee contended that given the potential for restrictions on an individual's daily activities or rights the threshold of necessity is not sufficient.<sup>1025</sup> The response of the Home Office was to argue that the requirement of necessity ensures that any interference with a defendant's rights will be in accordance with the law and that the court's duty of Section 6 of the Human Rights Act ensures that the orders will be compatible with the UK's human rights obligations under the ECHR.<sup>1026</sup> Central issues which remain with the STRO are twofold, a lack of legal certainty within the statutory provisions means that people cannot be fully aware of the potential legal consequences of their actions, which could ultimately result in the imposition of restrictions on the fundamental rights of individuals who do not have existing modern slavery convictions.

The CPS applied for the first successful STPO on 15<sup>th</sup> January 2016. The orders were applied to three members of a trafficking gang operating in between Slovakia and the UK. The terms orders include restrictions on travel to the UK for the defendants and immediate family member and restrictions on organising transport or accommodation until further notice.<sup>1027</sup> The Slovakian police will monitor the orders in order to bring any breaches to the attention of the UK authorities. This agreement could potentially be crucial to the efficient operation of such orders due to the often trans-national nature of trafficking. This example of effective multi-agency partnership is essential to combatting modern slavery and ensuring that anti-slavery strategies can efficiently operate. However, despite this positive development in the enforcement of the MSA and the evident belief of the Home Office that the flexible nature of the orders will ensure effectiveness, concern was expressed by the Joint Committee about the ability of such orders to act as a sufficient deterrent.<sup>1028</sup> It has been previously highlighted that concerns have been voiced in relation to asset recovery orders. The willingness of offenders to face further time in prison rather than comply with such orders demonstrates the potential difficulty in creating successful methods of deterrence.

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<sup>1024</sup> *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, HL638

<sup>1025</sup> Joint Committee on the Draft Modern Slavery Bill Report fn fn1020, 54

<sup>1026</sup> *ibid*

<sup>1027</sup> Martin Bentham, Traffickers who 'sold' woman for £3,000 face travel ban under anti-slavery orders *The Standard* 20<sup>th</sup> January 2016 (<https://www.standard.co.uk/news/uk/traffickers-who-sold-woman-for-3000-face-travel-ban-under-antislavery-orders-a3160926.html>)

<sup>1028</sup> Baroness Butler-Sloss, *et al Op cit* fn996 32

Trafficking and slavery are forms of criminal behaviour, which have the potential to yield great profits and it is possible that this general trend of non-compliance with confiscation orders could extend to other forms of deterrence. Therefore, despite the assurances offered by the Home Office, it appears that the effectiveness of STPO's and STRO's remains open to question.

### **3.4. Criminal Justice and Modern Slavery Prevention: A Short-Term Assessment**

The section has considered the introduction of new offences and tougher penalties aimed to deter offenders from participating in criminal behaviour to make modern slavery crime a high risk, low reward enterprise. The continuously increasing referrals to the National Referral Mechanism would suggest that in the short term this approach in isolation with not enough emphasis on victim support and protection is not yielding the desired results. Evidence suggests that police forces' approach to addressing 'modern slavery' varies in success by region.<sup>1029</sup>

The three police forces with the highest number of adult referrals have made more than 900 referrals since the NRM began in 2009, while six police forces have referred fewer than ten adult potential victims each in the same period. The ratio between the forces with the highest number of referrals and the lowest number is much higher than for other types of crime.<sup>1030</sup>

A report conducted by Her Majesties Inspectorate of Constabulary and Fire & Rescue Services<sup>1031</sup> into the law enforcement response to the MSA highlighted a number of key failings. These included tendencies to close cases prematurely without following all lines of enquiry, lack of focus on safeguarding victims and a tendency to refer victims without legal status directly to immigration status, thus criminalising them.<sup>1032</sup>

In 2016, the number of potential victims referred into the NRM was 3805 (a 17% increase on 2015). In 2017 5145 victims were referred which is roughly a 36%

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<sup>1029</sup> House of Commons Committee of Public Accounts, Reducing Modern Slavery – 36th Report of Session 2017-2019, HC 886 (2017) 15 accessed at (<https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/886/886.pdf>)

<sup>1030</sup> *ibid*

<sup>1031</sup> Her Majesties Inspectorate of Constabulary and Fire & Rescue Services, Stolen Freedom – The Policing Response to Modern Slavery and Human Trafficking (October 2017) accessed at (<https://www.justiceinspectrates.gov.uk/hmicfrs/wp-content/uploads/stolen-freedom-the-policing-response-to-modern-slavery-and-human-trafficking.pdf>)

<sup>1032</sup> *ibid* 12-13

increase from the previous year. While the introduction of the consolidated offences under the label of 'modern slavery' and stricter penalties for offenders is viewed to be the central tool for anti-slavery, in the short term, this does not necessarily appear to be the case.

In the twelve months following the enactment of the Modern Slavery Act, there were many jubilant reports across the media and in the House of Commons regarding the unprecedented increase in prosecutions in the wake of the new legislation. If we look at the figures in the first year, the police recorded a number of 884 'modern slavery' offences between April 2015-May 2016; 246 of these cases were referred to the Crown Prosecution Service.<sup>1033</sup>

There has been a steady increase in the volume of cases recorded by the police and defendants referred for prosecution, rising from 246 in 2015-2016 to an all-time high of 271 in 2015-2016.<sup>1034</sup> Despite this, between 2016-2017 the number of convictions fell by 6 per cent, from 192 to 181, with the conviction rate falling from 65.1 per cent to 61.4 per cent, the number of unsuccessful convictions rose from 34.9% to 38.6%.<sup>1035</sup> Thus, bearing in mind the earlier critique of the human trafficking-focused conceptualisation of 'modern slavery'; it is possible that factors such as the increased expectation of harm could come into play.

Statistics published by the National Crime Agency demonstrate that only 665 of the 5145 (13%) of those referred to the NRM in 2017, had received positive conclusive grounds decisions by 7 March 2018. In addition, of the 3804 referrals made in the previous year, 1133 positive conclusive grounds decisions had been issued by the same date. What can, therefore, be seen is the huge gap between identified victims, those with positive decisions and number of cases recorded and referred to the CPS for prosecution and once again the number of successful convictions. While there may have been much fanfare in the press about increased prosecution numbers, this was an increase from an already low baseline. The 2017 Violence against Women and Girls Report<sup>1036</sup> highlights the failings of the new approach to crack down on the exploitation and increase prosecutions meaning that the new harsher penalties aimed

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<sup>1033</sup> Violence Against Women and Girls Report Ninth Edition 2015-2016  
([https://www.cps.gov.uk/sites/default/files/documents/publications/cps\\_vawg\\_report\\_2016.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/cps_vawg_report_2016.pdf))

<sup>1034</sup> *ibid* 15

<sup>1035</sup> *ibid* A36

<sup>1036</sup> VAWG Report *Op cit* fn 1033, 15

at deterrence can be utilised. In addition to the criminal offences this section also discussed the introduction of the civil Prevention and Risk orders. Between July 2015 and March 2017, there were 56 orders issued in total – 37 Prevention and 19 Risk.<sup>1037</sup> The Government's annual report provided no specific analysis on the effectiveness of these orders to date.

The approach of the Modern Slavery Act places a clear emphasis on driving the criminal justice response in order to disrupt modern slavery crimes and deter those who may participate in them. It is indisputable that prior to the MSA the criminal justice response to these issues could be found to be severely lacking. With the small number of prosecutions of what are now the modern slavery offences, the codification in the MSA was a logical step. It emphasises the importance and severity of modern slavery while at the same time offering a degree of clarity on what offences fall under this umbrella term. The other methods of deterrence including confiscation of assets and STPO/STROs are a further tool available to law enforcement agencies to deter and disrupt. As discussed in this section, it is open to question whether this approach to criminal justice approach will bring about the desired results. With the continuous rise in the number of victims identified it appears to be increasingly clear that it is perhaps victim protection and support which should lead the way rather than the retroactive action of punishment to deter future action. However, what this approach does demonstrate is the influence of the 'modern slavery' narrative on the shape of anti-slavery/trafficking legislation. As discussed in Chapter 4, placing human trafficking at the centre serves to depoliticise the issue, shifting the emphasis of the root cause of exploitation solely on to criminal enterprise.<sup>1038</sup> This consequently results in an unbalanced focus on criminal justice responses.

#### **4. Victim Protection: Identification and Vulnerability**

The current modern slavery strategy is rooted firmly in the idea of criminal justice. However, a vital element of any anti-slavery strategy must be victim protection. An argument could be made that it is victim protection which should take the central role in the modern slavery strategy. Alison Brysk and Austin Choi-Fitzpatrick have argued

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<sup>1037</sup> 2017 UK Annual Report on Modern Slavery (October 2017) 31  
([http://www.octf.gov.uk/OCTF/media/OCTF/documents/publications/Human%20Trafficking/2017\\_uk\\_annual\\_report\\_on\\_modern\\_slavery.pdf?ext=.pdf](http://www.octf.gov.uk/OCTF/media/OCTF/documents/publications/Human%20Trafficking/2017_uk_annual_report_on_modern_slavery.pdf?ext=.pdf))

<sup>1038</sup> See Chapter 4: Critiquing Modern Slavery

that a new human rights-based approach to slavery and trafficking is required that places the victim at its centre.<sup>1039</sup> Criticisms of the current human rights approach include the fact that it is embedded in the United Nations Convention against Transnational Organised Crime, meaning that it is shaped by the criminal justice model. Fitzpatrick argues that victims of slavery and trafficking are the weakest link in a larger system of exploitation. Therefore, protecting them requires more robust solutions.<sup>1040</sup> Consequently, a sustainable victim rights-based approach requires more than the typical rescue, short-term support, and rehabilitation,<sup>1041</sup> thus, in theory, placing the victim at the centre of anti-strategies means:

a commitment to empowering and organising workers before exploitation can begin and empowering and organising workers in those cases where slavery and trafficking have already occurred is central to any attempt at sustainable emancipation.<sup>1042</sup>

Therefore, it is essential to stress the need to move beyond a simplistic focus on criminal justice and using victims to ensure prosecutions. Meaning that the state must reconceptualise its role of prosecution and policing borders to take a more dynamic role. Such measures make the victim the key actor, who does not necessarily need to rely on the state to rescue them and prosecute the perpetrators, but to provide more opportunities for those who are exploited to effect change in their own situation.<sup>1043</sup>

It has been highlighted by Kevin Hyland, the former Anti-Slavery Commissioner, that “immediate support is paramount in making victims feel safe and secure and protecting them from harm, and sustained support is often needed to enable long-term healing, increased resilience, reintegration into society and the rebuilding of lives.”<sup>1044</sup> However, it is concerning that within the report produced by the Joint Committee on the Draft Modern Slavery Bill, the concern for victim protection is motivated by the desire to increase the relative proportion of successful prosecutions.<sup>1045</sup> In evidence

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<sup>1039</sup> Austin Choi-Fitzpatrick, *From Rescue to Representation: A Human Rights Approach to the Contemporary Anti-Slavery Movement* (2015) Vol 14 *Journal of Human Rights*, 496

<sup>1040</sup> Alison Brysk & Austin Choi-Fitzpatrick, *Rethinking Trafficking and Slavery, in Human Trafficking and Human Rights: Rethinking Contemporary Slavery* (University of Pennsylvania Press 2013) 12

<sup>1041</sup> Fitzpatrick *Op cit* fn1039, 496

<sup>1042</sup> *ibid*

<sup>1043</sup> *ibid* 497

<sup>1044</sup> Independent Anti-Slavery Commissioner: Strategic Plan (2015) accessed at ([https://www.antislaverycommissioner.co.uk/media/1075/iasc\\_strategicplan\\_2015.pdf](https://www.antislaverycommissioner.co.uk/media/1075/iasc_strategicplan_2015.pdf))

<sup>1045</sup> Joint Committee on the Draft Modern Slavery Bill fn1020, 55

provided by Maria Grazia Giammarinaro the Special Representative and Co-ordinator for Combating Trafficking in Human Beings for the Organization for Security and Co-operation in Europe, the review stated that “in order to strengthen the criminal justice response, we need a multi-faceted range of criminal and social measures, which should include strengthening victims’ access to assistance, support and compensation”.<sup>1046</sup> The reason for concern is evident when we have experts advocating victim protection to strengthen the criminal justice response. This is also alluded to in the Report published in the evidence review. The review panel expressed the opinion that there is a significant benefit for the state in providing improved victim identification and support – victims can provide evidence for prosecutions.<sup>1047</sup> The idea is that victim protection is offered as a direct trade-off for evidence to ensure prosecutions. One thing to consider is whether the support offered reflects this.

This section will demonstrate that the support provided by the Government via the National Referral Mechanism remains limited, particularly regarding the period of time for which support is offered. It could be argued that there is a link to be made between the period of time support is offered and the procurement of evidence from survivors to ensure successful prosecutions. Therefore, the level of support available not only to those who may fall victim to the flaws of the NRM but also to those who have provided law enforcement agencies with the information they need, should be viewed with a critical eye. Kevin Bales has described modern slaves as disposable people, disposable to traffickers and slavers due to the abundance of supply and the commercial value of individuals.<sup>1048</sup> However, does the Modern Slavery Act treat victims as disposable once they have fulfilled their use in the criminal justice system and are faced with life beyond the safe house? While victim protection does receive attention within the Modern Slavery Act, this section will assess the level of protection and support offered through the Strategy and the Act. Ultimately, the MSA and the related policies reach stumbling blocks when it comes to adequate victim protection and long-term victim support but also when it comes to reconciling immigration policies with the issue of exploitation and addressing the hidden victims

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<sup>1046</sup>Baroness Butler-Sloss, etal *Op cit* fn996 33

<sup>1047</sup> *ibid*

<sup>1048</sup> Kevin Bales, *Disposable People – New Slavery in the Global Economy* (University of California Press 3<sup>rd</sup> Edition 2012)

of exploitation. Thus, perpetuating a range of issues discussed in Chapter 4 pertaining to how the ‘modern slavery’ narrative has the potential to negatively affect victims.

#### 4.1. Non-Criminalisation of Modern Slavery Victims:

The MSA offers some good news for victim protection with the introduction of a new statutory defence for victims of modern slavery offences under Section 45.<sup>1049</sup> Up until this point victims of trafficking were left vulnerable to prosecution upon identification in the event they had been coerced into involvement with trafficking or criminal enterprises. Marija Jocanovic remarks that the “trafficking victim, thus, simultaneously occupies conflicting legal positions, which prompts the question of the relationship between these statuses, both on a conceptual level and in practice.”<sup>1050</sup> The *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking*<sup>1051</sup> 4.7 state that trafficking victims are victims of crime and should, therefore, not be prosecuted for status-related offences committed during the course of their exploitation.<sup>1052</sup> This is an obligation echoed both by ECAT and the EU Trafficking Directive. It is stated in ECAT that all parties should provide “the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”<sup>1053</sup> This is mirrored by the EU Trafficking Directive which requires that legal systems of all Member States take the necessary actions to ensure that “competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”<sup>1054</sup> Thus the protection afforded by ECAT and the EU Directive differs in relation to the principle of non-punishment. First, ECAT discusses the “possibility of not imposing penalties” while the Directive talks of an entitlement not to prosecute or

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<sup>1049</sup> Modern Slavery Act 2015 C.30

<sup>1050</sup> Marija Jocanovic, *The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance* (2017) 1(1), *Journal of Human Trafficking and Human Exploitation*, 41, 42

<sup>1051</sup> United Nations, *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, November 2010, HR/PUB/10/2 accessed at ([https://www.ohchr.org/Documents/Publications/Commentary\\_Human\\_Trafficking\\_en.pdf](https://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf))

<sup>1052</sup> *ibid* 131

<sup>1053</sup> ECAT fn957 article 26

<sup>1054</sup> EU Directive 2011/36/EU fn 958, article 6

impose penalties.<sup>1055</sup> However, perhaps most importantly when it comes to the activities included within the scope of the defence, ECAT discusses “‘unlawful activities’ while the latter provision is concerned with ‘criminal activities’, thus potentially excluding from its scope activities that may contravene legislation other than criminal law, such as administrative law or immigration law.”<sup>1056</sup>

The Act provides a defence for victims of modern slavery offences, which states a person is not guilty of an offence if they have been compelled to act. This compulsion is attributable to slavery or exploitation and if a reasonable person having the relevant person's characteristics would act in the same way.<sup>1057</sup> This has been characterised as a novel but problematic approach<sup>1058</sup>, the reason for this being that establishing “a specific principle directed at victims of human trafficking would be pointless if they were to be subject to the same protective mechanisms that apply to anyone.”<sup>1059</sup>

Thus:

Three cumulative conditions need to be fulfilled to be able to use the defence. First the person has to be compelled to commit an offence. Secondly such compulsion needs to be attributable to slavery or to relevant exploitation. Thirdly a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing the act.<sup>1060</sup>

The non-punishment principle does not preclude trafficking victims from prosecution. In *L & Ors*<sup>1061</sup> it was stated by the Court that the principle cannot be interpreted to infer that a:

trafficked individual should be given some kind of immunity from prosecution, just because he or she was or has been trafficked, nor for that reason alone, that a substantive defence to a criminal charge is available to a victim of trafficking.<sup>1062</sup>

Thus, the Court views its role as guardian of the rights of the victim:

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<sup>1055</sup> Jovanovic *Op cit* fn1050, 47

<sup>1056</sup> *ibid* 48

<sup>1057</sup> Modern Slavery Act 2015 s45(1), s45(4)

<sup>1058</sup> Jovanovic *Op cit* fn1050

<sup>1059</sup> *ibid*

<sup>1060</sup> *ibid*, note that the defence applies differently to victims under the age of 18, the element of compulsion is excluded.

<sup>1061</sup> *L & Ors v. The Children's Commissioner for England & Anon* [2013] EWCA Crim 991

<sup>1062</sup> *ibid* at 13

the court protects the rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing to countenance any prosecution, which fails to acknowledge and address the victim's subservient situation, and the international obligations to which the United Kingdom is a party.<sup>1063</sup>

Although this new defence offers positive news for victims, there are still concerns about the scope of protection provided. Jocanovic observes<sup>1064</sup> that the case of *LM* explicitly confirmed that the non-punishment principle “extends to any offence where it may have been committed by a trafficked victim who has been compelled to commit it.”<sup>1065</sup> However, the protection afforded by the Act does not reach this threshold. The Act exempts a large list of offences from the scope of the defence.<sup>1066</sup> In a report produced by Liberty, it was stated that the group was concerned about the number and the nature of offences that were covered by the defence. One particular concern is that there are large numbers of people trafficked from Romania, Bulgaria, and Slovakia, who are compelled to carry out acts of theft.<sup>1067</sup> Therefore, the exclusion of the Theft Act<sup>1068</sup> from the defence fails to acknowledge the reality of trafficking for such victims.<sup>1069</sup> The exceptions to the defence are included in Schedule 4 of the Act; it contains a large number of criminal offences. However, there are some which could have potentially been included in the defence, such as the Theft Act<sup>1070</sup>, Criminal Damage Act<sup>1071</sup> the Immigration Act<sup>1072</sup> and offences under the Modern Slavery Act such as trafficking.<sup>1073</sup> The reason for this being that it is not uncommon for trafficked individuals to become involved in the process of trafficking themselves via coercion as part of a “cycle of abuse”<sup>1074</sup> There is also further concern raised regarding the practical application of the defence. The report published by

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<sup>1063</sup> *ibid* at 16

<sup>1064</sup> Jocanovic *Op cit* fn1050, 65

<sup>1065</sup> *LM and Others v. R [2010] EWCA Crim 2327* at 12

<sup>1066</sup> Section 45 does not apply to any offence listed under Schedule 4, further to this the broad discretionary powers of the Secretary of State allow this list to be altered at any time.

<sup>1067</sup> Liberty's Second Reading Briefing on the Modern Slavery Bill in the House of Lords (November 2014), 25 accessed at

([https://www.libertyhumanrights.org.uk/sites/default/files/Liberty's%20Second%20Reading%20Briefing%20on%20the%20Modern%20Slavery%20Bill%20\(Nov%202014\).pdf](https://www.libertyhumanrights.org.uk/sites/default/files/Liberty's%20Second%20Reading%20Briefing%20on%20the%20Modern%20Slavery%20Bill%20(Nov%202014).pdf))

<sup>1068</sup> Modern Slavery Act (2015) Schedule 4 (14)

<sup>1069</sup> Liberty fn1067, 25

<sup>1070</sup> Theft Act 1968 C.60

<sup>1071</sup> Criminal Damage Act 1971 C.48

<sup>1072</sup> Immigration Act 1971 C. 77

<sup>1073</sup> Modern Slavery Act 2015 C.30 s1

<sup>1074</sup> Jocanovic *Op cit* fn1050, 65

HMICFRS indicates a low awareness of Section 45 among law enforcement.<sup>1075</sup> The report stated that:

Lack of awareness of the statutory section 45 defence means that officers attending incidents or crime scenes may not consider or gather sufficient evidence to help determine whether individuals are offenders, or potentially victims forced to commit offences. Some victims, therefore, may be viewed solely as suspected offenders, when a higher level of awareness among officers might make such victims more likely to receive the safeguards to which they would be entitled under the Modern Slavery Act 2015.<sup>1076</sup>

In addition to the new defence, Section 46 of the Act includes special measures for witnesses in criminal proceedings;<sup>1077</sup> it could be argued that the combination of these measures with Section 45 is targeted at facilitating the participation of victims of exploitation in the criminal justice system in order to secure successful prosecutions. This would echo the sentiments discussed earlier in this section that point to the fact that victim protection may be being developed to the extent that it will aid in prosecutions rather than focussing on the needs of the victims.

#### **4.2. Increased Protection for Vulnerable Groups**

An undeniable positive of the Modern Slavery Act is the introduction of the statutory basis for Independent Child Trafficking Advocates.<sup>1078</sup> Although vulnerability exists for all victims of exploitation, it could be argued that children occupy a special category of their own. Children who are trafficked into the UK or are perhaps enslaved are vulnerable due to their unique position as children. This position of vulnerability is the result of cultural or linguistic barriers, lack of awareness of their rights. Furthermore, depending on the age they entered into exploitation they may have been given false information about their situation or groomed into providing a false account by those who have exploited them.<sup>1079</sup>

Both the EU Trafficking Directive and ECAT have highlighted the need for a specific support mechanism that is tailored towards child victims of slavery and trafficking.

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<sup>1075</sup> HMICFRS *Op Cit* fn1031 43

<sup>1076</sup> *ibid*

<sup>1077</sup> Modern Slavery Act 2015 C.30

<sup>1078</sup> *ibid* s47

<sup>1079</sup> Baroness Butler-Sloss *et al Op cit* fn996 .66

When it comes to the protection of child victims of trafficking the EU Directive specifies that “Member States should ensure that specific assistance, support and protective measures are available to child victims.”<sup>1080</sup> This position was also re-emphasised in the EU Strategy for the Eradication of Trafficking in Human Beings, 2012–2016, which calls for a “comprehensive child-sensitive protection systems that ensure interagency and multidisciplinary coordination are key in catering to diverse needs of diverse groups of children, including victims of trafficking”.<sup>1081</sup> Similarly, ECAT states “each Party shall take specific measures to reduce children’s vulnerability to trafficking, notably by creating a protective environment for them.”<sup>1082</sup> Both the Directive<sup>1083</sup> and ECAT<sup>1084</sup> include a requirement that all unaccompanied children identified as victims be allocated a legal guardian.

During the evidence review of the Draft Bill, it was recognised that the current system whereby children could be shuttled from agency to agency retelling their story multiple times was not only ineffective but could put undue stress on children. It was pointed out that children, in particular, were vulnerable to being re-trafficked, therefore these kinds of barriers could leave children susceptible to re-exploitation if they have difficulty accessing the necessary support. Research carried out by Christian Action Research, and Education (CARE) has highlighted this fact. Between 2005 and 2010, 32% of rescued children were lost while in local authority care.<sup>1085</sup> This demonstrates that there is a significant risk of these incredibly vulnerable children simply becoming lost in the system.<sup>1086</sup>

The introduction of the Draft Modern Slavery Bill did not include any reference to provisions that would address the gap in support and assistance to child trafficking

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<sup>1080</sup> Recital, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA states that “Member States should ensure that specific assistance, support and protective measures are available to child victims.”

<sup>1081</sup> European Commission, EU Strategy for the Eradication of Trafficking in Human Beings, 2012 – 2016, 7 accessed at ([https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu\\_strategy\\_towards\\_the\\_eradication\\_of\\_trafficking\\_in\\_human\\_beings\\_2012-2016\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf))

<sup>1082</sup> ECAT fn991 article 5(5)

<sup>1083</sup> EU Directive 2011/36/EU fn958, article 23

<sup>1084</sup> ECAT fn fn991 article 10(4)

<sup>1085</sup> Joint Committee on the Draft Modern Slavery Bill *Op cit* fn 1020, 67

<sup>1086</sup> Liberty *Op cit* fn1069, para 47

victims.<sup>1087</sup> The Joint Committee report on the Draft identified the gaps in coverage in relation to child victims, highlighting the need for specially designated advocates in light of the unsuitability of CAFCASS guardians and Independent Reviewing Officers.<sup>1088</sup> The new child advocates will make decisions on the child's behalf and may obtain legal advice or representation on the child's behalf. However, the most essential element is that advocate's actions are tied to the best interest of the child and that they must promote the child's wellbeing.<sup>1089</sup> This is also tied to a presumption of age in Section 47 of the Act, which provides that an individual must be presumed to be a child to access assistance and support. Therefore, where age is unclear, but there is a reason to believe an individual is under the age of 18 the presumption of age will apply. There were a number of recommendations made in relation to the draft including: clarification on the stage at which an advocate would be appointed, an insistence on the independence of the advocate from the decision-making process and a statutory list of core functions.<sup>1090</sup> However, it should be noted that the inclusion of the advocates was on a trial basis for nine months after royal assent, to be concluded by a report by the Home Secretary. Therefore, while the inclusion of child advocates signalled some positive news for victim protection, this safeguard was not necessarily a guaranteed or permanent one.

The Government had announced the introduction of a pilot scheme of child trafficking advocates, "who will ensure that the child victims' voices are heard and that they receive the support and assistance they need in relation to the social care, immigration, and criminal justice systems."<sup>1091</sup> Despite this commitment and prior commencement of the pilots, dissatisfaction was voiced in the House of Commons with the arrangements in the belief that the proposed Modern Slavery Bill did not fulfil the requirements of the EU Trafficking Directive.

We would also like a system of independent guardians to be introduced. They are a requirement of the EU directive that the Government eventually signed up to, and the system has been implemented elsewhere in Europe and shown to work well. After three years of campaigning, we welcome the

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<sup>1087</sup> Home Office, Draft Modern Slavery Bill, December 2013 accessed at ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/266165/Draft\\_Modern\\_Slavery\\_Bill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/266165/Draft_Modern_Slavery_Bill.pdf))

<sup>1088</sup> Joint Committee on the Draft Modern Slavery Bill *Op cit* fn 1020, 67

<sup>1089</sup> Modern Slavery Act 2015 s48(4)

<sup>1090</sup> Liberty *Op cit* fn1069, para 28

<sup>1091</sup> HC Deb, 10 June 2014, vol 582, col 178.

Government's pilots for child advocates and the enabling provisions, but we do not believe that they go far enough. The position is unclear, but the advocates do not appear to be the same as the child guardians for which a huge coalition of charities, including Barnardo's, UNICEF and the Children's Society, have called. During Bill's passage, we will seek to strengthen the powers given to child advocates, thereby establishing guardians who can act independently of local authorities and in the best interests of the child.<sup>1092</sup>

This is a sentiment echoed throughout the debates on the Modern Slavery Bill. In fact, up until a month before the Bill received Royal Assent dissatisfaction permeated debates on the robustness and boldness of section 48.<sup>1093</sup> Further to this, the Joint Committee remarked that while they welcomed the introduction of a pilot scheme, "it is not, however, a substitute for a statutory advocate scheme."<sup>1094</sup>

The Government's commitment to introducing some form of child advocates system during Parliamentary debates was carried through in Section 48 of the Modern Slavery Act 2015.<sup>1095</sup> It provided the statutory footing for the Child Trafficking Advocate Scheme upon completion of the pilot programme. Section 48(6) required the Secretary of State to lay a report before Parliament 9 months after the passing of the Act. In accordance with the Act, a Child Trafficking Advocate will promote the well being of the child and promote the child's best interest.<sup>1096</sup> A child should be as far as practicable "represented and supported by someone who is independent of any person who will be responsible for making decisions about the child."<sup>1097</sup> However, the use of this statutory provision was to be subject to the 'successful' completion of pilot schemes.

The ICTA pilot scheme was operated by Barnardo's over a period of 12 months starting in September 2014. The trial was undertaken in 23 local authorities across England and Wales which represented a mix of "rural and urban areas with varied experiences in dealing with children trafficked for the purposes of different forms of

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<sup>1092</sup> HC Deb, 8 July 2014, vol 584, col 183.

<sup>1093</sup> see HC Deb, 25 February 2015 vol 579

<sup>1094</sup> Joint Committee on the Draft Modern Slavery Bill *Op cit* fn 1020 70

<sup>1095</sup> Gary Craig, The UK's Modern Slavery Legislation: An Early Assessment of Progress (2017) 5(2), Social Inclusion, 16, 23

<sup>1096</sup> Modern Slavery Act 2015 s.48(4).

<sup>1097</sup> *ibid* s.48(2).

exploitation.<sup>1098</sup> The trial involved 158 children, 86 of which were allocated to an advocacy group and 72 children to a comparator group.<sup>1099</sup> Of the 158 full case file data was only available for 141 children. The majority of the children allocated to the scheme were between the ages of 13-16 (59%), further to this 70% of the group were nationals of non-EU countries, predominantly Vietnam and Albania.<sup>1100</sup> The University of Bedfordshire, upon the completion of the trial, carried out an independent report, which sought to evaluate the success of the pilot.

The main features of the scheme included six advocates covering all 23 local authorities, recruitment of trained volunteers to spend time with the children and support them in leisure and recreational activities and the creation of a 24-hour helpline manned by an advocate. The advocate's role within the pilot was to navigate three main areas social care, immigration and criminal justice. All 86 children allocated to the advocate group had an allocated social worker, and 57 had an IRO.<sup>1101</sup>

The report concluded that for the children placed in the advocacy group, the advocate provided an "anchor" for the child:

I can call my social worker and then she tells me OK but I'm busy or something. But if I call [the advocate] then she can make things happen.  
(Child interview, advocacy group)<sup>1102</sup>

The role of the advocate went beyond the practical remit of ensuring they had the basics such as food, shelter, money and health care adding a dimension of care and support that was lacking from the comparator group.

Advocates remembered birthdays, anniversaries, and culturally specific celebrations. Over time, advocates sought out opportunities for the children to participate in activities that developed their talents and skills. The ICTA service provided a number of young people's grants, which were used to support the children to access karate classes, dance classes, sea cadets, snooker, bike riding, as gentle re-introductions into ordinary life. Advocates helped young people to write CVs, apply for jobs, understand how to access

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<sup>1098</sup>R. Kohli, P. Hynes, H. Connolly, A. Thurnham, D. Westlake, K D'Arcy, Evaluation of independent child trafficking advocates trial: Final report. Home Office (2016) 8 accessed at ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/730098/assessment-of-independent-child-trafficking-advocates-horr101.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/730098/assessment-of-independent-child-trafficking-advocates-horr101.pdf))

<sup>1099</sup> ibid 4

<sup>1100</sup> ibid 12-13

<sup>1101</sup> ibid 21

<sup>1102</sup> ibid 27

emergency services, understand employment rights, manage money, and get a bank account. These types of activities were highly valued by the children and young people.<sup>1103</sup>

One of the prevailing questions about the use of advocates is whether they add value to the existing systems in place, the independent report concluded that from the evidence collated that the answer was yes.<sup>1104</sup> There were several identifiable benefits for the children in the advocate group, including: keeping the children safely visible, the creation of relations of trust and credibility, and maintaining momentum in the case suitable to the child's needs,<sup>1105</sup>

As the trial progressed, and those experiencing the work of advocates widened to immigration and criminal justice services, evidence of the benefits to the children and other service providers accrued; tightening the strings and filling gaps helped trafficked children to be visible and kept safe. In such complex and fast-moving environments, the function of an ICTA service appears to be important in ensuring clarity, coherence, and continuity for the child, as well as for other services responsible for the child, over time and across contexts.<sup>1106</sup>

However, despite this clear statement of the beneficial effect of advocates, the Government's own report stated, "there was also limited evidence of benefits regarding involvement with the immigration and criminal justice systems."<sup>1107</sup> Further to this, the report highlighted the fact that the advocate pilot did not address the issue of missing children. During the trial, 15 of the children who were assigned an advocate were permanently missing at the end of the trial, compared to 12 children from the comparator group who were not assigned one. The Government report appears to be drawing a correlation between children who were designated advocates and rates of disappearance. The independent report first, indicates that the sample size is too small and that any number of variables including nationality and quality of care

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<sup>1103</sup> *ibid*

<sup>1104</sup> *ibid*, 3

<sup>1105</sup> *ibid*, 39.

<sup>1106</sup> *ibid*, 39

<sup>1107</sup> Report on the trial of independent child trafficking advocates and next steps (Crown Copyright 2015) 2, accessed at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/486957/53019\\_Un-num\\_Report\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486957/53019_Un-num_Report_Web_Accessible.pdf)

can affect the risk of disappearance.<sup>1108</sup> However, the independent report specifies evidence that this was not necessarily due to failings on behalf of the child trafficking advocates. In cases where there was evidence of children having gone missing before their referral to the Independent Trafficking Advocates local authorities were notified of the risks of a child disappearing;

There was substantial evidence of the ICTA service seeking to warn, persuade and challenge local authorities to provide adequate protection and sustainable care. However, the advocates could not readily influence decisions about accommodation provision and it is not known what resource constraints local authorities were operating with. Also, the sample size is small, and a number of variables, including nationality and the quality of care planning, influence the heightened risk of children disappearing and remaining missing.<sup>1109</sup>

Despite the positive evidence provided by the children themselves in the independent report and the Government report's own acknowledgment of the fact that children in the advocate group felt "listened to and valued",<sup>1110</sup> the pilot was not automatically extended. The Government concluded that while some "aspects of the independent child trafficking advocates model show promise" it did not deliver on the key outcomes of ensuring "every child always receives the support that they need and prevents the child from going missing."<sup>1111</sup> For this reason, the Home Office announced that it would not be carrying through Section 48 of the Modern Slavery Act.

Following the end of the trial, there was silence from the Government on the fate of Section 48 and the rollout of ICTA on a national scale. On the 28<sup>th</sup> June, 2016 MP's across the House of Commons converged to question the delay of nationwide advocacy for trafficked children. It was commented that the yearlong delay to establish a scheme was "disappointing in the light of the positive evaluation of the scheme."<sup>1112</sup> Further to this, MP's pointed out that the conclusions of the Government report were contrary to the evidence presented by the independent assessment.<sup>1113</sup> It was announced by Karen Bradley a former Home Office Minister that the

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<sup>1108</sup> Kohli et al. *Op cit* fn1098, 29.

<sup>1109</sup> *ibid*

<sup>1110</sup> Home Office fn1107, 2

<sup>1111</sup> *ibid* 3.

<sup>1112</sup> HC Deb 28 June 2016, Vol 612 Col 33WH.

<sup>1113</sup> *ibid* Col 35WH.

Government was fully committed to rolling out section 48 and in an effort to improve advocacy in the short term that ICTA would be introduced in three early adopter sites in order to refine the model.<sup>1114</sup> The three early adopter sites are located in Hampshire, Wales and Greater Manchester; this pilot will run until March 2019.

### **4.3. Victim Identification and Support: Failure to reform the National Referral Mechanism and the implications for victims.**

The next element to consider is victim identification itself and the role of the NRM. It has already been discussed that much criticism has been levelled at the NRM. The NRM operates on a non-statutory basis directed by Home Office policy guidance. The mechanism is the gateway to all support for potential victims of trafficking. It operates on a three-tier model. At the initial level are the first responders; these include local authorities, enforcement agencies, and NGOs have the power to make an initial referral to a competent authority. This is the second tier; there are two bodies in the UK with competent authority status, the UK Human Trafficking Centre (UKHTC) and the UKVI, a Home Office agency with responsibility for considering immigration applications. It falls to the competent authority to determine whether there are reasonable grounds to consider a person a victim of trafficking. The competent authority must reach a decision within five days of referral as to whether there are reasonable grounds to believe an individual may have been subjected to exploitation within the boundaries of Section 1 of the Act. If an individual receives a positive decision, they are then accommodated for a reflection and recovery period of 45 days.<sup>1115</sup> At the end of this period, stage three, a conclusive decision is made about an individual's status. When a decision has been made, an adult has 48 days to leave the accommodation provided in the case they receive a negative conclusive grounds decision and 14 days to leave if a positive decision is reached. However, there is a commitment to extend this by 45 days bringing the total to 90.<sup>1116</sup> In either case, adults get no further assistance, and they may start a claim for asylum. Children are accommodated by Local Authority Children's Services. The importance of long-term

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<sup>1114</sup> *ibid* Col 50WH.

<sup>1115</sup> Following a reasonable grounds decision the victim is provided with assistance and support including safe house accommodation, legal advice, psychological and medical assistance,

<sup>1116</sup> In her statement to the House of Commons in October 2017, then Home Officer Minister Sarah Newton MP stated that the 14 days entitlement to support for identified victims post-NRM decision will be extended to 45 days in due course: Hansard, vol 630, column 512. The Home Office announcement can be accessed at (<https://www.gov.uk/government/news/modern-slavery-victims-to-receive-longer-period-of-support>)

victim support and failings of the Modern Slavery Act have been highlighted in a report by the Human Trafficking Foundation which found a quarter of victims disappeared after being rescued. The report characterises the original 45-day window of support and two-week notice period as an abandonment of victims.<sup>1117</sup>

It was pointed out in numerous reports that the Modern Slavery Bill provided the ideal opportunity to place the NRM on a statutory basis and reform the system. In evidence provided by Anti-Slavery International, it was pointed out that the lack of a legislative basis,

has led to [an] arbitrariness of application, and access of victims [to support], without any formal ability for potential victims to appeal against decision. Furthermore, there is no legal category of victim of trafficking. This puts trafficked persons in a situation of uncertainty and sends an unclear message to statutory bodies. In practice, trafficked persons are not able to access the support and the protection they are entitled to, and courts do not consider themselves bound by the NRM decisions.<sup>1118</sup>

However, the largest failings of the NRM were illustrated in the five-year report published by the Anti-Trafficking Monitoring Group in 2014.<sup>1119</sup> The first issue discussed is the failure to identify victims. One of the initial problems is determining which organisations receive first responder status and which do not. The knock-on effect of such distinctions is that support agencies which are not designated as first responders do not receive government funding for victim support. This means that they have to navigate their way around the system without being designated as an official first responder. Second, it is noted that first responders are consistently referring cases to the ATMG while the Home Office's own first responders fail to spot trafficking indicators during asylum screenings. In fact, the interviewer will be

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<sup>1117</sup> Human Trafficking Foundation, Day 46: Is there life after the Safe House for Survivors of Modern Slavery? (Human Trafficking Foundation October 2016) accessed at (<https://static1.squarespace.com/static/599abfb4e6f2e19ff048494f/t/599eec35a803bb09254f7d0d/1503587392258/Human+Trafficking+Foundation+Report+2016+Day+46.PDF>)

<sup>1118</sup> Baroness Butler-Sloss et al *Op cit* fn996 35

<sup>1119</sup> The Anti-Trafficking Monitoring Group, The National Referral Mechanism A Five Year Review - A report by the Anti-Trafficking Monitoring Group for the Committee on the Modern Slavery Bill (February 2014) accessed at (<http://webarchive.nationalarchives.gov.uk/20141202113524/https://nrm.homeoffice.gov.uk/wp-content/uploads/2014/08/ATMG.pdf>)

directed not to consider substantive issues that could allude to such indicators.<sup>1120</sup> The next issue reported was inconsistency in decision-making:

Figure 1: Rates of positive conclusive decisions (The Anti-Trafficking Monitoring Group, A report by the Anti-Trafficking Monitoring Group for the Committee on the Modern Slavery Bill, p.11 February 2014)

NRM Competent Authority	Period	Total Referrals Processed	Percentage granted Positive Conclusive Decision
UKHTC	2012	299	80%
Home Office	2012	875	< 20%
UKHTC	Oct–Dec 2011	65	80%
Home Office	Oct-Dec 2011	184	19%

The ATMG argued that the dramatic difference in positive and negative decisions by different authorities was worrying. One of the central issues discussed was that the majority of EU nationals referred by the police to the UKHTC, who have been recovered during operations, carry with them substantial evidence of trafficking. This will enhance the likelihood of a positive decision being reached. On the other hand, non-EU/EEA trafficked persons who are referred to the Home Office competent authority, the UKVI, are less likely to receive positive decisions. In such cases, there is often a lack of information to support the individual's application.<sup>1121</sup> This issue also feeds into the idea of discrimination within the NRM; a primary concern for the ATMG is the culture of disbelief in the decision-making process of the UKVI. In 2011-2012 challenges to the credibility of victims referred to the NRM from the

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<sup>1120</sup> *ibid* 8

<sup>1121</sup> *ibid* 10

Poppy Project accounted for 54% of the decisions which received a negative outcome.<sup>1122</sup>

Further to this, given the apparent importance placed on the vulnerability of children within the Strategy there are flaws identified in this area particularly when comparing children from the UK and EEA and children from outside the EEA:

Figure 2: A sample of NRM statistics for children between July– September 2013 (The Anti-Trafficking Monitoring Group, A report by the Anti-Trafficking Monitoring Group for the Committee on the Modern Slavery Bill, p.25 February 2014)

July-Sept 2013	Quarter Total	UK	Vietnam	Ghana	Slovakia
Total referral numbers	105	18	22	5	2
Positive Conclusive Grounds	30 (29%)	16 (90%)	4 (20%)	0 (0%)	1 (50%)
Decision not yet made		1	12	4	1

The above figures concerned the ATMG due to the variances in decision-making between two competent authorities, in particular when one takes into account the number of outstanding decisions for children outside of the EU. The report states that in the above table, children from the UK are likely referred by the police, therefore the decision-making is quick.<sup>1123</sup> The report makes an important point that the NRM

<sup>1122</sup> ibid 12

<sup>1123</sup> ibid 24

conflates trafficking and immigration policy, and this blurs the boundaries of decision-making. There is a disproportionate focus on credibility in order to justify negative decisions by the Home Office competent authority.

In 2016, 1447 victims were referred by first responders with a potential immigration bias; such referrals were largely made as part of an asylum claim (UKVI referred 1,932 victims, Home Office Immigration Enforcement referred 374 and 111 were referred by the UK Border Force.<sup>1124</sup> Further to this, the UKVI also acted as the competent authority for 2728 (72 %) of the referrals made.<sup>1125</sup> The available data from the Home Office states that 20% of the decisions made as of June 2017 constituted negative conclusive grounds decisions. Thus, it stands to reason that the concerns identified by the ATMG continue to constitute a bias in the identification process.

The Modern Slavery Act did not place the NRM on a statutory footing. In the Government's response to pre-legislative scrutiny, it was stated that there were concerns expressed by the ATMG that the Government were taking seriously. Such concerns include that the NRM should be placed on a statutory footing, the removal of the UKVI from case working functions and the extension of the NRM to all victims of modern slavery offences.<sup>1126</sup> In 2014, the government published a review of the NRM<sup>1127</sup>, which recommended a number of improvements. The Modern Slavery Strategy draws attention to the following recommendations: that new anti-slavery leads replace the first responder role, the government seeks to streamline the referral process by removing the reasonable grounds decision, and that new multi-disciplinary panels are established with a view to removing the UKVI and the NCA from the decision-making process.<sup>1128</sup>

In response to a 2014 government review on the NRM, a pilot was announced in the West Yorkshire and South West police force areas from the 3<sup>rd</sup> August 2015. The pilot system would use new multi-disciplinary panels to remove the UKVI from the

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<sup>1124</sup> *ibid* 11

<sup>1125</sup> *ibid* 12

<sup>1126</sup> The Government Response to the Report from the Joint Committee on the Draft Modern Slavery Bill *Op cit* fn 1021, 18

<sup>1127</sup> Home Office, Review of the National Referral Mechanism for the victims of human trafficking (November 2014) accessed at (<https://www.gov.uk/government/publications/review-of-the-national-referral-mechanism-for-victims-of-human-trafficking>)

<sup>1128</sup> Modern Slavery Strategy fn993, 63

decision-making process and extend the NRM to all adult victims of modern slavery. This pilot became an on-going project with a final report being published in October 2017.<sup>1129</sup> The findings of the report were that on average a higher proportion of potential victims received positive, reasonable grounds decisions in pilot areas, 89% compared to 83% in non-pilot areas. Further to this, decisions were made on a quicker time scale with an average of "one day between referral and reasonable grounds decision compared with six days in the non-pilot areas. This represented a decrease from an average of six days in the pilot areas in the previous year, while no change was observed in the non-pilot areas."<sup>1130</sup> Regarding conclusive grounds decisions, a higher percentage received a positive conclusive grounds decision in the pilot (43%) compared with the non-pilot (21%) areas. Therefore, not only was the timeliness of reasonable grounds decisions improved in pilot areas, but the percentage of conclusive grounds decisions also exceeded that of the non-pilot areas. However, the report concludes that practitioners felt that "the Slavery Safeguarding Lead role nor membership of multi-disciplinary panels were sustainable beyond the pilot period. Both roles were voluntary, taken on in addition to existing responsibilities, and this stretched the resources of those involved."<sup>1131</sup> The Prime Minister's Modern Slavery Task Force announced in October 2017 further changes to the decision-making process of the NRM. The government has offered a commitment to implement new measures including the creation of a "a single, expert unit to be created in the Home Office to handle all cases referred from frontline staff and to make decisions about whether somebody is a victim of modern slavery, this will replace the current case management units in the National Crime Agency and UK Visas and Immigration."<sup>1132</sup> However, while the streamlining of the two-stage system may represent a positive change, this new measure does not acknowledge the concerns raised by the ATMG regarding the bias of the Home Office and dual responsibility to enforce immigration law and its involvement in the NRM process.<sup>1133</sup>

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<sup>1129</sup> Nicola Ellis, Christine Cooper, and Stephen Roe, An evaluation of the National Referral Mechanism pilot Research Report 94 (October 2017) accessed at (<https://www.antislaverycommissioner.co.uk/media/1177/an-evaluation-of-the-national-referral-mechanism-pilot.pdf>)

<sup>1130</sup> *ibid* 4

<sup>1131</sup> *ibid* 6

<sup>1132</sup> Home Office, *Modern Slavery Taskforce agrees new measures to support victims*, 17 October 2017 accessed at (<https://www.gov.uk/government/news/modern-slavery-taskforce-agrees-new-measures-to-support-victims>)

<sup>1133</sup> ATMG fn 1119

One final concern to consider when critiquing the role of the NRM and the focus of the Home Office report is the total lack of attention given to the quality of support provided and the reality of life beyond the NRM safe house for victims of trafficking and slavery. As previously discussed those who are referred in the NRM who receive an initial positive, reasonable grounds decision may be able to access accommodation and support in government contracted safe houses run currently by the Salvation Army. This support is for “recovery and reflection” and is provided for 45 days or until a conclusive grounds decision is reached. The MSA does not address the issue of quality control; the current situation continues to be that neither the Salvation Army nor its subcontractors are subject to independent inspections or standards of care.<sup>1134</sup>

The Department does not have effective oversight of the victim care contract and has not itself put in place a robust inspection regime to check the quality of care and support provided in safe houses. The anti-slavery commissioner told us that “there has been a void” in relation to ensuring care standards are in place and are met. He also commented that “the independent quality inspectorate for the Salvation Army has not really been utilised in this area as it would be about other services.”<sup>1135</sup>

The current contract with the Salvation Army expires in 2020; the Government has stated that the next contract will be adopted using the survivor care standards developed by the Human Trafficking Foundation. However, there remains uncertainty regarding the monitoring of the implementation and compliance of such standards.

The Department told us that, for the next victim care contract, which is due to start in 2020, it will be adopting the survivor care standards created by the Human Trafficking Foundation in 2014. It told us that it is currently working with stakeholders to identify what the standards should be and how they should be. However, the ex anti-slavery commissioner Kevin Hyland has commented that “if we have standards without an inspection regime, nothing will change.”<sup>1136</sup>

Further to this, there is no legal obligation on the Salvation Army or the Home Office to maintain contact with the victim or offer prolonged support or record information on the location of the victim once they have exited contract support.<sup>1137</sup> However, in

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<sup>1134</sup> House of Commons Committee of Public Accounts, Reducing Modern Slavery – 36th Report fn1029, 14

<sup>1135</sup> *ibid*

<sup>1136</sup> *ibid* 15

<sup>1137</sup> HC Deb 20 Jan 2014 C27W/182091

October 2017, Sarah Newton MP announced plans to extend victim support. The government has committed to “run weekly drop-in centres in partnership with the Salvation Army so that victims can continue to receive ongoing support and advice.”<sup>1138</sup> While it is true that a major overhaul of the NRM is necessary concerning effective and consistent identification and decision-making, one of the most worrying flaws is the complete disregard for the fate of vulnerable individuals once the 45-day reflection period is over. The report commissioned by the Home Office in 2014 confirms this apparent lack of interest. While it makes many recommendations in relation to the NRM, the Human Trafficking Foundation (HTF) argue that little attention is given to post safe house support.<sup>1139</sup> The HTF has identified three areas of concern: What happens to victims who choose not to be referred to the NRM? What happens if a victim receives a positive, reasonable grounds decision but is not eligible or chooses not to enter a safe house? Moreover, what happens after a victim leaves the safe house? The HTF recognises that there is no "one size fits all" system for supporting survivors of modern slavery, emphasising the importance of tailor-made support after leaving the safe house in order to help them adjust and integrate.<sup>1140</sup> On the 26<sup>th</sup> October 2017, it was announced that victims would see an extension of 14 days transitional support to 45 days, increasing the total period of support to 90 days on receipt of a reasonable grounds decision.

The situation post-MSA remains that referral into the NRM and the receipt of positive conclusive grounds decision leaves the victim with little more than a worthless paper and 90 days short-term support. The current system in the UK presents a problem whereby recognition as a victim of exploitation carries no immediate right to remain and therefore, no simple point of access to prolonged protection and support. Thus, the granting of a conclusive grounds decision “does not represent a complete solution.”<sup>1141</sup> In contrast, the Human Trafficking Foundation has highlighted that recognition as a refugee via the asylum system provides an initial period of five years leave to remain, which can be extended indefinitely.<sup>1142</sup> There is no specific

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<sup>1138</sup> HC Deb 26 Oct 2017 Vol 630 Col 512

<sup>1139</sup> Human Trafficking Foundation fn1117, 10

<sup>1140</sup> *ibid* 7

<sup>1141</sup> Alexandra Williams-Woods, Yvonne Mellon, *Irregular Victims: Investigating the Immigration Status Decisions of Post-NRM Victims of Human Trafficking, the Availability of Eligible Benefits and the Related Impact on Victims of Trafficking* (2018) 4:2, *Journal of Modern Slavery*, 66, 73

<sup>1142</sup> *ibid* 4

provision under the Immigration Rules relating to the granting of leave on the basis of ‘modern slavery’. The High Court provided clarity on the issue of discretionary leave in *R (On the Application Of K) v Secretary of State for the Home Department*.<sup>1143</sup>

With conclusive status, there is no automatic grant of discretionary leave for one year and one day, although this may be granted if the individual is cooperating with the Police or owing to their personal circumstances (under Article 14 of the Trafficking Convention). Leave to remain as a victim is without prejudice to any other entitlement to leave as a refugee (a category of immigration leave).<sup>1144</sup>

Thus, while there is no automatic grant of discretionary leave, there exists a narrow set of grounds on which leave can be granted. In line with the circumstances discussed in *K*, the advice provided to Competent Authorities in 2016 outlined three grounds on which discretionary leave to remain could be granted.<sup>1145</sup>

However, recent legal developments regarding conclusive grounds decisions and DLR have potentially increased options for victims in respect of discretionary leave to remain to be awarded.

In February 2018 the judgment in *K* was appealed in *PK (Ghana) v Secretary of State for the Home Department*.<sup>1146</sup> The Court of Appeal ruled that the certain elements of the policy set out by the Home Office for assessing discretionary leave applications were in breach of international obligations, particularly in relation to ECAT<sup>1147</sup>. The appeal focused on the requirement under Article 14 to provide a renewable residence permit if necessary due to personal circumstances. The appeal in question was in relation to a negative discretionary leave to remain decision relating to the applicant's personal circumstances. It was submitted by the Secretary of State that,

in Article 14(1)(a), there are no restrictions upon the concept of "necessary", and thus, the Convention gives the Secretary of State as competent authority discretion which is both broad and untrammelled or open-ended. That is underscored by the fact that Article 14(1)(a) refers, not

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<sup>1143</sup> *R (On the Application Of K) v Secretary of State for the Home Department* [2015] EWHC 3668

<sup>1144</sup> *ibid* para 53

<sup>1145</sup> Victims of Modern Slavery – Competent Authority Guidance (Home Office 2016) 75 accessed at ([https://www.antislaverycommissioner.co.uk/media/1059/victims\\_of\\_modern\\_slavery\\_-\\_competent\\_authority\\_guidance\\_v3\\_0.pdf](https://www.antislaverycommissioner.co.uk/media/1059/victims_of_modern_slavery_-_competent_authority_guidance_v3_0.pdf))

<sup>1146</sup> *PK(Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98

<sup>1147</sup> ECAT fn 991, art 14

to an absolute requirement, but only that the competent authority "considers that their stay is necessary" ... the exercise of that discretion, the Secretary of State, is entitled to have a policy that the discretion will only be exercised in favour of the victim of trafficking if there are compelling personal circumstances in his or her case.<sup>1148</sup>

Thus, the Court concluded that the Secretary of State's guidance regarding personal circumstances did not properly reflect the nature of Article 14 of the Convention. The Convention states that a renewable residence permit will be granted where "their [the victim's] stay is necessary".<sup>1149</sup> Ultimately, the guidance in place failed to engage with the relevant Convention criteria.

The provision does not give an open-ended discretion, but rather requires an assessment of whether it is necessary for the purposes of protection and assistance of the victim of trafficking (or one of the other objectives of the Convention) to allow him to remain in the country. In this case, the Secretary of State's guidance neither requires nor prompts any such engagement. As a result, in my view, it does not reflect the requirements of Article 14(1)(a) and is unlawful.<sup>1150</sup>

Following the delivery of this judgment, the opportunity for victims in receipt of positive conclusive grounds decisions to acquire leave to remain may, eventually be enhanced, but is currently in a state of uncertainty. To this effect, the Home Office has issued interim guidance regarding discretionary leave.<sup>1151</sup> The current advice from the Home Office is to pause all discretionary leave decisions in which the decision reached will be negative, leaving individuals concerned in limbo.

On the 26<sup>th</sup> July 2017, a private members bill was introduced aiming to extend victim support. The Modern Slavery (Victim Support Bill) aims to provide a statutory basis for support and assistance for potential victims of modern slavery. The main aim of the Bill is to ensure that those in possession of a positive conclusive grounds decision have an extended rest and reflection period of twelve months once the ninety-day

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<sup>1148</sup> *PK* fn1 146 para 41

<sup>1149</sup> ECAT fn 991, article 14

<sup>1150</sup> *PK* fn1 146 para 51

<sup>1151</sup> Interim operational guidance: Discretionary leave for victims of modern slavery (February 2018) accessed at (<https://www.gov.uk/government/publications/interim-operation-guidance-discretionary-leave-for-victims-of-modern-slavery>)

period under the NRM ends.<sup>1152</sup> It has been recommended by the Work and Pensions Committee that all victims be granted a minimum of twelve months leave to remain to allow a period to “receive advice and support, and give them time to plan their next steps.”<sup>1153</sup> It was commented by Baroness Butler-Sloss that the lack of automatic entitlement upon a conclusive grounds decision was a “ludicrous situation”.<sup>1154</sup> However, the Government’s response to this recommendation does not signal any imminent positive changes to the policy on discretionary leave to remain:

The decision about whether an individual is a victim of modern slavery and their immigration status are and must remain separate decisions. The Government does not accept that all confirmed victims of modern slavery should be given at least one year’s leave to remain in the UK.<sup>1155</sup>

Thus, while the Bill offers some indication of movement on this issue, it remains unclear whether such a change will materialise.

The lack of security offered to non-British/EEA victims of exploitation highlights the tensions between contemporary anti-slavery/trafficking policy and legislation and immigration policy. Research has demonstrated that restrictive immigration policies and insecure immigration status facilitate exploitation.<sup>1156</sup> Thus, the current situation places vulnerable migrants, who have been subject to exploitation, into a situation by the Government in which they have insecure immigration status. This move serves to heighten their susceptibility to re-exploitation. One central criticism of the ‘modern slavery’ narrative is that it acts in some form as a vehicle by which to curb undesirable migration.<sup>1157</sup> Thus, through the NRM the authorities are able to identify

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<sup>1152</sup> Modern Slavery (Victim Support) Bill [HL] (2017) 48 b(3) accessed at (<https://publications.parliament.uk/pa/bills/cbill/2017-2019/0211/180211.pdf>)

<sup>1153</sup> House of Commons Work and Pensions Committee, Victims of Modern Slavery – Twelfth Report Session 2016-2017 (April 2017) 45 accessed at (<https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/803/803.pdf>)

<sup>1154</sup> House of Commons Work and Pensions Committee, Victims of Modern Slavery – Twelfth Report Session 2016-2017 (April 2017) 40 accessed at (<https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/803/803.pdf>)

<sup>1155</sup> Victims of modern slavery: Government Response to the Committee’s Twelfth Report of Session 2016–17 – 30th November 2017 (<https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/672/67202.html>)

<sup>1156</sup> Lewis *Op cit* fn733 22

<sup>1157</sup> Joel Quirk, Annie Bunting, *Contemporary Slavery – Popular Rhetoric and Political Practice* (UBC Press 2018) chapter 3

and process victims to offer available support. However, at the same time for those who are already in possession of irregular immigration status, the NRM offers no guaranteed solution hence can only either serve to heighten precarity or lead them to “protracted immigration detention, criminal prosecution and removal.”<sup>1158</sup>

Such concerns can be evidenced by the findings of the HMICFRS report on the response of law enforcement to the MSA. The report states that there is a tendency across some forces to refer victims with irregular immigration status directly to immigration authorities rather than investigating modern slavery and human trafficking offences.<sup>1159</sup> However, the report also demonstrates a further risk posed by that the incongruence of the two policy areas:

In January 2017, officers attended an address in response to intelligence suggesting that Chinese nationals were using it as a brothel. When officers forced entry they found a 48-year-old female. She was arrested on suspicion of immigration offences and taken to a police station. Subsequent enquiries revealed that she was in the UK legally. The woman had no idea where she was in the UK, however, and did not even have a key to the premises. When officers returned her to the address, she disclosed her fear of the man who ran the business. In spite of that, she was left outside the premises. On returning to the station, other officers expressed concern that she might be a victim of modern slavery and human trafficking. The address was then revisited, but by then had been vacated. The woman is now a missing person and at risk of continued exploitation and re-trafficking<sup>1160</sup>

In this particular instance as the victim in question was viewed as being in the country legally she was returned the potential site of exploitation placing her at further risk. Thus, the immigration focus created by the emphasis placed on human trafficking poses a twofold problem for victim protection. The first, as discussed is that the NRM does not offer DLR for those who receive positive decisions. The second as evidenced by the example above is with instances where victims with legal status are identified - they may not be automatically be viewed by law enforcement as vulnerable or subject to exploitation and consequently placed in a situation where re-trafficking or re-exploitation can occur.

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<sup>1158</sup> *ibid*

<sup>1159</sup> HMICFRS *Op cit* fn1031 13

<sup>1160</sup> *ibid* 45

Thus, one of the greyest areas in the MSS is victim re-trafficking at the three stages mentioned above. Re-trafficking either within the UK or from the survivor's country of origin is an issue not dealt with by the MSA. The HTF correctly point out that the Act fails to define re-trafficking or re-victimisation. The most significant concern here is the possibility that policies and legal measures are failing individuals on more than one occasion. The Act has looked to safeguard children through the introduction of the child advocate pilot. It also attempts to prevent re-victimisation by compensating victims of modern slavery. It does not move beyond these tentative mechanisms, so the safeguarding of vulnerable adult survivors cannot be ensured. The idea of paying reparations or compensation to survivors of modern slavery is the only acknowledgement of support beyond the safe house. In line with section 7 (confiscation of assets), the Act also creates Slavery and Trafficking Reparation Orders to complement the confiscation of assets.<sup>1161</sup> These new orders can be issued in order to provide compensation to victims of modern slavery offences. This compensation will be paid from assets recovered from the perpetrator in order to "ensure that victims of modern slavery are properly compensated for the suffering."<sup>1162</sup> These sections of the Modern Slavery Act combine with non-legislative actions such as strengthening the operational capabilities of the NCA in relation to asset recovery and the promotion of asset recovery powers among police forces so that financial investigations can quickly follow the start of a criminal investigation.<sup>1163</sup> However, this is an element of the Act that is highly problematic in relation to the position of the victim. The implication that financial compensation will properly compensate the victim for their suffering is particularly unsettling. It suggests a belief that the only vulnerability that needs to be addressed is financial in nature and that providing survivors with money that has been earned through their exploitation will be sufficient to prevent re-trafficking. This is demonstrated by the Home Office MSS:

We know that compensation for victims is very important in the process of recovery and also in preventing possible re-trafficking. It can improve the chances of a victim's psychological recovery and eventual reintegration into

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<sup>1161</sup> *ibid* s8-10

<sup>1162</sup> Home Office, Modern Slavery Bill Factsheet: Reparation Orders (2014) accessed at ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/372787/ReparationOrders.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/372787/ReparationOrders.pdf))

<sup>1163</sup> Modern Slavery Strategy *Op cit* fn 993, 40

society and can also offer economic empowerment and protection from being re-trafficked.<sup>1164</sup>

The idea of financial compensation as a short-term fix could be compared to a sticking plaster. Providing compensation has the potential to provide a financial safety net. However, it is questionable whether such compensation can aid in psychological recovery or reintegration. The central problem is that many of the vulnerabilities that led to trafficking in the first place may still exist. Further to this, such compensation cannot help somebody suffering from post-traumatic stress syndrome or who may have no independent living skills that require prolonged support in order to live in the community. The HTF is clear on the fact that the aspirations of the compensation scheme expressed in the MSS do not directly address the practical issues of how organisations can identify and monitor risks to each individual.<sup>1165</sup> Survivors of ‘modern slavery’ experience a broad range of feelings during the referral process and are still affected psychologically and physically by the exploitation. In research conducted by the HTF, survivors spoke of their desires to start a new life, to contribute to society and become independent. However, the survivors also highlighted a number of problems they feel impede their recoveries such as isolation and the risk of future harm.<sup>1166</sup> The NRM as it stands does nothing to address these issues, with policymakers seemingly silent on the role the UK must play in the long-term support of victims. It is not sufficient to focus merely on the role of criminal justice. The prosecution of perpetrators is a necessary but insufficient approach in the long-term effort to combat modern slavery. Sustainable long-term strategies must consider both criminal justice and prolonged victim protection efforts.

Further to this, by placing emphasis on areas such as financial compensation the MSA allows the reconciliation of restrictive immigration policies and the rhetoric of ‘modern slavery’. Considering the issues raised by victims to the HTF,<sup>1167</sup> the first step to security and starting a new life would be acquiring legal status in the UK. Yet, the emphasis placed on financial compensation creates a perception that the key barrier to doing so is economic status rather than structural issues (such as

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<sup>1164</sup> *ibid* 67

<sup>1165</sup> Human Trafficking Foundation *Op cit* fn1165, 21

<sup>1166</sup> *ibid* 25

<sup>1167</sup> *ibid*

immigration status), which fall within the control of the Government. Thus, by emphasising financial compensation as a tool to reduce vulnerability and prevent re-exploitation, the MSA provides further evidence of the influence of the depoliticising nature of the ‘modern slavery’ narrative

The weight of providing long-term support and assistance falls on organisations like the Snowdrop Project who provide long-term community support for survivors after exiting the safe house – Snowdrop is the first charity in the UK to provide this service.<sup>1168</sup> Therefore, the onus for such support falls on a small number of NGOs working outside of the Government contract. This lack of a legal obligation to monitor survivors and offer long-term support is a fundamental flaw in an anti-slavery strategy which purports to place victims needs at its core. This is something which has been recognised during debates on the National Referral Mechanism in the House of Commons:

Government support is withdrawn quickly after a conclusive groundwork decision is made, and non-governmental organisations are all too often having to pick up the pieces because of a lack of resources and awareness among local authorities. Safe house accommodation should be more flexible, with support diminishing gradually according to an individual’s needs; they should not just have the rug pulled from under them.<sup>1169</sup>

Further to this:

At its heart, the national referral mechanism relies on traumatised people, who have often known only betrayal, immediately agreeing to go into a Government system. If they do not, they have to fend for themselves. A small minority may be supported by non-governmental organisations, but the rest receive no support. One NGO outside the national referral system found that three-fifths of survivors will go into the national referral mechanism if they are given a preliminary period of support of, say, six weeks.<sup>1170</sup>

What this serves to demonstrate is that the first stage of the battle in victim support needs to occur before entry into the NRM. Adults are required to consent to enter into the system, however, "without appropriate funding, support and accommodation, and

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<sup>1168</sup>The Snowdrop Project – What We Do (<http://snowdropproject.co.uk/what-we-do/>)

<sup>1169</sup> HC Deb 26 October 2017 vol 630 col 480

<sup>1170</sup> *ibid* Col 511

a suitable environment where they can get proper advice to allow them to make informed decisions, far too many turn to homelessness or, even worse, return to their traffickers”.<sup>1171</sup> While it is essential to continue to fight for extended support after entry into the NRM, it is also necessary to support and facilitate the victim's entry into this system from the first point of contact.

#### 4.4. The Hidden Victims of the Modern Slavery Act

There is much discussion of the importance of protecting vulnerable groups of people in the MSS. The policies are primarily designed to protect children and groups adults who are deemed as being vulnerable to exploitation. While the strategy identifies specific groups that are at risk both within the UK and outside of it and details a number of policies that are to be put in place, it falls short in two specific areas. First, is the vulnerable position occupied by Overseas Domestic Workers. Second, is the more general silence of the Act on workers’ rights.

Overseas domestic workers are perhaps one of the most vulnerable group when it comes to considering exploitative labour practices in the UK at present. The reason for this being that the Act itself fails to remedy the issue in the UK's immigration system of the tied visa for overseas domestic workers. This system arguably operates in a way that has the potential to facilitate exploitation. The tied visa system was introduced in 2012 by the Coalition government; it is a six-month renewable visa that means overseas domestic workers can only legally remain in the UK on the basis that they do not leave or change employers.<sup>1172</sup> The decisions to amend the terms of the visa created a situation which exacerbated the vulnerability of domestic workers to exploitation. Craig has remarked that:

Prior to 2010, domestic workers employed for example by wealthy businesspeople or diplomats had a degree of protection in that, although their visas were tied to a specific employer if evidence of abuse emerged (as frequently occurred) the worker could change employer without endangering their immigration status. The 2010 government changed this arrangement, and workers became liable to deportation (and thus loss of income also) if they tried to change employers or change employers<sup>1173</sup>

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<sup>1171</sup> *ibid* Col 510

<sup>1172</sup> Home Office, Immigration Rules – Part 5: 159 accessed at (<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-5-working-in-the-uk>)

<sup>1173</sup> Craig *Op cit* fn900, 23

The Modern Slavery Strategy identifies the vulnerability of the overseas domestic workers. However, the proposals made to safeguard this group against abuse are not sufficient. The strategy discusses strengthening the requirement for a written contract; introducing compulsory videoconference interviews for visa applicants and piloting a programme to provide workers with information on their rights.<sup>1174</sup> While such suggestions are all well and good, they are for all intents and purposes useless to a worker without the right to change employer who may be subject to exploitation. Craig has highlighted the comments made by GRETA in their 2016 Report which suggest that the above measures do not go far enough:

GRETA's (2016) monitoring report also noted that the government had fallen short of its promise arguing there was a need for inspections of private households to be encouraged and that in particular that changes in employers should be more clearly facilitated. Contracts with those working for diplomats should, they felt, be concluded with Embassy Missions rather than individual diplomats to prevent the latter using diplomatic privilege to escape prosecution.<sup>1175</sup>

Lord Hylton, Baroness Hanham, Baroness Royall and The Lord Bishop of Carlisle tabled an amendment to the Draft Modern Slavery Bill. Kalayaan – a charity set up to help overseas domestic workers - reported that the amendment in question would have transformed the situation of overseas domestic migrant workers by reinstating the right to change employers, readdressing the power imbalance and potentially allowing them to escape exploitation without the threat of breaching immigration law.<sup>1176</sup> However, the House of Commons did not pass the amendment, leaving the tied visas in place. While the strategy is paying lip service to the idea that overseas domestic are open to exploitation, it does not go far enough given it is becoming more evident that the visa is increasing the levels of exploitation overseas migrant domestic workers are subject to. The retention of the tied visa system creates a system whereby ODW are left vulnerable to exploitation demonstrating a further tension between

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<sup>1174</sup> Modern Slavery Strategy (2015) 54-55

<sup>1175</sup> Craig Op cit fn900, 23

<sup>1176</sup> Kalayaan, Time to untie migrant domestic workers – Briefing for Report Stage of the Modern Slavery Bill in the House of Lords (February 2015) accessed at (<http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Kalayaan-Peers-briefing-Report-Stage.pdf>)

immigration policies and anti-slavery strategies. What this suggests is that MSA cannot be seen as a wholly genuine attempt to tackle labour exploitation.

It has been argued by Virginia Mantouvalu that the sector of domestic labour is difficult to regulate because workers are not “visible to the authorities and are not easily accessible to labour inspectors.”<sup>1177</sup> Further to this, in the UK, domestic workers are exempt from many of the protections afforded to workers, including health and safety, working time regulations and minimum wage requirements.<sup>1178</sup> Thus, the sector already creates a precarious landscape for employment. If the tied visa and insecure immigration status are then factored into the equation, it can be seen that due to immigration rules overseas domestic workers occupy a position of heightened vulnerability to exploitation. Just a brief glance at some figures on the 184 tied workers registered by Kalayaan since 2012 demonstrates the effects of the tied visa system;

- 14% of workers tied by their visa to employers reported physical abuse, compared with 9% who were not tied
- 66% of tied workers reported being prevented from leaving the house freely, compared with 41% of those who had entered on the original visa.
- 81% tied workers reported having no time off compared to 66%.
- Reports by workers tied to employers were that 31% were not paid at all, compared with 11% who were not tied.
- 74% of workers who were tied reported having their passport kept from them, compared with 50% who were not tied.
- Kalayaan staff internally identified 64% of the workers on a tied visa as trafficked, compared with 25% who were not tied.<sup>1179</sup>

In a study of 24 overseas domestic workers, Mantouvalu further exposes the experiences of those subject to tied visas. Mantouvalu’s research highlights that the workers were often poorly paid (some as low as £50 per month), expected to work

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<sup>1177</sup> Virginia Mantouvalu, Am I Free Now? Overseas Domestic Workers in Slavery [2015] *Journal of Law and Society*, 42(3), 329, 332

<sup>1178</sup> *ibid* 332, see Mantouvalu for a detailed discussion of the different legal protections from which domestic workers are exempt

<sup>1179</sup> Kalayaan, Britain’s forgotten slaves; Migrant domestic workers in the UK three years after the introduction of the tied Overseas Domestic Worker visa (2014) accessed at (<http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Kalayaan-3-year-briefing.pdf>)

long hours (between 12-20 hour days seven days a week), were not allowed leave the house unaccompanied and reported regular psychological and physical abuse.<sup>1180</sup>

The idea of ‘modern slavery’ is often discussed in relation to the millions of people who are enslaved globally. However, what the MSA fails to take into account is that in 2014 16,753 visas were issued to domestic workers accompanying their employers into the UK.<sup>1181</sup> This means that 16,753 individuals were placed into a potentially exploitative position, which the MSA overlooks. At the same time as numbers of visas granted increases, Kalayaan has registered a decrease in the numbers of workers approaching them for help. The strategy proposes strengthening employment contracts and offering programmes to inform overseas domestic workers of their rights. However, what purpose can this serve when there is a fear that as a result of the tied visa workers are being prevented from leaving and seeking help or are aware of the new rules which mean if they leave their new employer they will be breaching immigration law? Two implications of this could be to first remain with their employer or second to escape and due to their vulnerability and illegal status ODW may choose to go underground to further exploitation.<sup>1182</sup> The treatment of overseas domestic workers under the MSA further demonstrates the depoliticising effect of the modern slavery narrative. Such workers are brought into the country via legal channels and thus although they experience treatment which would be deemed to fall within Section 1 of the MSA, due to the fact they are not subject to illegal movement or do not possess an illegal status, they fly entirely under the radar of the Act.

The UK Supreme Court in the case of *Taiwo v Olaiigbe* addressed this justice gap in the provisions of the Modern Slavery Act.<sup>1183</sup> This case involved the severe mistreatment of two overseas domestic workers Ms Taiwo and Ms Onu; both had been brought to the UK from Nigeria on tied visas. Due to the lack of protection offered by the MSA to overseas domestic workers a remedy was sought via the employment tribunal. Both women were successful in bringing claims against their employers for breaches of the National Minimum Wage Act<sup>1184</sup> and the Working

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<sup>1180</sup> Mantouvalu *Op cit* fn1177, 341

<sup>1181</sup> Kalayann *Op cit* fn1179

<sup>1182</sup> Kalayann fn1176

<sup>1183</sup> *Taiwo v Olaiigbe (and another)* [2016] UKSC 31

<sup>1184</sup> National Minimum Wage Act (1998) Ch 39

Time Regulations.<sup>1185</sup> However they were unsuccessful in claims for race discrimination on the grounds of nationality. The Court concluded that:

These employees were treated disgracefully, in a way which employees who did not share their vulnerable immigration status would not have been treated. As the employment tribunals found, this was because of the vulnerability associated with their immigration status.<sup>1186</sup>

However, despite acknowledging this fact, the Court dismissed both appeals, as although discrimination had taken place it was not on the grounds of race but on the grounds of their vulnerable immigration status. Thus, due to the range of issues discussed above in relation to overseas domestic workers and tied visas, both Ms Taiwo and Ms Onu were vulnerable to mistreatment in a way that other migrant workers would not be. This is owed to the fact that the tied visa leaves such workers dependent on their employers for the right to remain in the UK. Lady Hale concluded the judgment by recognising the limitations of the current legal provisions pertaining to overseas domestic workers:

It follows that these appeals must fail. This is not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all. Parliament may well wish to address its mind to whether the remedy provided by section 8 of the Modern Slavery Act 2015 is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out to workers such as these, along with the other remedies which it does have power to grant.<sup>1187</sup>

As has already been demonstrated, such workers are neglected and become invisible under the Act. It has been highlighted by Mantouvalu that given that the definitions of offences listed under section 1 rely on the ECHR and the interpretations of the ECtHR, the tied visas and thus the MSA are directly in breach of international obligations.<sup>1188</sup> Mantouvalu focuses on the *Rantsev* judgement of ECtHR. This thesis has already examined the judgement in this case and critiqued the Court's interpretation of the prohibition of slavery. However, what is of interest in this

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<sup>1185</sup> Working Time Regulations (SI 1998/1833)

<sup>1186</sup> *Taiwo* fn1183 para 14

<sup>1187</sup> *ibid* para 34

<sup>1188</sup> Mantouvalu *Op cit* fn1177, 350

particular instance is that “Rantsev shows then, that a visa regime, which is very restrictive and creates strong ties between the worker and the employer, creating the opportunity to exercise control over her, may breach the Convention.”<sup>1189</sup> Thus, the silence of the Act on the issue of tied visas represents a potential breach of Article 4 ECHR.

When taking into consideration the current state of the law, it would not be hard to conclude that the Government is giving the employer a quasi-ownership over the individual that is recognised and to some extent enforced by the immigration system. Consequently, as discussed in Chapter 4, restrictive immigration policies serve to create and heighten vulnerability to exploitation.<sup>1190</sup> The tied visa system represents a legal structure within the immigration system which opens the door to exploitation in an already under-regulated sector. The use of the tied visa mirrors findings of Michael Potter and Jennifer Hamilton regarding the use of irregular status and the fear of criminalisation to control workers in the agricultural sector.<sup>1191</sup> The visa therefore acts in much the same way constituting a mechanism to control workers and make them reliant on a single place of employment.<sup>1192</sup> In addition, the system then continues to neglect this group of migrants by failing to offer sufficient protection or redress in the event that exploitation and mistreatment does occur on the grounds of their vulnerable immigration status.

The treatment of overseas domestic workers is representative of a broader silence amongst the provisions of the Modern Slavery Act, to address the structural causes of exploitation. In Chapter 4 it was argued that the ‘modern slavery’ narrative and the subsequent emphasis placed on human trafficking has an obscuring effect on exploitation. This was demonstrated via the example of Amazon Fulfilment Centres and treatment of workers in what would be regarded as voluntary working environments.<sup>1193</sup> The critique of the ‘modern slavery’ narrative theorised that if it is accepted that exploitation exists on a spectrum and further to this, exploitation does not take place simply due to organised criminal behaviour, that methods of prevention

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<sup>1189</sup> *ibid* 351

<sup>1190</sup> see Chapter 4 4. Do Victims Benefit from ‘Modern Slavery’ and does Legal Accuracy Matter?

<sup>1191</sup> Michael Potter, Jennifer Hamilton, Picking on Vulnerable Migrants: Precarity and the Mushroom Industry in Northern Ireland (2014) 28(3), *Work Employment and Society*, 390

<sup>1192</sup> *ibid* 397

<sup>1193</sup> see Chapter 4 2.2. Slavery? What about Labour Exploitation - Amazon Fulfillment Centers and Geographies of Containment

and protection must be constructed to also protect against labour exploitation in a broader sense. The strategy adopted with the Modern Slavery Act is that exploitation is caused primarily via criminal behaviour – whether it is larger-scale organised crime or the acts of smaller groups and individuals. This thesis has taken on board and developed Julia O’Connell Davidson’s critique which suggests that the human trafficking focus of ‘modern slavery’ depoliticises the legal response to exploitation.<sup>1194</sup> The Modern Slavery Act evidences this effect on legislative responses. Thus, rather than acknowledging that structural factors and legal mechanisms such as weak workers’ rights protection and immigration rules can create exploitation, the emphasis is placed largely on criminal justice. It is perhaps the case that reinforcing vulnerability, as is the case when it comes to overseas domestic workers, is an unintended consequence of two divergent policy areas. However, given that anti-slavery has historically been entangled with divergent issues and policies, it is necessary to reflect critically on the impact of the concept of ‘modern slavery’. Such reflection highlights that vulnerability can be created and, thus, exploitation can be aided by the State. What can be seen in the case of the Modern Slavery Act, is that whether intentional or not, the reluctance to capture activity that strays too far from the human trafficking focus means that certain state-sanctioned actions are not challenged and evade scrutiny.

## 5. Modern Slavery and Business

Much of the Modern Slavery Act is concerned with dealing with trafficking and slavery and thus improving the working lives of individuals domestically. However, the Act also considers the issue of exploitation outside of the UK and thus, improving the working lives of individuals in other countries.<sup>1195</sup> The role of business in tackling modern slavery in the UK was discussed in the CSJ report on modern slavery. The CSJ has initially worked on the drafting of the Transparency in UK Company Supply Chains (Eradication of Slavery) Bill (TISC), which required companies with a turnover exceeding £100 million to engage in the anti-slavery agenda.<sup>1196</sup> The focus of this Bill was transparency in supply chains. The reason for this focus is highlighted

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<sup>1194</sup> Julia O’Connell Davidson, *New Slavery, Old Binaries: Human Trafficking and the ‘borders of freedom’* (2010) 10(2) *Global Networks*, 244, 245

<sup>1195</sup> Modern Slavery Act 2015 C.30 s54

<sup>1196</sup> Centre for Social Justice, fn916 26

in a report produced by the Chartered Institute of Procurement & Supply (CIPS) and the Walk Free Foundation<sup>1197</sup> Business more often than not comes into contact with labour exploitation where there are complex supply chains. Therefore it is crucial that supply chains do not unwittingly involve exploitative labour.<sup>1198</sup> The report stresses the importance of being aware of this issue and being proactive in combatting it due to the increasing awareness of consumers of labour and human rights issues.<sup>1199</sup> However, the way in which this particular issue has been addressed has created unsatisfactory results in terms of scope and enforcement.

### 5.1. Transparency in Supply Chains

On a statutory level, the role of supply chains was an issue that initially went unanswered in the Draft Modern Slavery Bill. The evidence review for the Bill highlighted the need for legislation that would ensure due diligence and transparency in supply chains,<sup>1200</sup> the reason for this being that labour exploitation exists in supply chains on a global level. It is not enough for legislation to focus on the idea of individuals being trafficked into exploitation or enslaved within the UK. There is the unseen danger of the use of exploitative labour in the production of goods that are bought and sold in the UK. The underpinning logic is that companies must be able to offer the consumer a degree of certainty that the goods that they are purchasing are free from exploitation. Further to this, the Review highlighted the growing number of high profile incidents of exploitative labour practices in foreign supply chains, such as conflict minerals in the Congo and child labour in Latin America and Africa.<sup>1201</sup> The advice given in the evidence review and the Joint Committee was to model legislation on California's Transparency in Supply Chains Act 2010.<sup>1202</sup> The Panel recommended that the Modern Slavery Bill contain requirements for companies to state in their annual reports measures they have taken to eradicate exploitation from supply chains and appoint a special non-executive director to control anti-slavery actions.

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<sup>1197</sup> Chartered Institute of Procurement & Supply, Modern Slavery in Supply Chains, ([https://www.cips.org/Documents/About%20CIPS/Ethics/CIPS\\_ModernSlavery\\_Broch\\_WEB.pdf](https://www.cips.org/Documents/About%20CIPS/Ethics/CIPS_ModernSlavery_Broch_WEB.pdf))

<sup>1198</sup> *ibid*

<sup>1199</sup> *ibid*

<sup>1200</sup> Baroness Butler-Sloss *et al Op cit* fn996 6

<sup>1201</sup> *ibid* 32

<sup>1202</sup> Centre for Social Justice *Op cit* fn 916 32-33

The Home Office published a consultation on the issue in February 2015. The consultation concluded that given the cumulative support for a clause on transparency in supply chains from the CSJ, the Joint Committee on the Draft Modern Slavery Bill and the evidence review carried out by Frank Field that this was an issue that needed to be addressed.<sup>1203</sup> The issue of supply chains is addressed in Section 54 of the Modern Slavery Act: it creates a statutory obligation for commercial organisations to produce an annual modern slavery statement.<sup>1204</sup> Following a consultation process, the Secretary of State determined that the provision would apply to organisations with a minimum turnover of £36million.

Although on the face of it this Section of the Act directly addresses the concerns raised in relation to supply chains there are potential issues that could affect the aims of this provision. Dissatisfaction with the approach to the transparency in supply chains clause was raised across both the House of Commons and the House of Lords. One issue raised during the drafting process was the need to amend Section 54 to /\*-41+6\*01 34567890- include Government departments and agencies within the reporting requirement, a move supported by the British Retail Consortium and the British Medical Association.<sup>1205</sup>

Just to give your Lordships a glimpse of the scale of procurement that is under discussion here, the Government spent a total of £238 billion on the procurement of goods and services in 2013-14. This sum represents approximately one-third of all public spending. Even breaking that down into departments produces substantial figures. For example, if we look at the Ministry of Defence, we see that the Defence Clothing Team, which is part of Defence Equipment and Support spent a total of £64.7 million on uniform and clothing in the financial year 2013-14, which would have put it well within the scope of the £60 million which was one of the figures that have been bandied around as a suggestion for a threshold figure that companies might need to meet to be covered by this clause. That is just spending on clothing.

However, despite the fact that the figures above debated in the House of Lords would place the NHS and MOD well within the threshold of £36 million, Section 54

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<sup>1203</sup> Home Office, Modern Slavery and Supply Chains Consultation (12<sup>th</sup> February 2015) accessed at ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/448201/2015-02-12\\_TISC\\_Consultation\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf))

<sup>1204</sup> Modern Slavery Act 2015 C.30

<sup>1205</sup> HL Deb 25 February 2015 vol 759, cols 1732, HL Deb 08 July 2016 vol 773 col 2249-2250

exempts public bodies. It is important to remember that it is not only private companies in the procurement and supply chains which must carry out diligence and reflect on their social responsibility, the same task should also fall to the Government and the supply chains of public bodies.<sup>1206</sup>

There have been a number of reports published on Section 54 of the Modern Slavery Act and the efficacy of the reporting mechanism for dealing with exploitative practices in supply chains.<sup>1207</sup> The first statements from companies were due in 2016; CORE and the Business & Human Rights Centre undertook an analysis of the 75 statements received. The conclusion was that the first early statements failed to make a statement about dealing with exploitative practices in supply chains. The Act requires that statements be signed by the Director, be approved by the Board and be displayed on the company's website.

Out of 75 statements found, only 22 were both signed by a director and available from the company's website homepage. Thirty-three were not signed by the director, and 33 companies had not placed a link to the statement from their website homepage.<sup>1208</sup>

Further to this, while the Act does not explicitly illustrate what the content of the statement should be, which is an issue in of itself, it does suggest six areas for consideration. Of the 75 first statements, 19 met these suggestions, however "critically, only 9 statements met the minimum requirements and covered the six suggested areas."<sup>1209</sup>

Following the submission of the first statements, the conclusion to be drawn from the first statements seemed to be that the "initial annual statements are little more than PR and do not disclose information as recommended by the law and the non-binding guidance."<sup>1210</sup> A report published by the International Trade Union Confederation highlighted a number of areas of concern. First, the Modern Slavery Act does not

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<sup>1206</sup> HL Deb 08 July 2016 vol 773 col 2228-2229

<sup>1207</sup> International Trade Union Confederation, Closing the loopholes - How legislators can build on the UK Modern Slavery Act (2017) accessed at (<https://www.ituc-csi.org/closing-the-loopholes-how>) CORE, Business and Human Rights Resource Centre, UK Modern Slavery Act: First 75 statements In (2016) ([http://corporate-responsibility.org/wp-content/uploads/2016/03/CORE-BHRRRC-press-release\\_modern-slavery-statements\\_160307\\_.pdf](http://corporate-responsibility.org/wp-content/uploads/2016/03/CORE-BHRRRC-press-release_modern-slavery-statements_160307_.pdf))

<sup>1208</sup> CORE, Business, and Human Rights Resource Centre, UK Modern Slavery Act: First 75 statements In (2016)

<sup>1209</sup> *ibid*

<sup>1210</sup> International Trade Union Confederation *Op cit* 1207 6

include legally mandatory requirements for what Modern Slavery Statements must include. The ITUC recommends that legislation on supply chains make the disclosure of information not merely permissive but mandatory.<sup>1211</sup> In the Government's failure to offer clear guidance it has fallen to NGOs to offer reporting guidance<sup>1212</sup> Further to this, as Section 54 currently stands it falls short of the expectations of the UN Guiding Principles on Business and Human Rights (UNGPs) and the requirement for businesses to carry out human rights due diligence<sup>1213</sup>

Further, there is a potential loophole in Section 54 as the wording states a statement of steps taken by a commercial organisation should be made regarding "its supply chains" or "any part of its own business";<sup>1214</sup> this creates a possible exemption for companies over the threshold. It is possible to argue that the provision as it stands in the MSA creates a potential gap whereby the use of exploitative labour in overseas supply chains for non-UK subsidiaries that are not wholly owned by the parent company could remain out of sight. Further to this, there is no requirement for companies not registered in England and Wales who sell goods or services in the UK to meet the requirements. The implication of this is that businesses operating and selling goods in the UK could continue to profit from the use of exploitative labour practices in supply chains as long as the goods in question do not enter the country. The report states that this shortcoming equates to a lack of an extraterritoriality offence and recommends that any new legislation should "any natural or juridical persons of a state who commit the act of slavery, servitude and forced or compulsory labour and human trafficking should be held to account in the courts of that state, regardless of where these crimes were committed."<sup>1215</sup>

The final element to consider is that it is entirely plausible that such reports will not have the desired effect regarding corporate responsibility. As it stands, while the Act requires companies with a turnover exceeding £36 million a year to publish an annual

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<sup>1211</sup> *ibid* 7

<sup>1212</sup> CORE, *Beyond Compliance: Effective Reporting under the Modern Slavery Act – A Civil Society Guide for Commercial Organisations on the Transparency in Supply Chains* (2016) accessed at ([http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO\\_TISC\\_guidance\\_final\\_digitalversion\\_16.03.16.pdf](http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO_TISC_guidance_final_digitalversion_16.03.16.pdf))

<sup>1213</sup> United Nations, *Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy Framework* (2011) accessed at

([https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf))

<sup>1214</sup> Modern Slavery Act 2015 C.30

<sup>1215</sup> International Trade Union Confederation *Op cit* fn1207, 8

statement, it is merely permissive as there is no penalty for noncompliance. While any company whose proceeds exceed the threshold will be breaking the law in failing to submit a report, noncompliance goes unpunished.

In the face of these numerous shortcomings, the Government is making some attempt to readdress the issue of transparency in supply chains. On the 12 July 2017, the first reading of the Modern Slavery (Transparency in Supply Chains) Bill [HL] 2017 took place. The Bill addresses some of the issues highlighted by reports discussed above including the inclusion of public bodies and Government departments<sup>1216</sup>, the inclusion of six mandatory areas in the statement<sup>1217</sup>. However, in its current format, the Bill does not cover what appears to be the most pressing issue penalties for non-compliance. There is currently no central register for ‘modern slavery’ statements, and there is no list of companies who must fulfil the requirements of Section 54. Further to this, the Home Office has conceded that is no real idea of how many companies should be compliant with the transparency requirement.

"The Department told us that it does not have a list of all the eligible organisations, but it has written to 10,000 that it thinks may be eligible. It explained that it does not monitor the publication of the statements; instead, it relies on two NGO run registries, which collate statements. The Department could not say what figure of compliance it would expect in the future."<sup>1218</sup>

The Business and Human Rights Resource created the Modern Slavery Register, which is a voluntary forum, which after two cycles holds 3213 statements. However, according to the Office for National Statistics as of March 2017, there were 743433 companies paying VAT or PAYE with a turnover of £25-49 million or over. This means that there are potentially a large number of companies either selling or manufacturing goods in England and Wales who do fall under the scope of the Section 54 requirements but are not compliant. The Home Office has conceded that is no real idea of how many companies should be compliant with Section 54.

There are two striking issues, which emerge when considering the issue of ‘modern slavery’ and business. The first is that this particular problem bears a striking

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<sup>1216</sup> Modern Slavery (Transparency in Supply Chains) Bill [HL] 2017 s1 (2b) accessed at (<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0057/18057.pdf>)

<sup>1217</sup> *ibid* s1 (4)

<sup>1218</sup> House of Commons Committee of Public Accounts fn1134, 10

resemblance to the one faced by 19<sup>th</sup> Century abolitionists in England. Human exploitation is morally and ethically wrong but it also extremely profitable for business and the economy. The second is that the answer of the State is that is possible to be seen to be reacting to a problem, yet not directly address the structural issues and continue to profit from exploitation. This is evident in post-abolition colonialism and the use of native forced labour in the place of slavery.<sup>1219</sup> The abolition of the slave trade left a gap in many economies and colonial forced labour programmes allowed this gap to be filled under the guise of civilising missions and continued anti-slavery work. Eric Alina comments that the Portuguese in Mozambique “justified their modern labour slavery as Europe’s moral duty to civilize the ‘Dark Continent’” and transform beasts into men.”<sup>1220</sup> This is something, which was then legitimised by the 1926 Slavery Convention via the creation of loopholes in the prohibition of forced labour:

The convention did note that forced labour could develop into “conditions analogous to slavery,” but left to local authorities the power to decide how and whether to change forced labour practices. Even the League’s 1930 Convention on Forced Labour left a number of loopholes and lacked enforcement mechanisms.<sup>1221</sup>

A similar situation is evident to an extent when considering the approach to business and transparency in supply chains. It is possible to argue that to a degree Section 54 is a smokescreen. The poor drafting and enforcement gaps speak to an agenda of deregulation. This thesis has previously discussed the Conservative Governments pursuit of labour market flexibility via the ‘Red Tape Challenge’<sup>1222</sup> and the Deregulation Act 2015. Much in the way that the use of colonial forced labour provided a cover for what was essentially slavery, Section 54 offers regulation, which is all bark and no bite, a red herring. Further to this, the Act focuses only on one element, supply chains. While exploitation in supply chains is an area which needs to be effectively targeted, the Act neglects once again other structural issues. This is done in a manner seemingly inspired by the focus on human trafficking. The Act focuses solely on supply chains, suggesting that the issue is not in business operations

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<sup>1219</sup> see Eric Alina, *Slavery By Any Other Name* (University of Virginia Press 2012)

<sup>1220</sup> *ibid* 6

<sup>1221</sup> *ibid* 7

<sup>1222</sup> see Introduction 4. ‘Modern Slavery and the Normalisation of Labour Exploitation

in the UK, but that exploitation is almost geographically removed from us. Therefore, factors such as workers rights protection, zero-hour contracts and workplace inspections go unaddressed. This further evidences the effect of the ‘modern slavery’ narrative and the focus on human trafficking on legislative responses to exploitation.

## **6. The Modern Slavery Act: A Not Impossible Balancing Act**

By examining the concept of ‘modern slavery’ and the construction of the Modern Slavery Act, it becomes clear that, rather than being world-leading, the approach to ‘modern slavery’ and exploitation in England and Wales is wanting. As a result of the blurred boundaries between slavery and human trafficking, the use of the phrase ‘modern slavery’, places an immediate importance upon prioritising trafficking.<sup>1223</sup> It suggests that trafficking is slavery, and it blurs the boundaries of what are already confusing definitions. Further to this, detailed analysis of the Act demonstrates the effect that the ‘modern slavery’ narrative has on legislative and policy responses to exploitation. The current approach to tackling exploitation falls at the same stumbling blocks that faced historical anti-slavery projects – prioritising competing political or economic interests over holistically approaching the issue at hand. This thesis has identified a threefold critique of the concept of ‘modern slavery’; this chapter, therefore, demonstrates how this critique maps on to the Modern Slavery Act. Specifically, this chapter emphasises the depoliticising effects of the human trafficking focus on the Act.

This chapter began by stating the importance of a holistic approach to anti-slavery/trafficking, an approach that places the victim at the centre of any given strategy. This is something that analysis of historical abolition has demonstrated to be a fundamental failing of previous responses.<sup>1224</sup> An assessment of the role played by the Act displays an imbalance in the current approach. Examination of the statutory and policy measures demonstrates a mixture of criminal and civil provisions within the Act intended to reduce the threat of ‘modern slavery’. However, there is an overwhelming focus on the idea of criminal justice and law enforcement and increasing the powers of organisations and bodies involved in order to reduce the

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<sup>1223</sup> see Chapter Chapter 4: Critiquing Modern Slavery

<sup>1224</sup> see Chapter 1: The Road to International Abolition and the 1926 Slavery Convention:Chapter 2: History and Legal Definition of Trafficking

threat. This emphasis is the result of the human trafficking focus of the ‘modern slavery’ narrative.

This chapter highlights a key thinking point about contemporary anti-slavery, the question to be asked is whether criminal justice must be the lynchpin of the Modern Slavery Act? The answer is, that if the concept of ‘modern slavery’ frames the legal and policy responses, such an emphasis is the logical response. However, a central element of the critique of ‘modern slavery’ is that the erosion of the boundaries between human trafficking and other practices such as slavery creates a situation whereby any kind of exploitation is characterised as human trafficking, and it becomes synonymous with slavery. It was argued in Chapter 4, that such a conceptualisation depoliticises the problem of exploitation, thus requiring a legal response, which focuses on criminal justice to the detriment of other factors.<sup>1225</sup> This critique is manifest in the construction of the Modern Slavery Act. The question to be asked is must the tools aimed at reducing the threat of ‘modern slavery’ focus solely on the actions of the perpetrators? If the construction of legal and political responses moves away from the concept of ‘modern slavery’, the answer is no, the critique of ‘modern slavery’ emphasises the importance of the ‘victim’. The aim of reducing the threat of ‘modern slavery’ could also be achieved by looking not only at current victims of modern slavery but also the socio-economic and legal structural factors, which allow the threat of exploitation to hang over individuals in the first place.

Although analysis of the MSA demonstrates that victims do feature to an extent within the Modern Slavery Act, it appears that there should be concern regarding whether the current offerings are sufficient. Due to the focus on human trafficking within the ‘modern slavery’ narrative, the State is able to create a narrow focus on criminal justice and negate addressing the structural issues, which create and reinforce the vulnerability of victims, thus weakening attempts to protect and support them. This chapter considers what the MSA has to offer in relation to victim protection. In light of the increasing numbers of victims since the introduction of the Act, the conclusion can be reached the approach taken is not fit for purpose. The Act does not offer enough concrete change in the way of victim protection and support, and

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<sup>1225</sup> See Chapter 4: Critiquing Modern Slavery

elements such as Sections 45, 48 and 49 indicate virtue signalling rather than sincere and tangible efforts to increase victim protection and support.

In addition, the continuously increasing number of victims suggests that in the short term that the criminal justice-driven approach is not yet yielding the desired results. Yet, perhaps, it is impossible for this to happen in the context of ‘modern slavery’. Analysis of historical approaches to anti-slavery/trafficking has demonstrated that the task of tackling human exploitation always has and continues to be waylaid by a melee of competing political interests; this is the true utility of the historical analogy. While the use of criminal justice elements are a vital part to targeting the issues such as human trafficking, such a response does not target the structural factors which create vulnerability and precarity, addressing such factors is essential to effective responses to all forms of exploitation. Further to this, there is an overwhelming feeling from the reports that victim identification and protection are viewed as important due to their value in relation to ensuring prosecutions. This leads to a conclusion that although victim protection features, its primary role is to support the criminal justice response. A victim can help build a case against the individual who has exploited them. However, the main aim of this facet of the response should be to prevent the vulnerability from occurring. The most worrying omission when it comes to victim support is the lack of attention given to victims both before referral to the NRM and following a positive grounds decision and the options available to victims after contracted support ends, and they face life after the safe house. The concern here is that anything positive achieved by the MSA potentially becomes redundant when survivors are left defenseless due to the systems failure to safeguard vulnerable individuals. Additionally, despite the evident flaws with the NRM, identified by the UKHTC and the Home Office, the Modern Slavery Act did not make any substantive changes to the system. This ultimately means that not only is the system not operating in an efficient manner, but also it continues to only function as a gateway to support for the purposes of identification as a trafficked victim for criminal convictions.

Alongside the legislative and policy responses regarding victim protection and support, the silences and gaps identified in this chapter further demonstrate the impact of the concept of ‘modern slavery’. The analysis of the position of overseas domestic workers highlights the negative impact of the narrative on individuals in the workplace in England and Wales. This underlines the cyclical nature of abolition, in

which competing policy interests (in this case immigration policy) undermine the protection of vulnerable individuals and in some cases actually create a structural cause of vulnerability and exploitation. This is then compounded by the analysis of Section 54 and the weak attempt to regulate the business sector through supply chains.

The MSA aims to reduce the prevalence of ‘modern slavery’, however, in the Public Accounts Committee’s 2018 report it stated that the Government has failed “to set out how such a reduction could be measured, and the Department’s only estimate of the prevalence of modern slavery still relates to 2013.”<sup>1226</sup> An in-depth analysis of the Modern Slavery Act 2015 and the developments in the area since it received royal assent lead to the conclusion that rather than being a world-leading piece of legislation, the Government and Parliament are on the right track, but are not on the train. The influence of the ‘modern slavery’ narrative is evident throughout the analysis of the Act. The main gaps and silences of the Act and the related policy responses are evidence of the impact the concept of ‘modern slavery’ has when it is operationalised. The failure to meaningfully confront the issue of supply chains by creating a robust statutory reporting mechanism with penalties for noncompliance, combined with the halfhearted attempt to address victim support and the blind eye turned towards structural factors cast the Modern Slavery Act as not only imbalanced and looking more like a criminal justice instrument but also as a missed opportunity.

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<sup>1226</sup> House of Commons Committee of Public Accounts fn1134, 8

## **Conclusion**

The objective of the research for this thesis was to explore and critique the concept of ‘modern slavery’ and the effect that this concept has on legal and policy responses to slavery and human trafficking. To date, the boundaries and distinctions of the concept have been underexplored. It is essential to critique the concept of ‘modern slavery’ because the concept is used instrumentally and because it does affect legal and policy responses to slavery, trafficking and other exploitative practices. In addition, as the analysis of this thesis demonstrates, the instrumentalisation of the concept can lead to attention being placed on particular responses that don’t necessarily support victims and can in some places heighten precarity to exploitation.

The concept of ‘modern slavery’ represents an erosion of the legal boundaries between the related but not synonymous practices of slavery and human trafficking. This erosion is evidenced in the construction of the concept of ‘modern slavery’, whereby human trafficking and slavery are seen as the same thing and, thus, are used as interchangeable terms. Analysis of historical anti-slavery and anti-trafficking movements demonstrates that tackling the issue of human exploitation has never been a straightforward task. Anti-slavery is a task which has historically been entangled with competing economic and policy concerns. In the contemporary setting, the human trafficking focus of ‘modern slavery’ acts as a tool for obfuscation, in much the same way that anti-slavery was employed to disguise colonial expansion in the 19<sup>th</sup> Century. In the contemporary setting, the concept of ‘modern slavery’ can be seen to obscure divergent policies such as immigration and deregulation which limit anti-slavery/trafficking responses.

The Modern Slavery Act 2015 demonstrates the way in which the depoliticising nature of the concept of ‘modern slavery’ affects legal and political responses. There are three significant ways in which this depoliticisation is effectuated which are discussed throughout this thesis: First, that the concept of ‘modern slavery’ is propagated via historical analogies which serve to obscure detrimental policies; Second, creating a threefold critique of the concept of ‘modern slavery’ based upon the idea of depoliticisation; Third, the mapping of this critique on to the provisions of

the Modern Slavery Act to demonstrate the impact the concept has on legal and policy responses.

Crucially, the Modern Slavery Act, by instrumentalising the concept of ‘modern slavery’ and by placing emphasis on human trafficking, normalises what could be deemed routine labour exploitation, whilst willfully neglecting the structural causes of exploitation and precarity. Further to this, in a broader sense, as a result of the blurring of the boundaries between slavery and trafficking, the concept is, in fact, damaging to victims

### **1. Modern Slavery and the True Utility of the Past:**

The analogical and iconographic use of the historical abolition of the transatlantic slave trade serves to delineate the connection not only between historical and contemporary exploitation but also, between the efforts of those cast in the role of ‘abolitionists. The way in which this connection is made will vary depending on the intent of its user.<sup>1227</sup> Analysis of historical modes of anti-slavery/trafficking is essential to the task of assessing the concept of ‘modern slavery’ on two levels. First, it exposes the analogy of human trafficking and the trans-Atlantic slave trade as a smoke screen, but also offers a different approach to utilising such an analogy. Second, the analogy itself currently serves as an iteration of the unhelpful conflation between slavery and human trafficking.

It has been argued by Karen Bravo that, as a strategy, the analogy is underutilised due to the fact that it fails to highlight “essential similarities or differences shared by the modern traffic in humans and the transatlantic slave trade.”<sup>1228</sup> However, this thesis demonstrates that there is further use for the analogy between historical and contemporary abolition. The analogy between human trafficking and historical slavery is often used for its emotive appeal; and, it relies on highlighting the role played by countries such as Britain as ‘abolitionists’ rather than oppressors. Analysis of 18<sup>th</sup> Century British anti-slavery demonstrates that the cause of abolition was

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<sup>1227</sup> Karen Bravo, Exploring the Analogy between Modern Trafficking in Human and the Transatlantic Slave Trade (2007) 25(2) Boston University International Law Journal, 207, 210

<sup>1228</sup> *ibid* 207

deeply entangled in economic and foreign policy interests, which impacted the time scale and nature of the eventual abolition of the slave trade.

It is, in fact, useful to draw a connection to the past, not to invoke the memory of 19<sup>th</sup> Century abolitionists, but to consider why such efforts have thus far been ineffective, and why measures such as the MSA will likely continue in the same vein. Once deconstructed and examined, the analogy between historic and contemporary abolition highlights the anti-slavery project for what it was then, and for what it is now when employed by the state - a tool. The analogy highlights the tenuous position historically occupied by anti-slavery, further to this, that it could and has been used as a vehicle to pursue diametrically opposed policy objectives. Thus, in light of the analysis of the concept of 'modern slavery' and the Modern Slavery Act 2015, an analogy between historical and contemporary anti-slavery/trafficking can be utilised as a tool for reflective and critical thought on current responses. Such an analogy exposes the continuities but, also the depoliticising rhetoric of the 'modern slavery' narrative.

## **2. Modern Slavery: Human Trafficking and Slavery**

The conflation of human trafficking and slavery under the umbrella term of 'modern slavery' is unhelpful and legally and practically inaccurate. Analysis of the legal definitions of slavery and human trafficking demonstrate that the two are related, but distinct concepts. This construction of the concept alongside the analogy of human trafficking and the transatlantic slavery represents a domain expansion. The concepts of slavery and human trafficking have essentially been redefined as 'modern slavery' in order to fit varying agendas. It has been highlighted by Nicole Siller, that this is a shift readily used without critique by NGOs, academics and lawmakers.<sup>1229</sup>

Building on Julia O'Connell Davidson's discussion of 'modern slavery' as a discourse of depoliticisation, it is possible to see how human trafficking, under the guise of 'modern slavery' has become the sole focus of attention, diverting eyes away

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<sup>1229</sup> Nicole Siller, 'Modern Slavery' – Does International Law Distinguish between Slavery, Enslavement and Trafficking? (2016) 14(2), *Journal of International Criminal Law*, 405, 406

from slavery and other exploitative practices, usually effectuated by the state.<sup>1230</sup> The inclusion of human trafficking within anti-slavery prohibitions within human rights law and international criminal law provides the legal basis for domain expansion. For example, the interpretation provided by the ECtHR in *Siliadin*<sup>1231</sup> represents a blanket inclusion of human trafficking in all of its forms within the boundaries of slavery, thus, reinforcing the basis for the ‘modern slavery’ narrative.

It might be asked, why do legal definitions matter, why is an insistence on legal accuracy important? By blurring the boundaries between different practices and placing an emphasis on human trafficking, the concept of ‘modern slavery’ has the capability of negatively affecting victims of exploitation. The analysis of the concept evidences that in the broader sense, the emphasis placed on human trafficking has a depoliticising effect on the narrative surrounding exploitation. As discussed in Chapter 4 with the example of Amazon Fulfillment Centre Workers, the conceptualisation is incapable of being reconciled with the general acceptance that exploitation exists on a spectrum. The focus on human trafficking shifts attention to criminal behaviour and thus requires criminal justice responses. Consequently, responsibility is transferred away from the state and structural issues, which create and contribute to vulnerability and exploitation.

First, the concept dilutes both anti-slavery and anti-trafficking norms. Perhaps most striking, as discussed in relation to the *Tanedo* case, is the fact that by obliterating the boundaries between slavery and human trafficking, the threshold for the expectation of harm is heightened. Human trafficking is itself an umbrella term - it is the process of moving an individual by force or deception into a situation of exploitation. The exploitation can potentially fall anywhere on the spectrum, including prostitution, forced begging and organ harvesting. By recasting human trafficking as slavery, the narrative undermines the agency of those who may be exploited. A key element of human trafficking is the movement of persons, and as Janie Chuang argues a large number of trafficking narratives begin with an act of agency by the victim.<sup>1232</sup>

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<sup>1230</sup> Julia O’Connell Davidson, *New Slavery, Old Binaries: Human Trafficking and the ‘borders of freedom’* (2010) 10(2), *Global Networks*, 244, 245

<sup>1231</sup> *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights

<sup>1232</sup> Janie Chuang, *The Challenges and Perils of Reframing Trafficking as ‘Modern Slavery’* (2015) 5, *Anti-Trafficking Review*, 146

Second is the normalisation of labour exploitation. ‘Modern slavery’ is primarily dealt with as a security and criminal justice issue.<sup>1233</sup> Analysis of the working conditions of Amazon Fulfillment Centre Workers<sup>1234</sup> demonstrates not only the poor working conditions but also the precarity that exists within the free wage labour market. What could be described as routine labour exploitation is widespread and has been described by Nikos Passas as “lawful but awful.”<sup>1235</sup> If we consider that labour, as well as exploitation, can exist on a continuum between decent work and enslavement, between these points exists a wide range of exploitative practices and labour abuses which are neglected by the ‘modern slavery’ paradigm’. The concept creates an idealised victim who is subject to an idealised type of exploitation; anything or anyone who does not fit this mould is not necessarily protected by legal or policy responses.<sup>1236</sup> Workers (as in the case of the Amazon Fulfillment Centres) may make some relative gains from employment, and can often be better off in relative terms than if they were not in employment. However, the issue of autonomy obscures the occurrence of exploitation; how autonomous is a choice when the option is between starvation and destitution and, how relevant is autonomy when undertaking difficult and perhaps dangerous work for low wages in a poorly regulated employment context.<sup>1237</sup> As demonstrated by James Bloodworth’s study on low wage Britain, workers suffer harm from such treatment, whether it is physical, mental or financial. Thus, what this demonstrates is that the ‘modern slavery’ narrative co-exists well with deregulation policies. At the same time that Theresa May was advancing the Modern Slavery Bill, the Government was pursuing the Red Tape Challenge and The Deregulation Act 2015.<sup>1238</sup> Thus, the pursuit of labour market flexibility would not sit comfortably alongside a response to human trafficking and slavery which sought to

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<sup>1233</sup> Julia O’Connell Davidson, *Decanting Trafficking in Human Beings – Reentering the State* (2016) 51(1), *The International Spectator*, 58, 68

<sup>1234</sup> see Chapter 4 2.2. Slavery? What about Labour Exploitation - Amazon Fulfillment Centers and Geographies of Containment

<sup>1235</sup> Nikos Passas, *Lawful but Awful: ‘Legal Corporate Crimes’* (2005) 34(6), *Journal of Behavioral and Experimental Economics*, 771

<sup>1236</sup> Nils Christie defined the ideal victim as possessing five characteristics - The victim is weak or vulnerable - old or very young people are particularly well suited as ideal victims.(2) The victim was carrying out a respectable project (3) She was where she could not possibly be blamed for where she was (4) The offender was big and bad (5) The offender was unknown and in no personal relationship to her see Nils Christie, *The Ideal Victim in E A Fattah (ed) From Crime Policy to Victim Policy* (Palgrave Macmillan London 1986) 18-19

<sup>1237</sup> see fn1230, 245

<sup>1238</sup> see Introduction 4. ‘Modern Slavery and the Normalisation of Labour Exploitation

address structural issues such as poor regulation, zero contracts, low wages and the poor treatment of workers. Consequently, both the ‘modern slavery’ narrative and the emphasis that it places on human trafficking, therefore, act as the justification not to address such issues. This, therefore, epitomises the depoliticisation of the problem.

The final strand is the dissonance between ‘modern slavery’ and immigration which leads to vulnerability and legal mechanisms actively working against victims of exploitation. Human trafficking is the lynchpin of the ‘modern slavery’ narrative. This, therefore, places legislative responses to exploitation in opposition to restrictive immigration policies. It demonstrates an innate misunderstanding of the factors, which create precarity and leave migrants vulnerable to exploitation. The ‘modern slavery’ narrative once again serves to depoliticise the issue but also lends itself as a vehicle for pursuing immigration policies. If we are to accept that human trafficking is the central issue, then the forced movement of victims must be addressed. This means that alongside criminal justice measures, the solution lies in restrictive immigration policies and tighter border control. It has been evidenced in the HMCIFS report, that, in a large number of cases, law enforcement officers are referring victims with insecure status directly to immigration authorities, rather than to the NRM.<sup>1239</sup> This, therefore, presents a situation whereby legal immigration mechanisms can be utilised by employers to coerce and exploit migrants. This also creates a narrative in which the purported solution is to heighten immigration controls.

### **3. ‘Modern Slavery’ and The Modern Slavery Act 2015:**

The Modern Slavery Act was framed by the then Home Secretary, Theresa May, as a continuation of the work of abolitionists such as Wilberforce and, was described as a world-leading piece of legislation. Rather than being the cutting edge piece of legislation it was described to be, however, this represents a missed opportunity to truly tackle the causes of vulnerability and exploitation and improve victim protection and support.

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<sup>1239</sup> Her Majesties Inspectorate of Constabulary and Fire & Rescue Services, *Stolen Freedom – The Policing Response to Modern Slavery and Human Trafficking* (October 2017) 12-13 accessed at (<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/stolen-freedom-the-policing-response-to-modern-slavery-and-human-trafficking.pdf>)

Research demonstrates that in order to truly tackle the issue of human exploitation, strategies should first and foremost place victims at the centre, and, thus, must offer a holistic approach.<sup>1240</sup> A series of reports published in the period since the enactment of the Modern Slavery Act have demonstrated that although the Act is perhaps the first step in the right direction, the current response is inadequate.<sup>1241</sup> The limitations of the current response can be traced to the ‘modern slavery’ paradigm. The blurring of the legal boundaries between slavery and human trafficking shapes the ‘modern slavery’ narrative and its corresponding critique. In light of the critique discussed above and the narrative of depoliticisation it creates, if legal responses rely on the concept of ‘modern slavery’, they will be inescapably limited. This once again highlights the importance of a truthful analogy to historical slavery and abolition. There is one central lesson to be learned from previous legal interventions in the spheres of slavery and human trafficking: there must be an awareness of policy factors, which might limit the effectiveness of anti-slavery/trafficking responses.

This contention is evidenced through the analysis of the Modern Slavery Act 2015. It is possible to map various aspects of the ‘modern slavery’ critique onto the Act. This demonstrates that, first, the human trafficking focus of the concept, does, in fact, prioritise a criminal justice approach. This approach is the cornerstone of the Modern Slavery Act 2015, with a consolidation of offences, increased custodial sentences and other measures. Second, as a result of the ‘modern slavery’ narrative, individuals are in fact negatively affected by the Act. This is demonstrated in a number of ways including the treatment of overseas domestic workers, the silence on factors such as weak workers’ rights, zero hours contracts, and discretionary leave to remain for victims of exploitation.

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<sup>1240</sup> Austin Choi Fitzpatrick, From Rescue to Representation: A Human Rights Approach to the Contemporary Anti-Slavery Movement (2015) 14, *Journal of Human Rights*, 486

<sup>1241</sup> National Audit Office, *Reducing Modern Slavery* (Home Office 2017) accessed at (<https://www.nao.org.uk/wp-content/uploads/2017/12/Reducing-Modern-Slavery.pdf>) Anti-Trafficking Monitoring Group, *Class Acts: Examining Modern Slavery Legislation Across the UK* (2016) accessed at ([http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg\\_class\\_acts\\_report\\_web\\_final.pdf](http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf)) Her Majesties Inspectorate of Constabulary and Fire & Rescue Services, *Stolen Freedom – The Policing Response to Modern Slavery and Human Trafficking* (October 2017) accessed at (<https://www.justiceinspectores.gov.uk/hmicfrs/publications/stolen-freedom-the-policing-response-to-modern-slavery-and-human-trafficking/>)

#### 4. Looking Forward:

With the announcement of a new review of the Modern Slavery Act,<sup>1242</sup> the introduction of the Transparency in Supply Chains Bill<sup>1243</sup> and the Victim Support Bill<sup>1244</sup> it appears that the UK will continue to provide a particularly interesting and rich context to examine the concept of ‘modern slavery’ and contemporary abolition. One thing is clear, the construction of the concept of ‘modern slavery’ erodes the boundaries between slavery and human trafficking. It is necessary to be critically reflective of what the concept of ‘modern slavery’ means but also how it may potentially negatively affect victims of exploitation. The instrumentalisation of the concept in legal and policy responses leaves them resoundingly hollow, largely due to the narrative of depoliticisation created by the human trafficking focus.

Structural factors of exploitation go unaddressed by the Modern Slavery Act, and issues such as irregular or insecure immigration status leads not only to precarity in the first instance but, can also impair stability and protection of victims of exploitation in the long term. Thus, following the UK’s proposed withdrawal from the European Union, there is potential for concern as the legal and political dynamics undergo adjustment. First, if there is a continued decline in EU net migration, it is possible that this may create labour shortages in a number of sectors including the domestic, food and agricultural sectors. Examples as to how the position may alter include diverse outcomes such as that, on the one hand, legal channels of migration may close down, with the result that migrant workers, particularly from Eastern Europe may experience increased vulnerability to trafficking and exploitation in the UK. On the other hand, it is possible that British workers may be targeted to fill any labour gaps. Thus, further attention may need to be given to factors which create

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<sup>1242</sup> Government commissions independent review of the Modern Slavery Act 2015 accessed at (<https://www.gov.uk/government/news/government-commissions-independent-review-of-the-modern-slavery-act-2015>)

<sup>1243</sup> Modern Slavery (Transparency in Supply Chains) Bill [HL] 2017-19 accessed at (<https://services.parliament.uk/bills/2017-19/modernslaverytransparencyinsupplychains.html>)

<sup>1244</sup> Modern Slavery (Victim Support) Bill [HL] 2017-19 accessed at (<https://services.parliament.uk/bills/2017-19/modernslaveryvictimsupport.html>)

vulnerability in low skilled and unregulated precarious sectors.<sup>1245</sup> In light of the analysis of the vulnerable space occupied by overseas domestic workers, reports of a new scheme which proposes to fill the labour gap with non-EU workers offers a further avenue to explore. The Government proposes to bring in to the country 5000 non-EU/EEA migrant workers for the agricultural sector on six month tied visas.<sup>1246</sup> This presents a fertile environment conditioned by immigration and Brexit policies in which exploitation can take place,

Leading on from this, there are two important specific structural causes of exploitation, which go unaddressed, due to depoliticisation and the ‘modern slavery’ narrative – deregulation/workers’ rights and immigration policy. There is a gap in the literature regarding the role of austerity in creating vulnerability to ‘modern slavery’ offences. There are two particular avenues to consider: first, how is austerity affecting the mechanisms and institutions used to tackle ‘modern slavery’ and trafficking? For example, the Gangmasters Licensing Authority suffered a number of cuts as a part of the Conservative Governments Red Tape Challenge. In addition, the funding provided to the Authority is described as “negligible” compared for example to the UKVI.<sup>1247</sup> This once again demonstrates, the tension between competing policy objectives and makes it clear that “controlling who enters the country is regarded as much more important than controlling how someone fares within it.”<sup>1248</sup> Furthermore, in light of recent reports on the failure of victims by police forces,<sup>1249</sup> reductions of the budgets of the institutions intended to uphold and enforce the Modern Slavery Act will potentially lead to increased vulnerability for those working in the UK. The second avenue to consider is how austerity directly creates and reinforces precarity in the UK. Consequently, in light of the point made above in relation to Brexit, there is clear

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<sup>1245</sup> Anti-Trafficking Monitoring Group, Brexit & the UK’s Fight Against Modern Slavery (July 2017) accessed at (<https://www.antislavery.org/wp-content/uploads/2017/07/ATMG-Brexit-paper.pdf>)

<sup>1246</sup> Mary Bulman, Brexit plan to bring in more non-EU workers could lead to ‘sharp rise’ in exploitation, warns charity (The Independent 18 September 2018) accessed at (<https://www.independent.co.uk/news/uk/home-news/brexit-migrant-workers-eu-exploitation-modern-slavery-flex-a8542806.html> .)

<sup>1247</sup> Thanos Maroukis, The UK Gangmasters Licensing Agency: A Model to be Followed and How to Undermine It (Open Democracy 25<sup>th</sup> May 2016) accessed at (<https://www.opendemocracy.net/beyondslavery/pt/thanos-maroukis/uk-gangmasters-licensing-agency-model-to-be-followed-and-how-to-underm>)

<sup>1248</sup> *ibid*

<sup>1249</sup> HMICFRS fn1239

scope to explore how factors such as benefits cuts, insecure work, reliance on food banks and homelessness factor into shaping precarity and entry into exploitation.

Much of the ‘modern slavery’ critique and assessment of the Modern Slavery Act, emphasises the blind eye turned towards factors such as immigration – for example, the overseas domestic worker's visa. Analysis of the Act emphasises that much attention is paid to criminal justice strategies, and there is comparative silence in the Act on structural causes and non-criminal measures. The critique of ‘modern slavery’ and narrative of depoliticisation created in its application to legal responses are evidenced with the Modern Slavery Act. This means that positive obligations to protect individuals do not alone hold the answer. Thus, a potential aspect to consider is the law on state responsibility. It has been demonstrated through discussion of tied visas for overseas domestic workers, that the policies and institutions of the State can be complicit in the exploitation of individuals. Therefore, the tied visa could be used as a test case, to consider how the International Law Commissions Draft Articles on the Responsibility of States<sup>1250</sup> could be used to hold the State responsible for the occurrence of exploitation.

The blurring of the legal boundaries between the practices of slavery and trafficking shape the way in which the term ‘modern slavery’ is conceptualised. The critique of ‘modern slavery’ applied to the case study of the Modern Slavery Act demonstrates the reason why, despite overt anti-slavery/trafficking sentiments, victims are sidelined by legal and policy responses. It is possible to build on this research to explore further the practical effect of the concept of ‘modern slavery’ and how its construction impacts not only the development of legal and policy responses but also victims themselves. This critical approach towards the concept of ‘modern slavery’ is essential. History would seem suggest that the task of tackling human exploitation has always been enmeshed with policies that work actively against the task at hand. The concept of ‘modern slavery’ is a comfortable fit in a political context that prioritises restrictive immigration and an economy that operates on the basis of labour flexibility and deregulation. However, in light of the UK’s vote to exit the European Union

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<sup>1250</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 accessed at ([http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf))

and the growing clamour to close borders perhaps, it is time to learn the lesson of historical abolition and not be blindly led to believe that anti-slavery is necessarily always about anti-slavery.

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