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Human Trafficking

Dear Readers,

The Groningen Journal of International Law (GroJIL) is proud to publish its Issue No. 2: Human Trafficking in International Law. As President and Editor-in-Chief of GroJIL, I am extremely proud that our Editorial Board and our Editing and Language Review Committees have worked so hard to produce GroJIL's largest issue to date.

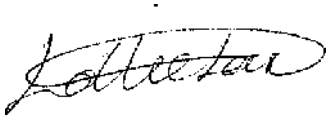
This issue addresses human trafficking, an area of law which we believe is in great need of development. We are very pleased to have received five contributions for this issue, touching upon different aspects of human trafficking in international law. The articles focus on a wide range of specific topics, *inter alia* trafficking on the high seas, the detrimental effects that having been a victim of human trafficking can have in domestic criminal law cases, and the trafficking of human organs. It is evident from the articles that the phenomenon of human trafficking has very wide-ranging effects, both within society as a whole, and in relation to individual victims. We hope, through this issue, to bring to light some of the prominent challenges associated with current laws relating to human trafficking. For example, problems regarding the enforcement of anti-trafficking laws, their ability to effectively protect (potential) victims of human trafficking, or the need for such laws to be reformed. Moreover, we hope to highlight the potential solutions proposed by our authors.

The Journal is not only growing in terms of its publication size, however. Over the last few months, GroJIL has welcomed several new participants, including two new Editorial Board members. We are very excited to be making such progress, and we continue to take steps to extend the reach of GroJIL within the academic community. For example, GroJIL will shortly be establishing an Events Committee, to organise discussion events, amongst others, focused on the topic of the current issue. Having organised a successful event relating to Issue No. 1, Drones in International Law, we feel confident that this will provide members of GroJIL, as well as our local academic community, with an opportunity to reflect upon and debate the Journal's latest issue.

I am extremely grateful to all of the participants in the Journal for contributing towards and producing such a successful issue of GroJIL. In particular, I would like to thank our authors for their fantastic contributions, and their enthusiasm in participating in GroJIL. Without such support, it would not be possible for the Journal to fulfil its goal of providing innovative articles to try to push forwards the frontiers of international law.

I am very much looking forward to working together with all of our members to publish the first issue of GroJIL's second volume, the topic of which is International Energy and Environmental law. This relatively new area of law is in constant need of development, and is raising many difficulties. We hope, through the next issue, to address and suggest solutions for some of these dilemmas.

On behalf of GroJIL,



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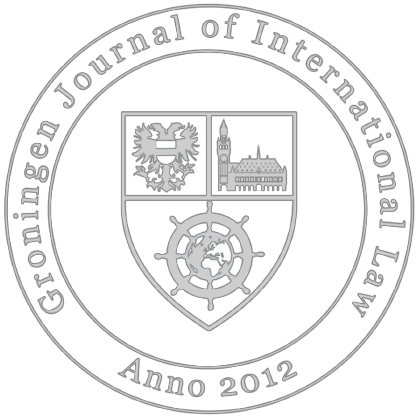
President and Editor-in-Chief
Groningen Journal of International Law



Groningen Journal of International Law

Crafting Horizons

ABOUT

The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

MISSION

The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of international law through engaging analysis, innovative ideas, academic creativity, and exploratory scholarship.

PUBLISHING PROFILE

The Groningen Journal of International Law is not a traditional journal, which means that the articles we accept are not traditional either. We invite writers to focus on what the law could be or should be, and to apply their creativity in presenting solutions, models and theories that in their view would strengthen the role and effectiveness of international law, however it may come to be defined.

To this end, the Journal requires its authors to submit articles written in an exploratory and non-descriptive style. For general queries or for information regarding submissions, visit www.grojil.org or contact groningenjil@gmail.com.

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Human Trafficking
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How Conflict and Displacement Fuel Human Trafficking and Abuse of Vulnerable Groups. The Case of Colombia and Opportunities for Real Action and Innovative Solutions.

Luz Estella Nagle[1]

Keywords
COLOMBIA, HUMAN TRAFFICKING, TRAFFICKING OF WOMEN AND CHILDREN

Abstract
Disaffected, impoverished, and displaced people in weak and failing states are particularly vulnerable. Human trafficking exploits social and political turmoil caused by natural disasters, economic crisis, and armed conflict. The exploitation and forced servitude of millions of trafficking victims take many forms. Women and children are trafficked into becoming child soldiers and concubines of illegal armed groups, men, women and children are trafficked into forced labor and sexual slavery, forced to sell drugs, steal, and beg money for the criminals controlling them, and thousands are coerced or forced into a growing black market trade in human body parts. The growth in illegal mining operations by illegal armed groups and organized crime is also fueling conditions of forced labor. Trafficking victims are dehumanized and suffer grave physical and mental illness and often die at the hands of their captors and exploiters. Colombia is particularly afflicted by the scourge of human trafficking. All the elements of modern-day slavery and human exploitation are present in this Latin American state that is struggling to overcome decades of internal armed conflict, social fragmentation, poverty, and the constant debilitating presence of organized crime and corruption. Women's Link Worldwide recently reported that human trafficking is not viewed as an internal problem among Colombian officials, despite estimates that more than 70,000 people are trafficked within Colombia each year. This article examines human trafficking in its many forms in Colombia, the parties involved in trafficking, and the State's response or lack of response to human trafficking. The article also presents innovations that might be effective for combating human trafficking, and proposes that Colombia can serve as an effective model for other countries to address this growing domestic and international human rights catastrophe.

I. Introduction

Civil strife devastates nations and causes incalculable injuries and deaths, mass displacements, and widespread abuse, killing, rape, and human rights violations. Armed conflict forced people from their homes and thrusts them away from their environment, leaving them vulnerable and easy prey to become objects of exploitation. In the mists of war, human trafficking flourishes. While it is uncertain how many

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trafficking victims derive from conflict, there is a consensus that the majority of the victims trafficked as a consequence of war are women and children.

War affects vulnerable groups the most because they are the ones that have most often been discriminated against and excluded and disaffected from a nation's wealth, education, policies of protection and prevention. Once so exposed, they are at risk of re-victimisation even in post-conflict scenarios by being exploited and traded by individuals and organised crime within and outside their societies. Amid such chaos and impunity, nations in conflict struggle to balance security and resources. Nations lack policies with proper legal, physical, and social protection mechanisms. They experience a breakdown in economic, social structures, and legal institutions. International obligations are ignored or its application is inadequate and poorly executed. Instability is exacerbated by the massive displacement of people and families that then face stigmatisation and abuse. Women and girls especially fall prey to sexual violence and other forms of victimisation.

To achieve stability and peace, nations devise models of transitional justice.[2] Most models focus on responsibility for the crimes and abuses perpetrated during the conflict and contain reparation programs for victims of war. While the measures included in transitional justice may achieve compensation and culpability, they often fail to address violations of economic, social, and cultural rights, and they do not tackle the root of the problems or address past injustice.[3] The result is that nations remain in a phase of low intensity conflict, deprived of meaningful stability and peace. Abuses continue or transform, and violent actors morph into new entities while new violent actors enter an already chaotic state of affairs.

To achieve significant peace and comprehensive justice,[4] and to secure a nation in which vulnerable groups do not remain at risk of further abuses, the transitional justice framework must be holistic and comprehensive. It should not only address violations considered crimes under international law, but it must also account for the root causes of conflict and provide for the protection of 'all human rights, including economic, social, and cultural rights.[5] Moreover, true stability and justice can only be achieved if a peace process embraces the participation of women and women's groups in order to 'ensure that women's needs and interests are included' and 'gender-sensitive and gender-inclusive responses to the conflict' are promoted.[6]

This article examines the ordeal of trafficking of women and children and the duty of the Colombian government (GOC) to fulfill both its commitments to its citizens by enforcing its domestic laws, and its obligations to the international community by effecting innovative forms of transitional justice to deal decisively with this growing human rights crisis. Section II offers an overview of the conflict and reveals how international humanitarian law (IHL) and human rights laws have been violated by the various actors, how the governments' policies, legislation, and attempts to

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2 Transitional justice must provide for the protection of "all human rights, including economic, social, and cultural rights." *Cf.* Arbour, L., "Economic and Social Justice for Societies in Transition", *NYU Journal of International Law and Politics*, vol. 40, (1) 2007, 1-27.

3 Louise Arbour stated: "Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that pre-dated the conflict and caused or contributed to it." *Cf. Idem*, 3.

4 Comprehensive justice must include social justice. According to Louise Arbour the "general understanding of the concept of justice itself," has influenced the marginalisation of the "economic, social, and cultural rights" from transitional justice initiatives. *Idem*, 4.

5 *Idem*, 19.

6 SC Resolution 1325, 31 October 2000.

demobilise the armed groups are nothing more than a "formal or written" fulfillment of the nation's obligations under international law, and how many laws create a form of "legal conflict" which, among several problems, creates a conundrum of rights difficult to realise and that perpetuate the nation's discrimination against the most vulnerable groups and exposes them to additional violations. We will also see how the growth of displacement and the permanent state of marginalisation and abuse that displaced women and children endure reflect Colombia's persistent violation of its international obligations, and how the "legal" and internal armed conflict creates fertile soil in which human trafficking and exploitation flourishes.

Section III examines the trafficking of women and children due to the armed conflict and the ways in which they are exploited, victimised and abused as combatants, concubines, sex workers and slave labourers. We will examine the impact that illegal armed groups have had on fragmenting the Colombian people into millions of displaced and disaffected beings in such a way as to render them susceptible to human trafficking and related forms of exploitation. This section will also consider the cultural attitudes that persist in Colombia and exacerbate their precarious situation. Section IV addresses Colombia's domestic and international obligations to protect its citizens from human trafficking and important laws and examines several legislative acts and court decisions that impact the conditions of displaced women and children. Section V introduces innovations that can and should be implemented in Colombia, including the development of a human trafficking court and the creation of human trafficking task force. We will also discuss how the international community can assist in finding permanent solutions to the crisis. Section VI offers conclusions.

II. The Actors and Conditions that Fuel Human Trafficking

Despite an "official" notice of an end of decades-long internal armed conflict, Colombia endures the most unrelenting armed conflict in the Western world, sustained largely because multiple illegal armed groups evolve and forge alliances with prior enemies for common criminal interests and for resisting 'the advance of the security forces.'[7] These actors also pose an increasing security threat to the nation due to their involvement with international terrorist organisations and transnational criminal organisations.[8]

After five decades of violence, Colombia has the highest level of internal displacement in the world.[9] Innocent civilians have been victims of numerous human

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[7] BBC News, Jeremy McDermott, *Colombia's Criminal Bands Pose New Security Challenge*, 25 April 2011, available online at <bbc.co.uk/news/world-latin-america-12804418> (accessed 17 August 2013).

[8] Dayton News, *Houston Man Gets 101 Months for Trafficking Firearms to Colombia*, 16 June 2013, at <yourhoustonnews.com/dayton/news/houston-man-gets-months-for-trafficking-firearms-to-colombia/article_1a588cc9-b088-5846-91d0-a5a194d868cd.html> (accessed 17 August 2013); For a comprehensive report on the trafficking of weapons in Colombia, *Cf.* Rand Corporation, Cragin, K. and Hoffman, B., REPORT, *Arms Trafficking and* Colombia, 2003, available online at <rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1468.pdf> (accessed 17 August 2013). *;* MSNBC Online, Lackey, S. and Moran, M., *Russian Mob Trading Arms for Cocaine with Colombia*, 9 April 2000, available online at <nbcnews.com/id/3340035/ns/news-special_coverage/t/russian-mob-trading-arms-cocaine-colombia-rebels/> (accessed 17 August 2013).

[9] Colombia Reports, Mead, H., *Colombia Has Highest Level of Internal Displacement in the World: Study*, 29 April 2013, available online at <colombiareports.com/colombia-has-highest-level-of-internal-displacement-in-the-world-study> (accessed 17 August 2013); BBC News Latin America and

rights violations and atrocities including forced displacement and disappearances, inhuman and degrading treatment, extrajudicial and summary executions, sexual violence, forced recruitment of minors, and dispossession of land. Human rights violations are a prevalent occurrence and include violations of the right to life, the right to personal integrity, the right to liberty, the right to security of person, and the right to due process.[10]

Just like the reasons for the armed struggle, the actors have evolved. Between the 1960s and the mid-1980s, left-wing groups fought the GOC over social and economic issues disparities in Colombian society.[11] During the latter 1980s and 1990s, a new layer of violent groups, well-trained and heavily armed drug cartels and paramilitary groups, emerged to contest for control of the drug markets, to assert hegemony over the civilian population, to steal land in order to create de facto feudal fiefdoms, expropriated natural resources, and corrupted their way into political power.[12] Yet, throughout the long conflict, Colombia has crafted different initiatives and negotiated numerous peace agreements. Unfortunately, past efforts have been "bilateral" agreements between the government and one of the illegal actors, and many negotiations have ended in failure followed by a resumption of a bloodier conflict.[13]

Caribbean, *Colombia Tops IDMC Internally Displaced People List*, 29 April 2013, at <bbc.co.uk/news/world-latin-america-22341119> (accessed 17 August 2013).

[10] These rights are expounded in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, art. 4 (also known as the Convention of Belem do Para), which Colombia ratified on October 3, 1996, available online at <oas.org/juridico/english/treaties/a-61.html> (accessed 17 August 2013).

[11] In the 1960s, peasants armed themselves and formed a guerrilla group, the Revolutionary Armed Forces of Colombia (FARC) that to this day continues hostilities against the state. In 1965, National Liberation Army (ELN) was formed. Other smaller leftist guerrilla groups emerged during the 1970s. For an historical overview of these three armed groups, *Cf.* Nagle, L. E., "Placing Blame Where Blame Is Due: The Culpability of Illegal Armed Groups and Narcotraffickers in Colombia's Environmental and Human Rights Catastrophes", *William & Mary Environmental Law and Policy Review,* 29(1) 2004, 13-31.

[12] Guerrillas extorted and kidnapped land owners and drug cartels. To defend themselves, land holders created paramilitary groups under the umbrella of the United Self-Defense Forces of Colombia (AUC). These paramilitary groups, allowed to form as legal self-defence militias by Law 48 of 1968, eventually colluded with the Colombian military to combat the leftist guerrillas, and were often used by the Colombian army as shock troops to go into guerrilla controlled areas prior to the army. In this manner, the Colombian army could claim "plausible deniability" for any human rights violations and potential war crimes committed by the paramilitaries. *Cf.* The National Security Archive, National Security Archive Electronic Briefing Book No. 166, Evans, M., *Paramilitaries as Proxies*, 16 October 2005, available online at <gwu.edu/~nsarchiv/NSAEBB/NSAEBB166/> (accessed 17 August 2013); Colombia Journal, Leech, G., *Fifty Years of Violence*, May 1999, available online at <colombiajournal.org/fiftyyearsofviolence#n12> (accessed 17 August 2013). By the end of 1990s, the AUC, FARC and ELN were involved in drug trafficking and other organised crimes and acts of terrorism. Under Plan Colombia, the U.S. supported Colombia's counter-narcotics efforts. However, after November 11, 2001, Plan Colombia included counter-insurgency efforts. *Cf.* Nagle, L.E., Global Terrorism in Our Own Backyard: Colombia's Legal War against Illegal Armed Groups, *Transnational Law and Contemporary Problems*, 15(5) 2005, 63-68. In 1997, the U.S. government designated FARC and the ELN Foreign Terrorist Organizations (FTOs), and added the AUC to that FTO list in 2001.

[13] The last time the GOC negotiated seriously with the FARC, during the administration of former President Andres Pastrana Arango, the British press reported that British intelligence was tracking the shipments of surplus weapons and drugs from the FARC in Colombia to Al- Qaeda operatives in Africa, and then to England. Sunday Express, Thomas, G., *British Spies Fight to Stop Bin Laden's Gun-Running*, 9 November 2003. For a thorough analysis of Colombia's obligations to combat domestic and international terrorism, *Cf.* Nagle, L.E., *supra* note 12. After the failure of the 2002 peace negotiations with FARC, the GOC unleashed a ten year military offensive against them. FARC ranks were cut significantly and many senior leaders were killed. Yet, the FARC still threatens the

Despite assertions by the GOC that Colombia is in a post-conflict era and that all is well, the nation continues to be in the throes of an internal armed conflict pitting government forces against heavily armed transnational criminal organisations depicting themselves as leftist guerrillas, violent urban gangs comprised of current and former paramilitary combatants, and drug traffickers protected by private armies of enforcers trained by and sometimes comprised of foreign mercenaries.[14] Thrown into this evil and volatile brew can be found external transborder criminal organisations from elsewhere in Latin America, from Russia and China, stateless soldiers of fortune, and Islamic terrorist organisations exploiting porous borders and the inability of a central government to maintain and protect the rule of law throughout Colombia's national territory. What is occurring in Colombia is not unlike what is happening in other weak and failing nations in the world where armed conflict and an absence of state security allows low intensity conflict and small wars to persist decade after decade.

II.1. Illegal Armed Groups

Three major armed groups are responsible for the violence: the left-wing insurgent guerrillas known as the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), respectively, and the successor groups to disbanded right-wing paramilitary forces, known as "BACRIMs" (*bandas criminales emergentes*).[15] This last group has emerged as a nationwide threat involved in many different kinds of illegal activities. According to one 2012 report, BACRIMs may have some 8,000 members, and are present in 406 of 1,119 municipalities (46 more than in 2010) and 31 out of 32 departments in Colombia.[16] It is stated that 'Bacrims have replaced the

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peace and security of the nation with well-planned attacks against military targets, civilian targets, and the country's infrastructure. For a good summary of the various peace negotiations, see Federation of American Scientists, Congressional Research Service, Beittel, J.S., *Peace Talks in Colombia,* 1 March 2013, available online at <fas.org/sgp/crs/row/R42982.pdf> (accessed 17 August 2013). The GOC is currently in a new round of peace negotiations with the FARC in Oslo, Norway, but many observers contend that the talks are little more than political theater and the FARC has become such a powerful international criminal organisation, with a vast criminal empire of drug trafficking, illegal mining, weapons trafficking, money laundering, and even international cattle rustling, that there is no incentive for the group to put down is arms any time soon. *Cf.* Nagle, L.E., "The FARC: Doing What Any Multinational Corporation Would Do—Diversify", *International Enforcement and Law Reporter,* 28(5) 2012 178.

[14] Internal armed conflict is defined in Article 3 of the Geneva Convention as "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." *Cf.* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 *UNTS* 287. A more contemporary source on the definition of international armed conflict or non-international armed conflict and the factors that must be present to determine that violence rises to the level of constituting an internal armed conflict can be found in Cullen, A., *The Concept of Non-International Armed Conflict in International Humanitarian Law,* Cambridge University Press, Cambridge, 2010, 14.

[15] For a broad overview of BACRIMS, see InSight Crime, Perez-Santiago, M., *Colombia's BACRIM: Common Criminals or Actors in Armed Conflict?,* 23 July 2012, available online at <insightcrime.org/news-analysis/colombias-bacrim-common-criminals-or-actors-in-armed-conflict> (accessed 17 August 2013).

[16] According to a 2012 study done by the Colombian NGO Indepaz *Cf.* LatAm-Threads, *BACRIMS: Colombia's "New" Nightmare*, 18 August 2012, available online at <latam-threads.blogspot.com/2012/08/bacrims-colombias-new-nightmare.html> (accessed 17 August 2013). See also Semana, Palomino, S., *Las Bacrim tendrían unos seis mil hombres, en seis estructuras*, 18 January 2011, available online at <semana.com/nacion/bacrim-tendrian-unos-seis-mil-hombres-seis-estructuras/150361-3.aspx>*;* InSight Crime Ortiz, A., *Police: BACRIMs Main Threat to Colombian*

Marxist rebels as the primary generators of violence.'[17] These groups are a hybrid of three illegal armed groups: criminal gangs, paramilitary forces, and narcotraffickers,[18] and are comprised of former paramilitary combatants and sundry criminal actors.[19] They have been referred to by the Colombia National Police commander as Colombia's greatest current threat to national security.[20]

In addition, combos gangs divide the comunas into zones of control, engaging in a plethora of criminal activities and imposing a form of security, commercial self-regulation and self-imposed justice that for lack of a better description closely resembles a system of feudalism parallel to and independent from government authority.[21] Nearly all illegal combatant groups maintain both a rural and urban presence and assert control over most regions of national territory to the point that in many areas government security forces are loathe to enter except in force and do not remain very long when they do. These groups pose the greatest threat to the civil society and public security. Together they are responsible for 'the largest number of killings, rape, sexual exploitation, physical and psychological violence, forced displacement, extortion, harassment and threats.'[22] In rural areas, combos gangs debilitate the capacity of government entities to function, and their continuing presence erodes public confidence in state authority.[23]

Security, 26 January 2011, available online at <insightcrime.org/news-analysis/police-bacrims-main-threat-to-colombian-security> (both accessed 17 August 2013), noting GOC National Police General Oscar Naranjo's statement that the biggest threat to national security is now the activities of the BACRIMS.

17 BBC News Latin America and Caribbean, McDermott, J., *Colombia's Criminal Bands Pose New Security Challenge*, 25 April 2011, available online at <bbc.co.uk/news/world-latin-america-12804418> (accessed 17 August 2013).

18 See Nem Guerra Nem Paz, Ramirez, I.D., *Medellín: Los niños invisibles del conflicto social y armado*, 160, Children and Youth in Organized Violence, 2011, available online at <uic.edu/orgs/kbc/International/reports/medillin.pdf> (accessed 14 November 2013).

19 Criminal gangs are subordinated to narcotrafficking and paramilitary groups. In Medellín, the gangs are linked to paramilitary groups. Each gang has between 35 and 50 members and most are minors and young adults. *Ibid.* and Insight Crime 2012, *supra* note 15; International Crisis Group, *Colombia's New Armed Group*s, Latin American Report No. 20, 10 May 2007, available online at <crisisgroup.org/~/media/Files/latin-america/colombia/20_colombia_s_new_armed_groups.ashx> (accessed 17 August 2013); International Crisis Group, *Dismantling Colombia's New Illegal Armed Groups: Lessons from a Surrender*, Latin American Report No. 41, 8 June 2012, available online at <crisisgroup.org/~/media/Files/latin-america/colombia/41-dismantling-colombias-new-illegal-armed-groups-lessons-from-a-surrender> (accessed 17 August 2013).

20 In January 2011, then Chief of the Colombian Police, General Oscar Naranjo, stated that the BACRIMS were the biggest threat to national security and called the groups emerging criminal bands (bandas criminales emergentes). *Cf.* In Sight Crime, Ortiz, A., *Police: BACRIMs Main Threat to Colombian Security*, 26 January 2011, available online at <insightcrime.org/news-analysis/police-bacrims-main-threat-to-colombian-security>; Human Rights Watch, *World Report 2012: Colombia*, 2012, available online at <hrw.org/world-report-2012/colombia> (both accessed 17 August 2013).

21 The Observer, Vulliamy, E., *Medellín, Colombia: Reinventing the World's Most Dangerous City*, 8 June 2013, available online at <guardian.co.uk/world/2013/jun/09/medellin-colombia-worlds-most-dangerous-city>, noting that daily life in the comunas among the combos is like living in a war zone (accessed 20 August 2013).

22 United Nations High Commissioner for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights, Addendum, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in* Colombia, A/HRC/22/17/Add.3, 7 January 2013, available online at <ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add3_English.pdf> (accessed 17 August 2013).

23 *Ibid.*

The internal armed conflict is extremely complex, aggravated by drug trafficking and illegal activities that provide highly lucrative revenue streams to keep the groups in existence and their leaders and commanders flush with money stashed in sizable private bank accounts around the world. Until recently, the official position of the Colombian state avoided recognition of the armed conflict as being an "armed conflict" in order to prevent state responsibility that would impose on Colombia certain international obligations under the laws of war. Instead, the government has often referred to the "hostilities" as 'operations against illegal armed groups.'[24]

II.2. Internal Displacements and the Comunas

It has been estimated that as many as five million Colombians have been internally displaced in the course of the long-running internal armed conflict, including refugees fleeing Colombia for shelter abroad.[25] Displacement is a strategy by armed groups used to maintain territorial control. It is also an expression of power among the actors fighting for territorial control.[26] Most of the reports indicate that internal displacement is caused by 'the direct or indirect action of illegal armed groups or clashes between such groups.'[27] Displacements typically occur from rural areas to urban centres. Medellín, with between 3 and 4 million residents, has been among the major Colombian cities most heavily impacted by displacements. Since the 1970s, Medellín's population has exploded each decade, with some thirty percent of housing comprising the illegal settlements constructed up in the hillsides above Medellín's urban centre during the last forty years. These settlements are called comunas and began growing when campesinos were forced from their lands in conflict areas and sought refuge in urban environments beginning in the 1950s.[28]

The living structures in the comunas were at first little more than illegal squatter camps made from building scraps and pilfered electricity and water. Conditions in the comunas were - and in most cases remain - mostly impoverished, with many comunas still lacking basic necessities. Over time the comunas closer to urban centres became more permanently developed, and now have utilities provided by the municipal government that are paid for by taxes levied in the wealthy neighbourhoods.[29] The

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[24] International Center for Transitional Justice, Lyons, A. and Reed-Hurtado, M., *Colombia: Impact of the Rome Statute and the International Criminal Court,* ICTJ Briefing, May 2010, available online at <ictj.org/sites/default/files/ICTJ-Colombia-Impact-ICC-2010-English.pdf> (accessed 17 August 2013).

[25] Inter Press Service News Agency, Martínez, H., *Colombia: Despite Peace Talks, Forced Displacement Still Climbing in Colombia*, 4 June 2013, noting that Colombia has one of the largest displaced populations in the world.

[26] Amparo Sánchez, L. and Atehortúa, C., "Narraciones sobre la experiencia del éxodo. El caso del desplazamiento forzado en la comuna" 13, *Universitas Bogota (Colombia)* 117 July-December 2008, 15-40.

[27] "In 45.6% of cases, there is no information available about who caused the displacement. 20.5% of IDPs report that they were displaced as a result of a guerrilla group and 12.7% as a result of other groups, 10.8% do not identify the group that led to their displacement, 9.6% blame counterinsurgent and paramilitary groups, 0.5% the armed forces and 0.4% more than one actor. Source: *Accion Social*, March 2009." Consuelo Carrillo, A., Internal Displacement in Colombia: humanitarian, economic and social consequences in urban settings and current challenges, *International Review of the Red Cross,* vol. 91, ed. 875, 2009, 527-546, 529.

[28] Amparo Sánchez, L., *et al*, *Desplazamiento forzado en la comuna: La huella invisible de la guerra*, CNRR – Grupo de Memoria Histórica, Bogota, 2011, 54.

[29] Some would say that instead of the government taking decisive steps to return displaced populations back to their places of origin once those areas are deemed secure, it has created a large welfare state that constitutes a classic case of wealth redistribution and encourages populist politics.

newest arrivals to the comunas build more squalid and illegal constructions at the outside periphery of the older comunas. This is how the comunas expand, with the most impoverished conditions being at the external edges of the comunas that are the farthest from the municipal presence and municipal services. Naturally, the most squalid areas are the most vulnerable to criminal elements and gang and paramilitary control, although all the comunas are vulnerable to violence.

Statistics have attempted to identify which comunas have been formed by displaced populations and whether the comunas, as a whole, have really been formed by displaced people or are basically communities into which displaced people integrate. The studies have been hypothetical because corroborating the information gathered is difficult due to several reasons. For one thing, armed conflict moves displaced people to any urban environment. The displaced population remains very mobile, and can change from one city to another city. Also, many of the victims of displacement are fearful of being identified to the authorities as such because they feel stigmatised. So they prefer not to report where they are living. This makes it very difficult to determine with certainty which comunas are comprised purely of displaced people.[30]

II.2.1. Forced Recruitments in the Comunas

The comunas have very little consistent law enforcement presence such that the displaced communities become a crucible of violence and social discontinuity where criminal gangs prey on defenceless people and recruit, coerce or force individuals into joining the illegal groups. The presence of BACRIMS and combos gangs in the comunas contributes to the social collapse, and increases the victimisation of all people living there, but especially women and children. BACRIMS control everything in the comunas and the combos gangs serve as their underlings and foot soldiers doing the dirty work and carrying out criminal activities. In some comunas, the gangs are the only entities that maintain some semblance of order and security. Because the comunas are so forbidding to the civilian government and law enforcement agencies, illegality flourishes.

During demobilisation between 2004 and 2006, youngsters in the comunas were forcibly recruited by paramilitary groups to pose as paramilitaries to show that the paramilitaries were demobilising.[31] These were just children living in the comunas that had nothing at all to do with paramilitaries. If the families of the children refused to cooperate, the paramilitaries threatened to massacre all the children in the comunas affected.[32] This elaborate ruse was solely to put on a show to the government that its demobilisation plans were working, while allowing the paramilitaries to preserve their forces as they transformed into BACRIMS. In this way, the demobilisation plans did not help restore internal security at all, but led to the growth of a new security threat in the form of the BACRIMS.

Forced recruitment of children into combos and BACRIMS[33] occurs throughout the displaced communities.[34] This activity constitutes another form of human

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[30] *Cf.* Del Pilar Bohada R., M., "Desplazamiento forzado y condiciones de vida de las comunidades de destino: el caso de Pasto, Nariño", *Revista de Economía Institucional,* 12(23), 2010, 259-298.

[31] Amparo Sánchez, L., *supra* note 28, 128, noting that the paramilitary group Cacique Nutibara, was the first to forced displaced children into the demobilisation process.

[32] *Ibid.*

[33] *Idem,* 126.

[34] Forced recruitment has taken place in the comunas are far back as 2000 when guerrilla forces still had a presence in the comunas before being forced out by the paramilitaries. Forced recruitment of children under the age of fifteen is a violation of Article 4(3)(c) of Additional Protocol II of the

trafficking, since the children forced into the illegal groups are made to carry out many illegal activities, like drug trafficking and larceny, and serve as intelligence gatherers. Young virgins, both boys and girls, are forcibly recruited by the gangs to be prostitutes, charging Johns 7 million Colombian pesos to have them.[35] Statistics to support these reports are difficult to gather because there is a great deal of fear among those who could provide accurate details about this human trafficking activity.

II.2.2. Urban Displacement

BACRIMS and combo gangs have increasingly involved growing problems of urban displacements, in which people are forced from one comuna into another in an attempt to escape gang-related violence, predatory crime, and forced recruitment into the gangs.[36] Forced urban displacement constitutes another form of human trafficking. Urban displacement been recognised as a problem only since 2003. Before that time, it was hidden by other social problems and undetected by government authorities due to its dimensions and effects. In the cities, this hidden effect was deepened because it occurred in limited spaces within the comunas. Moreover, only members of the affected communities were aware of urban displacement because denouncing it provoked direct threats from the perpetrators.[37]

While urban displacement is now an acknowledged problem, the authorities seem less concerned about the welfare of the inhabitants who are victimised by urban displacement and more preoccupied by the possibility of 'contamination and diffusion' into other urban areas.[38] Also, urban displacement appears to be occurring with government complicity, in direct violation of several civil and human rights. In a recent incident in a notorious comuna in Medellín, a man was told by the leader of the local combo that he had to surrender his house to the leader because the location was strategically important to the combo for maintaining control of the comuna.[39] The man, who lived in the home for five years after the government had settled him there, refused to turn his property over to the combos and went to the local government official's office to complain. He returned to his home in the late afternoon to discover that official and several officers of the SIJIN[40] were there waiting to help him pack his

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Geneva Conventions. The Convention on the Rights of the Child, which Colombia has ratified, also fixes the minimum recruitment age of fifteen. However, it should be noted that when Colombia ratified the 1989 Convention on the Rights of the Child on Jan. 28, 1991, it filed a reservation to art. 38 (in regards to the fact that Colombia considers 18 years the minimum age for taking part in armed conflicts).

35 Dario ADN, Atehortúa, D.C., *'Combos' de Medellín inducen a niñas vírgenes a la prostitución*, 8 November 2012, available online at <diarioadn.co/medell%C3%ADn/mi-ciudad/prostituci%C3%B3n-y-delitos-acosan-a-adolescentes-1.32216> (accessed 18 August 2013).

36 In 2011, these groups became primarily responsible for the highest number of population displacements. The groups identified as being chiefly to blame are Las Águilas Negras, Los Rastrojos and Los Machos. *Cf.* Internal Displacemet Monitoring Centre, *Internal Displacement Global Overview 2011: People Internally Displaced by Conflict and Violence*, April 2012, 56, available online at <internal-displacement.org/publications/global-overview-2011> (accessed 18 August 2013).

37 Amparo Sánchez, L., *supra* note 28, 17.

38 *Ibid.*

39 El Colombiano, Arango, R.M., *Desplazadas otras 18 personas en la comuna* 13, 9 June 2013, available online at <elcolombiano.com/BancoConocimiento/D/desplazadas_otras_18_personas_en_la_comuna_13/desplazadas_otras_18_personas_en_la_comuna_13.asp> (accessed 18 August 2013).

40 The SIJIN is the National Police's Section of Criminal Investigation. See the official webpage at <policia.gov.co/portal/page/portal/UNIDADES_POLICIALES/Comandos_deptos_policia/comando_depto_meta/especialidades/Sijin> (accessed 18 August 2013).

house up to move. One can only wonder how is it that the combos have the power to force people from their homes with the backing and active support of the government.

II.2.3. Victimisation of Women in the Comunas

A significant number of displaced women in the comunas become displaced due to sexual violence which 'is under-reported, as women are ashamed to report incidents when attempting to register as displaced.'[41] The conflict hits particularly hard displaced women who are forced to assume all family responsibilities after the killing of their husbands or partners.

Women (and children) of the comunas are coerced, trafficked or forced due to the conditions in which they live to become prostitutes in a burgeoning domestic sex tourism industry fuelled by foreign visitors, or become forced labourers in manufacturing and agriculture production. They are also forcibly recruited to become combatants and child soldiers,[42] consorts and camp followers for male combatants and, at times, human weapons to be sacrificed in terrorist attacks or as expendables used to clear mine fields.[43] There is also strong evidence that Colombia has emerged since 2005 as one of the top five country destinations for organ trafficking.[44]

Women and children in the comunas are particularly vulnerable to false opportunities to get out. Most have been uprooted from their rural origins and the children of displaced families now grow up in the comunas without any orientation to the places from which their families came. Violence against women by abusive male partners is a constant problem, and children are often seen as an impediment to surviving in the urban landscape. Human traffickers are adept at exploiting the social conditions rampant in the comunas. Young girls and women who have no other means of support are extremely impressionable when traffickers come into the comunas to offer jobs in fashion modelling or working as domestic house staff. It is the same modus operandi used around the world where human traffickers prey on the misery and desperate economic circumstances of others.

II.3. Impact of Demobilisation on Human Trafficking

By many accounts, the demobilisation effort undertaken by the GOC has been a fiasco. While carefully avoiding recognising the internal armed conflict for what it is,

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41 A 2007 study of four Colombian cities by the Colombian government's Ombudsman Office found that "18% of displaced women identified sexual violence as a direct cause of displacement." *Cf.* Refugees International, *Colombia: Displaced Women Demand Their Right*s, 16 November 2009, available online at <refintl.org/policy/field-report/colombia-displaced-women-demand-their-rights> (accessed 18 August 2013). It is estimated that seventy-six percent of abused women do not denounce their abusers for fear of violence and retaliation against family members. *Cf.* Dario ADN, Redaction Medellín, *Gobernación reconoce existencia de prostitución en Antioquia*, 30 May 2013, <diarioadn.co/medell%C3%ADn/mi-ciudad/prostituci%C3%B3n-en-antioquia-1.62198> (accessed 18 August 2013).

42 Article 4(3)(c) of Additional Protocol II of the Geneva Conventions prohibits the recruitment of children under the age of fifteen or allowing them to take part in hostilities.

43 Social workers in rural Colombia are alarmed that children are taken to replenish the ranks of adult fighters who are killed or leave the FARC. *Cf.* CNN World, George, W.L., *Colombia's Indigenous Communities Caught in The Middle*, 2 August 2011, available online at <cnn.com/2011/WORLD/americas/08/02/colombia.violence/index.html> (accessed 18 August 2013).

44 *Cf.* Mendoza, R.L., Colombia's Organ Trade: Evidence from Bogotá and Medellín, *Journal of Public Health*, 18(4) 2010, 375-384 (noting that "the organ trade in Colombia is generally open, brokered, and without price competition and provisions for vendors' postoperative care, which help attract many foreign buyers. These factors also increase the vulnerability of vendors to unscrupulous third parties.").

the GOC has undertaken at different times several strategies to reduce hostilities and bring about peace in a troubled land by negotiating demobilisation plans with belligerents.

II.3.1. Demobilisation of Armed Groups

In July 2003, the GOC proposed a peace agreement with the AUC in a bill known as the Law of Alternative Punishment[45] under which the AUC would agree to 'total cessation of hostilities and gradual demobilisation.' In exchange, the GOC offered immunity during negotiations, and it agreed to work with Congress to grant them special treatment regarding their prosecution and punishment for war crimes, crimes against humanity, and drug trafficking offences."[46] The bill was met with strong opposition in Congress and defeated. More than a year later, the Congress passed Law 975 of 2005,[47] known as Justice and Peace Law. This law began the process of transitional justice in Colombia.

The demobilisation process of 30,000 members of paramilitary groups, namely the AUC, under the framework of the Justice and Peace Law[48] (JPL) enacted in 2005, was presented as the endpoint of the armed conflict and a 'point of departure for transitional justice'[49] because it would reinstate into the civil society thousands of illegal armed combatants and not-state actors operating outside the law and 'contribute to achieving national peace and other provisions for humanitarian agreements.' The JPL was intended to pacify and stabilise the national territory by offering a path to reintegration for paramilitary combatants and a means for restitution for victims. Even though the JPL is considered a vital component for transitional justice in Colombia, its implementation has been controversial, unreliable and flawed.[50] The JPL was supposed to bring to justice the main leaders of the paramilitary forces, but as pointed out by the UNHCR, 'as of September 2012, out of thousands of possible defendants, only 14 people have been sentenced' for crimes involving serious human rights crimes.[51] This shortfall is due to a significant lack of resources and inadequate staffing within the Justice and Peace Unit that was established under the

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45 El Abedul, *Proyecto de ley de alternatividad penal, Proyecto de Ley Estatutaria 85 de 2003 Senado*, at <elabedul.net/Articulos/Nuevos/alternatividad_proyecto_de.php> (accessed 18 August 2013).

46 Domac, Chehtman, A., REPORT, *The ICC and Its Normative Impact on Colombia's Legal System* October 2011, available online at <domac.is/reports/> (accessed 18 August 2013),

47 Ley 975 de 2005, *Diario Oficial* No. 45.980 of 25 July 2005, available online at <secretariasenado.gov.co/senado/basedoc/ley/2005/ley_0975_2005.html> (accessed 18 August 2013).

48 *Ibid.*

49 Centro Nacional de Memoria Histórica, Ansari, E. et al., *Historical Memory in Colombia: The work of the group de Memoria Historica, Report of the International Economic Development Program*, 2012, available online at <centrodememoriahistorica.gov.co/descargas/IEDP_2012_COLOMBIA_Human_Rights_Report_GMH.pdf> (accessed 18 August 2013).

50 The JPL and the demobilisation law provided a "two-track" process or legal framework for demobilising. All members of illegal armed groups "could demobilize collectively or individually under Law 782/2002 (which was extended and modified in December 2006). Law 782 helped deserters with their reintegration into civil society. In contrast, the JPL promoted alternative sentences and penalty reductions to demobilised combatants who confessed to major crimes committed while under arms. "In July 2006, Colombia's Constitutional Court upheld the constitutionality of the JPL, but limited the scope under which demobilising paramilitaries could benefit from reduced sentences." *Cf.* Beittel, J.S., *supra* note 13, 10.

51 *Supra* note 22, 17. In one particular proceeding from April 2011, the Mampuján case, the Colombian Supreme Court ordered financial compensation and collective reparations for more than 1,400 victims of forced displacements and murders in three Colombian communities.

law to process victims' claims.[52] The demobilisation process under the JPL during 2004 to 2006 also triggered the emergence of the BACRIMs.

Regrettably, the JPL may have been misused by corrupt officials to create a political smoke-screen, allowing the investigations against top paramilitary commanders to proceed at a snail's pace or to be derailed all together so that paramilitary commanders could seek extradition to the U.S. to face drug trafficking charges and negotiate plea bargains rather than face much stiffer human rights charges in Colombia.[53] Many thousands of individuals may also have received government benefits for falsely claiming to be paramilitary combatants as part of a corrupt scheme carried out by former Peace Commissioner Luis Carlos Restrepo, a charge Mr. Restrepo has vehemently denied.[54] Moreover, many of the weapons that were turned in were not even functional, suggesting that fully serviceable weapons have been cached away for the benefit of the BACRIM groups that have emerged from the demobilisation process.

Reintegration from the perspective of Colombian society has been difficult as well. Much of the population takes a dim view toward welcoming former paramilitaries back into civilian life when so many of them are responsible for human rights abuses and terrorising communities. Finding themselves as social outcasts rather than as prodigals welcomed back into the fold of the social fabric, the former illegal armed combatants now struggle to exercise territorial control in certain regions and are also responsible for widespread criminal activities and violence. If successful demobilisation of belligerent forces is a marker to indicate post-conflict conditions, then it is difficult to accept that such a condition exists in Colombia at this time.[55]

II.3.2. Demobilisation of Women and Child Soldiers

Women and children have been largely left out of the GOC's demobilisation process due to many factors that combined render them more vulnerable to human trafficking. Of the nearly 41,000 men, women and children who have been demobilised, between 6 and 9 percent are women.[56] As the Colombian public becomes more knowledgeable

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[52] International Crisis Group, *Correcting Course: Victims and the Justice and Peace Law in Colombia*, Latin American Report No. 29, 30 October 2008, available online at <crisisgroup.org/home/index.cfm?id=5753> (accessed 18 August 2013).

[53] Nagle, L.E., Better a Jail Cell in the United States: Using Extradition to Avoid Criminal Accountability in Colombia, *International Enforcement Law Reporter*, vol. 28, ed. 11, 2012, 397.

[54] *Cf.* Colombia Reports, Alsema, A., *Medellín's Ex-Mayor Says Fake Paramilitaries Demobilized*, 21 February 2012, available online at <colombiareports.com/medellins-ex-mayor-says-fake-paramilitaries-demobilized>, noting that the "AUC demobilized 35,000 men while before the peace process they officially only had 20,000 members," and reporting that "[t]housands of demobilized members have since rearmed". *Cf.* InSight Crime, Stone, H., *Fake Colombian Demobilization Stories Explain Rise of BACRIMs*, 11 March 2011, available online at <insightcrime.org/news-analysis/fake-colombian-demobilization-stories-explain-rise-of-bacrim> (both accessed 18 August 2013), noting that this falsified demobilisation plan led to the growth of BACRIMS.

[55] *Supra* note 24, noting: "Colombia has a long history of using amnesties to address the demobilization of guerrilla members and some paramilitary groups. The peace-versus-justice debate has been loaded with rhetoric and manipulation. The official discourse avoids the use of 'armed conflict' and instead has cast the debate in terms of 'illegal armed groups' and 'terrorists,' thereby avoiding questions of state responsibility. To date, no serious public discussions have occurred to outline the various stakeholders' positions."

[56] Statistics vary significantly depending on the source. 'Unofficial data illustrates that from November 2003 to August 2006, out of the 31,664 combatants collectively demobilized, 6 % (1,911) were women (ODDR, 2011); meanwhile, official sources increase this number to 9.2% or 2,930 women who collectively demobilized (Policía Nacional de Colombia, 2008). Considering women who individually demobilized, from August 2002 to March 2011, from among 23,402 combatants individually demobilized, 18.5% (4,333) were women (ODDR, 2011). This data is doubtful after

about the role women played as combatants, either voluntarily or otherwise, there is little sympathy for them as former members of illegal armed groups. Consequently, many are victimised a second time when they demobilise because they carry the stain of having been fighters, concubines, perpetrators of violence, and propagandists against the Colombian state and against the Colombian people.[57] Former female combatants are not seen in a sympathetic light. They are treated as pariahs because they transgressed "traditional gender norms."[58] They are shunned by their families and by their communities. Many can never return to their places of origin because of the things they did as illegal armed combatants. They have been victims of sexual violence, rape, forced abortions, forced sterilisation and contraception. Some have had children with guerrilla-fighters and many Colombian citizens do not want the State to be responsible for caring for the acute mental and physical needs of female combatants or for the children they now have. Most of the demobilised women cannot return to their places of origin due to well-founded fears of reprisals from former armed combatants.[59] One report notes that while demobilised women were born in all but one of Colombia's 32 departments, 85 percent sought the relative security of anonymous urban neighbourhoods and comunas in Bogotá and Medellín rather than returning home to their families and native surroundings.[60]

Former female combatants are also stigmatised because they have transgressed traditional gender norms and for most the prospect of returning to their families is out of the question, due to the harshly paternalistic and patriarchal nature of Colombian society. One recent paper put the situation succinctly:

> The traditional association of women with homemaking and their important family role of raising children and supporting their husbands, makes Colombians stigmatize and be afraid of female ex-combatants. With a past surrounded by weapons and death, to civilians, demobilized women have apparently lost their femininity and the established patterns of their behaviour in society; then, people perceive them as a double danger, not only for the uncertainty they bring into society, but also because of the threat they represent to social order in important aspects like family care, children´s education, sexuality and reproduction.[61]

Reports also indicate that child soldiers were largely left out of the demobilisation process, because government officials "failed to enforce the handover of children as a condition for AUC paramilitary groups to enter the process, leaving thousands of

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comparing it to the number of women active and mistreated in armed groups, situation that for some analysts can only be explained by the assertion that women are not properly counted in the demobilization] process.' *See* UCLA: Centre for the Study of Women, Giraldo, S., *Demobilized Women Combatants: Lessons from Colombia*, 3 February 2012, 7. S*ee also* Schwitalla, G. and Dietrich, L.M., "*Demobilisation of Female Ex-Combatants in Colombia"*, Forced Migration Review, vol. 27, ed. 58, January 2007, available online at <fmreview.org/FMRpdfs/FMR27/39.pdf> (accessed 18 August 2013).

57 Schwitalla, G. and Dietrich, L.M., "Demobilisation of Female Ex-Combatants in Colombia"*, Forced Migration Review*, vol. 27, ed. 58, 58-59, January 2007, available online at <fmreview.org/FMRpdfs/FMR27/39.pdf> (accessed 18 August 2013).

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 Giraldo, S., "Demobilized Women Combatants: Lessons from Colombia", Thinking Gender Conference 22, Ann. Grad. Student Res. Conf., UCLA Ctr. for the Study of Women, Feb. 3, 2012, 7.

children formerly associated with the AUC unaccounted for and without any protection."[62] According to one analysis, of the 31,671 AUC combatants that demobilised, only 391 minor combatants were processed between 2003 and 2006.[63]

The alternatives for integrating children back into civilian life include the following options:

- *Transitory Home*: a temporary location where the child is assessed for a more permanent arrangement that may better fit his or her needs.
- *Specialised* Care *Centre:* a second phase during which a more comprehensive evaluation is better targeted to the special needs of the child.
- *Juvenile Hospice*: a third phase where the child receives job and life skills training for insertion back into society.
- *Care in a socio-familiar unit*: controlled foster family care until age 18.[64]

Although this and other structured reintegration programs are well-intentioned, the crucial need for long-term follow up care and monitoring is largely absent. Of greater concern, however, is that many female child soldiers fall through the cracks of specialised support programs.[65] When girls leave the ranks as soldiers, they frequently experience conflicting feelings of betrayal of their 'protective' group. At the same time, they may become a target for retaliation by those very same armed groups. Many are no longer welcome in their families and their communities.

II.4. Conflict or Post-Conflict and Why It Matters

Why is it so important for Colombia to convince the nation and the world that it is entering a "post-conflict" era? Non-conflict or post-conflict status is crucial in order to attract new investment from overseas, to stabilise the business climate, to maintain the flow of aid and loans into the country, and to create the appearance that commerce is secure, and the civil society is protected. Well-publicised military gains against guerrilla groups and the killing of key rebel leaders, promote the appearance of a Colombian state achieving post-conflict security.[66]

Between the 1960s and into the 1990s, there is general agreement that the international law applicable to the conflict in Colombia was Common Article 3 of the Geneva Convention of 1949[67], Additional Protocol II[68] and international customary law. It was not until the late 1990s, however, that the international community reached a consensus that Colombia was indeed engaged in an internal armed conflict,

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62 Watchlist on Children and Armed Conflict, *No One to Trust: Children and Armed Conflict in Colombia* 4, April 2012, available online at <watchlist.org/wordpress/wp-content/uploads/Watchlist-ColombiaReport-LR.pdf> (accessed 18 August 2013).

63 *Ibid.*

64 Obra Social Fundación "La Caixa", Castillo-Tietze, D., "Las Niñas Soldados: En Busca de la dignidad arrebatada", November 2008, available online at <obrasocial.lacaixa.es/deployedfiles/obrasocial/Estaticos/pdf/Coop_Internacional/Sensibilizacion/Les_nenes_soldat_es.pdf> (accessed 18 August 2013).

65 *Ibid.*

66 E.g. Human Rights Watch, "World Report 2011: Colombia", January 2011, available online at <hrw.org/world-report-2011/world-report-2011-colombia> (accessed 14 June 2013).

67 Geneva Conventions Relative to the Laws of War, 1950, 75 *UNTS* 135, Art. 3.

68 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 *UNTS* 609, Art. 6.

because there was a well-armed group, under the direction of a leader, and in control of a portion of Colombian territory. These three conditions met the threshold for internal armed conflict under Protocol II, which afforded extra protection to the civilian population. The GOC long insisted that such was not the case, and the difficult aspect with the type of struggle that Colombia is in today, particularly with regard to the BACRIMS, is whether we are still going to apply Common Article 3, Protocol II, and customary international law to protect those civilians even though the GOC asserts that the conflict is over.

The GOC would argue that the country is in a state of post-conflict because the two prominent illegal armed groups, the paramilitaries and the FARC, seem to have demobilised, demilitarised and entered into a peace process. That argument is but a formality. The reality is that Colombia is still engaged in an armed conflict, and while the political elites may believe that there is no more armed conflict, the residents of the comunas and inhabitants of many rural municipalities would be hard pressed to believe otherwise.

In an armed conflict, all parties in the conflict are responsible for upholding the laws of war. The laws of war were developed to protect human life in armed conflict. By trying to convince the civil society and the international community that the armed conflict is over, the GOC is essentially taking away the legal protections for civilians under international law. What is the incentive for the GOC to do this? Some would argue that the motivation is development-driven. Foreign investment is attracted back to most post-conflict countries if the security situation is believed to have stabilised. The concern, however, is that the Colombian state could be viewed as placing economic incentives and investment before the welfare, safety, and rights of Colombia's civil society.

After many years of denial during the Uribe government, the current president, Juan Manuel Santos, officially recognised - shortly after taking office - that there has indeed been an armed conflict in Colombia for some time,[69] sustained by the presence of domestic and transnational criminal organisations that profit from the trafficking of drugs, weapons, and human beings and any other profitable illicit activity. While the security situation is improved in some areas of the country, especially the neighbourhoods in which the political elites reside, ongoing criminality has created a chronic environment of social insecurity.

Another measure to determine the difference between conflict and post-conflict conditions concerns, of course, is the number of internally and externally displaced people that remain uprooted from their places of origin. A measure of stability is a demonstration that property ownership is relatively secure, but such is not the case in Colombia where displacement translates to a catastrophic loss of land ownership and title.

The GOC has long had a significant problem with proving land ownership among peasant families in rural areas. In fact, one of the issues over which the UNHCR is most critical is that the manner in which the GOC is implementing its land restitution agenda to address displacements is not consistent with international standards.[70] This is one of the goals put forth for 2013, along with helping to strengthen the technical

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[69] Insight Crime: Organised Crime in the Americas, Stone, H., *The War of Words Over Colombia's Conflict*, May 2011, available online at <insightcrime.org/insight-latest-news/item/884-the-war-of-words-over-colombias-conflict> (accessed 22 June 2013).

[70] UNHCR, 2013 UNHCR Country Operations Profile–Colombia Working Environment, 2013, available online at <unhcr.org/pages/49e492ad6.html> (accessed 7 June 2013).

support capacity of those institutions, responsible for implementing the Victims and Land Restitution Law.[71]

Another indicator that Colombia is not in a post-conflict era is the frequency of armed assaults on journalists,[72] human rights advocates and community organisers,[73] educators, trade unions,[74] indigenous and Afro-Colombian representatives,[75] advocates for displaced people, and the victims of paramilitary violence seeking land restitution and justice.[76]

Bolstering the appearance that Colombia has entered a post-conflict era includes promoting both domestic and foreign tourism. The GOC has encouraged the tourism industry to trade on the imagery for which Colombia is well known—tropical beaches, lush jungles, emerald Andean highlands, upscale hotels, casinos and a cosmopolitan nightlife, and especially beautiful and exotic Colombian women. While this is not a result of armed conflict and displacement, per se, both contribute to the conditions that have forced women and children into sex tourism.

Trading on beauty has become hyper-sexualised, and the Internet is now crowded with sex tourism businesses, some based in the United States, specialising in making all inclusive arrangements for foreign men to come to Colombia to meet beautiful Colombian women (or whatever else they desire), for companionship and adult entertainment.[77] The tourism packages include rental apartments, exclusive night club reservations, excursions and female escorts (known as *prepagos)*, [78] to serve as

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[71] *Ibid.*

[72] Colombia currently ranks fourth on the Committee to Protect Journalists 2013 Impunity Index. See CPJ Blog, Getting Away with Murder, 2 May 2013, available online at <cpj.org/reports/2013/05/impunity-index-getting-away-with-murder.php>. Recent reports by the CPJ stress that BACRIMS are now emerging as a serious threat to journalists in Colombia. See CPJ Blog, Otis, J., In Colombia, 'Bacrim' Pose New Press Threat, 24 May 2013, available online at <cpj.org/blog/2013/05/in-colombia-bacrim-pose-new-press-threat.php> (both accessed 18 August 2013).

[73] Human Rights First, *Human Rights Defenders in Colombia*, available online at <humanrightsfirst.org/our-work/human-rights-defenders/colombia>. See also Human Rights First, Baseless Prosecutions of Human Rights Defenders in Colombia in the Dock and Under the Gun, February 2009, available online at <humanrightsfirst.org/2009/02/01/baseless-prosecutions-of-human-rights-defenders-in-colombia-in-the-dock-and-under-the-gun> (both accessed 18 August 2013).

[74] 'From 2005 to 2010, 265 trade unionists were murdered in Colombia; 51 trade unionist were murdered in Colombia in 2010; 29 were murdered in 2011. In the last two decades, more than 2,800 Colombian trade unionists have been assassinated with a near total rate of impunity (over 95%).' *See* USLEAP: US Labor Education in the Americas Project, Background: Violence Against Trade Unionists in Colombia, available online at <usleap.org/usleap-campaigns/colombia-murder-and-impunity/more-information-colombia/background-violence-against-> (accessed 24 June 2013).

[75] Washington Office on Latin America, Racism, Violence Continue for Afro-Colombians, 7 February 2013, available online at <wola.org/commentary/racism_violence_continue_for_afro_colombians> (accessed 27 June 2013).

[76] *E.g.* Relief Web, OAS Report: IACHR Regrets Murder of Colombian Activist and Urges State to Protect Community Leaders Advocating for Rights of Those Displaced by Armed Conflict, 19 April 2013, available online at reliefweb.int/report/colombia/iachr-regrets-murder-colombian-activist-and-urges-state-protect-community-leaders (accessed 18 August 2013).

[77] See for example the website of one business called Adult Vacations Cartagena, available online at <cartagenaadultvacations.com> (accessed 24 June 2013). The promotion reads, 'If you aren't "bringing sand to the beach" we have beautiful Colombian girls of your choice looking to get out of the house to help share in your vacation adventures!' The company is based in San Francisco, California.

[78] A term for pre-paid women escorts that has now become a widely used expression to denote prostitutes that cater to well-heeled clientele.

companions for the duration of the vacation.[79] The adult entertainment industry has become such a significant and lucrative component of Colombian tourism and nightlife that women from all levels of Colombian society, many with college educations and coming from wealthy families, are drawn to the opportunity of profiting from consorting among foreign men with money to spend.[80] It is a powerful draw for women anxious to improve their life situation in a society that is so heavily materialistic that prostitution becomes an activity that is considered by some as being chic and a valid way to get ahead in life.[81]

This is not to infer that efforts are not in place to combat sex tourism, at least in Cartagena, where awareness campaigns to discourage sex tourism, particularly involving minors, have been underway for a decade. In one instance, when a foreign tourist entered a hotel with a twelve year old girl he had encountered at the La Boquilla beach through the referral of a taxi driver, he was welcomed with a sign reading, 'La Muralla Soy Yo' (I Am the Wall). The receptionist, suspicious, made the tourist aware that it is a serious crime in Colombia to sexually exploit children, and that perpetrators may be charged for up to 25 years in prison. The man, who barely spoke any Spanish, let the girl go home.[82]

The non-government organisation, Fundacion Renacer,[83] has been an instrumental actor in the city of Cartagena, in particular, where the organisation has managed to win the collaboration of government officials and private entities to encourage local business to adopt codes of conduct.[84] Very significantly, Fundacion Renacer has been able to convince the Hotel Owners Association that child sex tourism is not only a human rights violation, but it is also not good business.[85] The awareness campaign also includes schools, police officers, beach vendors, restaurant owners, and taxi drivers, among others. The organisation has played a central role in the wording of Law 1329 of 2009, which amends a previous law, Law 599 of 2000, and provides sentences of between 14 to 25 years in prison for facilitating, organising, or

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79 Slate, Jiménez Jaramillo, J., *Colombian Escorts Go High-Class—and High-Tech*, 19 April 2012, available online at <slate.com/blogs/browbeat/2012/04/19/colombian_prostitutes_websites_and_twitter_feeds_why_escorts_in_colombia_have_gone_high_tech.html> (accessed 18 August 2013), noting that 'The infrastructure behind the prepago industry is massive and problematic, with ties to both corporate and drug money. Telenovelas about escorts and drug lords, like Sin Tetas No Hay Paraíso (No Heaven Without Tits), have proliferated in Colombia in recent years, gathering huge audiences.'

80 These Internet businesses are supposed to conform to a standard of privacy for the escorts working for them. However, only children younger than 13 years of age are covered. The notice, found on the Cartagena Adult Vacations website states: 'The Rule imposes certain requirements on operators of websites or online services directed to children under 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age (collectively, "operators"). If human trafficking of children includes minors up to 18 years of age, then these internet businesses operating in Colombia and from outside Colombia appear to be in violation of international human trafficking norms.'

81 Terra Networks, *Cacho: Con el Modelo de Mujer Hipersexualizada Ganaran las Mafias Sexuales*, 7 June 2010, available online at <noticias.terra.com/noticias/cacho_con_el_modelo_de_mujer_hipersexualizada_ganaran_las_mafias_/act2364163> (accessed 18 August 2013).

82 Foreign Affairs Trade and Development Canada, Stolen Youth: Combatting Sexual Exploitation of Children in Cartagena, Colombia, 14 December 2010, available online at <acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/ANN-1117114059-MKN> (accessed 18 August 2013).

83 Fundación Renacer, webpage, available at <fundacionrenacer.org> (accessed 24 June 2013).

84 Foreign Affairs Trade and Development Canada 2010, *supra* nt. 85.

85 *Ibid.*

participating in any form of sex trade or exploitation of an underage child, or for *demanding or soliciting* sex with a minor.[86]

III. Trafficking of women and children due to armed conflict.

The trafficking of women and children for labour and sexual exploitation is a multi-billion dollar crime worldwide. While no certain figures can be determined, it is reported that trafficking for forced labour[87] alone generates US$31.6 billion in illegal profits annually,[88] whereas trafficking for sex exploitation is about US$33.9 billion each year.[89] Forced displacement due to internal armed conflict, creates favourable conditions for human trafficking and puts at risk the most vulnerable groups: women and children. According to the Internal Displacement Monitoring Centre, at the end of 2012, an estimated 28.8 million people were displaced worldwide, with Colombia topping the list with between 4.9 and 5.5 million internally displaced people (IDPs).[90] More than half of the IDPs are under age eighteen.[91] In 2012 alone, more than 230,000 people were displaced in Colombia due to internal armed conflict and organised criminal activities.[92] Among women and children displaced in Colombia, nearly all become potential targets of human traffickers and the illegal armed groups that prey on women and children to fill the ranks of armed combatants as well as to provide sources of income.

International observers are nearly in lockstep in their observations of conditions in Colombia; that, firstly, the situation of human trafficking is out of control, that women and children from displaced communities are most vulnerable, that the GOC is not able to combat the human trafficking occurring through the national territory and that officials of the GOC appointed to combat human trafficking and other human rights abuses are not providing reliable or accurate reports and statistics on how bad the situation actually has become. Lastly, that the GOC has been accused of conducting

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86 Ley 1329 de 2009, *Diario Oficial* No. 47.413 of 17 July 2009.

87 Forced labour is defined by the ILO as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' International Labor Organization Convention No. 29 Concerning Forced or Compulsory Labor, 1930, 39 *UNTS* 55, Art. 2(1)l.

88 UNODC: United Nations Office on Drugs and Crime, REPORT, Global Report on Trafficking in Persons 2012, 68 available online at <unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf> (accessed 14 June 2013).

89 Belser, P., "Forced Labor and Human Trafficking: Estimating the Profits", *ILO Special Action Programme to Combat Forced Labour (SAP-FL),* Working Paper, DECLARATION/WP/42/2005, March 2005, 14, available online at <digitalcommons.ilr.cornell.edu/forcedlabor/17> (accessed 13 June 2013).

90 Colombia Reports, Mead, H., REPORT, *Colombia Has Highest Level of Internal Displacement in the World: Study*, 29 April 2013, available online at <colombiareports.com/colombia-has-highest-level-of-internal-displacement-in-the-world-study/>; also, Norwegian Refugee Council, Albuja, S. et al, Global Overview 2012 People Internally Displaced by Conflict and Violence, April 2013, 9, available online at <nrc.no/arch/_img/9674184.pdf>. Another report places Colombia second behind Sudan in the number of internally displaced people. John Hopkins The Protection Project, REPORT, *A Human Rights Report on Trafficking in Persons, Especially Women and Children*, September 2010, available online at <protectionproject.org/wp-content/uploads/2010/09/Colombia.pdf> (all accessed 14 November 2013).

91 Watchlist on Children and Armed Conflict, *No One to Trust: Children and Armed Conflict in Colombia*, April 2012, 4, available online at <watchlist.org/wordpress/wp-content/uploads/Watchlist-ColombiaReport-LR.pdf> (accessed 18 August 2013).

92 Norwegian Refugee Council, Albuja, S. et al, *Global Overview 2012 People Internally Displaced by Conflict and Violence*, April 2013, p. 9.

illegal activities against human rights workers, Supreme Court judges, journalists, and political rivals.[93]

Illegal armed groups use women as instruments and objects of war. Most are victims between 15 and 30 years old.[94] Many are recruited by force and become sexual slaves. In many cases, the illegal armed groups control women through physical and psychological violence as a way to injure the enemy. This is achieved through the dehumanisation of the victim, exploiting vulnerabilities of the family, and stoking terror in the community.[95] Women lack guarantees to denounce abuses because few believe them or because denouncing the aggressors is a longer process than it takes for the aggressors themselves to find out who actually went to the authorities.[96]

Women and children who are caught up as victims of human trafficking in Colombia are subjected to the physical and mental methods of control that characterise victimisation and domestic abuse in other parts of the world. These may include:

- Using Intimidation: Victims are subjected to violence directed at them or around them by witnessing violence against others. This occurs through using looks, actions, gestures, smashing objects and destroying the victim's belongings, and by displaying weapons in a menacing manner.
- Using Emotional Abuse: Victims are humiliated and ridiculed, dehumanized by the use of demeaning words and actions, and playing mind games.
- Using Isolation: One of the most effective means of asserting total control of trafficking victims is to remove them from outside human contact, controlling all movements, limiting or preventing any mental stimulus like reading materials and television and using jealousy among victims to justify actions.
- Minimizing Denying and Blaming: Traffickers make light of the abuse and do not take the concerns of victims seriously. They shift responsibility for the victims' circumstances onto the victims, making them feel as if it is their fault.
- Using Children: Traffickers threaten the relationship of women to their children in order to gain control and power over them.
- Using Male Privilege: Macho tendencies in Colombian culture have long persisted. Traffickers use such behaviour, to control

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93 Colombia Reports, Theintz, G., *Critical Report on Colombia Human Rights Presented to UN Council*, 24 March 2010), available online at <colombiareports.com/critical-report-on-colombia-human-rights-report-presented-to-un-council/> (accessed 18 August 2013), citing Ana Maria Rodriguez, a representative of the Colombian Jurist Commission, who asserted that there was enough documentation to 'demonstrate the government's responsibility in the illegal activities of the Colombian Security Agency (DAS) against human rights defenders, magistrates of the Supreme Court, political opposition and journalists.'

94 El Tiempo, Zambrano, A., *El expediente de los crímenes sexuales de las Farc*, 6 June 2013, available online at <eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-12851726.html> (accessed 18 August 2013), noting a 2012-2013 report, 'Violencia basada en género (VBG)' that concluded that there was an evident "instrumentalization of women as tools and objects of war".

95 Verdadabierta, Moro, B., *Mujeres: víctimas con derecho a la verdad, justicia y reparación*, available online at <verdadabierta.com/nunca-mas/41-violencia-contra-mujeres/230-mujeres-victimas-con-derecho-a-la-verdad-justicia-y-reparacion> (accessed 27 June 2013).

96 Zambrano, A. *supra* nt. 97.

women and children, for example, making victims servants and submissive.

- Using Coercion and Threat: Victims are subjected to constant threats of violence, punishments, and deprivations in order to be controlled.[97]

III.1. Women and Children as Forced Combatants, Concubines, and Sex Workers

III.1.1. Women and Children as Forced Combatants and Concubines

Women have been trafficked into the ranks of illegal armed groups for many years. There is an abundant amount of documentation and testimonials by former female combatants, who suffered years of serious sexual abuse and other forms of forced servitude. In many cases of women forced into illegal armed groups, including both guerrillas and paramilitaries,[98] an alarming number become unwilling concubines.[99] This constitutes a clear violation of the Fourth Geneva Convention and Additional Protocol I, which is intended to protect women from sexual violence, including rape, assault, and forced prostitution.[100] One former female FARC member interviewed, told how nearly all female "recruits," regardless of age, were forced to be sex slaves servicing male guerrillas 'in an effort to maintain morale among the male troops and avoid the security risk that comes with the men venturing into town to consort with civilians.'[101] Those women that have the misfortune to become pregnant are subjected to forced abortions or induced labour before full term, after which the baby is left to die.[102] Moreover, the UNHCR has reported that illegal armed groups often run prostitution rackets in areas under their control in order to generate revenue and use brothels as a means to extract intelligence from enemy clients."[103]

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97 *E.g.* Help Guide, *Domestic Violence and Abuse: Signs of Abuse and Abusive Relationships*, available online at <helpguide.org/mental/domestic_violence_abuse_types_signs_causes_effects.htm> (accessed 14 June 2013).

98 US Office on Colombia, *Understanding Colombia Series: The Impact of War on Women*, available online at <usofficeoncolombia.org/understanding_colombia/pdf/women.pdf> (accessed 14 June 2013).

99 CNN Freedom Project: Ending Modern Day Slavery, *Horrific Use of Child Soldiers Rising in Colombia, Report Finds*, 15 October 2012, available online at <thecnnfreedomproject.blogs.cnn.com/2012/10/15/horrific-use-of-child-soldiers-rising-in-colombia-report-finds> (accessed 18 August 2013).

100 Hathaway, O., *et al.*, "Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law", *Minnesota Law Review*, vol. 96, 2012, 1883, citing Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 1977, 1125 *UNTS* 3, Art. 76, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *UNTS* 287, Art. 27.

101 Americas Forum for Freedom and Prosperity, Phillips, A., FP: Why Women Turn to the FARC—and How the FARC Turns on Them, 3 June 2012, available online at <americas-forum.com/why-women-turn-to-the-farc-and-how-the-farc-turns-on-them/> (accessed 18 August 2013).

102 *Ibid.*

103 Nacla Online, Ballvé, T., Colombia: Aids in the Time of War, 2011, available online at <nacla.org/article/colombia-aids-time-war> (accessed 13 June 2013), noting that forcing sex workers to have unprotected sex garners a higher price, and that such tactics of intelligence gathering places the sex slaves in further peril as enemy spies. It is also a crime in Colombia for any group, including the Colombian armed forces, to use children in intelligence gathering roles. Ministero de Defenso Nacional, *Decreto Numero 128* (2003) (Colombia), available online at <dafp.gov.co/leyes/D0128003.htm> (accessed 24 June 2013) , Art. 22.

With regard to the trafficking of children into armed conflict, while statistics are very unreliable and produced for sometimes less then objective purposes, it has been estimated that some 14,000 children in the last decade were pressed into armed groups involved in the Colombian conflict,[104] in direct violation of Article 4(3)(c) of Protocol II prohibiting the recruitment of children under the age of fifteen or allowing them to take part in hostilities, and the Convention on the Rights of the Child, which fixes a minimum recruitment age of fifteen and which Colombia has also ratified. This places Colombia fourth behind Myanmar, Liberia, and the Republic of Congo in the number of children soldiers recruited.[105] Some current reports indicate that the number of children being forcibly recruited into the ranks of armed groups is still rising. Children are trafficked into illegal armed groups through kidnapping, but some who live in desperate circumstances are coerced by the promise of food and shelter.[106] Child soldiers are deprived of their "right to freedom, self-determination, right to a family, [and] are forced to adopt a denigrating life style, fundamentally unjust for the exercise of their fundamental guarantees"[107] under both Colombian and international law.

The findings of a recent, and apparently controversial study, produced by a law school dean in Bogotá, indicate that sixty-nine percent of child soldiers are under 15 years of age and as young as 8 years old.[108] Child soldiers are known as "little bees"[109] who fulfil a variety of roles, including placing land mines (or in some cases being used as human detonators), transporting weapons and explosives, clearing minefields, conducting reconnaissance, and working as servants and sex slaves of guerrilla and paramilitary combatants. There have been reports that child soldiers are also forced to participate in summary executions, torture, assassinations, kidnappings, and armed attacks against civilian targets.[110] In addition, child soldiers are considered expendable renewable resources. In one particularly heinous act, a ten year old boy was tricked by FARC guerrillas into riding a bicycle packed with explosives into a military checkpoint where it was detonated by remote control.[111]

III.1.2. Women and Children as Forced Sex Workers

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[104] UNICEF, Armed groups in Colombia stealing childhood from girls and boys alike, 25 August 2008, available online at <unicef.org/infobycountry/colombia_45354.html> (accessed 18 August 2013), noting that in 2003, '7,000 children in Colombia were in the ranks of armed groups, and an additional 7,000 were involved in urban militias.' See also Rethmann, A., "Condenados al Silencio– jovenes excombatientes en Colombia" *Independencias - Dependencias - Interdependencias, VI Congreso CEISAL,* 2010, Toulouse, Paper, available online at <halshs.archives-ouvertes.fr/halshs-00503128/> (accessed 25 June 2013). While many children report to have voluntarily enrolled, purported consent is involved with regard to underage children. Ramirez Barbosa, P.A., "El recrutamiento de menores en el conflict armado colombiano", *Rev. de Derecho Penal y Criminalogia*, vol. 31, Jan-Jun 2010, 115.

[105] Watchlist on Children and Armed Conflict, Colombia's War on Children, February 2004, available online at <watchlist.org/reports/pdf/colombia.report.pdf> (accessed 17 June 2013), 26.

[106] CNN Freedom Project: Ending Modern Day Slavery 2012, *supra* nt. 103

[107] Ramirez Barbosa, P.A. 2010, *supra* nt. 108.

[108] CNN Freedom Project: Ending Modern Day Slavery 2012, *supra* nt. 103

[109] Escobar, V., "Reclaiming the "Little Bees" and "Little Bells": Colombia's Failure to Adhere to and Enforce International and Domestic Law in Preventing Recruitment of Child Soldiers", *Fordham International Law Journal*, vol. 26, 2002-2003 , 785-870, 810, noting these child soldiers have been dubbed as "little bees" for their ability to 'sting before their targets realize they are being attacked' and that Paramilitaries also use young children, called "little bells," to serve as back-up troops, spies, and patrolmen in their home regions.

[110] Ramirez Barbosa, P.A. 2010, *supra* nt. 108.

[111] Watchlist on Children and Armed Conflict, Report to Ombudsman's Office, No. 017, 5/12/03: Colombia's War on Children, February 2004, available online at <watchlist.org/reports/pdf/colombia.report.pdf> (accessed 17 June 2013), 8 and 26 *et seq.*

The GOC currently promotes a new image for Colombia as a fabulous tourism destination. Regrettably, while there is so much to see and do in Colombia, some Colombian cities have become notorious for sex tourism, even though all prostitution-related activities are illegal in Colombia.[112] While prostitution is a part of adult entertainment and a high octane nightlife, perhaps in no other Colombian city is the exploitation of women and children more pernicious than in Cartagena, where over the last decade, the city has seen an explosion of the hotel and tourism sectors, promoted by feverish investment by wealthy tourists mainly from the United States and Europe.

The improved economic conditions have not trickled down to the local poor communities however, and many of the poor and displaced living in Cartagena's slums are invariably drawn into the city's sprawling sex industry.[113] An average of 650 minors are believed to be forced into the sex trade at any given time, and while sex tourism is illegal,[114] the law does not stop a high number of service workers, waiters, doormen, taxi drivers, and bus operators competing for commissions to deliver clients to Cartagena's many sex clubs and brothels.[115] Facilitated in great part by the development of the Internet, foreign tourism for sex with both girls and boys[116] is highly priced, in great part due to the misconception that children are free of STIs.[117]

Cartagena is now ground zero in Colombia for predators coming from around the world to have sex with children.[118] But Cartagena is just one destination for an illegal industry that exploits over 35,000 children in Colombia every year.[119] In Bogotá, for instance, girls thirteen and fourteen years old are approached in schoolyards, and drawn into sex slavery for foreign businessmen.[120] According to a 2010 report produced by *Fundacion Renacer*, *Fundacion Esperanza*, the *Instituto Distrital de Turismo* and the *Secretaria de Integracion Social*, Internet websites and chat rooms that cater to international sex tourists provide explicit details on locations in Colombia where to have sex with minors.[121]

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[112] Codigo Penal de Colombia Art. 213, available online at <derechos.org/nizkor/colombia/doc/penal.html> (accessed June 14, 2013).

[113] IRIN Plus News*, Colombia: Sex Tourism Booming on the Caribbean Coast*, 18 November 2008, available online at <irinnews.org/report/81528/colombia-sex-tourism-booming-on-the-caribbean-coast> (accessed 18 August 2013).

[114] Codigo Penal de Colombia Art. 219, available online at <derechos.org/nizkor/colombia/doc/penal.html> (accessed June 14, 2013).

[115] IRIN Plus News 2008, *supra*, nt. 119.

[116] In 2010, the Children of the Andes foundation described the appalling story of an eight year old boy who became victim of sex trade. Accompanying his twelve-year old sister to the beach, where she would meet tourist-clients, and subsequently to hotel rooms, he would duck under the bed while his sister was being abused by the client. On one occasion, the client offered to pay extra for touching the young boy. Aware of his family needs, the young boy thus became another victim of Colombian sex trade. *See* Silent Victims: Children of the Andes Spring Newsletter 2010, Speaking Out against the Sexual Exploitation of Children in Colombia, 20 March 2010, available online at <childrenoftheandes.org/news.php/321/silent-victims-spring-newsletter-2010> (accessed 18 August 2013).

[117] According to Fabian Cardenas, regional director of Fundacion Renacer, 'People come here from other countries or cities to have sex with children because they think it is safe.' IRIN Plus News 2008, s*upra*, nt. 119.

[118] *Ibid.*

[119] Silent Victims: Children of the Andes Spring Newsletter 2010 *Supra*, nt. 123.

[120] El Tiempo, Malaver, C*., Asi opera el "turismo" sexual con menores: Taxistas, 'tarjeteros' y empleados de hoteles informarían a turistas en donde encontrar a menores*, 8 December 2010, available online at <eltiempo.com/colombia/bogota/as-opera-el-turismo-sexual-con-menores/8554540> (accessed 18 August 2013).

[121] Some businessmen even plan their official business around their sexual activities, *Ibid.*

Indigenous children continue to be particularly vulnerable to predatory sex servitude. One pernicious form is called "a hunt" (*caceria*), in which indigenous children are kidnapped for days and believed to be forced into sex trade and drug trafficking.[122] Often these children never return to their communities.[123]

III.1.3. Cultural Attitudes toward Female Victims

As has happened to demobilised female combatants, Colombian women in general are vulnerable to chauvinist, patriarchal, and patronising attitudes by Colombian men that are deeply rooted and difficult to confront in the society.[124] In Colombia, gender violence is an accepted fact of life. Most victims are girls between 5 to 14 years of age,[125] and most do not file charges against their male perpetrators because intimidation is so overwhelming. The notion that a female family member is nothing but property to use as the family patriarch sees fit is deeply entrenched and very resistant to change, particularly in agrarian family life where such conduct is rarely exposed to prosecution under the law.[126]

There is also a high level of shame and guilt imposed on female victims by the society and many in law enforcement have the attitude that if a woman is beaten or raped, she must have done something to bring this on herself. Knowing that many law enforcement officers do not take violence or sexual exploitation against women seriously, perpetrators have a feeling of impunity for their conduct.[127]

The stress displaced women and children feel is compounded by the social divides that already separate Colombians between the "haves" and the "have-nots." Those on top control everything, while those who are impoverished have no hope of rising any higher than their born station in life. Displacement only increases the sense of being disaffected and stigmatised by the circumstances of life, thrown into chaos by armed conflict and continuing violence.[128] Colombia's already difficult social roles between males and females are amplified by internal armed conflict.[129] Indeed, it has been argued that the high number of female victims of the Colombian armed conflict is

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[122] El Tiempo, Efe, *Denuncian rapto de niños indígenas para la explotación sexual en Colombia,* 2 January 2011, available online at <eltiempo.com/colombia/otraszonas/ARTICULO-WEB-NEW_NOTA_INTERIOR-8719440.html> (accessed 18 August 2013).

[123] *Ibid.*

[124] Tolton, L., "Normalizing Wife Abuse in Colombia" *in:* Majstorović, D. and Lassen, I., eds., *Living with Patriarchy: Discoursive Constructions of Gender Subjects across Cultures*, John Benjamins Publishing Company, Amsterdam, 2011, 39.

[125] Centro de Estudios de Opinion, Carrillo Urrego, A., Los Delitos Sexuales en Colombia, entre el Desconcierto y la Impunidad, 4, available online at <aprendeenlinea.udea.edu.co/revistas/index.php/ceo/article/viewArticle/1376> (accessed 26 June 2013).

[126] As a judge, I was once charged to hear the case of a peasant for sexual assault on his daughter, and render sentence. His attitude was that his daughter was his property because that was the way things have always been in his society. He literally could not understand why what he had done was against Colombian law because the formal codes of law were utterly foreign to his way of life.

[127] The GOC Attorney General's Office recently stated: 'Despite efforts for public officers to work in a more gender sensitive manner, they continue to be clumsy towards victims in their response. There are still prejudices which are difficult to eradicate.' See Targeted News Service Universidad Nacional de Colombia, *Women Have Been War Scenarios*, 6 March 2013, available online at <unal.edu.co/ndetalle/article/women-have-been-war-scenarios.html> (accessed 18 August 2013).

[128] Nagle, L.E., "Global Terrorism in Our Own Backyard: Colombia's Legal War against Illegal Armed Groups", *Transnational Law and Contemporary Problems*, vol. 5, ed. 10, 2005, 15.

[129] UNIFEM, Meertens, D., REPORT, *Final Report of the Program on Peace and Security: Tierra, derechos y género: Leyes, políticas y prácticas en contextos de guerra y paz*, 2006, available online at <ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Gender-Colombia-CaseStudy-2012-English.pdf> (accessed 18 August 2013).

itself a manifestation of a patriarchal culture, magnified in the crucible of war.[130] Gender violence has also become both a military and a strategic method and objective of warfare and assault that is a continuation of aggressions and violations that occur during civilian life.[131] In the context of armed conflict, the female body becomes a weapon or a tactical target used in such a way as to terrorise civilians, to acquire territory by forcing displacements, to punish the enemy, to claim as a war prize, and to exploit for sexual gratification and labour servitude.[132]

III.2. Organ Trafficking

In addition to sex tourism, Colombia has become an important destination for medical tourism.[133] Many legitimate hospitals and medical groups are taking advantage of Colombia's close proximity to the United States to advertise the cost benefits of going to Colombia for elective procedures in plastic surgery, weight reduction, cardio-vascular care, and organ transplants.[134] One organ transplant company operating in Colombia even set up a call centre in Arizona,[135] and on a webpage discussing organ harvesting, one posting from Colombia said,

> 'I give my knowledge to obtain organs for needy patients, here in Colombia of legal form according to the constitution for foreigners they can call me 3107134300 cellular'[136]

Demand for organs results in a supply chain that begins in displaced communities throughout Colombia, and this flourishing black market in illegally harvested organ and body parts, such as kidneys and corneas, lures foreigners to Colombia to obtain transplants sooner than they can obtain them in their home countries.[137] This is in

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[130] Andrade Salazar, J.A., "Women and Children, the Main Victims of Forced Displacement", *Orbis*, vol. 16, ed. 5, 2010, 28-53, 36. See also Garcés, E., *Colombian women: the struggle out of silence*, Lanham: Lexington Books, 2008, 9.

[131] Opinión Jurídica, Restrepo Yepes, O.C., *El Silencio de las Inocentes? Violencia Sexual a Mujeres en el Contexto del Conflicto Armado,* 6, January-June 2007, available online at <redalyc2.uaemex.mx/articulo.oa?id=94501106> (Accessed 18 August 2013), 93, noting that 'it is the same model of men against women that keeps encouraging the acts of domination of man over women'.

[132] International Displacement Monitoring Centre, *Internally Displaced Women: Gender-based Violence*, available online at <internal-displacement.org/8025708F004D404D/(httpPages)/953DF04611AD1A88802570A10046397B?OpenDocument> (accessed 03 April 2012).

[133] Between 2005 and 2010 at least 321 foreigners travelled to Colombia for organ transplants, and many of the surgeries are 'driven by profit for hospitals, doctors and brokers'. See Edmonton Journal (Alberta), Smith, M., *Turning Life into Death*, 19 June 2011, available online at <www2.canada.com/edmontonjournal/news/sundayreader/story.html?id=d847ec7f-6115-4032-bb1f-166303c93b60> (accessed 18 August 2013), noting: 'In the illegal organ trade, brokers scour the world's slums, preying on the poor with promises of easy money and little risk in exchange for a kidney. Inside hospitals, people are injured or killed by botched surgery as doctors place money above ethics, criminal investigators say.'

[134] *Supra* nt. 93, noting that Colombia is one of the top five "hot spots" in the world for organ trafficking, due to its proximity to medical tourists from the United States seeking cheap operations and Web sites that offer liver and kidney transplants within 90 days.

[135] Pittsburg Tribune-Review, Fabregas, L., *Transplant 'Tourism' Questioned at Medical Centers in Colombi*a, 18 February 2007, available online at <highbeam.com/doc/1P2-11273372.html> (accessed 18 August 2013).

[136] Debate, Author Unknown, *Should the Sale of Organs Be Legal?*, available online at <debate.org/opinions/should-the-sale-of-human-organs-be-legal> (accessed 14 June 2013).

[137] Colombia is one of the key Latin American nations (along with Argentina, Brazil, Mexico and Peru) in the sale of body parts. See Fox News Latino, O'Reilly, A., "Organ Trafficking on the Rise", 16

direct conflict with the World Health Organization's 1991 Guiding Principles on Human Cell, Tissue and Organ Transplantation,[138] which state, among other points, that, 1) organs should preferably be obtained from the deceased; 2) living donors should generally be genetically related to recipients; and 3) no payment should be given or received.[139]

Colombia, along with Spain, called for a revision of the World Health Organization's 1991 Guiding Principles on Human Cell, Tissue and Organ Transplantation back in 2003[140] to address the growing problem of "for profit activity".[141] But a subsequent review by the WHO and International Society of Nephrology (ISN) indicated that transplant commercialisation and human organ trafficking were "rampant" in several countries, including Colombia.[142] In 2004, Colombia adopted the language of the WHO Guidelines by enacting Law 919 of 2004[143], mandating that organs cannot be sold commercially and criminalising human organ trafficking. Additionally, Decree 2493 of 2004 provided that foreign visitors could only receive transplants if no Colombian citizens or foreign residents were on a waiting list.[144] Despite enactment of these laws, Colombia remained one of several hotspots for illegal organ trafficking,[145] and at one point in the last decade, allegations arose that of 873 transplant operations done in 2007, 69 transplants were done on foreigners and that some of the transplants involved organs taken from deceased persons through commercially arranged transactions.[146] There are also credible rumours from interviews with doctors in 2013 that organ trafficking is a big business in Colombia, particularly in cities where there are good medical centres and a large population of displaced persons.[147]

III.3. Trafficking of Colombians Abroad

August 2012, available online at <latino.foxnews.com/latino/news/2012/08/16/organ-trafficking-on-rise-in-united-states/> (accessed 18 August 2013).

138 WHA Resolution 44.25, 13 May 1991.

139 World Health Organisation, REPORT, *Report of the World Health Organisation: Ethics, Access and Safety in Tissue and Organ Transplantation: Issues of Global Concern*, 2003, available online at <who.int/transplantation/en/Madrid_Report.pdf > (accessed 24 June 2013), 9. The principles were reaffirmed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22.

140 WHO Resolution WHA57.18, 22 May 2004, available online at <apps.who.int/gb/ebwha/pdf_filesAVHA57/A57_Rl8-en.pdf> (accessed 14 June 2013).

141 US Committee of Foreign Affairs, Organ Harvesting of Religious and Political Dissidents by the Chinese Communist Party: Joint Hearing before the Subcommittee on Oversight and Investigations and the Subcommittee on Africa, Global Health, and Human Rights of the Committee On Foreign Affairs, House of Representatives: 112th Congress, Second Edition, Ser. No. 112-180, 12 September 2012, 18. (statement of Gabriel Danovich, M.D., professor of medicine, UCLA Medical School), available online at <gpo.gov/fdsys/pkg/CHRG-112hhrg75859/pdf/CHRG-112hhrg75859.pdf> (accessed 18 August 2013).

142 *Idem*, 19.

143 Ley 919 de 2004, *Diario Oficial* 45771 of 23 December 2004.

144 Decreto 2493 de 2004, *Diario Oficial* 45631 of 5 August 2004, Art. 40.

145 Reuters, FACTBOX-Five Organ Trafficking Hotspots, 6 August 2007, available online at <reuters.com/article/2007/08/05/idUSL01426288> (accessed 18 August 2013).

146 Shimazono, Y., "The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information", *Bulletin of the WHO*, vol. 85, ed. 12, 2007, 901-980, citing Pittsburg Tribunal Review, Fabregas, L., Transplant 'Tourism' Questioned at Medical Centers in Colombia, 18 February 2007, available online at <highbeam.com/doc/1P2-11273372.html> (accessed 18 August 2013).

147 Interviewed by the author: The doctors do not want to be identified for their own safety because they assert that important government officials are directly profiting from organ trafficking and that international organised crime is also deeply involved.

Of the estimated 70,000 Colombian women and children who fall prey to human trafficking each year,[148] many enter one of about 560 trafficking pipelines within Colombia,[149] and about 254 of trafficking pipelines out of Colombia into Ecuador and Venezuela, and into Europe (Spain, Germany and Holland), Asia (China, Japan, and Singapore), North America and Central America, and the Middle East (particularly Jordan and Iran).[150] Many victims are lured by employment and education opportunities, and dating and marriage services. Traffickers place newspaper and Internet ads with catch phrases like, "To Spain with work and papers," "International modelling agency needs young women/men to work in Europe," "Women needed to babysit children in Holland," or "Scholarships to study in the United States."[151] Sadly, it is believed that three out every ten Colombian females between the ages of 14 and 21 years who enter the fashion world will become victims of human trafficking.[152] Older women in their thirties are also vulnerable to being trafficked into servitude as maids and nannies.[153] Traffickers also target small villages and convince parents that their children will be better off with "a friend of the family," a tactic that is used by traffickers worldwide.[154] It should be noted, however, that children are also brought into Colombia from other countries to supply the demand of sex tourists coming to Colombia from the United States, Europe, and other South American countries.[155]

The Colombian conflict has caused a spill-over of refugees into neighbouring states. Many refugee families flee Colombia out of fear that their children will be recruited into illegal armed groups, or worse, that they or other family members will

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[148] Inter Press service, Martinez, H., Rights-Colombia: Endless Pain Awaits Victims of Sex Trade, 11 June 2009, available online at <business.highbeam.com/409433/article-1G1-201668762/rightscolombia-endless-pain-awaits-victims-sex-trade> (accessed 09 September 2013). See also The Protection Project, A Human Rights Report on Trafficking in Persons, Especially Women and Children, September 2010, *Colombia Country Report at The Johns Hopkins University School of Advanced International Studies*, available online at <protectionproject.org/wp-content/uploads/2010/09/Colombia.pdf> (accessed 13 June 2013), noting that Colombia has the third-highest number of trafficking victims in Latin America, following the Dominican Republic and Brazil.

[149] "Colombia is a major source country for women and girls subjected to sex trafficking in Latin America, the Caribbean, Western Europe, Asia, and North America, including the United States, as well as a transit and destination country for men, women, and children subjected to forced labor.", U.S. Dpt. of State, Trafficking in Persons Report, 2011, 205, available online at <state.gov/j/tip/rls/tiprpt/2011/index.htm> (accessed 26 June 2013).

[150] El Tiempo, Redacción Justicia, 560 rutas de tráfico de mujeres y niñas en el país tienen redes de trata de personas, 31 March 2009, available online at <eltiempo.com/archivo/documento/CMS-4930107> (accessed 09 September 2013).

[151] Toro Bedoya, J.A., "Reflexiones sobre la Trata de Personas Fenomeno que Afecta el Desarrollo Humano de los Colombianos", *Revista Eleuthera*, vol. 3, December 2009, 190-191.

[152] EFE Newswires, ONU acompanara a modelos en caigan en trata de personas, 3 March 2010, available online at <vanguardia.com/historico/55090-onu-acompanara-a-modelos-en-concurso-para-que-no-caigan-en-trata-de-personas> (accessed 09 September 2013).

[153] Martinez, H., 2009, *supra*, nt. 156. In one case, a woman named Mara, a 40 year-old unemployed mother from Tolima, was offered a job as a domestic worker for an affluent Colombian family in the United States. Upon her arrival, Mara was put to work 19 hours a day, with barely any food to sustain her. Her weight dropped from 58 kilograms to 41 kilograms in just 39 days. After she attempted to report her exploitative situation to the police, her abusers threatened her family in Colombia. Mara was finally able to escape thanks to the help of a neighbor that realised the exploitation to which Mara was subjected.

[154] Toro Bedoya, J.A., 2009, *supra*, nt. 159

[155] Council on Hemispheric Affairs, Vasquez, J. and Bacon, K., "Colombia and Peru Facing Mountainous Path to Eradicating Slavery", *Washington Report on the Hemisphere*, vol. 32, ed. 19 & 20, 16 November 2012, 10, available online at <coha.org/wp-content/uploads/2012/11/WRH-32.19-and-20.pdf> (accessed 09 September 2013).

be maimed or killed by the fighting. A majority of women, or approximately 44 percent of the estimated 135,000 refugees that have crossed the Colombian border, end up in the region bordering northern Ecuador, the main recipient state for Colombian refugees.[156] Most Colombian refugees and asylum seekers travel to Lago Agrio, in the province of Sucumbíos, where they become easy prey for labour and sex traffickers. Sucumbíos is a difficult place. Widespread poverty, the presence of illegal armed groups, organised criminal networks,[157] and many male oil workers and members of the military[158] create conditions conducive for the trafficking of Ecuadorian women and female Colombian refugees into labour servitude and forced prostitution.[159] Although information on human trafficking per se is not readily available, it is estimated that about 70 percent of female registered "sex workers" in the region of Sucumbíos are Colombian and of these, some 50 percent are minors.[160] As members of the Organization of American States, this exploitation places both Colombia and Ecuador in direct violation of the Inter-American Convention on International Traffic in Minors,[161] which among its many measures, calls for ensuring "the protection of minors in consideration of their best interests"[162] and for the "prompt return of minors who are victims of international trafficking to the State of their habitual residence, bearing in mind the best interests of the minors."[163] In addition, victims, mostly between the ages of 14 and 22 years, are sold as 'brides'[164] to individuals who will then sexually exploit them and/or resell them to another trafficker. This constitutes a clear violation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children,[165] which requires punishment for those "offering or delivering children for the purposes of sexual exploitation, transfer

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[156] U.S. Dpt. of State, *Trafficking in Persons Report 2011*, 148, available online at <state.gov/j/tip/rls/tiprpt/2011/index.htm> (accessed 26 June 2013), noting: "Ecuador is a destination country for Colombian, Peruvian, and to a lesser extent, Chinese women and girls subjected to sex trafficking. Indigenous Ecuadorians are vulnerable to forced labor in domestic service. Colombian refugees and migrants are subjected to forced labor in palm oil plantations." See also Velez, A.C.A., *Gender-Based Violence towards Colombian Uprooted Women in the Northern Borderland of Ecuador*, dissertation, Geneva, 2009, 27-28, available online at <graduateinstitute.ch/webdav/site/genre/shared/Genre_docs/2342_TRavauxEtRecherches/Memoire_AndreettiVelez.pdf> (accessed 14 June 2013).

[157] Semana, Cocaína decomisada en Ecuador pertenece a las FARC, 13 October 2009, available online at <semana.com/mundo/articulo/cocaina-decomisada-ecuador-pertenece-farc/108617-3> (accessed 09 September 2013).

[158] Velez, A.C.A., *supra*, nt. 164, 27-28.

[159] The International Organization for Migration (IOM) has signed a series of agreements with the authorities of the Ecuadorian provinces of Sucumbios and Esmeraldas in order to strengthen local capacity to combat human trafficking, mainly in the northern border cities of Lago Agrio and San Lorenzo. *See* Int'l Office on Migration, La IOM Signs Two New Agreements to Strengthen the Fight Against Human Trafficking in Ecuador, 17 June 2011, available online at <iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2011/pbn-listing/iom-signs-two-new-agreements-to-strength.html> (accessed 09 September 2013).

[160] Velez, A.C.A., *supra,* nt. 164, 36-37.

[161] Inter-American Convention on International Traffic in Minors, (hereafter referred as O.A.S.T.S.) No. 79, official Web site of the Organization of American States, <oas.org/juridico/english/treaties/b-57.html> (accessed 28 June 2013). Colombia ratified the Convention on 12 June 2000, and Ecuador ratified on 20 May 2002.

[162] O.A.S.T.S., art. 1(a)

[163] O.A.S.T.S., art. 1(c).

[164] Velez, A.C.A., *supra,* nt. 164, 37.

[165] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Resolution 54/263, Annex II, A/RES/54/263, March 16, 2001, available online at <unicef.org/crc/index_30204.html>. Colombia ratified this on November 11, 2003 and Ecuador ratified on January 30, 2004.

of organs or children for profit or forced labour," which could be either or both Colombian and Ecuadorean actors, as well as punishment "for anyone accepting the child for these activities."[166] Coincidentally, Sucumbíos encompasses most of the 30 crossing points for weapons smuggling, drug trafficking and human trafficking, and establishes the link between the products trafficked and the routes used to transport different types of illicit goods and trafficking victims.

Women also become victims of sexual exploitation by border patrol and immigration police officers who take advantage of their vulnerable situation. The officials force the refugee women to have sexual relations or face deportation, and police officers are also known to detain women in jail for several days where it is generally assumed that the women may be abused.[167] Tragically, despite the abuse to which they are subjected by different groups, women do not see themselves as victims of human rights violations, but rather interpret their situation as a temporary means of survival.[168] Such an attitude only empowers the abusers.

Among the estimated 100,000 Latin Americans trafficked internationally each year, a large number of Colombians are sent to Japan for sexual exploitation,[169] which during the last decade was very slow to address human trafficking as a problem there.[170] In what is considered a laissez-faire attitude toward the sex trade, prostitution is referred to as "compensated dating."[171] Even married Japanese women are complacent, accepting that their husbands may engage in prostitution as long as they do not leave their wives for foreign women. In fact, Japanese women have the attitude that these foreign women are not even "human beings like them,"[172] an attitude that makes it quite difficult to change societal perceptions of the problem.

IV. Colombia's Obligations to Protect Its Citizens

IV.1. Legal Framework and Meeting International Obligations

Colombia's internal conflict presents a challenge for the government. In order to confront illegal groups and effectively achieve peace and security for all citizens and ensure their full enjoyment of their rights, the GOC needs to apply effectively all provisions of both international human rights and economic, civil and cultural rights treaties. Such implementation needs to be part of the State's policy. This situation poses an unequivocal challenge for the Colombian State and requires the provision of both human and economic resources for effectively confronting these illegal groups [173]

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[166] See explanation of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography on the UNICEF webpage, available at <unicef.org/crc/index_30204.html> (accessed June 27, 2012).

[167] Velez, A.C.A., *supra,* nt. 164, 39-40.

[168] *Ibid*.

[169] Seelke, C.R., REPORT, *Trafficking in persons in Latin America and the Caribbean*, Congressional Research Service Report for Congress, July 15 2013, available online at <fas.org/sgp/crs/row/RL33200.pdf> (accessed 09 September 2013).

[170] BBC, Monitoring International, Japanese Police Uncovers 83 Cases of Foreign Sex Slaves in 2003, 25 March 2004, available online at <accessmylibrary.com/coms2/summary_0286-20805640_ITM> (accessed 09 September 2013).

[171] *Ibid*.

[172] BBC, Monitoring International, *Japanese Police Uncovers 83 Cases of Foreign Sex Slaves in 2003*, BBC Monitoring Int'l Rep. (March 25, 2004), quoting Yoko Yoshida, a lawyer for the Japan Network Against Human Trafficking in Persons (not available online).

[173] United Nations Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties in Accordance with Article 9 of the Convention, Fourteenth Periodic Report: State

and fighting human trafficking, with a view to achieving peace and giving all citizens' full enjoyment of their rights. As evidence of the GOC's commitment to human rights, 55 percent of the resources allocated to _____ between 2002 and 2006 were dedicated to creating conditions of peace and generating development in depressed areas and among victims of violence; on the protection and promotion of human rights and international humanitarian law; on reforming the criminal justice system; and on strengthening the executing agencies pursuing those objectives.

Colombia has plenty of laws and the Constitutional Court has done a yeoman's job of interpreting the laws. Overall, Colombia's legal framework is comprehensive. Its domestic legislation and jurisprudence prohibits human rights abuses and international crimes, including human trafficking. It incorporates international obligations into domestic legislation and promulgates legislation for the rights of the victims.[174] It implements policies addressing the rights and needs of displaced people. Where the State falls short is in the lack of coherence between law and policies such that the State has failed to address stigmatisation and discrimination of displaced people, and has not alleviated their suffering nor created a safer and secure environment for them wherein they may exercise their rights. Even though the Colombian legal framework "takes into account the unique needs of displaced women and girls, and assigns government actors specific obligations to prevent gender-based violence against displaced women," poor follow-through of the laws prevents displaced people, especially women and children, from overcoming barriers to seeking justice and needed social services.[175]

As a party to many international conventions, the GOC has a duty to abide by its commitments to extend the protections afforded under international law and international humanitarian law to all citizens. International human rights treaties and international humanitarian norms duly ratified by Colombia become part of its Constitution under the doctrine of "Constitutional Block."[176] Under the Constitutional

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Parties Due in 2008, Addendum: Colombia 7 Sec. F: Armed Violence, para. 33, 29 February 2008, International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/COL/14 (on file with the author).

[174] Ley 1257 de 2008, *Diario Oficial,* No. 47.193, 4 December 2008, available online at <www.secretariasenado.gov.co/senado/basedoc/ley/2008/ley_1257_2008.html> (accessed 3 July 2012).

[175] Human Rights Watch, Rights Out of Reach. Obstacles to Health, Justice, and Protection for Displaced, Victims of Gender-Based Violence in Colombia 30, 2012, available online at <peacewomen.org/assets/file/colombia1112forupload.pdf> (accessed 23 June 2013).

[176] The Constitutional Block doctrine is a recent jurisprudential development that emerged from French law. The Constitutional Court used it for the first time in Sentencia No. C-225/95, when it determined that international humanitarian laws are ius cogens norms of obligatory character for all illegal armed groups and State employees, especially members of the armed forces. The Court also found that international humanitarian law is part of human rights and at the same time, complement each other; both "are ius cogens norms that above all, seek to protect the dignity of human persons," the Court wrote.

The Court then had to determine how to harmonise two apparently contradictory constitutional articles: art. 4, which establishes the supremacy of the Constitution over treaties; and art. 93, which gives priority and supremacy in the domestic order to some contents of human rights treaties. Using the Constitutional Block doctrine, the Court decided that under art. 93 of the Colombian Constitution, international humanitarian law norms have constitutional rank and therefore prevalence and supremacy in the internal order.

The Court then needed to decide what hierarchical position those norms occupied in the Colombian Constitution, and determined that "human rights treaties and international humanitarian law treaties form a "constitutional block" with the rest of the Constitution. In this manner the principle of constitutional supremacy as a norm of norms is harmonised, with prevalence of treaties ratified by Colombia, which recognised human rights and those rights are of the kind that cannot be suspended

Block doctrine, several principles, treaties and rules may form part of the Colombian Constitution notwithstanding them being explicitly mentioned in the charter. Those treaties have constitutional rank and primacy in domestic law, and no national law or provision may conflict with them.

The Constitutional Block has expanded over the years[177] to include international human rights treaties,[178] humanitarian law, treaties ratified by Colombia that

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during state emergency." See Sentencia No. C-225/95, available online at <corteconstitucional.gov.co/relatoria/1995/c-225-95.htm> (accessed 12 June 2013). The Court has since used this doctrine in criminal matters related to obedience of the military, in Sentencia No. C-225/95 and Sentencia No. C-578/95, respectively, and the rights of the victims of crime, in Sentencia No. C-282/02, Sentencia No. C-04/03 and Sentencia No. T-249/03. See Uprimny , R, Bloque de constitucionalidad, derechos humanos y nuevo procedimiento penal, unpublished paper for the *American University Human Rights Academy*, available online at <wcl.american.edu/humright/hracademy/documents/Clase1-Lectura3BloquedeConstitucionalidad.pdf> (accessed 3 July 2013).

[177] Precedente, Olaya, M.A., *El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional colombiana*, 2004, vol. 80, 86-94, available online at <bibliotecadigital.icesi.edu.co/biblioteca_digital/bitstream/item/949/1/Bloque_constitucionalidad.pdf> (accessed 3 July 2013).

[178] Colombia has "signed and ratified most of the international covenants, protocols and conventions related to human rights." These include:

Regional:

- Acceptance of the competence of the Inter-American Court of Human Rights, June 21, 1985
- American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673, ratified Jan. 28, 1973
- Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, ratified Oct. 3, 1996
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 16, 1999, O.A.S.T.S. No. 69, 28 I.L.M. 1641, ratified Oct. 22, 1997
- Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, ratified Dec. 2, 1998

International:

- 1949 Geneva Conventions (ratified 1961), Additional Protocol I of 1977 (ratified 1993), and Additional Protocol II (ratified 1995);
- International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966), ratified Oct. 29, 1969;
- International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) C, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966), ratified Oct. 29, 1969;
- First Optional Protocol to the International Covenant on Civil and Political Rights, ratified Oct. 29, 1969
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, 1249 *UNTS* 13, ratified Jan. 19, 1982;
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP), December 10, 1999, 2131 *UNTS* 83, ratified Jan. 23, 2007;
- Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. res. 3318 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 146, U.N. Doc. A/9631 (1974), ratified Dec. 14, 1974
- Declaration on the Elimination of Violence against Women. U.N. Doc. A/48/49 (1993), ratified Dec. 20, 1993;
- Convention on the Rights of the Child (CRC), U.N. Doc. A/48/49 (1993), ratified Jan. 28, 1991;
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OPSC), G.A. Res., 54/263, Annex II, A/RES/54/263, (March 16, 2001), ratified Nov. 11, 2003;

recognised intangible rights, and jurisprudence developed by international tribunals in relation to those international standards.[179]

Two conditions must be fulfilled before international human rights treaties may be incorporated into the Colombian Constitution: Treaties must have been ratified by Colombia, and those rights cannot be suspended during a state of emergency.[180] All rights and duties enshrined in the Constitution must be interpreted in conformity with the provisions of those international human rights treaties.[181] According the Constitutional Court, International humanitarian law is also part of the "constitutional block."[182] Moreover, innominate rights are also included in the Constitution. "The declaration of rights and guarantees contained in the Constitution and in international agreements in force, should not be understood as a denial of others rights inherent to the human person which are not expressly referred to in them."[183]

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OPAC), G.A. Res. 54/263, Doc. A/54/49 (May 25, 2000), ratified May 25, 2005;
- ILO Convention concerning Minimum Wage for Admission to Employment, art. 3, June 26, 1973, 1015 *UNTS* 297 (1973), ratified Feb. 2, 2001;
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 3(a), June 17, 1999, 38 *I.L.M.* 1207, ratified Jan. 28, 2005;
- Abolition of Forced Labor Convention, 1957 (No. 105), June 25, 1957, 320 U.N.T.S. 291, ratified June 7, 1963;
- Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children supplements the Convention Against Transnational Organized Crime (CATOC), supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, A/RES/55/25 (Nov. 15, 2000) (Colombia has ratified but date is unknown)
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 UNTS 240, ratified June 18, 1998;

Curiously, Colombia has NOT signed or ratified the following important international conventions:

- Slavery Convention, Protocol amending the Slavery Convention signed at Geneva on 25 September 1926, Sept. 25, 1926, 212 *U.N.T.S.* 17;
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Forced Labour Convention, 1930 (No. 29), Sept. 27, 1956, 266 *UNTS* 3;
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317 (IV), U.N. Doc. A/RES/317(IV) (Dec. 2, 1949)

[179] Court jurisprudence has redefined the block in sources and content. The following are now part of the Constitutional Block: *in stricto sensu:* (i) the Preamble, (ii) constitutional norms, (iii) boundary treaties ratified by Colombia, (iv) humanitarian law treaties, (v) treaties that recognised intangible rights ratified by Colombia, (vi) articles of human rights treaties ratified by Colombia, when they deal with rights recognised by the Constitution, and (vi), at least as a relevant criterion of interpretation, to some extent, doctrine developed by international tribunals in relation to those international standards. Uprimny, R., *supra*, nt. 184, noting: "Obviously, this generic list specifically includes ILO conventions and the doctrine drawn up by the supervisory bodies of the international organization. And on the other hand, to integrate the block *in latu sensu*, one would need to add to the previous guidelines (i) statutory laws and (ii) organic laws, the relevant, with the proviso that some court rulings exclude some statutory laws of their integration to the constitutional block i*n latu sensu*."

[180] Art. 93 C.C.: "International treaties and agreements ratified by the Congress, which recognize human rights and which prohibit their limitation in exceptional circumstances, take prevalence in internal order. The rights and responsibilities consecrated in this charter will be interpreted in conformity with international human rights treaties ratified by Colombia."

[181] Sentencia No. C-358/1997 (determining that those rights become part of a "constitutional block).

[182] Sentencia No. C-225/1995 decided the constitutionality of Law 171 of 1994, which approved Protocol II Additional to the Geneva Conventions of 1949.

[183] Art. 94 C.C..

In sum, four provisions play a crucial role in the Constitutional Block:

1. Article 53, establishes that once ratified, international labour conventions become part of the domestic law.
2. Article 93, establishes that certain international standards of human rights "prevailing in the internal order" and "the rights and duties enshrined in this Charter shall be interpreted in accordance with the international treaties on human rights ratified by Colombia."
3. Article 94, incorporates the unnamed rights clause and states that "the enunciation of rights and guarantees contained in the Constitution and the international agreements in force should not be understood as a denial of others which, being inherent in the human person, are not expressly referred to in them.
4. Article 214, which regulates states of emergency, indicates that even in times of crisis, human rights and fundamental freedoms cannot be suspended and that "in all cases the rules of international humanitarian law will be respected."[184]

Therefore, the following treaties duly ratified by Colombia, international human rights instruments, and customary law form part of the constitutional legal regulations under the Constitutional Block doctrine:

1977 Additional Protocol II

a. Article 4(2) of the 1977, on rape and sexual violence[185]
b. Article 4(2)(f), on slavery and slave trade[186]

Customary International Law

1. Forced labour. The Constitutional Court, considering the "development of customary international humanitarian law applicable in internal armed conflicts, notes that fundamental guarantees stemming from the principle of humanity, some of which have attained *ius cogens* status … [include] the prohibition of uncompensated or abusive forced labor. [187]

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[184] Uprimny, R., *supra*, nt. 184.

[185] In Sentencia No. C-291/07, the Constitutional Court held that taking into account the development of customary international humanitarian law applicable in internal armed conflicts, fundamental guarantees stemming from the principle of humanity, some of which have attained ius cogens status, include the prohibition of gender violence, sexual violence, enforced prostitution and indecent assault. In addition, art. 139 and art. 141 of Colombia's Penal Code (2000) imposes a criminal sanction on anyone who, during an armed conflict, carries out or orders the "carrying out of forced sexual acts on protected persons" and "forced prostitution or sexual slavery.", available online at <icrc.org/customary-ihl/eng/docs/v2_cou_co_rule93> (accessed 1 July 2013).

[186] Also in Sentencia No. C-291/07, the Constitutional Court stated that the essential principles of international humanitarian law have acquired ius cogens status, based on the fact that the international community as a whole has recognised their peremptory and imperative nature in the same way it has recognised this for other cardinal provisions such as … the prohibition of slavery. Art. 17 of the Colombian Constitution prohibits slavery or any form of forced labour, available online at <confinder.richmond.edu/admin/docs/colombia_const2.pdf> (accessed 3 July 2013).

[187] The Constitutional Court, in Sentencia No. C-291/07, noted that art. 150 of the Colombian Penal Code (2000) imposes a criminal sanction on anyone who, during an armed conflict, compels or orders the compelling of a protected person to serve in the armed forces of the enemy.

2. Respect for Family life. In Constitutional Court Case No. C-291/07, the Plenary Chamber of Colombia's Constitutional Court stated:
   --Taking into account … the development of customary international humanitarian law applicable in internal armed conflicts, the Constitutional Court notes that the fundamental guarantees stemming from the principle of humanity, some of which have attained ius cogens status, … [include] the obligation to respect family life[188]

3. Forced Displacement.
   a. In 2004, the Constitutional Court found that Colombia's response to internal displacement constituted an "unconstitutional state of affairs" and recognised that certain minimum rights of the internally displaced population exist that must be satisfied by the authorities to ensure a life with dignity. The minimum protection which must be timely and effectively guaranteed implies (i) that in no case may the essential core of constitutionally guaranteed fundamental rights of displaced persons be threaten and (ii) the satisfaction of, at a minimum, the rights to life; to dignity; to physical, psychological and moral integrity; to the family unit; the provision of basic and/or urgently needed health services; protection from discrimination on the basis of displacement; and the right to education up to fifteen years in the case of displaced children. According to the Court, the national and territorial authorities must adopt and implement measures to correct and reverse situations where any of these minimum protections have not been realised. The Court stated that one of the problems in the design and execution of "State policy regarding comprehensive care of the displaced population is the lack of a specific approach to these population groups that would make it possible to identify and address their particular and pressing needs deriving from their specific situation within that of internal displacement." [189]
   b. In its third periodic report to the Committee on the Rights of the Child, Colombia acknowledged that the problem of people displaced by the violence worsened as a result of paramilitary and guerrilla activity, but also, as a result of State forces clashing with these illegal groups. This phenomenon is one of the most serious human rights violations.[190]
   c. In 2005, analysing the constitutionality of the 1977 Additional Protocol II, the Constitutional Court found that "in relation to the

[188] According to art. 2(4) of Colombia's Law on Internally Displaced Persons (1997), the family of forcibly displaced persons must benefit from the right to family reunification. This right is also addressed by the Constitutional Court in Sentencia No. C-291/07.

[189] According to the Constitutional Court in Sentencia T-025/2004, social spending on marginalised populations is regarded as priority expenditure. There is a State policy of attention to the displaced population, articulated in a law of the Nation, a detailed regulatory framework, and a quantification of the budget effort required to comply with constitutional and legal mandates. However, the authorities responsible for ensuring the adequacy of these resources have omitted repeatedly to adopt the remedies needed to ensure that the level of protection defined by the Legislature and developed by the Executive, is effectively achieved.

[190] International Committee for the Red Cross, Colombia: Practice Relating to Rule 129, The Act of Displacement, available online at <icrc.org/customary-ihl/eng/docs/v2_cou_co_rule129> (accessed 1 July 2013).

> rules on the protection of civilians and persons *hors de combat*: . . . more than half a million Colombians have been displaced from their homes as a result of the violence. … The principal cause of displacement involves violations of international humanitarian law associated with the armed conflict."[191]

Protection of women and children is addressed by several articles of the Geneva Conventions. Among the articles are the duty of state parties to treat women with due consideration on the basis of their sex,[192] and the duty to protect women against rape, enforced prostitution, and other forms of indecent assault.[193] Colombia must also meet its obligations under Additional Protocol II to ensure that in its internal armed conflict, all persons, including women and children, who do not, or who have ceased, taking direct part in hostilities, are entitled to respect for their person and honour and must be treated humanely.[194] Under the Rome Statutes, which apply to both international and internal armed conflicts, Colombia has a duty to prosecute as war criminals actors involved in outrageous acts of sexual violence and particularly humiliating and degrading treatment.[195]

The observations of the United National High Commission on Human Rights, presented in April 2013, read like a laundry list of issues that have not been addressed sufficiently by the GOC. These include conforming to basic international human rights requirements such as gathering accurate data on human trafficking of children. For example, in 2011 the GOC reported only 483 instances of children being coerced into sex and forced labour and into the drug trade by illegal armed groups, a number that would suggest to any reasonable person an alarming level of under-reporting.[196] In fact, the international community has taken the GOC to task for careless reporting and for failing to identify and investigate trafficking victims "due to the lack of effort and resources in inspecting the informal and illicit sectors of the market."[197]

The GOC is obliged to conform to international norms regarding human rights, including recognising that sexual violence, associated with all forms of human trafficking, is a crime under international law, and specifically under the Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children,[198] as well as under the Rome Statute of the International Criminal Court, which could become a venue for the prosecution of human rights abusers, should the Colombian government prove unwilling or unable to do so.[199] The state of internal

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[191] Sentencia No. C-225/95, revising Additional Protocol II and its implementing law, Law 171 of 1994 (*Ley 171 de 1994*, *Diario Oficial*, No. 41.640, 20 December 1994).

[192] Geneva Convention I, art. 12(4), and Geneva Convention II, art. 12(4).

[193] Geneva Convention IV, art. 27, and Additional Protocol I, art. 76.

[194] Additional Protocol II, art. 4(1).

[195] ICC Statute, arts. 8(2)(b)(xxi); (xxii); 8(2)(c)(ii); 8(2)(e)(vi).

[196] Vasquez, J., & Bacon, K., 2012, *supra*, nt. 163

[197] *Ibid*.

[198] The Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children supplements the Convention Against Transnational Organized Crime (CATOC), G.A. Resolution 55/25, A/RES/55/25 (Nov. 15, 2000), and the U.N. Convention Against Transnational Organized Crime and the Protocols Thereto, Annex I, art. 2(a), Nov. 15, 2000, 2225 U.N.T.S. 209. Colombia has been a party to both since ratifying them on August 4, 2004.

[199] Rome Statute of the International Criminal Court, 1998, 2187 UNTS, art. 1, 90 available online at <treaties.un.org/doc/publication/UNTS/Volume%202187/v2187.pdf>. See also Wallström, M., "2012 Special Issue: Gender and Post-Conflict Transitional Justice: Introduction: Making the Link between Transitional Justice and Conflict-related Sexual Violence", *Wm. & Mary J. Women & L.*, vol. 19, Iss. 1, 2012, 3. Colombia signed the Rome Statute on December 12, 2000 and ratified it on August 5, 2002.

conflict in Colombia compelled the international community to make several recommendations to the GOC through a dialogue between Colombia and 76 member states., issued through the UNHCR on April 23, 2013 [200] The pertinent recommendations include:

- To reinforce efforts to end impunity for human rights violations;
- To develop at the regional level State institutions tasked with preserving historic memory with of the armed conflict;
- To strengthen measures to rehabilitate child victims of the armed conflict and to investigate all cases of illegal recruitment of children into armed groups;
- To increase efforts to address violence against women, including access to justice, medical care for victims, social reintegration and combatting impunity for such acts;
- To step up efforts to combat human trafficking vis-à-vis the new National Strategy to Combat Trafficking in Persons 2013-2018;
- To ensure appropriate protection of human rights defenders operating in the country and to increase efforts to investigate and prosecute those responsible for threats or violence against human rights defenders;
- To introduce stronger measures to protect indigenous peoples and Afro-Colombians from attacks by armed groups; to implement the law on Victims and Land Restitution in a just manner;
- To intensify efforts aimed at providing access to free and compulsory primary education to all children;
- Ratification of human rights instruments.

These calls for action fall on the heels of the UNHCR's January 2013 report on Colombia which urged the GOC to take immediate and decisive action to shore up efforts undertaken to address grave human rights concerns, among them displacement, violence against women and children, and human trafficking.

The GOC is also a party to several international instruments concerned with assisting the victims of internal armed conflict and suppressing human trafficking. For example, Colombia is obliged by the UN Security Council's Resolution 1325 of October 31, 2000 [201] addressing the UN's concern that women and children are particularly targeted for exploitation and abuse, to respect the rights and protection of women and girls during and after conflicts. Despite such obligations, a great number of Colombian women and children, especially those who have been displaced, continue to be subjected to servitude and sexual exploitation and violence,[202] while their precarious circumstances predispose them to sexual violence.[203] Displacement

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[200] The 76 nations included 28 HRC members and 38 observers; UNHCR, Universal Periodic Review – Media Brief, available online at <ohchr.org/EN/HRBodies/UPR/Pages/Highlights23April2013pm.aspx> (accessed 23 April 2013).

[201] SC Resolution 1325/2000, 31 October 2000.

[202] Céspedes-Báez, Lina María, "Les vamos a dar por donde más les duele. La violencia sexual en contra de las mujeres como estrategia de despojo de tierras en el conflicto armado colombiano", *Revista Estudios Socio-Jurídicos*, vol. 12, ed. 2, 2010, 273-304.

[203] This is a problem that has persisted since at least 2003 when the GOC's Ministry for Social Protection reported that "36 percent of internally displaced women had been forced by men into

exacerbates exploitation and abuse and remains a fundamental cause of human trafficking in Colombia.

To meet international obligations imposed on Colombia by Additional Protocol II[204] and bring some form of security to the national territory, in 2011 the GOC under President Santos enacted a series of laws and decrees known collectively as the Victims and Land Restitution Law in an attempt to address the status of some four million Colombians displaced by the internal armed conflict.[205] The Victims and Land Restitution Law is particularly significant because it recognised the true nature of Colombia's internal armed conflict. This was an important departure from Uribe, who never acknowledged that a state of internal armed conflict existed in Colombia. Rather, Uribe used other "labels" to describe the violence in Colombia. For instance, the GOC was not fighting an internal armed conflict against organised military combatants, but was instead conducting a series of internal government "operations" against illegal armed groups, and when the GOC initiated a democratic security policy plan as part of Plan Colombia following the 9/11 terrorist attacks in the United States, Uribe described what the government was doing as fighting terrorism, not fighting an internal armed conflict.[206]

The principle focus of the Victims and Land Restitution Law was to award damages and to restore millions of hectares of stolen land to rightful owners and to the relatives of individuals killed in the conflict.[207] It doesn't, however, fully address the economic, social, and cultural rights of the victims because this law is only concerned with land restitution, financial compensation, and land rights which emerged during the conflict. It does not address the root of the problem per se by looking at other related rights. Land ownership is something which falls under the rubric of economic, social and cultural rights—the point being that the law should have been crafted to address economic, social and cultural rights as a whole, and not just as a consequence of the conflict.

The land restitution plans met with strong resistance from the illegal armed groups responsible for stealing territory, especially paramilitary groups with close ties to the Uribe administration and the Internal Displacement Monitoring Centre subsequently reported that twenty-one land restitution leaders were assassinated in 2011.[208]

Even with a Victims and Land Restitution Law in force, the status of women as claimants is problematic in Colombia because women have not historically been title

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sexual relations." UN OCHA/IRIN, *The Shame of War - Sexual Violence against Women and Girls in Conflict, 2007*, available online at <iiav.nl/epublications/2007/shameofwar.pdf> (accessed 24 June 2013). See also Meertens, D.,, "¿Justicia desigual? cGénero y derechos de las víctimas en Colombia" in: Meertens, D., *La tierra, el despojo y la reparación: justicia de género para las mujeres víctimas en Colombia*, 2009, Bogotá.

[204] Additional Protocol II, art 17. Forced displacement of civilian populations within a country and across a border in non-international armed conflicts is prohibited unless the security of the civilians or imperative military reasons so demand.

[205] The legislative and executive acts comprising the Victims and Land Restitution Law are: Ley 1448 de 2011, *Diario Oficial* 48096 of 10 June 2011; Decreto 4800 de 2011, *Diario Oficial* 48280 of 20 December 2011; and Decreto 4829 de 2011, *Diario Oficial* 48280 of 20 December 2011, respectively.

[206] The Uribe administration also signed the 1996 International Convention for the Suppression of the Financing of Terrorism on October 20, 2001.

[207] According to a country report provided to the UN High Commissioner on Human Rights, more than 150,000 victims received some form of compensation in 2012. *See* State News Service, *Council Discusses Country Reports under Agenda Items on Annual Report of the High Commissioner and on Technical Assistance*, 20 March 2013.

[208] Internal Displacement Monitoring Centre, Internal Displacement Global Overview 2011: People Internally Displaced by Conflict and Violence 29, April 2012, available online at <internal-displacement.org/publications/global-overview-2011> (accessed 10 September 2013).

holders of property. Particularly in rural areas, property records tend to be poorly recorded, ambiguous, or missing altogether.[209] If the land restitution provisions of the Victims and Land Restitution Law fall short due to problems with land titles and make it difficult for men to make their claims, then restitution almost certainly does not reach displaced women and children that are on their own. The result is that forced displacement has a disproportionately greater impact on women than on displaced men, and without the benefit of property rights, displaced women are left without legal standing, without the right to agency, and without the ability to organise and participate in their own advocacy. Moreover, displaced women have greater difficulty finding work than displaced men, which further exposes them to predatory crimes and sexual violence.[210] Homeless, disaffected, and disenfranchised, they become easy targets for human traffickers.

The UN High Commission has expressed significant concern that the impact of the Victims and Land Restitution Law will be tempered if there is not a concerted effort to change the "attitudes and sensitivities" of State actors and some victims who have misinterpreted the Law as being one of providing assistance to victims to a law that "becomes a rights-based programme of empowerment in practice."[211]

The bureaucracy created to deal with victim's claims, the Unit for Assistance and Comprehensive Reparations for Victims (UARIV), has been slow to handle complaints and process claims, and mistakes in the manner in which victims testimonies are taken and recorded impedes the delivery of justice.[212] There is also concern that "violations other than displacement, such as rape or enforced disappearance and those violations committed by post-demobilization groups, will not be taken into account in practice."[213]

The GOC has a duty, according to the UNHCR, to ensure that restitution and reparations to victims are not only are not only in the form economic compensation, but also account for the need of victims to rebuild their lives in a dignified manner and to restore the "social fabric of the affected communities."[214] At the same time, perpetrators of the armed conflict must face justice for acts that constitute human rights violations. When a State is unable or unwilling to meet these obligations to the civilian populations, the international community may convene ad hoc tribunals such as have been created for the former Yugoslavia and Rwanda. One international tribunal was recently convened in Kosovo to try a group of doctors involved in an elaborate organ trafficking ring based in the capital of Pristina.[215] Prosecutors, headed by a Canadian, tried the case before a panel of judges from the European Union Rule

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[209] *Supra* nt. 202.

[210] Note 61, Global Overview 2011: People Internally Displaced by Conflict and Violence 57, Internal Displacement Monitoring Centre (April 2012).

[211] UNHCR, *Annual Report of the UNHCR on the situation of human rights in Colombia* 5, 7 January 2013, available online at <ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add3_English.pdf> (accessed 14 November 2013).

[212] Note 64, *Ann. Rep. of the UNHCR on the situation of human rights in Colombia* 6, A/HRC/22/17/Add.3 (Jan. 7, 2013), available online at <ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add3_English.pdf> (accessed 14 November 2013).

[213] *Ibid.*

[214] *Ibid.*

[215] The New Yorker News Desk, Schmidle, N., *An Organ-Trafficking Conviction in Kosovo*, 29 April 2013, available online at <newyorker.com/online/blogs/newsdesk/2013/04/an-organ-trafficking-conviction-in-kosovo.html>, and NY Times, Bilefsky, D., *5 Are Convicted in Kosovo Organ Trafficking*, 29 April 2013, Available online at <nytimes.com/2013/04/30/world/europe/in-kosovo-5-are-convicted-in-organ-trafficking.html> (both accessed 10 September 2013).

of Law Mission in Kosovo sitting with a Kosovar judge, and won several convictions for human trafficking and organised crime. This is an important court proceeding that could become a model for international cooperation with the GOC in bringing human traffickers to account.

IV.2. Legislation

The Colombian government has enacted various domestic laws following a broader international legal framework for the protection of refugees to address the displacement crisis. According to Article 93 of the Colombian Constitution, rights included in the Constitution shall be interpreted in accordance with international human rights treaties ratified by Colombia; therefore, international treaties ratified by Colombia have constitutional rank within the Colombian system.[216] While a recitation of the specific laws is unnecessary, the primary enactments are Law 387 of 1997[217] and Decree 2569 of 2000,[218] and Decree 4503 of 2009,[219] which established the procedure and rules for determining refugee status under an Advisory Commission. Together these laws consists of three different phases for reparation and restitution: *prevention and protection*, *urgent humanitarian action* (by providing immediate aid during the first moments of refugee's arrivals, during which often the first cases of human trafficking take place), and *socioeconomic stabilization*.[220]

This legal framework was developed in the context of existing complex legal provisions intended to protect women from sexual violence and exploitation. Other legislation that embraces international law include Law 599 of 2000[221] which protects women as a group, Law 800 of 2003[222] which ratified the UN Convention against Transnational Organized Crime and the Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and Law 985 of 2005,[223] which incorporated an article into the Criminal Code pertaining to the trafficking of persons both within and beyond Colombian territory.[224]

Despite such efforts to conform to international law and apply reforms in the criminal code, many victims of human trafficking are still unable to receive adequate protection. One of the things that need to be included in nations in conflict to be able to protect vulnerable groups from human trafficking is to develop a transitional justice framework that is both holistic and comprehensive, and one that provides for the protection of all human rights, including the economic, social, and cultural rights. Victims of human trafficking, especially in conflict situations, are often the vulnerable groups, the ones that have traditionally been discriminated against, the ones that have

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[216] See Colombian Constitution, art. 93.

[217] Ley de 387 de 1997, *Diario Oficial* No. 43.091, of 24 July 1997.

[218] Decreto 2569 de 2000, *Diario Oficial* No. 44263, of 19 December 2000.

[219] Decreto 4503 de 2009, *Diario Oficial* No. 47538, of 19 November 2009.

[220] Morales Martinez, J.D., and Fandino Martinez, Y.M., "'Y Dios me hizo mujer': Desplazamiento forzado y vulnerabilidad de género", *Revista de Estudos e Pesquisas sobre as Americas,* Brasília, Vol. 2, N. 1 December 2008, available online at <seer.bce.unb.br/index.php/repam/article/view/1466/1099> (accessed 10 September 2013).

[221] Ley 599 de 2000, *Diario Oficial* No. 44.097, of 24 July 2000.

[222] Ley 800 de 2003, *Diario Oficial* No. 45.131, of 18 March 2003.

[223] Ley 985 de 2005, *Diario Oficial* No. 46.015, of 29 August 2005.

[224] As defined in Ley 985 de 2005, "exploitation means to obtain financial gain or other benefit for oneself or for another person, through the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or similar practices to slavery, servitude, exploitation of begging, servile marriage, organ removal, sex tourism and other forms of exploitation." The law also recognises that the consent of the victim to any form of exploitation "shall not constitute grounds for exemption to criminal responsibility."

been traditionally stigmatised, and the ones that have been excluded from any state policy that will benefit them.

At this time in Colombia, a framework of transitional justice is elusive, particularly as impunity of perpetrators is prevalent, and the government seems indifferent to addressing violations of the constitutional and international legal rights of women. It is worth noting that in 2009, the Social Platform of Migration (HERMES) and members of the Colombian Congress initiated a project meant to address the refugee crisis due to the armed conflict, including the prevention of related human trafficking. However, the government objected to the effort and the provisions to combat human trafficking were dismantled during the legislative process.[225]

IV.3. Constitutional Court Decisions Addressing Displacement

The inability of the Colombian state to significantly improve the conditions of refugees has led the Colombian Constitutional Court to take action where the legislature has fallen short. In 2004, the Court issued a *tutela*,[226] T-025/2004,[227] which determined that forced displacement constitutes "*an unconstitutional state of affairs.*" The findings of the ruling were essentially as follows:

- There is massive and generalized violation of several constitutional rights that affect a significant number of persons;
- There is prolonged omission by the authorities in the exercise of their responsibilities to guarantee such rights;
- The adoption of unconstitutional practices has occurred as part of a process to guarantee the violated right;
- There has been a failure to issue necessary legislative, administrative or budgetary means to prevent the violation of these rights.[228]

Additionally, in T-025/2004, the Court recognised that refugees face increased vulnerability to the violation of their rights, thus, meriting special attention. The court

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[225] For a thorough compilation of article son human trafficking in Colombia, see generally the collection of articles in "Diálogos Migrantes. Migración y Tráfico Humano", *Rev. del Observatorio de Migraciones*, No. 6 2011, available online at <observatoriodemigraciones.org/apc-aa-files/69e3909999fd8ec8018dd3f5d7dbdc5d/DMigrantes_No.6.pdf> (accessed 10 September 2013).

[226] The *tutela* action is an important legal mechanism through which an individual requests immediate protection of his or her constitutional rights when a violation occurs. The tutela may be used in three situations: when constitutional rights are violated; when constitutional rights are seriously threatened; or when no other judicial mechanisms are available. See Rodríguez, C.A. et al., "Justice and Society in Colombia: A Sociolegal Análisis of Colombian Courts", *in:* Friedman, L.M. and Pérez-Perdomo, R., eds., *Legal Culture in the Age of Globalization*, Stanford: *SUP* 2003, 178. See also Constitución Política De La República de Colombia, art. 86 ("Toda persona tendrá acción de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por sí misma o por quien actué a su nombre, la protección inmediata de sus derechos constitucionales fundamentales, cuando quiera que éstos resulten vulnerados o amenazados por la acción o la omisión de cualquier autoridad pública. La protección consistirá en una orden para que aquel respecto de quien se solicita la tutela, actúe o se abstenga de hacerlo. El fallo, que será de inmediato cumplimiento, podrá impugnarse ante el juez competente y, en todo caso, este lo remitirá a la Corte Constitucional para su eventual revisión.")

[227] Sentencia No. T-025/04, the English translation of the decision is available online at <brookings.edu/~/media/Projects/idp/Colombia_T%20025_2004.PDF> (accessed 21 August 2013).

[228] Morales Martinez , J.D. and Fandino Martinez, Y.F., "Y Dios me hizo mujer. Desplazamiento forzado y vulnerabilidad de género", *2:1 Revista de Estudos e Pesquisas sobre as Américas*, 6(8) 2008.

observed that "children, pregnant women, mothers with small children, female heads of the family, the disabled, and the elderly have a right to the protection and required assistance, and treatment that takes into account special needs."[229]

The Constitutional Court then issued an additional finding, called an *auto*, which essentially is an interpretation of law.[230] Auto 092 de 2008 attempted to articulate the vague mandate of T-025 de 2004, and contained sweeping mandates.[231] Most significantly, Auto 092 (a Constitutional Court Order Protecting Displaced Women and Girls) acknowledged the "disproportional impact, in both quantitative and qualitative terms, of the armed conflict and forced displacement on Colombian women,"[232] specifically recognised the unique needs of displaced women and girls, and ordered the government to take comprehensive measures to protect the fundamental rights of internally displaced women and to prevent the disproportionate gender impact and sexual violence against women in conflict, during and following displacement.[233] The Court found that 'sexual violence against women is a habitual practice that extends, systematically and invisibly, throughout the context of the armed conflict in Colombia'. Further, it emphasised that the Political Constitution and the international obligations the Colombian State has in areas of human rights and international humanitarian law mandate that women refugees have the "character of protected subjects", guaranteed by a reinforced constitutional protection.[234]

With Auto 092, the Constitutional Court identified eighteen gender dimensions of forced displacement in the context of armed conflict in Colombia. These eighteen dimensions include the heightened risks of displaced women to be victims of structural patterns of violence and gender discrimination such as sexual violence,[235] including forced prostitution, sexual slavery and human trafficking for sexual exploitation. In addition, the Court found that the GOC's response to the refugee crisis had been insufficient to meet its constitutional and international duties, and that the existing elements of the public policy attending to forced displacement contained critical gaps

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[229] *Idem*.

[230] "An Auto is a decision that the Court issues on its own accord, exercising its inherent administrative powers or its jurisdiction over an open case." *See* Landau, D., "Political Institutions and Judicial Role in Comparative Constitutional Law"*,* 51 *Harv. Int'l L.J.* 319, (360) 2010, nt. 196.

[231] Corte Constitucional, La Sala Segunda de Revisión, Auto 092 of 23 August 2008, (Colombia), available online at <www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/2EC27FC9762FF0A8C125796000443284/ $file/Auto+092+2008,+women.pdf> (accessed 22 August 2013).

[232] Morales Martinez , J.D. and Fandino Martinez, Y.F., 2009, *supra*, nt. 236.

[233] Meertens, D., "Forced Displacement and Gender Justice in Colombia: Between Disproportional Effects of Violence and Historical Injustice", Case Studies on Transitional Justice and Displacement, Brooking-LSE Project on Internal Displacement, July 2012, in order of the *International Center for Transitional Justice* (ICTJ), 11, available online at <ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Gender-Colombia-CaseStudy-2012-English.pdf> (accessed 22 August 2013). Morales Martinez , J.D. & Fandino Martinez, Y.F., 2009, *supra*, nt. 236.

[234] According to the Profamilia Survey of 2005, 8.1% of displaced women have been raped by people other than their spouses or partners, among which 27% have been forced to have sex with strangers.

[235] Original "auto" stating the following: "De acuerdo con la Encuesta de Profamilia de 2005, el 8.1% de las mujeres desplazadas ha sido violada por personas distintas a su esposo o compañero, entre las cuales el 27% han sido forzadas a tener relaciones sexuales con desconocidos." Court decision available online at <www.corteconstitucional.gov.co/relatoria/autos/2008/a092-08.htm>. And Ojeda, G., and Murad, R., *Salud sexual y reproductiva en zonas marginadas. Situación de las mujeres desplazadas*, 2005, Informe Profamilia, USAID, junio de 2006, Cuadro 7.1, 120, available online at <measuredhs.com/pubs/pdf/FR172/FR172.pdf> (both accessed 14 November 2013).

that specifically affect displaced women who are left in a state of total helplessness.[236] According to the resolutions of Auto 092, the Director of the Presidential Agency for Social Action and International Cooperation as well as the coordinator of the National System of Integral Attention to Displaced Population were tasked with implementing thirteen programs to assist victims displaced by the internal armed conflict.[237] These programs include:

- Prevention of general disproportionate impact on the displaced
- Prevention of sexual violence and integral attention to victims
- Prevention of inter family and community violence and integral attention to victims
- Promotion of health and support for displaced women who are heads of households, the facilitation of access to productive employment opportunity and prevention of domestic labour exploitation
- Educational support for displaced women over 15 years of age
- Facilitation of access to land ownership
- Protection of the rights of displaced indigenous and Afro-descendent women
- Promotion of the participation of women in the prevention of violence against displaced women leaders due to their public visibility as labor, social, and human rights activists
- Elimination of barriers to the access of protection systems for displaced women[238]

The Constitutional Court's decision has been criticised for not going far enough to help displaced women achieve restitution and social justice. For example, the Court was careful in its language with regard to land restitution for women, phrasing the program for displaced women as facilitating access to land and not restitution of land, 'and even less to 'doing justice' to women victims of conflict'.[239]

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[236] "Internally-displaced women are at far greater risk of being sexually abused, raped or forced into prostitution because of their particular social, psychological and economic condition. According to statistics from the Ministry of Social Protection (Ministerio de Protección Social), 36% of internally-displaced women have been forced to have sexual relations with men they did not know." See Amnesty International, "Colombia: Scarred Bodies, Hidden Crimes: Sexual Violence against Women in the Armed Conflict", 12 October 2004, available online at <amnesty.org/en/library/info/AMR23/040/2004> (accessed 24 June 2013).

[237] Human Rights Watch, "Rights Out of Reach, Obstacles to Health, Justice, and Protection for Displaced, Victims of Gender-Based Violence in Colombia", Report on developments in Colombia's laws, policies, and programs on rape and domestic violence, 14 November 2012, 30, available online at <hrw.org/reports/2012/11/14/rights-out-reach> (accessed 22 August 2013).

[238] Translated from original text: Prevención del Impacto de Genero Desproporcionado del Desplazamiento, Prevención de la Violencia Sexual y de Atención Integral a sus Víctimas, Prevención de la Violencia Intrafamiliar y Comunitaria y de Atención Integral a sus Víctimas, Promoción de la Salud, Apoyo de las Mujeres Desplazadas que son Jefes de Hogar, de Facilitación del Acceso a Oportunidades Laborales y Productivas y de Prevención de la Explotación Domestica Laboral, Apoyo Educativo para las Mujeres Desplazadas Mayores de 15 Anos, Facilitación del Acceso a la Propiedad de la Tierra, Protección de los Derechos de las Mujeres Indígenas y Afro descendientes Desplazadas, Promoción de la Participación de la Mujer y de Prevención de la Violencia contra Las Mujeres Desplazadas Lideres o que adquieren Visibilidad Publica por sus Labores de Promoción Social, Cívica o de los Derechos Humanos, Acompañamiento Psicosocial, y Eliminación de las Barreras de Acceso al Sistema de Protección por las Mujeres Desplazadas, supra, nt. 244, pt. V.A.7..

[239] Meertens, D., 2012, supra nt. 242.

The State's response to the Court ruling did little to fortify the goals of transitional justice because instead of creating special provisions for women to regain the land taken from them, they were placed into a market-based program run by the Rural Development Institute where they must compete with others for land reassignments. "Although this program has reportedly improved displaced women's access to land through special schemes, the government's strongly selective procedures based on economic competitiveness do not guarantee restitution at all (and in fact, were not aimed at restitution) to displaced women who have lost their land."[240]

With regard to displaced and demobilised children, in 2005 the Constitutional Court in Sentencia No. 203/05 addressed the problems attendant to reintegration of former child soldiers by writing that the institutional approach to demobilising child combatants should include socialisation, rehabilitation, education and protection. The Court wrote, 'It is a State obligation to promote the best interests of the child as well as the special protection and fundamental rights of minors, in their capacity as particularly vulnerable victims of the armed conflict'. Moreover, the Court found, "both Article 39 of the Convention on the Rights of the Child and its Optional Protocol as well as the various provisions in Article 3 common to the 1949 Geneva Conventions and in their 1977 Additional Protocol II bind the State to implement programs aimed at . . . promoting the eventual reincorporation of such minors into an ordinary civilian life in their communities of origin." [241]

In 2007, the Constitutional Court held, in Sentencia No. C-291/07, that the obligation to protect the special rights of children affected by armed conflict derives from the development of customary international humanitarian law applicable in internal armed conflicts, and is 'one of the fundamental guarantees stemming from the principle of humanity'.[242]

V. Call for Innovation and International Engagement

V.1. Creation of Human Trafficking Task Forces

In September 2003, the then President George W. Bush addressed human trafficking before the United Nations, declaring:

> "There's a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of sex trade see little of life before they see the very worst of life-an underground of brutality and lonely fear. Those who create these victims and profit from their suffering must be severely punished. Those who patronize this industry debase themselves and deepen the misery of others. And governments that tolerate this trade are tolerating a form of slavery."[243]

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[240] *Idem*.

[241] See International Committee of the Red Cross, "Colombia: Practice Relating to Rule 135. Children", available online at <icrc.org/customary-ihl/eng/docs/v2_cou_co_rule135> (accessed 1 June 2013). The ICRC report notes that the Court also held that "The mere participation of a child or adolescent in acts of violence committed by underage combatants will necessarily have grave psychological and social effects that demand an especially strong response from the State in terms of protection and rehabilitation, an objective to which determining the criminal responsibility of each minor and confronting the minor with the facts can contribute as well as the full implementation of the different steps of the process of reconciliation with the community, the society and the State."

[242] *Ibid*.

[243] U.S. Dept. of Justice, "Department Of Justice Announces Human Trafficking Task Force In The District Of Columbia And Grants For Law Enforcement To Fight Human Trafficking And Assist Victims", Press Release of 23 November 2004, available online at <justice.gov/opa/pr/2004/November/04_opa_760.htm> (accessed 22 August 2013).

Following his UN address, President Bush allocated $7.6 million in grants to federal and state law enforcement agencies to establish human trafficking task forces to 'aid in the identification and rescue of human trafficking victims'.[244] Less than a year later, pilot task force coalitions comprised of federal, state and local law enforcement, and community-based organisations were established in Atlanta, Philadelphia, Phoenix, and Tampa to spearhead coalition-building best practices for other task force coalitions to follow in other cities around the country.[245] Among the responsibilities given to these task forces was to establish training methods for law enforcement officers, conduct intensive community outreach, and to provide comprehensive assistance to victims.[246]

In addition to establishing task forces nationwide, the Department of Justice began holding nationwide training seminars and programs for law enforcement personnel, prosecutors, judges, social workers, victims' advocates, academics, business representatives, and faith-based organisations, among others, based on a carefully developed model curriculum that emphasises a victim-centred approach to finding and rescuing trafficking victims and investigating and prosecuting traffickers and abusers. The model curriculum became a uniform methodology of best training methods and investigative techniques for effectively combating human trafficking and related crimes nationwide.[247]

The success of human trafficking task forces are dependent on cooperation between local law enforcement and community-based organisations that are skilled at identifying trafficking victims during the course of "field operations and the delivery of social services."[248] One of the most successful task forces has been based in Tampa Bay, Florida and is known as the Clearwater/Tampa Bay Area Task Force on Human Trafficking, founded in 2006 with a grant from the U.S. Department of Justice. Like all task force coalitions, the Clearwater/Tampa Bay Area Task Force's mission is to 'identify and rescue victims, create a coordinated law enforcement system to investigate and prosecute these crimes, and to deliver social, legal and immigration services to human trafficking victims in the Clearwater and Tampa Bay area'.[249]

Since the national task forces and coalitions were conceived in 2004 in the United States, a great deal has been learned about how to combat human trafficking, identify and rescue victims, bring traffickers and abusers to justice, and restore the lives of trafficking victims and their families. These organisations could serve as exceptional models for establishing similar task force organisations throughout Colombia to combat human trafficking. Key to the success of such task forces, however, would be establishing close working relationships between law enforcement and community-based organisations. The challenge is that in Colombia there is a high level of distrust between law enforcement and community-based organisations, especially given the level of violence that has visited community-based organisations and their workers and the resulting impunity for perpetrators over the decades. Before any task force can be formed, steps must be taken to overcome the wariness that residents, social workers

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[244] *Ibid*.

[245] U.S. Dept. of Justice, Bush Administration Hosts First National Training Conference to Combat Human Trafficking, Press Release of 16 July 2004) available online at <justice.gov/opa/pr/2004/July/04_ag_489.htm> (accessed 24 June 2013).

[246] *Ibidem*.

[247] *Ibidem*.

[248] U.S. Dept. of Justice Press Release, 2004, supra nt. 252.

[249] See the Clearwater Task Force on Human Trafficking webpage, available at <catfht.org/index.php/about-us> (accessed 24 June 2013).

and community organisers in affected communities hold toward a state authority that has been largely absent in their communities, has not honored past commitments, and "may prove unable to protect them" from groups that may oppose the creation of task forces.[250] Then, in order to achieve the level of cooperation between law enforcement and community-based organisations that is critical to the success of human trafficking task forces, clearly defined and transparent common goals must be established. This may mean taking baby steps toward better cooperation by working on issues that are not too overwhelming, like, for example, promoting outreach projects to education communities about human trafficking.

Representatives from the task forces in the United States could provide valuable guidance to Colombian authorities in setting up pilot task forces, following a similar roadmap to that used by the Department of Justice in the United States during the last decade. My personal involvement with task force groups over the last ten years is that the law enforcement officers are passionate about their work in fighting human trafficking, and the community-based and faith-based organisations view rescuing and restoring victims as a special calling. If the GOC would be willing to introduce task force models first into major cities, like for instance, Bogotá, Medellín, Cali, and Cartagena, it would not be difficult to bring experts, including Spanish-speaking experts from the United States, to assist in setting up the organisations.

From within the regional task forces, an international organisation composed of law enforcement investigators of human trafficking crimes has emerged that could provide critical support to law enforcement counterparts in Colombia. This organisation, the International Association of Human Trafficking Investigators (IAHTI), has the capacity to share their best practices and intelligence for improving the capacity of law enforcement organisations to combat all forms of human trafficking. The mission of IAHTI is straight forward—to work with law enforcement and prosecutors throughout the world to provide the most up-to-date human trafficking training, investigative techniques and technology.[251] Engaging an organisation like IAHTI in pilot programs in just one or two Colombian cities would be to plant the seeds to develop new networks of law enforcement officers and prosecutors who could develop special expertise, and more importantly, special uniform expertise on combating human trafficking. Moreover, by creating a group of specialists in law enforcement, the GOC would be creating a sense of professionalism and a higher commitment to ethical conduct among an elite group of law enforcement personnel, which would go a long way to improving relations between law enforcement and the communities they serve.

Law enforcement must also understand how community-based organisations go about identifying, rescuing, and advocating for human trafficking victims. There are many organisations with vast international experience capable of going into Colombia to work closely with law enforcement to train officers and investigators on how to treat trafficking victims, to preserve the dignity of victims, and to prepare them to take an active role in investigating and prosecuting their traffickers and abusers. Among the groups best skilled at such a task is La Strada International (LSI), based in Eastern Europe.[252] LSI's mission has long been to prevent human trafficking, especially

[250] Isacson, A. and Poe, A., "After Plan Colombia: Evaluating "Integrated Action," the Next Phase of U.S. Assistance", Report for the *Center for International_Policy*, December 2009, available online at <justf.org/content/after-plan-colombia> (accessed 22 August 2013).

[251] See the International Association of Human Trafficking Investigators webpage at <iahti.org> (accessed 24 June 2013).

[252] La Strada International comprises a network of eight member organisations in Belarus, Bulgaria, Czech Republic, Macedonia, Moldova, The Netherlands, Poland and Ukraine, and an international

trafficking of women, and their mission is to improve the position of women in society, to protect their universal rights, and to protect them from violence and abuse. LSI would have the resources, membership, and experience to go into Colombia to work on capacity building among community-based organisations and work to educate law enforcement and judicial officers about the trafficking of women and best practices for preserving their human rights.

V.2. Creation of a Human Trafficking Court

Establishing a specialised court in Colombia to work in concert with specially trained police and prosecutor teams may be the best solution for gaining leverage on human traffickers. Such a court and investigation resources would have jurisdiction over all forms of human trafficking that occur on Colombian soil, and would be based on models in use and evolving in other countries.

For example, in the United Arab Emirates, beginning around 2007, the Dubai Police force established an anti-human trafficking unit, followed soon after by a similar special unit in the Dubai public prosecutor's office.[253] By 2010 the UAE had established a specialised court to process human trafficking cases to help victims of sexual exploitation.[254] The court was established because human trafficking crimes put unique responsibilities on the UAE government there. One is that the government bears the costs for caring for the victims while the case is adjudicated, which is obviously costly, and the other is that trafficking cases fall under the UAE's law on combating crimes of human trafficking, in addition to international agreements the government has entered into with other nations.[255] Judge Ahmed Ibrahim Saif said the purpose of the court was to hear cases more quickly, to 'protect the interests of the victims and to mitigate the damage inflicted upon them due to such crimes', and to assist victims in returning to their homelands.[256] Before the creation of the human trafficking court, cases involving human trafficking could take up to three months in the criminal court system where the adjudication process involved several hearings and adjournments before reaching a verdict.[257]

The court is composed of a three-judge panel convening to hear cases twice weekly, and care is taken to ensure a suspect's right to a fair trial, including assigning defence lawyers to help move the adjudication process along. However, the court hears cases only involving sex trafficking and not labour trafficking. Yet, this effort constitutes an important step toward creating a court of special jurisdiction that could serve as a model for a country like Colombia to follow.

V.2.1. How to Fund and Sustain the Court

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secretariat based in Amsterdam, The Netherlands. See the La Strada International webpage, available at <lastradainternational.org> (accessed 4 June 2013).

[253] Mustafa, A., Special Dubai Court to Ease Trafficking Victims' Ordeal, Dubai: the National (UAE), 10 Nov 2010, available online at <thenational.ae/news/uae-news/courts/special-dubai-court-to-ease-trafficking-victims-ordeal> (accessed 22 August 2013).

[254] Emirates 24/7, "Dubai to Set Up Special Human Trafficking Court", 25 October 2010, available online at <emirates247.com/news/emirates/dubai-to-set-up-special-human-trafficking-court-2010-10-25-1.308704> (accessed 22 August 2013).

[255] UAE Federal Law No. 51 *Combating Human Trafficking Crimes,* Law of 9 November 2006, available online at the website of the National Committee to Combat Human Trafficking, <nccht.gov.ae/en/menu/index.aspx?mnu=cat&PriMenuID=14&CatID=10> (accessed 22 August 2013).

[256] Emirates 24/7, 2010, *supra* nt. 263.

[257] Al Sadafy, M. "Special Panel to Handle Human Trafficking Cases", for Emirates247.com, 10 November 2010, available online at <emirates247.com/news/emirates/special-panel-to-handle-human-trafficking-cases-2010-11-10-1.315808> (accessed 22 August 2013).

If a similar human trafficking (HT) court could be established in Colombia, the first order of business for the government would be to find sustainable funding. This funding could come from various sources, including a "sin tax" or annual licensing fees collected from businesses that are connected to human trafficking activities, namely casinos and night clubs, escort businesses and sex tourism agencies, the hotel and hospitality industry, and agribusiness, which employs a significant number of trafficked workers particularly in Colombia's highly lucrative flower industry. Additional funding for the HT courts could also come from set-asides from demobilisation and reintegration programs. Law enforcement special anti-trafficking units that work directly with the HT courts would be funded by an additional tax for public services that most Colombian citizens already pay as part of property and income taxes. A modest tax could also be attached to highway tolls and gasoline taxes because human trafficking is a commercial enterprise that moves along highway corridors throughout the national territory. All Colombians need to become stakeholders in the fight against human trafficking, which means having to pay something into the government coffers to fund the apparatus necessary to bring special resources to bear to control human trafficking, rescue and restore victims, and punish traffickers.

V.2.2. Jurisdiction and Judicial Procedures

The HT courts would be part of the justice ministry, with judicial appointments made by the justice minister. Judges would have term appointments and their renewal would be based on performance measures established with the assistance of international consultations and foreign judicial experts. Judges, court staff, and law enforcement investigators would be required to participate in continuing education programs, and law schools could develop a specialisation in human trafficking adjudication for both law students and for continuing legal education.

The HT courts could be based in the capitals of each Colombian department. Judges could also "ride circuits" throughout their jurisdiction to hear cases in the municipalities where human trafficking crimes occur. This has been a practice in the courts of first instance in Colombia for decades and could help control administrative costs because it is easier for the judges and clerical staff to travel to where the cases originate than to pay to bring defendants, victims, witnesses, and their lawyers to a central court location. On the other hand, sending judges out to ride circuit to hear human trafficking cases would pose a security and safety concern for the welfare of the judges in cases where the defendants are tied to organised crime and illegal armed groups, in which case a secure centralised court would make more sense.

Court rules pertaining to procedure, evidence, and plea-bargaining must be drafted to ensure that justice is swift and certain, and penalties must include jail time and fines, as well as the possibility of civil remedies following conviction. Again, this is where experts from the international legal community could be crucial to establishing a specialised court system that functions well and upholds the law.

Fast-track rules of procedure and specialised rules of evidence would need to be promulgated to ensure that human trafficking cases do not get back-logged in the manner in which so many criminal and civil cases are mired in delay in the current Colombian court system. The UNHCR has noted in 2013 that, 'the vast majority of investigations into crimes against human rights defenders are in the preliminary stages in the Attorney General's Office, partly because prosecutors with high caseloads tend

to favour less complex cases'.[258] This is due in part to a confusing implementation of judicial reforms and a complex conversion from the inquisitorial system of Colombia's civil law tradition to a hybrid accusatory criminal justice system based on an Anglo-American model that was imposed on Colombia in the last decade under judicial reform/delivery of justice projects funded by Plan Colombia.[259]

Courts' rules would have to be devised by a judicial rule-making commission comprised of judges, prosecutors, defence lawyers, academics, and experts from rule-making commissions in the United States, especially because the Colombian accusatory system, which is now in place, was designed largely by legal consultants from the United States. Attention would be focused on the protection of witnesses and victims, production and preservation of evidence for trial, pre-trial motions, procedures during trial, jury instructions (if jurors were to be part of a human trafficking court), sentencing guidelines, and post-trial motions and appeals.

V.3. Involve the International Community to Advise and Monitor

Over the last several decades, the international community has invested many millions of dollars in aid to fortify, reform, and sustain the Colombian judiciary and provide relief to displaced trafficking victims.[260] Much of the funding comes from non-governmental organisations while a very small amount is provided by the GOC. In 2012, for example, the US State Department reported that the GOC provided less than $50,000 to one international organisation to assist trafficking victims within Colombia and to Colombian nationals requiring emergency assistance abroad.[261] Only a paltry ten victims received assistance from government-funded organisations, and while the GOC claimed its program for assisting trafficking victims was successful, the non-governmental organisations 'asserted that the referral process did not work well in practice, and that funding was insufficient and inefficiently distributed'.[262] In fact, one non-governmental organisation opened a shelter for trafficking victims, but it soon closed due to lack of funding. This is a prime example of the need to have long-term funding and monitoring of programs developed to assist trafficking victims, and it is incumbent upon the international organisations and States providing aid to keep a close watch on how the money is spent in Colombia.

The just-released 2013 State Department Report for Colombia presents a perplexing series of contradictions to international monitoring organisations trying to

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[258] Office of the United Nations High Commissioner for Human Rights, "Annual report of the United Nations High Commissioner for Human Rights", reference no. A/HRC/22/17/Add.3, 7 January 2013, 17, available online at <ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add3_English.pdf> (accessed 22 August 2013).

[259] For a thorough analysis of the Colombian judicial reform efforts, see Nagle, L.E., "Process Issues of Colombia's New Accusatory System", *Southwestern Journal of Law and Trade in the Americas*, (14) 2007-2008, 223-287.

[260] The international community has also made its share of empty commitments in the form of declarations such as the Condemnation of Terrorist Acts in Colombia issued by the Organization of American States in February 2003, that recognised the damage that terrorism has done to Colombia and its people and the link between these acts and drug trafficking, money laundering, arms trafficking, and "other forms of transnational organized crime," but did little else; see Permanent Council of the OAS, "Condemnation of Terrorist Acts in Colombia", 12 February 2003, ref. no. CP/RES. 837 (1354/03), available online at <oas.org/oaspage/terrorismo/rescoen1.htm> (accessed 28 June 2013).

[261] U.S. Dept. of State, *Trafficking in Persons Report - Colombia*, 19 June 2012, available online at <refworld.org/docid/4fe30cd75.html> (accessed 22 August 2013).

[262] *Ibid*.

understand what is happening in Colombia. Colombia remains a Tier 1 country in the fight against human trafficking for 2013. A Tier 1 classification means that a government has acknowledged that human trafficking exists in its territory, has addressed the problem, and meets the minimum standards set forth in the federal Victims of Trafficking and Violence Protection Act (TVPA).[263] In bestowing Tier 1 status on Colombia, the State Department asserts that things are looking up in Colombia:

> The Government of Colombia fully complies with the minimum standards for the elimination of trafficking. Authorities continued to undertake awareness campaigns and law enforcement efforts, prosecuting transnational sex trafficking cases and opening a significant number of investigations.[264]

Yet, Colombian trafficking victims continue to be found in forced labour in mining, agriculture and domestic service, in direct violation of the UN Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,[265] and women and children continue to be trafficked into forced sexual servitude, and the State Department even states that sex trafficking "remains a significant problem" in Colombia.[266] Moreover, Colombia remains a destination country for Ecuadorian children trafficked for sex and forced servitude, and Colombia has emerged as a major destination in the western hemisphere for sex tourism in which human trafficking plays a key role.[267]

The State Department says that the GOC has opened a significant number of investigations, but what are the actual numbers? The State Department also notes that the GOC has yet to enact a pending victim assistance decree from 2005, and that

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[263] Victims of Trafficking and Violence Protection Act of 2000, 28 October 2000, Public Law 106-386, reference 22 USC 7101. Section 104 of the Act sets forth the criteria for assessing to what extent a country is combating human trafficking. The tier system is devised from these criteria. For a complete explanation of the Tier system, see U.S. Dept. of State, Office to Monitor and Combat Trafficking in Persons, "Tiers: Placement, Guide, and Penalties for Tier 3 Countries", 2011, <state.gov/j/tip/rls/tiprpt/2011/164221.htm> (accessed 24 June 2013).

[264] U.S. Dept. of State, "Trafficking in Persons Report. Country Narratives: A-C", June 2013, 131, available online at <state.gov/j/tip/rls/tiprpt/2013/index.htm> (accessed 22 August 2013).

[265] Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 3(a), June 17, 1999, 38 I.L.M. 1207. Colombia ratified on January 28, 2005.

[266] U.S. Dept. of State, *supra* nt. 274. The Narratives report on Colombia paints a discouraging picture for Colombian citizens who continue to be targeted by human traffickers. Groups at high risk for internal trafficking include internally displaced persons, Afro-Colombians, indigenous communities, and relatives of members of criminal organisations. Ecuadorian children are subjected to forced labour and sex trafficking in Colombia, and Colombian children are exploited through forced begging in urban areas. Illegal armed groups forcibly recruit children to serve as combatants, to cultivate illegal narcotics, or to be exploited in prostitution. Members of gangs and organised criminal networks force vulnerable Colombians, including displaced persons, into sex trafficking and forced labour, particularly in the sale and transportation of illegal narcotics. Colombia is a destination for foreign child sex tourists from the United States, Europe, and other South American countries.

[267] Curiously, Colombia is one of a few States that is not a party to the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956, art. 1(d), 18 *U.S.T.* 3201, 226 *U.N.T.S.* 3, which entered into force on 30 April 1957. One could argue that even though Colombia is not a party, a convention having a large number of parties and in forced for a significant amount of time becomes customary international law, which would make Colombia subject to this Supplementary Convention.

identifying labour and sex trafficking victims remains a problem for Colombian authorities. A reasonable observer can only wonder what the US State Department uses as a measurement given overwhelming evidence that the trafficking situation in Colombia is out of control and getting worse. How is Tier 1 status possible, and if Colombia is the Tier 1 standard by which other countries are judged, one wonders how much worse is the human trafficking problem in Tier 2 and 3 countries?

This assessment raises more questions than it provides details, and it suggests that a wall of obfuscation persists in Colombia such that international monitoring is impeded by a bureaucracy that has issues with transparency and accountability. This is the conclusion I reached during a fact-finding trip to Colombia in summer 2012 to do research on the Colombian government's efforts to assist displaced trafficking victims. On a visit to the office of the director for human rights in Medellín, no one working there seemed to have any idea what they were doing. It became an exercise in futility to meet with anyone in authority to discuss human trafficking and the plight of the displaced in Medellín. I was sent first to one office, only to be told I was in the wrong office and that I should go to another office. I went there and was told that the official I could see was not available and to go to another office to make an appointment. I went to make the appointment and was told that appointments were not made there and to go to another office. Meanwhile, I observed that the staff appeared to be doing little more than shuffling papers and talking on their cellphones over personal business and gathering up in small groups to go out for morning coffee. I was left with the distinct impression that the government efforts to fight human trafficking and assist displaced trafficking victims are woefully inept or intentionally designed to accomplish nothing. If I was there as a former Colombian judge, as a researcher from the United States, as a native speaker of the language, and in my own home town, and I was unable to get past a receptionist to speak to an official who could answer a few questions, then how are international monitoring organisations able to do their jobs in Colombia? Or could it be that I received no attention or assistance precisely *because* I am a native Colombian? Had I been a "gringo" researcher going the office, would my reception have been completely different? Would the officials have rolled out the dog-and-pony show to demonstrate to the foreign monitors that the Colombian government is on top of the situation and vigilant in its fight against human trafficking? I realise that this unfortunate experience did not lead to a very scientific explanation of what is occurring in Colombia, but in speaking to several Colombian academics, law enforcement officials, human rights lawyers, and social workers in Colombia about the level of human trafficking and the impact of human trafficking on displaced people, it became apparent that their experience with the government mirrors my own. For Colombians not working inside the "system", there is basically no access to the officials who are supposed to be fixing the problems and there appears to be very little motivation to alter the status quo in the government apparatus. The attitude I felt in my dealings with the human rights office tasked with combating human trafficking was one of indifference at the least, and would suggest that as long as a minimum level of results is attained each year, as long as a little bit is accomplished to show that the GOC is doing something about the problem, then it is taken for granted that foreign government aid will keep rolling in year after year and that an entire "army" of bureaucrats will continue to keep jobs that seem to be meaningless and there for nothing more than show. Again, one can only wonder what my reception the office would have been had I been accompanied by foreign monitors and let them do the talking. My conclusion to this unfortunate episode is that foreign monitoring needs not only to be very diligent and persistent, but must also be more than willing to scratch far below the patina of the official presentations and facts and

figures presented during fact-finding visits. Foreign monitors must be cognisant that what they may see and hear and experience is possibly far different than what a Colombian sees and hears.

V.3.1. International Organisations and Non-Governmental Organisations

In an effort to combat human trafficking, Colombia and Peru have partnered with various agencies including the International Organization for Migration (IOM) and the United Nations Office of Drug and Crimes (UNODC). These international organisations have provided much needed education to law enforcement and government officials in both countries. Additionally, IOM and UNODC have worked closely with the governments of each to develop different types of prevention measures. In conjunction with the UNODC, the Colombian government created a special police force, the Division of Sexual Crimes, specifically trained to address the crimes of smuggling migrants and human trafficking. Along with specially trained police, the government has trained workers within all parts of the justice system and has even developed a National Unit of Human Rights within the public prosecutor's office, the focus of which is dealing with cases of trafficking in persons. While training police and educating government officials are integral to the prevention and prosecution of human trafficking, raising awareness among citizens is also vital.

An extensive list of national and international non-government organisations dedicated to combating human trafficking can be found with hyperlinks to those organisations on Wikipedia.[268] There are now dozens of organisations working worldwide to address specific aspects of human trafficking. Many of the organisations are well-funded and have experts well trained and prepared to travel to Colombia, often on modest budgets, to offer training on best practices for combating human trafficking, as well as to serve in a monitoring capacity of human trafficking programs in place in Colombia and offer recommendations for improving those programs.

Among the most well-established organisations that could offer significant technical expertise and advice are the Coalition Against Trafficking in Women, Global Alliance Against Trafficking in Women, La Strada International Association, and Polaris Project. Many of these organisations have a global footprint and networks. In addition to non-governmental organisations, several universities have established centres dedicated to combating human trafficking. Two of the most prominent academic centres in the United States are the Protection Project, based at Johns Hopkins University, which has been at the forefront of opposing human trafficking as a human rights violation since 1994,[269] and the Center for the Advancement of Human Rights, at Florida State University, which plays a leading role among 'U.S. universities in conducting research, training, and victim advocacy aimed at combating modern slavery'.[270] The Protection Project has one of the largest databases of country reports tracking human trafficking issues worldwide, and one the organisation's primary areas of work is in developing and presenting capacity-building programs for

[268] This is by no means a complete list, but it represents a reasonable point of embarkation for many reputable and capable human trafficking organisations. See Wikipedia, "List of organizations opposing human trafficking", available online at <en.wikipedia.org/wiki/List_of_organizations_opposing_human_trafficking> (accessed 24 June 2013).

[269] See the website of the Protection Project, available at <protectionproject.org> (accessed 26 June 2013).

[270] See the website of the Center for the Advancement of Human Rights at <cahr.fsu.edu/sub_category/HumanRight_ projects.html> (accessed June 26 2013).

non-governmental practitioners and government officials. The programs engage 'representatives of international organisations in bringing international mechanisms of human rights protection closer to those who need them most'.[271]

The GOC and the non-governmental and community-based organisations dedicated to fighting human trafficking and improving the conditions of displaced women and children have a great many resources around the world to partner with in order to achieve many of the goals that the government is currently unable to reach or sustain.

V.3.2. Involvement of United States Expertise

In 2013, the State Justice Institute of the United States Department of Justice, announced funding of a Strategic Initiatives Grant to the Center for Public Policy Studies, the National Judicial College, and the Center for Court Innovation that is focused on four strategic points: 1) increasing understanding and awareness about the challenges faced by state courts in dealing with cases involving trafficking victims and their families, and traffickers; 2) developing and testing state and local approaches for assessing and addressing the impact of human trafficking victims and defendants in the state courts; 3) enhancing state and local court capacity to improve court services affected by human trafficking-related cases processing demands; and 4) building effective national, state, and local partnerships for addressing the impacts of human trafficking case processing in the state courts.[272]

This is an important development in creating a specialised human trafficking court system for Colombia because the United States already has a well-established rule of law and judicial reform framework operating in Colombia that resulted from the implementation of democracy and national building programs under Plan Colombia during the last decade and can play a critical role in helping Colombia to create human trafficking courts. The resources, research and experience in the United States will establish of pool of experts that could then go to Colombia and help establish best practices for establishing, funding and administering a specialised court.

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[271] The Protection Project, "Technical Assistance/Capacity Building", available online at <protectionproject.org/activities/ta-capacity-building> (accessed 26 June 2013).

[272] State Justice Institute, "Human Trafficking and State Courts Collaborative", Strategic Initiatives Grant announcement, available online at <sji.gov/trafficking.php> (accessed 10 June 2013). The Collaborative will result in a variety of products benefiting the state courts, including:

- A comprehensive resource inventory of background information about the demographics, scope, dynamics, and implications for the courts and justice system of various forms of human trafficking;
- A measurement framework that includes measures and tools for monitoring the impacts of human trafficking case processing in the state courts;
- Summary of changes in federal and state trafficking law, policy, and practice that might better serve the interests of the state courts;
- A human trafficking and state courts web-based resource network and clearinghouse for judges and court personnel;
- A best practices toolkit for jurisdictions interested in establishing a specialised prostitution/trafficking court;
- A series of bench cards targeting human trafficking-related issues;
- Best practice guidelines;
- Model planning and technical assistance process and supporting materials;
- Training on human trafficking via 12 courses for judges;
- Intensive technical assistance in six jurisdictions, and proven nationally applicable technical assistance approaches; and
- Published articles in various court periodicals about the project and the issue in general.

V.3.3. Making Colombia a Model for Other Countries

Establishing a functioning and funded apparatus in the judicial branch, providing funding for special task forces in law enforcement to combat trafficking, and calling upon the private sector to become stakeholders in finding permanent solutions of displacements can all help Colombia to meet its international obligations. Yet, Colombia's international obligations do not entail only compliance with the international instruments to which it is a signatory. Rather, the GOCs international obligations extend to providing assistance outside Colombia to other nations struggling with similar issues of transitional justice. Colombia can in many ways be a crucible for devising best practices and developing a cadre of experts who can use their experiences and skills to effect change elsewhere. Colombian authorities, academics, non-governmental organisations, and practitioners should be encouraged to go beyond Colombia to establish a regional framework for training and implementing HT courts, special prosecutors, and law enforcement task forces (including those working with support from the private/corporate sector) throughout Latin America. They can play a role in relieving conditions in places like Ecuador and Panama where so many displaced Colombians have fled and have continued to be victimised and abused.

VI. Conclusions

Colombia is a nation trying to stand on its feet after decades of internal armed conflict and socio-political violence. The trafficking of human beings for sex and labour is a thriving business in Colombia as long as the conditions of displacement cause women and children to take desperate measures to survive, or are forced to remain living in conditions that render them fully exposed to exploitation and criminality. Human trafficking has served as an instrument of intimidation, domination and control of civilian populations, as a tool to remove people from their land, and as a means for illegal armed groups to amass illicit wealth.

There is also a troubling gap between Colombia's laws and the execution of its laws. In truth, Colombia has excellent laws. Most are carefully constructed, some elegantly so. The constitutional jurisprudence is often bold in it rulings on the constitutionality of Colombian law, and the Constitutional Block has integrated to constitutional rank many international treaties and conventions pertaining to international humanitarian law and human rights law.

But the gap between commitment and fulfilment of the law persists and is due to three reasons. First, there is a large difference between what appears in writing and how the law is applied in practice. The second reason, which is related to the first, is due in great part to the lack of economic resources. It takes money to enforce the laws, and Colombia, for many reasons, seems constantly short of money to fund its policies and programs. Either the money has been mismanaged, or it has been misused and siphoned away due to corruption. This is only speculation to take up at another time. The third reason is due to the discrimination and stigmatisation embedded in the culture of Colombia where the ruling elites continue to preserve at all costs the prerogatives of their station in life and care precious little for anyone living below their class level.

All Colombians must become stakeholders in the process of transitional justice by (1) elevating the value of all human life regardless of social background or racial heritage, and (2) by aggressively prosecuting and punishing the human traffickers and "end-users" that cause such social and emotional misery. The task may seem insurmountable, but the key may be as simplistic as asserting political will, compassion, and courage to effect change. Addressing the root causes that sustain the

trafficking of humans in Colombia entails not only tackling the economic, political, and social conditions that put women and children in vulnerable positions, but also changing the national consciousness.

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The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law

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Keywords
TRAFFICKING IN PERSONS, NON-CRIMINALISATION, CAUSATION-BASED, COMPULSION-BASED, DEFENCES

Abstract
Trafficked persons are often re-traumatised by being criminalised for offences that they have committed as a result of their status as trafficked persons. This paper argues that in the absence of a binding international law model for the non-criminalisation of trafficked persons, there is no unified vision of non-criminalisation to which regional and national legislators may (or must) adhere. As a result, the existing provisions giving effect to the non-criminalisation principle at the regional level in Europe and the national level in the United Kingdom are deficient in two significant respects: first, they require that the offence was committed under a high degree of pressure (rather than being a direct consequence of the trafficking situation); and, secondly, they are qualified (because non-criminalisation is discretionary). A model is proposed for the non-criminalisation of trafficked persons in international law to be incorporated into the international legal framework through an amendment to the Trafficking Protocol in the form of an additional clause empowering trafficked persons to protect themselves against criminalisation by way of a positive defence; the trafficking defence.

I. Introduction

The experiences to which trafficked persons are subjected cause severe and enduring psychological traumatisation. This traumatisation is exacerbated and entrenched when the trafficked person is subsequently treated as a criminal for offences committed as result of the trafficking situation (commonly, offences relating to their immigration status, prostitution or drugs trafficking). Minimally, the process of criminalisation is likely to involve being arrested and interviewed by law enforcement officers, at least one court appearance, some form of penalty and the imposition of a permanent criminal record. Maximally, it may additionally involve pre-trial detention, a series of court appearances including an extended trial, which would probably require the trafficked person to give evidence (including cross-examination on their "claim" of being a trafficked person) and a lengthy sentence of imprisonment. Each stage of the process of criminalisation disempowers and re-traumatises trafficked persons and, fundamentally, fails to recognise that they themselves are victims of crime.

Proper recognition of the victim status of trafficked persons requires the application of the principle of non-criminalisation: 'Criminalisation is the antithesis of the victim-centred approach, inevitably operating to deny trafficked persons the rights to which

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they are entitled under international law.'[2] In broad terms, the non-criminalisation principle recognises that trafficked persons should not be criminalised for the offending behaviour in which they engaged as a result of their being trafficked. The recognition of the centrality of this principle is not novel; indeed, 'there is considerable and growing evidence that the policy preference for victims of trafficking not to be subject to criminalisation is evolving into a widely accepted normative standard.'[3] This acceptance is demonstrated by the inclusion of non-criminalisation provisions in legal frameworks at international, regional and national levels.[4] Despite this, the inadequacy of these provisions means that the criminalisation of trafficked persons continues unabated.[5]

The fundamental reason for this inadequacy is the narrow scope of existing provisions. There are two prisms through which the principle of non-criminalisation has been interpreted: (1) causation-based, which requires that the criminal act be a direct result of the trafficking situation; and, (2) compulsion-based, which requires that the criminal act is committed under a high degree of pressure from the trafficker(s).[6] The latter prism provides insufficient protection for victims of trafficking for two reasons. First, it fails to grasp the subtle and nefarious methods by which traffickers can exert total dominance over trafficked persons, such that even in the absence of a high degree of pressure (or, indeed, any overt pressure at all), the trafficked person may, in reality, have little choice but to commit the criminal act. Secondly, it fails to recognise that a clear causal relationship between the criminal act and the trafficked status of the trafficked person may remain even after the trafficking situation has ended. Conversely, the former prism covers all offences committed as a direct consequence (broadly construed) of the trafficking situation. This broader protection encompasses criminality committed by the trafficked person when under the control of the trafficker, when attempting to flee the control of the trafficker or when 'otherwise acting to try to protect or assist him or herself on account of their trafficked status'.[7] Unfortunately, in the absence of a binding, hard-law provision of international law that mandates a causation-based approach, regional and national legislators are free to adopt compulsion-based models, and have done so.

This article proposes a model for the non-criminalisation of trafficked persons in international law. The proposed model consists of the introduction of a binding, causation-based non-criminalisation provision in international law which arms trafficked persons with a positive defence against criminalisation: the trafficking defence. The second and third sections set out the existing international and European regional legal frameworks and inform the fourth section, which is a critical analysis of

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2 Gallagher, A., *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2010, 283; Attar, M. Y., "Incorporating the Five Basic Elements of a Model Antitrafficking In Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention", *Tulane Journal of International and Comparative Law*, 14, 2006, 357—420, 380-1.

3 Gallagher, A., *Idem*, 285.

4 See part II, below.

5 See, for example: Drew, S., *Human Trafficking – Human Rights: Law and Practice*, LAG, London, 2009, 172—178; Cross, L., "Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors", *McGeorge Law Review*, 44, 2013, 395—422, 396-397; Serita, T., "In our own backyards: The need for a co-ordinated response to human trafficking, *New York University Review of Law and Social Change*, 36, 2012, 635—659, 657.

6 Gallagher, A., *supra* nt. 2, 284.

7 Carter, P. and Chandran, P., "Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System", *in:* Chandran, P., ed., *Human Trafficking Handbook: Recognizing Trafficking and Modern-Day Slavery in the UK*, LexisNexis, London, 2011, 425.

the implementation of those frameworks in the United Kingdom. The fifth section argues that there are significant deficiencies in the existing system and that these deficiencies create a lacuna in efforts to protect the rights of trafficked persons. Further, it argues that this lacuna could be filled by the introduction of a causation-based international law model which confers a positive defence against criminalisation upon trafficked persons.

II. The international legal framework

An examination of the existing international legal framework reveals that the non-criminalisation principle is an accepted element of the international response to trafficking in persons. Further, it is revealed that the normative standard of protection required by international law is causation-based. Yet, despite this, there is no binding international law provision that requires states to ensure that trafficked persons are not criminalised for offences committed as a direct consequence of their status as trafficked persons. The following sub-sections set out the international legal framework in chronological order.

II.1. UN Trafficking Protocol 2000[8]

Notwithstanding that it is the centrepiece of the international legal framework governing the response to trafficking in persons, the Trafficking Protocol does not make express provision for the non-criminalisation of trafficked persons. Kevin Fedette argues that the principle of non-criminalisation is incorporated in the Trafficking Protocol because it presents trafficked persons as 'victims'[9] inferring a 'legislative link'[10] between the Trafficking Protocol and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.[11] Yet as Fedette himself concedes: '[G]iven the historic trend of states to criminalise victims, an express non-criminalisation clause in the Protocol would have been advisable.'[12] Indeed, knowing that States Parties to the Trafficking Protocol were encouraged to include an express non-criminalisation provision and declined to do so,[13] any attempt to argue that the non-criminalisation principle is incorporated into the Trafficking Protocol by inference is significantly undermined. Nevertheless, it is noteworthy that the body established to make recommendations on its effective implementation has recently affirmed that:

> States parties should [c]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts

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8 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("Trafficking Protocol"), 2000, 2237 UNTS 39574.

9 The three purposes of the Trafficking Protocol are set out in Article 2. Article 2(b) provides that one of those purposes is 'to protect and assist the victims of such trafficking, with full respect for their human rights'.

10 Fedette, K., "Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation", *Cardozo Journal of International and Comparative Law*, 17, 2009, 101—134, 129.

11 UN General Assembly Resolution, A/RES/40/34, 29 November 1985.

12 Fedette, K., *supra* nt. 9, 129.

13 Gallagher, A., *supra* nt. 2, 284, citing United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organised Crime and The Protocols Thereto*, 2006, 368.

> committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts.[14]

II.2. UNHCR Recommended Principles and Guidelines 2002[15]

The Recommended Principles and Guidelines were designed to assist states and inter-governmental organisations in their efforts to prevent trafficking in persons and protect the rights of trafficked persons. They contain a number of express, causation-based non-criminalisation provisions. Recommended Principle 7 provides:

> Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.[16]

Further, Recommended Guideline 2 provides that states should consider, inter alia: 'Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons',[17] and, Recommended Guideline 4 provides that states should consider, inter alia: 'Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked person.'[18]

These provisions demonstrate that in 2002 there was, for the first time, recognition among states that the non-criminalisation of trafficked persons was central to efforts to ensure their protection. They have been 'extensively cited as the accepted standard' for the principle of non-criminalisation.[19] Although non-binding, the Recommended Principles and Guidelines, 'form the bedrock of an understanding of the needs and rights of victims of trafficking in the particular context of their criminalisation for trafficking-dependant crimes.'[20]

II.3. Subsidiary sources of international law

Developments since the adoption of the Trafficking Protocol demonstrate that the non-criminalisation principle, first expressed in the Recommended Principles and Guidelines, is receiving increasing support at the international level.[21] The principle

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[14] United Nations Working Group on Trafficking in Persons, REPORT: *Report on the meeting of the Working Group on Trafficking in Persons*, 14 and 15 April 2009, [CTOC/COP/WG.4/2009/2], Vienna, para. 12.

[15] UN High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking ("Recommended Principles and Guidelines") 2000, E/2002/68/Add.1.

[16] *Idem*, Principle 7.

[17] *Idem*, Guideline 2.5.

[18] *Idem*, Guideline 4.5.

[19] Gallagher, A., *supra* nt. 2, 286.

[20] Carter, P., and Chandran, P., *supra* nt. 7, 406.

[21] UN Office of the High Commissioner for Human Rights, REPORT: *Commentary – UN High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking*, 2010, Geneva, 131.

has been expounded in a series of UN General Assembly Resolutions, for example 63/156, which:

> Urges Governments to take all appropriate measures to ensure that victims of trafficking are not penalized for being trafficked and that they do not suffer from revictimization as a result of actions taken by government authorities, and encourages Governments to prevent, within their legal framework and in accordance with national policies, victims of trafficking in persons from being prosecuted for their illegal entry or residence.[22]

Further, the principle has been recognised in a series of reports by the UN Secretary-General, the UN Committee on the Rights of the Child and the UN Committee on the Elimination of Discrimination Against Women, major international and regional policy documents and soft-law instruments and national anti-trafficking laws.[23]

II.4. The UNODC Model Law 2009[24]

Foremost amongst the international soft-law instruments is the Model Law, which was developed in order to encourage states to become party to the Trafficking Protocol and to provide guidance for its implementation in states' domestic legal systems. For each proposed article, the authors provide a commentary in the body of the text before the suggested provision is articulated. Article 10 is entitled 'Non-liability [non-punishment] [non-prosecution] of victims of trafficking in persons'. The commentary canvasses existing hard- and soft-law non-criminalisation provisions at regional and national levels, before suggesting the following causation-based provision:

> 1. A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons.
> 2. A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.
> 3. The provisions of this article shall be without prejudice to general defences available at law to the victim.
> 4. The provisions of this article shall not apply where the crime is of a particularly serious nature as defined under national law.[25]

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[22] UN General Assembly Resolution 63/156, 30 January 2009, para. 12. See also UN General Assembly Resolutions: 61/144, 1 February 2007, para. 18; 59/166, 10 February 2005, paras. 8 and 18; 57/176, 30 January 2003, para. 8; 55/67, 31 January 2001, paras. 6 and 13; 52/98, 6 February 1998, para. 4; and, 51/66, 31 January 1997, para. 7.

[23] UN Office of the High Commissioner for Human Rights, s*upra* nt. 20, 132 and notes 264 to 269; Gallagher, A., *supra* nt. 2, 286-7 and notes 36-43.

[24] UN Office on Drugs and Crime, Model Law against Trafficking in Persons ("Model Law"), 2009, Vienna.

[25] *Idem*, Article 10.

III. The European legal framework

An examination of the European legal framework reveals that in the absence of a binding international legal obligation, the principle of non-criminalisation that has developed at the regional level in Europe is, at worst, compulsion-based and, at best, ambiguous. Further, the European legal framework offers qualified protection only: Member States are required to ensure the possibility of non-criminalisation only. Trafficked persons are not endowed with a positive right to avoid prosecution for status-dependent offending behaviour; rather, they must hope that the relevant authority exercises its entitlement not to prosecute them. The following sub-sections set out the European legal framework in chronological order.

III.1. Council of Europe Trafficking Convention 2005[26]

Article 26 of the Trafficking Convention is entitled 'Non-punishment provision' and provides for the possibility of protection from criminal sanction:

> Each Party shall, in accordance with the basic principles of its legal system, provide for 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.[27]

Three features of this provision are problematic. First, it provides only for the non-punishment of trafficked persons; the prosecution of such persons is not prohibited. This is significant because the process of prosecution – arrest, interview, court appearances, giving evidence and so on – is capable of re-traumatising a trafficked person as much as, if not more than, the sanction ultimately imposed, and a discretion to exempt trafficked persons does not provide an adequate remedy against such re-traumatisation. Secondly, it is qualified because it requires that states provide the possibility of non-punishment only; non-punishment is not an imperative requirement. Thirdly, it is compulsion-based rather than causation-based (only such involvement in criminality that is 'compelled' is covered by the provision), and, as such, it offers inadequate protection against criminalisation for trafficked persons.

III.2. The EU Trafficking Directive 2011[28]

Article 8 of the Trafficking Directive is entitled 'Non-prosecution or non-application of penalties to the victim' and provides:

> Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures 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

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[26] Council of Europe Convention on Action against Trafficking in Human Beings ("Trafficking Convention"), 2005, CETS 197.

[27] *Idem,* Article 26.

[28] Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JH ("Trafficking Directive"), 5 April 2011.

> consequence of being subjected to any of the acts referred to in Article 2.[29]

The Trafficking Directive entered into force on 5 April 2011. In accordance with European Union law, Member States had two years to transpose its provisions into their domestic legal systems (by 6 April 2013). After 6 April 2013, the Trafficking Directive began to have "direct effect", which meant that those provisions which are clear, precise and unconditional must be enforced by the domestic courts of Member States.

While the Trafficking Directive extends the protection offered by the Trafficking Convention to include the non-prosecution of trafficked persons, non-prosecution and non-punishment remain optional. The formulation whereby states must provide for 'the possibility of not' punishing trafficked persons is simply replaced by an analogous formulation whereby states must ensure that the relevant authorities 'are entitled not to' prosecute and punish trafficked persons. Both provide for the possibility of non-criminalisation, rather than making it an imperative requirement, and so the protection remains qualified.

Further, it is not clear whether the Trafficking Directive imposes a compulsion-based or a causation-based approach: the trafficked person must have been 'compelled' to commit the relevant criminal activity 'as a direct consequence' of having been trafficked. This conceptual blurring results in two possible interpretations of the provision: first, that it mandates a compulsion-based approach because some form of compulsion beyond the criminal activity being a direct consequence of the trafficking situation is required (presumably, the exertion of a high degree of pressure); or, secondly, it mandates a causation-based approach because it recognises that if the relevant criminal activity is a direct consequence of the trafficking situation then the trafficked person was compelled, in broad terms, to commit it.

Assistance in the interpretation of Article 8 of the Trafficking Directive can be found in Recital 14: 'This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.'[30] This appears to restrict the protection to circumstances in which the trafficked person was pressured to commit the criminal activity (that is, a compulsion-based approach). On the other hand, it has been argued that it is necessary to interpret Article 8 as causation-based in order to ensure that it is compliant with Member States' obligations under international law because a compulsion-based interpretation is 'too blunt a means of securing the protection required by international law.'[31] Certainly the formulation of Article 8 of the Trafficking Directive suggests both recognition that the protection offered by Article 26 of the Trafficking Convention was inadequate and an intention to improve that protection.[32] The rationale of the regional policy makers was that:

> Stakeholders have pointed out that victims of trafficking are normally detained or prosecuted or punished for minor offences which are typically connected with the victimisation process, such as violations of immigration laws, use of false documents, and prostitution, in countries where prostitution as such is criminalised. The fear of punishment and/or deportation is considered a major obstacle for victims to come

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[29] *Idem,* Article 8. Article 2 defines trafficking in human beings.
[30] *Idem*, Recital 14.
[31] Carter, P., and Chandran, P., *supra* nt. 7, 406 and nt. 6.
[32] Gallagher, A., *supra* nt. 2, 285 and *supra* nt.31.

> forward, report the crime, and act as witnesses. Therefore the clause must be considered a major element of a successful anti-trafficking legislation. A similar non-punishment clause has been included in the CoE Convention, but the formulation is not clearly binding; moreover it does not cover all victims, since it only refers to victims who have been compelled to commit a crime, while in some cases they are trafficked by means of deception and abuse, according to the legal definition of trafficking. The added value […] would be a better and binding formulation of the clause.[33]

It appears, then, that the formulation of Article 8 of the Trafficking Directive was informed, at least in part, by recognition that a pure compulsion-based approach offers insufficient protection against non-criminalisation for trafficked persons. Yet the ambiguous drafting of the provision is dangerous because it allows Member States a margin to interpret the provision as purely compulsion-based.

IV. The application of the international and European legal frameworks in the domestic courts of England and Wales[34]

An assessment of the existing international and European legal frameworks requires an analysis of how the provisions of those frameworks have been interpreted by and incorporated into states' domestic legal systems. I have chosen to consider the United Kingdom because it is the jurisdiction in which I practice and with which I am most familiar. The domestic interpretation of the principle of non-criminalisation can be charted through a series of four cases decided by the Criminal Division of the Court of Appeal of England and Wales between 2008 and 2013. What is revealed is an interpretation that is both compulsion-based and qualified. The following sub-sections consider the four cases in chronological order.

IV.1. *Regina v O*[35]

In *O* the Court considered the appeal against conviction of a female Nigerian national who had been trafficked into the United Kingdom for the purposes of sexual exploitation and was arrested trying to leave the jurisdiction using a false identity card. She had told her legal representatives that she was seventeen years old, and a social worker had assessed her to be credible. Having advised her to plead guilty to the offence (which she did), O's lawyer at first-instance had informed the first-instance court that she was aged seventeen but failed to raise the issue of trafficking (despite a letter from the social worker being among his papers). Indeed, neither O's lawyer nor

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[33] Commission of the European Communities, REPORT: *Accompanying Document to the proposal for a Council Framework Decision in preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/HJA, Impact Assessment*, 25 March 2009, COM (2009) 135, SEC (2009) 356, Brussels, 30. The relevant provision of the Framework Decision 2009 Proposal was essentially identical to Article 8 of the Trafficking Directive, see Gallagher, A., *supra* nt. 2, 285 and 31.

[34] Scotland and Northern Ireland are distinct legal jurisdictions.

[35] *Regina v O* [2008] EWCA Crim 2835 ("*O*").

the prosecutor had considered either of two protocols[36] which had been incorporated into the Code for Crown Prosecutors in order to give effect to the Trafficking Convention (which the United Kingdom had not yet ratified). The court made no enquiries about O's age and treated her as an adult in sentencing her to eight months' imprisonment.

In allowing O's appeal and quashing her conviction the court was excoriating in its criticism of the defence lawyer, the prosecution lawyer and the sentencing judge:

> This appeal against conviction must obviously be allowed. We would put it most simply on the footing that the common law and Article 6 of the European Convention on Human Rights alike require far higher standards of procedural protection than were given here. There was no fair trial. We hope that such a shameful set of circumstances never occurs again. Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client. Where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made, indeed statute so required. All this is obvious.[37]

O's appellate lawyers had argued that, despite not yet being in force, Article 26 of the Trafficking Convention applied, because as a signatory to it, the United Kingdom was obliged to refrain from acts which would defeat its object and purpose under Article 18 of the Vienna Convention on the Law of Treaties 1969. By framing its decision in terms of O's right to a fair trial (under the English common law and Article 6 of the European Convention on Human Rights), the Court avoided determining the issue of the applicability of Article 26 of the Trafficking Convention.

IV.2. *Regina v LM; YT; BT; DG; MB*[38]

LM was decided after the ratification of the Trafficking Convention so the argument centred on whether the United Kingdom was compliant with the obligations imposed. The Court offered the following analysis of the scope of Article 26:

> It is necessary to focus upon what Article 26 does and does not say. It does not say that no trafficked victim should be prosecuted, whatever offence has been committed. It does not say that no trafficked victim should be prosecuted when the offence is in some way connected with or arises out of trafficking. It does not provide a defence which may be advanced before a jury. What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner

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[36] Entitled: 'Protocol on prosecution of defendants charged with immigration offences who might be trafficked to victims'; and, 'Protocol on prosecution of young offenders charged with offences who might be trafficked victims'. They have since been replaced by Crown Prosecution Service guidance on the prosecution of trafficked persons.

[37] *Supra* nt.35, para. 26.

[38] *Regina v LM; YT; BT; DG; MB* [2010] EWCA Crim 2327 ("*LM*").

> compelled (in the broad sense) to commit it. Article 26 does not require a blanket immunity from prosecution for trafficked victims.[39]

The Court found that three domestic mechanisms, taken cumulatively, ensured compliance with the non-punishment provision of the Trafficking Convention: first, the defence of duress; secondly, the exercise of the prosecutorial discretion not to prosecute; and, thirdly, the power of the court to stay the prosecution as an abuse of process.[40] Considering the defence of duress, the Court considered that no special modification was required and that the defence would arise in relation to trafficked persons when they had been coerced into committing the offence in question. The obvious deficiency with the defence of duress is that it requires a threat of death or serious injury to the trafficked person or someone sufficiently close to them. Further, it is defeated if evasive action that is reasonably available is not taken (the Court gave the examples of failing to notify the authorities and voluntarily associating with the trafficker were given).[41]

Considering the exercise of the prosecutorial discretion not to prosecute, the Court examined the Crown Prosecution Service's guidance on the prosecution of trafficked persons[42] and found that it imposed a 'three-stage exercise of judgment':[43]

> The first is: (1) is there a reason to believe that the person has been trafficked? If so, then (2) if there is clear evidence of a credible common law defence the case will be discontinued in the ordinary way on evidential grounds, but, importantly, (3) even where there is not, but the offence may have been committed as a result of compulsion arising from the trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.[44]

Considering the availability of an application-to-stay proceedings as an abuse of process, the Court found that the jurisdiction could be used to ensure that a 'legal process to which a person is entitled, or to which he has a legitimate expectation, has [not] been neglected to his disadvantage'[45]. So while an application for a stay might succeed if it could be demonstrated that the prosecutor had failed to consider the Crown Prosecution Service guidance, the application would fail if the prosecutor had

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[39] *Supra* nt. 35, para. 13. Thus, the Court considered that Article 26 of the Trafficking Convention called for consideration of whether public policy necessitates the prosecution and punishment of the trafficked person. This is a commendably broad interpretation of Article 26: on a narrower interpretation, all that is required is that upon prosecution and conviction consideration is given to whether the public policy necessitates punishment (because Article 26 is a non-punishment, rather than non-prosecution, provision).

[40] *Idem,* para. 7.

[41] *Idem,* para. 8.

[42] The Court cited the following excerpt at para. 9: 'Victims of human trafficking may commit offences whilst they are being coerced by another. When reviewing such a case it may come to the notice of the prosecutor that the suspect is a "credible" trafficked victim. For these purposes "credible" means that the investigating officers have reason to believe that the person has been trafficked. In these circumstances prosecutors must consider whether the public interest is best served in continuing the prosecution in respect of the offence. Where there is evidence that a suspect is a credible trafficked victim, prosecutors should consider the public interest in proceeding. Where there is clear evidence that the defendant has a credible defence of duress, the case should be discontinued on evidential grounds'.

[43] *Supra,* nt. 35, para. 10.

[44] *Ibid.*

[45] *Idem,* para. 15.

considered the guidance before going on to make a decision to prosecute. In such circumstances, courts would only have the power to review the exercise of the prosecutorial discretion if the decision to prosecute was unreasonable.[46]

Having established these essential principles, the court went on to consider the particular facts of the five appellants' appeals, four of which are relevant for the purposes of this article. LM, DG and MB were three women jointly convicted of offences of controlling prostitution.[47] From the outset, the case against these women was that although they had originally been trafficked persons, they had subsequently assumed the role of controllers of prostitution, and had used threats, violence and sexual abuse in so doing. Shortly before trial, the prosecution accepted guilty pleas from the three women on the agreed basis that: (1) they had not perpetrated violence, threats or sexual abuse; (2) they had been trafficked, beaten and coerced into prostitution themselves; and, (3) anything which had amounted to controlling prostitution had been done under pressure, albeit pressure falling short of the defence of duress.[48]

The Court allowed their appeal and quashed their convictions. The prosecutor had considered the Crown Prosecution Service guidance and come to a reasonable decision to prosecute (because force and threats had moved them from being victims only to being exploiters of others). However, there had been a fundamental change in the situation once their bases of plea were accepted, and the question of whether it was in the public interest to prosecute was not revisited. Had this been done, Further, had the question been revisited, no reasonable prosecutor would have continued the prosecution. Thus, the convictions were quashed under the abuse of process jurisdiction.[49]

YT was a Nigerian national convicted of using a false identity document and fraud by producing a false national insurance card.[50] She claimed that she had been trafficked to the United Kingdom, for the purposes of sexual exploitation. After two years YT had been abandoned by her trafficker and, three to four months later she found part-time employment at a care home. She had produced the false documents when subsequently applying for a full-time position.[51] She had been assessed as credible by a social worker, yet the Court dismissed her appeal and upheld her conviction:

> What however is clearly fatal to any reliance upon the convention is the fact that for some months before the offences were committed the defendant had been entirely free of any exploitation, which she may

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[46] *Idem,* para. 19.

[47] BT had been convicted following a guilty plea to an offence of possessing a false identity document. She had been arrested en route to France. She had been convicted despite her claim that she was a trafficked person and had been attempting to escape her traffickers. The Court found that were her claim true, Article 26 would apply, and the failure to consider whether or not the public interest lay in her being prosecuted would have been a clear breach. However, the Court found her claim not to be credible and dismissed her appeal. Plainly, if a person cannot demonstrate that they are a trafficked person, they will not be entitled to benefit from the principle of non-criminalisation. Yet BT was found to be incredible notwithstanding that she had been assessed to be credible by a social worker and an immigration court. This is demonstrative of the entrenched culture of incredulity facing trafficked persons when attempting to establish their trafficked-status. While this is, of course, a serious problem, it is beyond the scope of this article.

[48] *Supra,* nt. 35, paras. 24—34.

[49] *Idem*, paras. 24—34.

[50] A national insurance number is a pre-requisite for working lawfully in the United Kingdom.

[51] *Supra,* nt. 35, paras. 41—47. .

> have suffered, and had been living a wholly independent life. Certainly she was living as an illegal immigrant, but that is quite different from remaining a trafficked victim, or being in the course of flight from such a position. It cannot be said that she committed the offences in an effort to escape her trafficked exploitation, because she had long been free of it. The reality is that she committed the offences because she wished to continue to live, unlawfully, in this country, and to work here when she was not entitled to do so. It may be understandable that she should do this, but so it is for many illegal immigrants. The offences were not committed under the necessary nexus of compulsion (in the broad sense) with her trafficking.[52]

The word 'compelled' in Article 26 of the Trafficking Convention renders it unequivocally compulsion-based and, accordingly, it was so interpreted by the Court in *LM*. While the Court recognised that Article 26 went further than the defence of duress, it found that a degree of compulsion (in a broader, undefined sense) was still required for Article 26 to apply.

YT's case starkly demonstrates a flaw in the compulsion-based approach: YT had been trafficked from Nigeria for the purpose of sexual exploitation and had been subjected to horrifying sexual abuse, daily for two years. There can be no doubt that she was deeply traumatised by her experiences. As an illegal migrant, it is highly probable that she was too fearful of the authorities to seek their help. Further, as a trafficked person, it is quite possible that she would feel too ashamed to seek help from her family or a non-governmental organisation (even if she had been aware of the availability of the latter). In order to avoid becoming destitute, she used false documents to obtain employment (it is noteworthy that she was working in the public sector and was no doubt paying income tax and national insurance) and yet she was subjected to the re-traumatising experience of being arrested, interviewed, prosecuted, convicted and imprisoned.[53] Her conviction (and thus the validity of this experience) was upheld by the Court of Appeal because she had not demonstrated a sufficient degree of compulsion. Conversely, had a causation-based approach been applied, YT could have argued that her criminality was caused by the trafficking situation: but for the trafficking situation she would not have been a destitute, traumatised and lone illegal migrant in a foreign country, forced into criminality in order to survive.

A further fundamental flaw in the language of Article 26 of the Convention is exposed in *LM*. Article 26 requires the provision of the 'possibility' of non-punishment, which the Court found to be satisfied by the exercise of the prosecutorial discretion. As long as a prosecutor were to give due consideration to the Crown Prosecution Service guidance and whether or not it was in the public interest to prosecute the trafficked person, the requirements of the Trafficking Convention would be fulfilled. In such circumstances, the only basis on which a court could intervene would be if the decision was unreasonable. This would require the trafficked person to demonstrate that the decision to prosecute was so unreasonable that no reasonable prosecutor acting reasonably could have come to it; this is an exceptionally high

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[52] *Idem*, para. 45.

[53] It is noteworthy that the Court reduced YT's sentence from 9 months' imprisonment to 4 months' imprisonment because her status as a (former) trafficked person was a relevant mitigating factor. *Supra,* nt. 35, para. 47.

threshold.[54] The necessity to rely on the sensible and compassionate exercise of the prosecutorial discretion inadequately protects trafficked persons and (once again) disempowers them. What is required is a substantive weapon that is a part of their arsenal rather than a discretionary mercy which might or might not benevolently be bestowed upon them.

IV.3. *Regina v N; Le*[55]

The issue in the appeals of N and LE was whether the decisions to prosecute them were an abuse of process. The appellants were Vietnamese nationals, assessed as being aged 17 and 18, respectively, at the dates of their convictions, who had worked as gardeners in cannabis factories and were convicted of producing a controlled drug. They received sentences of 18 months' and 20 months' detention.

N demonstrates the flaw in relying on the reasonable exercise of prosecutorial discretion to ensure the non-criminalisation of trafficked persons. Both N and Le had been assessed as credible by social workers and the United Kingdom Borders Agency. In N's case, there was evidence that he was locked in the factory and not allowed to leave, that he was unpaid, that he was unaware that the plants were illegal and that he was told that he would be killed if he tried to escape. Similarly, in Le's case, there was evidence that he was unpaid and coerced into working in the factory under threats of violence. Yet despite this evidence, in exercising its power of review, the Court found that in each case the prosecution had followed the relevant guidance and had come to a reasonable decision that it was in the public interest to prosecute.

In N's case, the Court found that the prosecutor's decision to prosecute was justified because there was evidence that N was a volunteer who had been smuggled into the country to make a better life for himself and that he had a family member in the United Kingdom, to whom he could have turned. In Le's case, there was evidence that on arrest he had been found with cash and a mobile telephone and that he had been provided with food at weekly intervals. In short, the Court found there was sufficient evidence for a prosecutor reasonably to consider that N and Le had not been compelled within the meaning of Article 26. While the exercise of the prosecutorial discretion in these cases might have been reasonable in the public law sense, it was anathematic to the fundamental purpose of the non-criminalisation principle: ensuring that trafficked persons are not re-traumatised by being prosecuted for offences which are caused by the trafficking situation.

IV.4. *Regina v L, HVN, THN, T*[56]

L was the first case to be decided after the Trafficking Directive became directly effective. The Court did not provide any analysis of how the requirements of Article 8 of the Trafficking Directive differed from those of Article 26 of the Trafficking Convention; rather, the Court found that Article 8 'echoe[d]'[57] Article 26 and that the tripartite procedure set out in *LM*, and endorsed in *N*, provided 'sufficient vindication

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[54] UK Court of Appeal, *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*, [1948] 1 KB 223. A full discussion of public law reasonableness is beyond the scope of this paper.

[55] *Regina v N; Le* [2012] EWCA Crim 189 ("N").

[56] *Regina v L, HVN, THN, T*, [2013] EWCA Crim 991 ("L").

[57] *Supra* nt. 55, para. 8.

for the rights enshrined in the EU Directive as well as the Anti-Trafficking Convention'.[58]

The Court went on to consider the four appellants' appeals. The cases of HVN, THN and T were factually similar: all three were Vietnamese nationals who had worked as gardeners in cannabis factories and were convicted of offences relating to the production of a controlled drug. All three appeals were allowed, and the appellants' convictions quashed, on the basis of strong evidence that they were trafficked children, who had been compelled to commit the criminal activities of which they had been convicted. On the basis of the evidence available at appeal, the Court found that if each appellant had been prosecuted then, an abuse of process argument would have been likely to succeed.[59] The facts of HVN, THN and T's cases did not differ greatly from those of N and Le in *N*, but in *L* the Court based its decision on the evidence available at the date of the appeal, rather than the evidence available at the time that the decision to prosecute was made. In so doing, the Court took a progressive, proactive approach to its power of review.

L was a female national of Uganda in her mid-thirties, who had been convicted of possessing a false identity document. She had been arrested after producing a false passport in support of an application for a national insurance card. She had been trafficked for the purposes of sexual exploitation from Uganda. After several years of enforced prostitution she had been released by her trafficker who gave her a passport that she believed was genuine and she was entitled to. She had been released several months before her arrest.[60] In allowing her appeal and quashing her conviction the Court held:

> Given the appellant's prolonged exposure to involuntary prostitution and enforced control, the offence she actually committed appears to us to have arisen as a result of her being a victim of trafficking who was provided with a forged passport for her to use as if it were genuine, and the use of it represented a step in a process by which she would escape. On the basis of the facts which are now known, if this appellant had been prosecuted, an abuse of process argument would have been advanced with a realistic prospect of success.[61]

The facts of L's case were almost identical to those of YT's in *LM*. In YT's case the Court found that there was an insufficient connection between the trafficking situation and the offending behaviour such that it had not been compelled within the meaning of Article 26 of the Trafficking Convention. In L's case the Court found that her use of the false passport was a step in the escape process. Once again, the Court took a progressive, proactive approach to its power of review. Indeed, the decision in L's case was even more progressive than those in the cases of HVN, THN and T because L had already escaped her trafficker precisely as YT had done. In effect, by finding that L's offence arose 'as a result' of the trafficking situation, the Court employed a causation-based approach.

Nevertheless, despite a bold application of the law to the particular facts of the appellants' cases, the Court in *L* did nothing to change the *de jure* position in the United Kingdom, namely that the compulsion-based requirements of the Trafficking

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[58] *Idem,* para. 18.
[59] *Idem*, paras. 35—67.
[60] *Idem*, paras. 68—74.
[61] *Idem*, para. 74.

Convention and the Trafficking Directive are met by three mechanisms: the defence of duress, the exercise of the prosecutorial discretion and the availability of a stay of proceedings as an abuse of process. As demonstrated by the cases of YT in *LM* and N and Le in *N*, this approach does not offer trafficked persons sufficient protection against non-criminalisation.

V. A proposed model for the non-criminalisation of trafficked persons in international law

V.1. Deficiencies in the existing system

The analysis of the operation of the international and European legal frameworks governing the non-criminalisation of trafficked persons in the domestic law of the United Kingdom demonstrates that the existing system has a number of significant deficiencies that result in a lacuna in efforts to protect the rights of trafficked persons.

Most significantly, there is no binding international law obligation to refrain from criminalising trafficked persons. In many ways, the Trafficking Protocol has been a great success. It has provided an authoritative definition of trafficking in persons. It tackles critical practicalities such as criminal jurisdiction, mutual legal assistance and extradition. It is linked to a parent instrument which combats corruption, provides for the exchange of evidence between states and establishes a mechanism by which the assets of offenders may be confiscated. It has provoked a swathe of legal and policy reforms at both regional and national levels which have had a profound (and predominantly positive) impact on the way in which trafficking in persons, and trafficked persons themselves, are dealt with at ground level. Perhaps most significantly, the adoption of the Trafficking Protocol has focused 'global attention and resources on debt bondage, forced labour, sexual servitude, forced marriage and other exploitative practices that continue to plague all regions and most countries of the world.'[62]

However, for all its successes, the Trafficking Protocol fails properly to protect trafficked persons from criminalisation for offences committed as a consequence of the trafficking situation. While developments since the adoption of the Trafficking Protocol demonstrate that there is broad consensus at the international level that the principle of non-criminalisation is an essential element of the framework for protecting trafficked persons, there exists no international legal provision capable of binding national courts. This is amply demonstrated by the conspicuous absence of any discussion of public international law in the judgments of the Court of Appeal in *O*, *LM*, *N* and *L*.

The absence of a binding non-criminalisation provision in international law is significant because it means that there is no unified vision to which regional and national legislators may (or must) adhere. This contributes to (and exacerbates) the remaining significant deficiencies in the existing system. While the international soft-law provisions are wholly causation-based (the Recommended Principles and Guidelines and the Model Law are both entirely devoid of the language of compulsion), in the absence of a binding international law provision, the European regional system has adopted a compulsion-based approach in giving effect to the non-criminalisation principle. The compulsion-based approach fails to recognise that even

[62] Gallagher, A.T., "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway", *Virginia Journal of International Law,* vol. 49, ed. 4, 2009, 789—848, 793.

in the absence of any threat or use of force, or direct pressure or coercion, a trafficked person might be left with no realistic alternative but to commit a criminal offence (even after the trafficking situation has ended).

In the United Kingdom, the significance of the regional system cannot be overstated because no non-criminalisation provision has been transposed into domestic law. Further, the interpretation of Article 8 of the Trafficking Directive in *L* (notwithstanding the generous judgments on the particular facts of the appellants' cases) means that the apparent attempt to move towards a causation-based approach at the regional level has not filtered down to the domestic level.[63] The Court found that there was no difference between Article 8 of the Trafficking Directive and Article 26 of the Trafficking Convention: both were purely compulsion-based, requiring something more than the offence being committed as a direct consequence of the trafficking situation.

Similarly, in the absence of a binding international provision to the contrary, the regional system in Europe has developed in such a way that the requirements of the non-criminalisation provision are qualified: they are satisfied by the provision of the possibility of non-punishment and non-prosecution. In the United Kingdom, the Court of Appeal has found that this requirement is fulfilled by the defence of duress, the exercise of the prosecutorial discretion and the court's limited power of review through the abuse of process jurisdiction.[64] In situations where duress is not available (that is, the vast majority of situations) the trafficked person is thus left to rely on a prosecutor deciding that it is not in the public interest to prosecute them. A court is only able to intervene if the prosecutor fails to consider the Crown Prosecution Service guidance or acts unreasonably.

This does not provide adequate protection because the power is placed entirely in the hands of the prosecutor. Trafficked parties do not have the right to defend themselves by asserting that the offence was committed as a result of the trafficking situation; rather, they must ask the prosecutor (who, it must be remembered, represents the opposing party in the litigation and, thus, has interests and motivations that diverge manifestly from those of the trafficked person) for mercy. If the prosecutor refuses, as long as the decision to continue with the prosecution is not so unreasonable that no reasonable prosecutor acting reasonably could have come to it, a court has no power to intervene. Perhaps unsurprisingly, the exigencies of security (specifically, the "prevention" of crime and effective immigration control) are thus reified at the expense of the rights of trafficked persons.

The absence of a binding international law provision has allowed regional and national systems in Europe to develop mechanisms to give effect to the non-criminalisation principle which are deficient in two significant respects: first, they are compulsion-based; and, secondly, they are qualified. The deficiencies produce a lacuna in the system of protections for trafficked persons. If they cannot demonstrate that they were compelled to commit the offence, or if a prosecutor decides that it is in the public interest to prosecute, they are not protected against criminalisation and the re-traumatisation that criminalisation entails. The absence of a binding international law provision has allowed these deficiencies to emerge and flourish. Consequently, the proposed model seeks to uproot and overcome these deficiencies through the introduction of such a binding provision.

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[63] See *L*, *supra* nt. 5, 52.

[64] See *L*, *supra* nt. 52.

V.2. The proposed model

Of course, following the Recommended Principles and Guidelines and the Model Law, the proposed model is causation-based. Such an approach is mandated by the obligation to protect and assist trafficked persons with full respect for their human rights. Trafficked persons often commit offences in the absence of a high degree of pressure, and yet the offending behaviour remains a direct consequence of the trafficking situation. The compulsion-based approach is incapable of dealing with the subtle realities of trafficking in persons. However, the proposed model goes further than the settled, causation-based model that is established in international soft-law. What is proposed is a positive defence against criminalisation: the trafficking defence.[65]

Similarly to the defences of self-defence or duress, the trafficking defence would apply even when all the requisite elements of an offence are present, which means that 'the accused admits that he has voluntarily committed what is *prima facie* a crime with the state of mind normally sufficient for that offence, but at the same time asserts some *special* circumstances which he claims excuse or justify his actions.'[66] For example, the defence of self-defence applies when the accused admits the deliberate application of force to another, but simultaneously asserts that she or he used only such force as was reasonable in the circumstances to protect against the infliction of unlawful physical harm by that other person. If successfully established,[67] self-defence is a complete defence against criminal liability.

The trafficking defence would operate in a similar manner. The trafficked person would not challenge committing the crime or its constituent elements. Rather, she or he would seek to rely upon the trafficking defence as a complete defence against criminal liability. In order to establish the defence, it is proposed that the trafficked person would need to establish: first, that they are (or were) a trafficked person; and, secondly, that the offence was committed as a direct consequence of the trafficking situation. If both elements were established, then the trafficked person would have a complete defence.

Of course, the trafficking defence could be invoked only upon the commencement of a criminal prosecution. Therefore, it is proposed that that the trafficking defence would work in tandem with an ordinary causation-based non-criminalisation provision allowing discretionary non-prosecution and non-punishment to continue. However, if a trafficked person is faced with a prosecutor who is determined that the public interest lies with prosecution, then the trafficking defence would empower them to protect themselves against criminalisation (if not arrest, interview and prosecution). Importantly, the primary role in assessing the credibility of the trafficked person would be removed from the prosecutor and vested in the court.

It is important to recognise that the trafficking defence does not protect trafficked persons from the re-traumatising experience of being prosecuted:

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[65] See generally Cross, L., *supra* nt. 4. Cross notes that eight States of the United States of America already provide trafficked persons with an affirmative defence in certain circumstances.

[66] Hooper, A and Ormerod, D., *Blackstone's Criminal Practice*, 22nd ed., Oxford University Press, Oxford, 2011, 48.

[67] In the United Kingdom, once self-defence is raised by the defendant, the prosecutor must demonstrate on the balance of probabilities that the defendant was not acting in self-defence. However, the proposed model does not seek to dictate the operation of the standard and burden of proof when the trafficking defence is raised. Such matters would be governed by the basic principles of states' domestic legal systems.

> 'Rather, by the time this relief is available to a trafficking victim, the criminal justice system already arrested, charged, and prosecuted the defendant as a criminal rather than recognizing him or her as a victim of crime. Therefore, while providing an affirmative defense for crimes committed while the defendant was a trafficking victim is an important form of relief for when trafficking victims slip through the cracks, it does not combat dual victimization.'[68]

Nevertheless, while it is important to recognise this fundamental shortcoming of the proposed model, the trafficking defence would provide a substantive mechanism by which trafficked persons would be empowered to protect themselves against criminalisation.

The model would be incorporated into the international legal framework by way of an amendment to the Trafficking Protocol in the form of an additional clause. While international treaties are ordinarily drafted to be unlimited in duration and are thus characterised by their stability, there are nevertheless times when their provisions must be amended. The standard process by which international treaties may be amended is set out in Article 40 of the Vienna Convention on the Law of Treaties but applies only when the treaty in question does not have an amendment clause. The Trafficking Protocol has such a clause: Article 18, entitled 'Amendment'. It provides that after the expiry of five years from the entry into force of the Protocol, a State Party may propose an amendment by filing it with the UN Secretary-General. The amendment is then communicated to the other States Parties and the Conference of the Parties to the Convention who must consider and decide upon the proposal. In the absence of consensus, a two-thirds majority vote of States Parties is required for an amendment to be adopted. The amendment would then be subject to the ordinary process of ratification, acceptance or approval.

In all likelihood the process of agreeing on an amendment and bringing it into force would be fraught with technical and political difficulties: 'the process […] can be as difficult as negotiating and bringing into force the original treaty, and sometimes even more troublesome.'[69] The process is difficult because, like any progressive public international law development, it requires consensus between a multiplicity of states, each with a distinct political, legal and moral culture. While there would, of course, be a myriad of political and technical practicalities involved in the amendment of the Trafficking Protocol, these practicalities should not deter progressive developments; rather, they must be engaged and overcome. It is posited that an additional clause in the following terms would constitute a progressive development:

Non-criminalisation

1. Trafficked persons shall not be criminalised (including by being arrested, detained, interviewed, charged, prosecuted or punished) for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their status as trafficked persons.
2. Trafficked persons shall have a complete defence against liability for their involvement in unlawful activities to the extent to which such involvement is a direct consequence of their status as trafficked persons.

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[68] Cross, L., *supra* nt. 4, 409.

[69] Aust, A., *Modern Treaty Law and Practice*, 2nd ed., Cambridge University Press, Cambridge, 2007, 262.

VI. Conclusion

What has been proposed is an amendment to the Trafficking Protocol to add a causation-based non-criminalisation clause which would include a positive defence against criminalisation for trafficked persons. While there can be no doubt that such a proposal would face staunch criticism among those who value security above all, reform is imperative to alleviate the on-going criminalisation, and consequent re-traumatisation, of trafficked persons. Despite being an accepted normative standard at the international, regional and national levels, the principle of non-criminalisation (in its present manifestation) fails in its eponymous aim; the truth at ground level is that instances of trafficked persons being criminalised for offences committed as a direct consequence of the trafficking situation remain common.

If adopted, it is hoped that the proposed international law model would provide an overarching vision which would lead to consequential amendments at regional and national levels and, ultimately, to the implementation of a more substantive realisation of the principle of non-criminalisation for trafficked persons at ground level.

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Trafficking of Human Beings for the Purpose of Organ Removal: Are (International) Legal Instruments Effective Measures to Eradicate the Practice?

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Keywords
ORGAN TRAFFICKING, ILLEGAL ORGAN TRADE, HUMAN TRAFFICKING, ORGAN DONORS, ORGAN RECIPIENTS, ORGAN DONATIONS, PRESUMED CONSENT, LEGAL INSTRUMENTS, INTERNATIONAL LEGISLATION, SUPRANATIONAL LEGISLATION, DOMESTIC LEGISLATION, EXTRA-LEGAL MEASURES.

Abstract
Organ trafficking is perhaps the most obscure form of human trafficking. It is an international problem with transnational dimensions and involves the intersection between the world of organized crime, impoverished organ donors, sick recipients and unscrupulous medical staff. This article starts out by exploring the global patterns of organ trafficking, highlighting the physical and psychological harm caused to victims. The statistics on organ transplants and patterns of organ trafficking as well as the social, economic and legal dimensions of this type of crime are examined. The article subsequently continues with a discussion of the domestic, regional and international legal and semi-legal instruments established to battle organ trafficking and reflects upon whether or not these instruments are effective in curtailing this growing problem. The article ends with a discussion of alternative approaches to deal with the problem of organ trafficking and makes a case for more problem-driven solutions, such as increased extra-legal measures, international cooperation and a focus upon the causes and victims of organ trafficking rather than focusing upon criminal law alone.

I. Introduction

Organ trafficking is perhaps the least understood and investigated form of human trafficking. It is a growing international problem with transnational dimensions. Organ trafficking involves the intersection between the criminal world of traffickers, impoverished donors, sick recipients and unscrupulous medical staff. This article

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explores the dimensions of organ trafficking, global patterns and physical and psychological harm to victims. It concludes with a discussion of domestic and international instruments used to regulate the trade in organs, and examines whether or not legal instruments can be effective in regulating and controlling this trade.

II. Human Trafficking

On 25 December 2003 the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, entered into force.[3] Human trafficking, according to Article 3 of the Protocol, is defined as:

> […] the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs.[4]

For an act to be considered human trafficking, it must comprise the three constituent elements and one element from each must be present for trafficking to occur: (1) an action (recruitment, transportation, transfer, harbouring or reception of persons); (2) through means of (threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim); and (3) goals (for exploitation or the purpose of exploitation - which includes exploiting the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or similar practices, and the removal of organs).
Based upon Article 3 of the UN Trafficking Protocol, the Declaration of Istanbul on Organ Trafficking and Transplant Tourism defines organ trafficking as the:

> […] the recruitment, transport, transfer, harboring or receipt of living or deceased persons or their organs 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 to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.[5] The discussion around the phenomenon is not about the trafficking of organs

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[3] GA Resolution 39574 (55th) of 15 November 2000, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2237 *UNTS* 319; Doc. A/55/383, available online at <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en> (accessed 5 June 2013. As of June 2013 it has been ratified by 155 states.

[4] *Ibid*.

[5] Declaration of Istanbul on Organ Trafficking and Transplant Tourism, World Health Organization, 2008, available online at <declarationofistanbul.org/index.php?option=com_content&view=article&id=81&Itemid=85> (accessed 12 October 2013).

> per se, but the trafficking of human beings for the purpose of organ removal.

One must understand organ trafficking within the context of transplant commercialism and transplant tourism. Both involve the commodification of the human organ (often a kidney or liver) which is bought or sold for commercial or material gain. While *travel for transplantation* – the movement of donor, recipient or transplant professionals across jurisdictional borders – may be legitimate, the practice becomes *transplant tourism* when the practice "…involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals, and transplant centers) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population."[6] Transplant tourism has often been linked to organ trafficking.

III. Organ Trafficking

III.1. Background

Organ trafficking is perhaps the least profiled and understood form of human trafficking. It often involves the intersection of donor, recipient, medical experts and (organized) criminal groups facilitating the trade. While the United Nations Office on Drugs and Crime[7] and the Council of Europe[8] also refer to the trafficking in organs or tissues (often from cadaver donors), the focus of this paper will be on the trafficking of live human beings for the purpose of organ removal.

In 2006, the United Nations came to the conclusion that it was impossible to provide any estimation on the scope of organ trafficking.[9] The topic was not a priority nor had it received close scrutiny in Member States. Most cases included in the report involved the illegal removal and trafficking of organs or tissue from deceased persons.[10] A year later, however, at the Second Global Consultation on Human Transplantation of the World Health Organization (WHO) in March 2007, it was estimated that "…the extent of organ sales from commercial living donors (CLDs) or vendors has now become evident..." and was estimated at 5-10% of the annual kidney transplants performed around the world.[11]

The improvement of health care in many parts of the developed world has contributed to an increased life expectancy, resulting in a larger population of older

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6 *Ibid*. Also, the full declaration can be found in *Clinical Journal of the American Society of Nephrology*, vol. 3, no. 5, 2008, 1227–1231, (128).

7 United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons*, 2008, available online at <unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf> (accessed 14 July 2013)

8 Council of Europe. *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, 2009, available online at coe.int/t/dghl/monitoring/trafficking/docs/news/organtrafficking_study.pdf> (accessed 14 July 2013).

9 United Nations, Report of the Secretary-General, *Preventing, combating and punishing trafficking in human organs,* Vienna, February 21, 2006, available online at <www.unodc.org/unodc/en/commissions/CCPCJ/session/15.html> (accessed 27 November 2013).

10 *Ibid*.

11 Budiani-Saberi, D. A. and Delmonico, F. L., "Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities", *American Journal of Transplantation,* vol. 8, ed. 5, 2008, 925–929, 925.

people. At the same time, technological and medical developments have facilitated the transplantation of organs, making this an almost routine procedure. The demand for organs far exceeds the supply and the shortage is acute. Between 1990 and 2003, kidney donations in the United States increased only 33%, but those awaiting a kidney for transplant increased by 236%.[12] According to the United States Department for Health and Human Services, there were, as of 5 June 2013, 118,226 candidates waiting for organs (75,643 of whom are active waiting list candidates), but only 3,412 donors registered in the U.S. as of March that year.[13] Data on organ transplants from the WHO shows that of the 106,879 organs known to have been transplanted in ninety five Member States in 2010, slightly more than two thirds (68.5%) were kidneys. But those 106,879 operations satisfied only 10% of the global need, according to the WHO.[14]

The wait for a kidney in the U.S. in 2008 was twenty one days to eight and a half years.[15] This problem has been identified elsewhere as well. The chronic shortage in Europe means between 15% and 30% of European patients will die while waiting for a kidney transplant, which averages about three years.[16] The US Department of Health and Human Services estimates eighteen people in the U.S. will die each day waiting for an organ.[17]

Organs can be obtained from living or deceased donors. Waiting times for an organ from a cadaver, usually a kidney, differs from one country to the next. This ranges from an average wait in Britain and the United States of two to three years, to six to eight years in Singapore, and a longer wait in the Gulf States and Asia.[18] The shortage in organs from cadaver donors has been driven, in part, by religious beliefs that the body should be buried intact, and to a fear of hospitals intentionally allowing patients to die in order to harvest their organs for paying patients.[19] A shortage in cadaver organs and lengthy waiting times for organ transplant has led many in need of a kidney to seek to obtain one from a live donor.[20]

There are a number of reasons that a person seeking an organ prefers one from a live donor. According to the International Association of Living Organ Donors, the quality of organs from live donors "tends to be superior to organs from deceased

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12 United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), "011 Workshop: Human Trafficking for the Removal of Organs and Body Parts", 13-15 February 2008 Background Paper, Vienna, available online at <www.ungift.org/doc/knowledgehub/resource-centre/GIFT_ViennaForum_HumanTraffickingfortheRemovalofOrgans.pdf> (accessed 27 November 2013), citing Scheper-Hughes, N., 'Illegal Organ Trade: Global Justice and the Traffic in Human Organs' (forthcoming).

13 US Department of Health and Human Services, Organ Procurement and Transplantation Network, available online at <optn.transplant.hrsa.gov> (accessed 5 June 2013).

14 The Guardian, Campbell, D. and Davison, N., Illegal kidney trade booms as new organ is 'sold every hour', 27 May 2012, available online at <guardian.co.uk/world/2012/may/27/kidney-trade-illegal-operations-who> (accessed on5 June 2013).

15 Budiani-Saberi, D.A. and Delmonico, F.L., *supra,* nt. 11, 925-929.

16 Council of Europe, *Trafficking in Organs*, Parliamentary Assembly, 3 June 2003, available online at <assembly.coe.int/documents/workingdocs/doc03/edoc9822.htm> (accessed 12 October).

17 US Department of Health and Human Services, available online at <organdonor.gov/index.html> (accessed 5 June 2013).

18 Rothman, D. and Rothman, S., "The Organ Market", *The New York Review of Books*, Vol. 50, ed. 16, 23 October 2003, available online at http://www.nybooks.com/articles/archives/2003/oct/23/the-organ-market/ (accessed 27 November 2013).

19 Aronowitz, A.A., *Human Trafficking, Human Misery: The Global Trade in Human Beings*, Greenwood Publishing Group, 2009.

20 Rothman, D. and Rothman, S., *supra* nt. 18.

donors".[21] The European Directorate for Quality of Medicines and Health Care emphasises the fact that organs from living donors are more desirable as surgeries can be planned in advance, patients can be prepped with pre-operative treatment[22] and that "long-term survival is usually better, due to a much shorter ischaemic time and a superior physiological state of the transplanted organ".[23]

Recipients also have a decreased likelihood of rejection of the transplanted organ. According to the International Association of Organ Donors, the United Network on Organ Sharing (UNOS) data for kidney transplants in the U.S. from 1996 to 2006, kidney graft survival rates are higher for recipients who have received organs from living donors.[24] After five years, the survival rate is 68% from deceased donors and 81% from living donors; after a ten year period, the survival rate is 42% for those whose kidney has been grafted from a deceased donor, compared to a 58% survival rate for those receiving an organ from a living donor.[25] It is for this reason that recipients prefer to have transplants from live donors.

III.2. Patterns of Organ Trafficking

Organs harvested from deceased donors are packed on ice and can be transported around the world. On the other hand, the harvesting of organs from live donors may involve the travel of both donor and recipient (and possibly the transplant experts) to the place where the transplant will occur. One of the world's leading experts on human trafficking for organ transplant, Dr. Nancy Scheper-Hughes, describes it as a trade that can bring together parties from three or more countries – the donors and recipients often come from different countries while the transplantation may occur in yet a third country. While donor and recipient may originate in the same country, transplant tourism involves the travel of donors and recipients. Shimazono (2007) introduces four modes of transplant tourism during which organ trafficking may occur. These involve situations in which the donor travels to the recipient's country, the recipient travels to the donor's country, a donor and recipient from the same country travel to a third country where the transplant centre is located, and a situation where a donor and recipient travel from different countries to a third country for the transplant procedure. The transnational nature of this crime raises questions about the possibility of its control through international law or instruments.

Historically, certain patterns have been observed. In the 1990's most recipients of kidneys were residents of the Gulf States who traveled to India to purchase an organ or they were Asians who traveled to China or India. India remains a popular destination for both purchase and transplant,[26] and buyers come from India's middle class and from around the world and include the United States, Canada, England and

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[21] See International Association of Living Organ Donors, Inc. at <www.livingdonorsonline.org/kidney/kidney2.htm>.

[22] In the case of legal transplants, both donor and recipient would be prepped and provided with care. In the case of illicit transplants, it is often only the donor who is provided with pre-operative care.

[23] Council of Europe, European Directorate for Quality of Medicines and Health Care, available online at <http://www.edqm.eu/en/living-donation-1523.html> (accessed 5 June 2013).

[24] Also supported by Naderi, G.H., e.a., "Living or deceased donor kidney transplantation: a comparison of results and survival rates among Iranian patients", *Transplant Proceedings*, vol. 41, ed. 7, 2009, 2772-2774.

[25] International Association of Living Organ Donors Inc., available online at <livingdonorsonline.org/kidney/kidney2.htm> (accessed 5 June 2013).

[26] At the time of writing this article, the lead author was told by experts on organ trafficking in Nepal, that a particular hospital in India is being used for the transplant of organs from trafficked Nepali victims.

the countries in the Middle East.[27] The market has expanded, but general patterns can be observed. The trade in kidneys from live donors generally flows from poor, underdeveloped countries to rich, developed ones. There are organ-donor and organ-recipient nations.[28] Common countries of origin for those selling kidneys are Bolivia, Brazil, China, Columbia, Egypt, India, Iran, Iraq, Israel, Moldova, Nigeria, Pakistan, Peru, the Philippines, Romania and Turkey. Countries of origin for those purchasing kidneys are Australia, Canada, Hong Kong, Israel, Italy, Japan, Malaysia, Oman, Saudi Arabia, South Korea, Taiwan and the United States.[29]

III.3. The donors and recipients in the organ trafficking trade

There are about 6,000 international kidney transactions a year.[30] Donors and recipients vary from one country to the next and even between regions within particular countries. There are, however, some very general trends. Organs are supplied by desperately poor people in poor countries to recipients in more affluent ones. Donors are generally minorities, and recipients of the organs - white or Middle Eastern. While donors may be male or female, most recipients of purchased organs are male, rarely female. Donors are young; recipients generally older.[31]

Few empirical studies exist on organ trafficking. Research in Nepal indicates that the trafficking of human beings for the purpose of organ removal occurs predominantly in one district (Kavree). Donors are young men between the ages of eighteen and forty two (average age is thirty). They come from different ethnic minority groups in the district and are extremely poor.[32] In the state of Tamil Nadu, India, 71% of the 305 respondents in a study of kidney sellers were women. Almost all of the men and 60% of the women were labourers or street venders. Two of the participants reported that they were forced to sell a kidney by their husband.[33] Other studies have also found that many organ sellers in India are women, however in the State of Punjab, India, it is generally poor young men (labourers) between the age of eighteen and thirty who agree to sell a kidney.[34] A kidney is sometimes sold to pay the dowry for a daughter's wedding.

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27 Rothman, D., and Rothman, S., *supra,* nt. 20.

28 Scheper-Hughes, N., "Parts unknown. Undercover ethnography of the organs-trafficking underworld", *Ethnography*, vol. 5, ed. 2, 2004, 29—73.

29 Information taken from Scheper-Hughes, N., "Organs Without Borders. A new comparative advantage? Why the poor are selling their organs", *Foreign Policy*, ed. 146, 2005, p. 26—27, available online at <foreignpolicy.com/articles/2005/01/05/organs_without_borders> and modified with data from Saletan, W., "The Organ Market", *The Washington Post,* April 15, 2007, available online at <washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041302066_pf.html> and Shimazono, Y., "The state of the international organ trade: a provisional picture based on integration of available information", *Bulletin of the World Health Organization*, vol. 85, ed. 12, December 2007, 955-962, available online at <who.int/bulletin/volumes/85/12/06-039370.pdf> (all accessed 13 October 2013). Published in table-format in Aronowitz (2009).

30 Information based on the World Health Organization estimates from Saletan, W., 2007, *supra*, nt. 29.

31 Aronowitz 2009, *supra* nt. 19.

32 Personal Interview by author with Dr. Meena Poudel, Anti-Trafficking, Gender and Violence Against Women Advisor, USAID, Kathmandu, Nepal, April 25, 2013.

33 Goyal, M., et al, "Economic and Health Consequences of Selling a Kidney in India", *Journal of the American Medical Association*, vol. 288, ed. 13, 2002, 1589-1593.

34 Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, Pearson, E., "Coercion in the Kidney Trade? A background study on trafficking in human organs worldwide", Eschborn, April 2004, available online at <www.giz.de/Themen/en/dokumente/en-organ-trafficking-2004.pdf> (accessed 12 October 2013).

In Moldova, kidney sellers are poor young men from rural areas between the ages of eighteen and twenty eight, most of whom were deceived or coerced in selling their kidney. While they were paid between $2,500 and $3,000 to forfeit their kidney, recipients were required to pay between $100,000 and $200,000 for the operation.[35] In Nigeria, kidney sellers are usually poor, single women.[36]

Table 1 Demographic Data on Organ Sellers in Different Countries[37]

Country (State)	Gender	Age	Education	Occupation	Income
India (Tamil Nadu)	Female 71% Male 29%	35	2.7 years	N.A.	Annual family income $420; 71% below poverty line
India (Punjab)	Male	18-30	N.A.	Laborer	N.A.
Philippines	Male	29	7 years	N.A.	Annual family income $480
Nigeria	Female	Not Available (N.A.)	N.A.	N.A.	Very low annual income
Moldova	Male	18-28	Poor	Laborer	Low

III.4. Consent, Deception, Coercion, and Exploitation in the Procurement of Body Parts

Organs are obtained through means varying from coercion and deception to fraudulently-obtained consent. Persons can be kidnapped, sold or killed for their organs. The United Nations has reported that child trafficking for organ harvesting has occurred and that "many abducted or missing children have subsequently been found dead, their bodies mutilated and certain organs removed".[38] This practice has been associated with the African traditional practice of voodoo in which certain body parts are sold and used by practitioners to increase fertility, health, wealth or influence of a paying client.[39]

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35 Council of Europe 2003, *supra* nt. 16.

36 Scheper-Hughes 2004, *supra* nt. 28.

37 Data for this table appeared in a different version in Aronowitz 2009, *supra*, nt. 19 and was compiled from the following sources: Scheper-Hughes, N., *Commodifying Bodies*, SAGE Publications LTD, London, 2003, Scheper-Hughes 2005, *supra*, nt. 29, Goyal *et al.* 2002, *supra*, nt. 33, GTZ GmbH 2004, *supra*, nt. 34, and the Council of Europe 2003, *supra*, nt. 16.

38 United Nations Office on Drugs and Crime, REPORT: *Report of the Secretary-General to the Commission on Crime Prevention and Criminal Justice on preventing, combating and punishing trafficking in human organs*, 21 February 2006, E/CN.15/2206/10, 2006, par. 82, available online at <unodc.org/unodc/en/commissions/CCPCJ/session/15.html> (accessed 03 October 2013).

39 Centre for African Studies, Scheper-Hughes, N.*, Bodies of Apartheid: the Ethics and Economics of Organ Transplantation in South Africa*, 28 September 1999, available online at <sunsite.berkeley.edu/biotech/organswatch/pages/bodiesapart.html> (accessed 28 September 2013).

Organ donors have been coerced into selling body parts. After leaving their homes, itinerant workers who have been promised jobs that fail to materialise, are locked in safe houses until they are a match for a kidney recipient. The donor is then forced to relinquish an organ if he or she hopes to return home.[40] The police in the Philippines raided a house near Manila and freed nine men who were being held by a gang that had lured them with the promise of good jobs. Instead, they forced them to agree to "donate" a kidney.[41]

Fraudulent practices have also been documented. Cases of persons admitted into the hospital in Brazil, India and Argentina, for an unrelated illness or accident have reportedly had a kidney removed without their consent.[42] One patient was admitted to a Sao Paulo (Brazil) hospital in June 1997 to have an ovarian cyst removed. During a routine follow-up examination, the woman's family doctor discovered that she was missing a kidney. The hospital later told the patient that her "missing kidney was embedded in the large 'mass' that had accumulated around her ovarian cyst" and that the diseased ovary and the kidney had been discarded. However, the hospital was unable to produce medical records.[43] A leading expert on organ trafficking documented an asylum for mentally ill persons in Argentina in which the director exploited his patients by providing "blood, corneas and kidneys" to area hospitals.[44]

Another method of obtaining an organ is through deception or fraud. Donors are often illiterate or ignorant about health and medical issues. Cases have been documented whereby donors were told that if they donate a kidney, another will grow back to replace it.[45] Another donor was told that only one kidney works while the other one sleeps and that the doctor would remove his "sleepy" kidney and leave him with the good one.[46] The most common form of trafficking in organs, however, involves cases in which the recipient agrees to the sale.[47] While donors may initially consent to selling a kidney, buyers exploit their ignorance, desperation, poverty or position of dependency or vulnerability. A mentally deficient criminal selling a kidney to his lawyer or a maid providing a kidney to her employer are examples of positions of dependency or vulnerability which may negate the consent of a person willing to donate an organ.[48]

Why is it human trafficking when donors often agree to voluntarily sell their organs? Deceit concerning payment and the medical risks involved in the operation often occurs so that donors are unable to make an informed decision. Exploitation

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40 Aronowitz, 2009, *supra*, nt. 19.

41 Medical News Today, Paddock, C., *Philippine Government Bans Organ Transplants For Foreigners*, May 1, 2008, available online at <medicalnewstoday.com/articles/105980.php> (accessed 28 September 2013).

42 GTZ GmbH, 2004, *supra*, nt. 34.

43 Scheper-Hughes, N., "Commodity Fetishisms in Organ Trafficking", *Body and Science,* vol. 7, ed. 2-3, 2001, 31-62.

44 Scheper-Hughes 2003, *supra*, nt. 37.

45 Interview with Dr. Meena Poudel, Anti-Trafficking, Gender and Violence Against Women Advisor, USAID, Kathmandu, Nepal, April 25, 2013 and Ms. Shareen Tuladhar, Program Officer, Combat-Trafficking in Persons, Asia Foundation, Kathmandu, Nepal, May 1, 2013.

46 Lip Magazine, Scheper-Hughes, N., *Black Market Organs: Inside the Trans-Atlantic Transplant Tourism Trade*, 3 June 2005, available online at <lipmagazine.org/articles/featscheperhughes.htm> (accessed 28 September 2013).

47 GTZ GmbH*,* 2004, *supra*, nt. 34.

48 Aronowitz 2009, *supra*, nt. 19. The man who received a kidney from his Filipino domestic worker justified this "donation" using the argument that "Filipinos are a people who are anxious to please their bosses" (Scheper-Hughes, N., "Keeping an eye on the global traffic in human organs", *The Lancet,* vol. 361, May 10, 2003, 1645-1648).

extends beyond the mere fact that donors are not adequately advised of the risks or compensated for the loss of a kidney. Victims of organ trafficking may be promised complete post-operative medical care, but this rarely happens.[49] Organs Watch,[50] which carried out research on organ trafficking in countries around the world, found that none of the donors interviewed in Brazil, Manila, Moldova and Turkey had been treated by a doctor a year after the operation, despite frequent complaints of weakness and pain. Some had even been turned away from the same hospitals which had performed the surgery. In one case a kidney seller was given a prescription medicine for the pain, but was unable to pay for the prescription of painkillers and antibiotics. Others interviewed also reported being fearful of not being able to pay for medication if they needed it.[51]

III.5. The Harm to Organ Donors: Economic, Physical and Psychological Consequences

Studies on those who have been trafficked for their organs, including those who have willingly sold their organs, show that the quality of the life of these patients is not better off than it was prior to the operation. The consequences can be dire, manifesting themselves in economical, physical and psychological hardships.

In a study of 305 Indians who had sold a kidney in Chennai, India, an average of six years before the survey, doctors found that 96% of the sellers had sold their kidney to escape debt. On average, the sellers received $1,070 which was spent on food and clothing, and repaying debts. Due to the weakened condition of the donor, the average family income declined after the operation, families were still in debt and the number who now lived below the poverty line had increased.[52] Further studies on kidney sellers in Iran, India, Moldova and the Philippines indicate that they experience unemployment, reduced income and economic hardship. Unable to sustain the heavy demands placed upon them after the operation, workers previously involved in agriculture or construction work found themselves unemployed.[53] In Moldova, kidney sellers reported having to spend their earnings to hire labourers to compensate for the heavy agricultural work they could not do.[54]

Victims are exposed to serious consequences to their health either during or after the operation. Police in the Philippines raided apartments and found surgical operations were being carried out to remove kidneys under poor hygienic conditions. Persons have reportedly died under such circumstances.[55] Without proper post-operative care, the physical health of kidney sellers often deteriorates after the operation; patients complain of chronic pain, weakness and ill-health. This was reported in 86% of the patients interviewed in India.[56] Donors in the Philippines and Eastern European countries reportedly suffered from hypertension and kidney insufficiency. In many of the cases investigated, few of the donors in Turkey, Moldova, the Philippines or Brazil had seen a doctor or received post-operative health

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49 Aronowitz 2009, *supra*, nt. 19.

50 Organs Watch is a human rights oriented documentation center at the University of California, Berkeley, which investigates complaints, conducts research and issues reports on the global trade in organs.

51 Scheper-Hughers 2003, *supra,* nt. 37.

52 Goyal et al. 2002, *supra*, nt. 33.

53 Aronowitz 2009, *supra*, nt. 19.

54 Scheper-Hughers 2003, *supra,* nt. 37.

55 Paddock 2008, *supra*, nt. 41.

56 Goyal et al. 2002, *supra*, nt. 33.

care – a year after the operation. Patients were either unable to pay for the services or refused medical care.[57] Deceived donors are unable to report their victimisation to police as they are often participating in the illegal act of selling an organ. Police in Punjab, India reported that donors were not provided proper post-operative care, were thrown out of the hospital one week after the surgery and threatened with imprisonment for participating in illegal organ transplants. Six persons died as a result of the transplants.[58] Health authorities in the Philippines report that due to lack of post-operative treatment for poor patients, many donors develop health problems such as high blood pressure and urinary tract infections.[59]

Donors also suffer psychologically as a consequence of the transplant. Reports of a sense of worthlessness, serious depression, social isolation and family problems are not uncommon.[60] In Moldova, sellers are excommunicated from the local Orthodox Church, their chances of marriage are non-existent and many are alienated from their families. There are reports of kidney sellers disappearing from their families and one committed suicide. Fear of being labelled disabled or weak results in male kidney donors from seeking follow-up medical care.[61]

III.6. Individuals and Organizations Involved in Organ Trafficking

This crime, unlike other forms of trafficking, cannot take place without the complicity of professional medical staff operating in hospitals or private clinics. These doctors knowingly remove healthy organs from individuals not related to the recipients and often in countries where organ donation between unrelated persons is a violation of criminal law – a topic covered later in this paper. In addition to the donor and seller, there are a number of brokers and agents involved. These have been identified as, but are not limited to, hospital and medical staff, nephrologists, postoperative nurses, medical directors of transplant units, dual surgical teams working in tandem, travel agents and tour operators to organize travel, passports and visas. Perhaps the most important link between donor and recipient in the organ trade is the organ hunters or brokers – those who recruit 'donors' locally or internationally from among vulnerable and marginalized populations.[62] These often unscrupulous individuals have no link to the medical field and are reported to be recruited from army barracks, bars, jails and prisons, unemployment offices and shopping malls.[63] Organ brokers scour slum areas in poor countries looking for suitable donors.

A huge organ trafficking operation in India between 1997 and 2002 is estimated to have generated a $31.4 million dollars exchange between the donors, middlemen and doctors. While the recipients were charged between $104,600 and $209,200, the organ

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[57] Scheper-Hughes 2003, *supra,* nt. 37.

[58] Kumar, S., "Police uncover large scale organ trafficking in Punjab", *British Medical Journal,* vol. 326, 2003, 180.

[59] Paddock 2008, *supra*, nt. 41.

[60] Interview with Dr. Meena Poudel, Anti-Trafficking, Trafficking, Gender and Violence Against Women Advisor, USAID, April 25, 2013 and Ms. Shareen Tuladhar, Program Officer, Combat-Trafficking in Persons, Asia Foundation, May 1, 2013.

[61] Scheper-Hughes, N., "Keeping an eye on the global traffic in human organs", *The Lancet,* vol. 361, 2003, 1645-1648, and Scheper-Hughes 2003, *supra*, nt. 37.

[62] UN Global Initiative to Fight Human Trafficking (UN.GIFT), *006 Workshop: Criminal Justice Responses to Human Trafficking,* 13-15 February 2008*,* available online at <www.ungift.org/docs/ungift/pdf/vf/backgroundpapers/BP006CriminalJusticeResponses.pdf> (accessed 03 October 2013).

[63] Scheper-Hughes 2004, *supra*, nt. 28.

sellers, poor migrant labourers from Bihar and Uttar Pradesh states were paid between $525 and $1,050.[64]

The internet provides a forum for organ donor and recipient to "meet" and could actually replace the organ broker. Dubious websites such as "www.Liver4You.org" used to advertise to those looking to purchase a new kidney for a mere $85,000 to $115,000.[65] The organ seller often receives no more than a few thousand dollars of this fee. Other advertisements on the internet encourage people to sell a kidney to get out of debt: "Crisis? Crisis is running over the planet, but you've got a chance! The cost of a human kidney is $70-80K and it could be enough to pay all your debts, credits and much more. You can help yourself right now: just sell your kidney. Hurry up!"[66]

According to the United Nations, corruption is an integral element in organ trafficking and transplantation.[67] It may be as "benign" as allowing wealthy patients to climb to the top of waiting lists for organ transplants, or may be as insidious as protecting illicit practices.[68] A large scale organ trafficking operation uncovered by the Indian Government involved 500 patients, three hospitals, ten pathology clinics, five diagnostic centres, twenty paramedics, five nurses and four doctors. Police were also implicated in the *mala fide* practice.[69]

The organ trafficking trade involves abuses of human rights, deception and at times criminal practices in the abduction or false imprisonment of those being held captive until there is a match to a recipient. The legal and medical communities are at odds concerning the best measures to address this problem. The following section examines legal measures in place to address the donation and sale of organs and explores solutions to end the practice of organ trafficking.

IV. Legal Instruments Dealing with Organ Trafficking

IV.1. Binding Instruments

IV.1.1. International Instruments

Putting the responsibility of combating the crime of organ trafficking, and of human trafficking in general, in the hands of individual states ignores the transnational nature of trafficking. Therefore, it is important to consider the establishment of international legal initiatives to ensure cooperation between State parties and the international criminalization of organ trafficking. To date, there are no legally binding international instruments devoted to organ trafficking alone.[70] There are several international documents, however, which deal with medicine, health sector and/or human trafficking in general and incorporate the crime of organ trafficking therein. The most

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64 Kumar 2003, *supra,* nt. 58.

65 Information available online at <www.liver4you.org> (Accessed 17 June 2008).

66 If you act before August 1st and recruit a friend, you can get 20% of the price of your friend's kidney. (Information at Complete Health Care Lifeline at <kidneykidney.com> (accessed 5 June 2013).

67 United Nations Office on Drugs and Crime, *Trafficking in Persons, Global Patterns,* April 2006, available online at <www.unodc.org/pdf/traffickinginpersons_report_2006-04.pdf> (accessed 03 October 2013).

68 Aronowitz 2009, *supra*, nt. 19.

69 Gentleman, A., "Kidney Thefts Shock India", *New York Times*, 30 January 2008, available online at <nytimes.com/2008/01/30/world/asia/30kidney.html> (accessed 03 October 2013).

70 Parliamentary Assembly of the Council of Europe, *Towards a Council of Europe convention to combat trafficking in organs, tissues and cells of human origin*, 20 December 2012, available online at <assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19236&lang=en> (accessed 03 October 2013).

important binding international legal document considering human trafficking with the purpose of the removal of organs is the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[71] supplementing the United Nations Convention against Transnational Organized Crime.[72] The Protocol is directed at human trafficking in general but includes trafficking with the purpose of the removal of organs within the scope of its definition. The Protocol specifies that ratification requires the criminalisation, prohibition and punishment of the act of trafficking and adopting legislation to ensure this,[73] providing assistance and protection for and aid in repatriation of victims of trafficking,[74] and facilitating the establishment of prevention programs for trafficking, the establishment of effective information exchange and training for law enforcement professionals, and measures concerning border control and the security and validity of travel documentation.[75] The Protocol has been signed by 117 and ratified by 158 UN Member States.[76]

IV.1.2. Regional instruments

The most recent regional binding instrument dealing with the issue of human trafficking in general, and incorporating the crime of organ trafficking specifically is the 2008 Council of Europe (CoE) Convention on Action against Trafficking in Human Beings. The Convention adheres to the definition of trafficking as put forward by the UN Trafficking in Persons Protocol. Being a CoE initiative, the Convention focuses mainly on inter-European cooperation and the prevention of trafficking in persons.

Another notable example of a regional legally binding document incorporating trafficking in organs is the 1997 Council of Europe Convention on Human Rights and Biomedicine, with its supplementary protocol dating from 2002, the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin. Most notably, Article 22 of the supplementary Protocol states that "Organ and tissue trafficking shall be prohibited". The requirements for ratification of the Convention and sanctions for the infringement of provisions for Parties put forward by the Convention are further specified in Articles 23 through 25. These include providing "appropriate judicial protection to prevent or to put a stop to the unlawful infringement of the rights and principles set forth in the Convention",[77] providing persons who have "suffered undue damage resulting from an intervention" with compensations according to the "conditions and procedures prescribed by law",[78] and the provision of "appropriate sanctions to be applied in the event of infringement of the provisions" by the Parties.[79]

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71 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol), 2000, 2237 *UNTS* 319.

72 The Convention may also be referred to as the 'Organized Crime Convention'.

73 As specified under Art. 5.

74 *Idem,* Art. 6 and 8.

75 *Idem,* Art. 9 and 13.

76 *Idem,* Chapter XVII Penal Matters, sub 12 a.

77 Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Applications of Biology and Medicine: Convention on Human Rights and Biomedicine, 1997, Oviedo, 4 IV, Art. 23.

78 *Idem*, Art. 24.

79 *Idem*, Art. 25.

In addition to this Convention, the Council of Europe is currently working on the adoption of the CoE Convention against Trafficking in Human Organs, thereby affirming the need for an international legal document dealing specifically with the issue of organ trafficking. Hence, the CoE will be the first legally binding international instrument dealing solely with the issue of organ trafficking.[80] The document is still pending before the Committee of Ministers and shall include provisions on the measures for the prevention of organ trafficking, protection of victims of the crime and national and international cooperation against organ trafficking and transplant tourism.[81]

IV.1.3. Domestic legislation

In general, the prohibition of organ trafficking and the punishment thereof is governed by domestic legislation. A number of governments have experimented with legislation prohibiting the sale of organs.[82] For the purpose of this article, the Netherlands will be used as a case study to highlight the workings of domestic legislation on organ trafficking. Human trafficking for the purpose of organ removal is included under Article 273f of the Dutch Criminal Code (DCC). Article 273f deals with the crime of human trafficking in general and organ trafficking was included within the scope of the article in 2005. The article specifies the criminalisation of organ trafficking and further states that a Dutch national who is guilty of organ trafficking abroad is also punishable under article 273f DCC. The liability to criminal prosecution of Dutch citizens who commit their crime elsewhere has been included within the scope of article 273f DCC since the implementation of the EU Directive on preventing and combating trafficking in human beings and protecting its victims (2011/36/EU).[83] Article 10 of the EU Directive further expands on the issue of extra-territorial jurisdiction and provides Member States with the option to establish jurisdiction over offenses for the benefit of legal persons established in the territory of the Member State and over offences committed for the benefit of a permanent resident of the territory of that Member State as well as offences committed against nationals or permanent residents.[84]

Voluntary organ donations in the Netherlands are regulated by the Organ Donation Act. The Act specifies the most important conditions for the donation of organs as explicit, informed consent by the donor (Article 8), and that no payment can be procured for the removal of the organ (Article 2).[85] The Organ Donation Act specifies that the intentional removal of an organ from a living person or after a person's death without prior consent constitutes a criminal offense, as well as deliberately causing or encouraging a person to provide permission to remove an

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80 Council of Europe 2012, *supra*, nt. 70.

81 *Ibid*.

82 In the United Kingdom, for instance, the 'Human Organ Transplants Act 1989' prohibits commercial transactions in human organs and establishes general guidelines, such as placing restriction on the transplantation of organs between persons who are not genetically related (The Human Organ Transplant Act 1989 (Chapter 31)). India, too, has legislation. The 1994 'Transplantation of Human Organs Act' prohibits commercial dealings in human organs and restricts live donations to relatives.

83 Art. 10, para.1, subsection b of the 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.

84 *Idem,* para. 2.

85 National Rapporteur on Trafficking in Human Beings (2012). *Human Trafficking for the purpose of the removal of organs and forced commercial surrogacy.* The Hague: BNRM, p. 5.

organ during his or her lifetime in return for a financial payment that amounts to more than the costs incurred by the donor as a direct result of the organ removal operation.[86]

Furthermore, two important legal amendments have been made in the Netherlands to further minimise the participation of Dutch nationals in organ trafficking related practices. Firstly, an amendment has been made to the Dutch Health Insurance Act, which previously stated that transplants completed abroad should be paid for by health insurers regardless of whether or not the organ had been purchased. Article 2.4 (1) (c) has now been amended to provide that the costs of transplants conducted outside of the European Union (EU) and parties to the Agreement on the European Economic Area (EEA) will not be reimbursed unless it can be effectively proven that the organ is donated by a spouse, a registered partner or a blood relative of the insured person.[87] However, for organ transplants conducted within the European Union and parties to the Agreement on the European Economic Area, it is not a requirement for health insurance companies to refuse to pay, even in the case of a reasonable or serious doubt about the contextual factors of transplants; in those cases, reimbursement is determined by the terms of policy of the insurance companies.[88] Secondly, in June 2009 the Subsidy Scheme for donation during life entered into force in the Netherlands; the Scheme ensures that donors receive compensation for expenses incurred through the donation and which are not reimbursed in any other way, thereby giving the compensation of expenses for donors a more permanent character, anchoring it more firmly in Dutch public law and decreasing potential obstacles for organ donation during life.[89]

IV.2. Non-binding international instruments

Several non-binding international instruments have been put forward condemning the practice of international organ trafficking as well as providing the international community with recommendations for eradicating the crime. The World Health Organization (WHO) has established a set of guiding principles[90] governing the practice of organ transplantation in general and, more specifically, condemning the commercial sale of organs.[91] As Guiding Principle 5 of the WHO Guidelines states: "Cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value. Purchasing, or offering to purchase, cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned." Also: "The prohibition on sale or purchase of cells, tissues and organs does not preclude reimbursing reasonable and verifiable expenses incurred by the donor, including loss of income, or paying the costs of recovering, processing, preserving and supplying human cells, tissues or organs for transplantation". The Principles further put forward that "the organization and execution of donation and transplantation activities, as well as their clinical results, must be transparent and open to scrutiny, while ensuring that the personal anonymity and privacy of donors and recipients are always protected".[92] This Principle condemns

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86 *Ibid.*
87 *Ibid.*
88 *Ibid.*
89 *Ibid.*
90 The WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, available at: <who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf> (accessed June 26th, 2013).
91 *Idem,* Guiding Principle 5.
92 *Idem,* Guiding Principle 11.

the practice of the illicit involvement of medical health care professionals in obscure and questionable organ transplantation activities. Moreover, Resolution WHA63.22, adopted by the 63rd World Health Assembly in May 2010, endorses a revision of the WHO Guiding Principles and further urges Member States to implement the Guiding Principles, to promote increased altruistic donation, to establish transparent systems for the allocation of organs and tissues, and to promote the collection of data relating to organ trafficking.[93]

In addition to the Guiding Principles, the WHO published the Global Glossary of Terms and Definitions on Donation and Transplantation in 2009.[94] The Global Glossary was established in response to a need for internationally recognized definitions and terminology with respect to organ donation and transplantation and urges for the uniformity of data and information for the Global Database on Donation and Transplantation.[95] According to the WHO, the Glossary aims to "clarify communication in the area of donation and transplantation, whether for the lay public or for technical, clinical, legal or ethical purposes."[96] The Glossary includes existing official definitions as well as newly added definitions and terms.[97]

A remarkable effort has been made on the part of several medical associations to establish international consensus condemning the practice of organ trafficking. Cooperation of the Transplantation Society and the International Society of Nephrology led to the establishment of the Declaration of Istanbul in 2008. The Declaration defines organ trafficking, transplant tourism and commercialism and seeks to achieve consensus regarding the principles of practice and the recommendation of alternatives which address the shortage of human organs, as well as the establishment of professional transplantation guidelines,[98] and signals an effort towards collaboration within the international medical community.[99] The Declaration calls for a reduction of the burden on live donors by increasing organ donation from cadaver donors and urges States to adapt their legislation in order to foster the use of cadaver donations.[100]

IV.3. Gaps and flaws in current legislation

A joint study conducted by the UN and the Council of Europe[101] concluded that while there are international instruments which cover all relevant aspects of the prevention

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93 World Health Assembly, Sixty-Third Session, Eighth plenary meeting, 21 May 2010, nr. A63/VR/8, available online at <who.int/gb/ebwha/pdf_files/WHA63/A63_R22-en.pdf> (accessed 14 October 2013).

94 WHO Global Glossary of Terms and Definitions on Donation and Transplantation, available online at <who.int/transplantation/activities/GlobalGlossaryonDonationTransplantation.pdf> (accessed 4 July 2013).

95 *Ibid.*

96 *Idem*, 1.

97 *Ibid.*

98 Declarationofistanbul.org, "The history and development of the Declaration of Istanbul", available online at <declarationofistanbul.org/index.php?option=com_content&view=article&id=77&Itemid=57> (accessed 14 October 2013).

99 *Ibid.*

100 *Idem*, Declaration of Istanbul, Proposals, under "To respond to the need to increase deceased donation", 1-4.

101 Joint Council of Europe/United Nations Study, "Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs", Directorate General of Human Rights and Legal Affairs Council of Europe, 2009, available online at <coe.int/t/dghl/monitoring/trafficking/docs/news/organtrafficking_study.pdf> (accessed 5 July 2013).

and combatting of organ trafficking,[102] these instruments have failed to significantly reduce organ trafficking. The study determined that one of the prime conditions for such international legal instruments to work is the generation of stronger political will on the part of Member States to implement organ-removal provisions.[103] Similarly, the study recognizes that the definition of human trafficking, including trafficking for the purpose of organ removal, is not the same across countries and urges the establishment of more international consensus concerning the topic and an increase in cooperation to diminish the crime.[104]

The UN Trafficking in Persons Protocol was the first binding instrument dealing with organ trafficking and, thus, it has had an anchoring effect on subsequent treaties and legislation and yet has received a significant amount of criticism from commentators.[105] Criticism has ranged from a lack of Member State implementation and compliance, to design flaws inherent to the Protocol.[106] The design flaws are related to the wording and language used within the document.[107] The Trafficking in Persons Protocol aims to combat and eradicate human trafficking through a combination of criminalization, prevention and victim assistance, yet parties have primarily focused upon the element of criminalization.[108] Moreover, as its supplementation to the U.N. Convention demonstrates as well as the numerous referencing within the document to 'organized criminal groups' and 'transnational criminal organizations', the Protocol places a heavy emphasis on the relationship between organised crime and trafficking. Whereas there is indeed a strong connection between organised crime and human trafficking,[109] organised crime is not the sole cause of trafficking.[110]

Critics have claimed that the Protocol's emphasis upon organised crime has caused states to ignore intrastate trafficking as well as confusing national policies, which have been set up to combat organised crime and trafficking simultaneously; this has led to restrictive and narrow-minded policy-making in which there often is no differentiation between trafficking and smuggling, consequently leading countries to incorrectly deport or prosecute victims.[111] Moreover, with its emphasis on prosecution and criminalization, the Protocol fails to recognise and address the underlying socioeconomic factors driving human trafficking,[112] meaning that even where offenders are prosecuted, the lack of change in the socioeconomic conditions for victims leaves them vulnerable to subsequent abuse and victimisation. Considering the anchoring effect of the Protocol and the nature of the binding legal instruments discussed previously, many, if not all, current binding instruments share the feature of emphasis upon prosecution and criminalization with the Protocol. Similarly, the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings as well as other non-specific legal instruments focus upon the element of criminalisation and

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[102] Most notably the UN Trafficking in Persons Protocol and the Council of Europe Anti-Trafficking Convention.

[103] *Idem,* 97.

[104] *Ibid*.

[105] Kelly, E., "International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter", *Boston College Law Review*, vol. 54, ed. 3, 2013, 1339.

[106] *Ibid.*

[107] *Ibid.*

[108] *Ibid.*

[109] Surtees, R., "Traffickers and Trafficking in Southern and Eastern Europe: Considering the Other Side of Human Trafficking", *European Journal of Criminology*, vol. 5, ed. 1, 2008, 39-68.

[110] Kelly 2013, *supra*, nt. 105, 1339.

[111] *Ibid.*

[112] *Idem,* 1340.

prohibition of (organ) trafficking. Whereas victim support and assistance as well as the establishment of prevention programs are included within the scope of these instruments, they largely focus on post-hoc remedies and neglect the differentiation between human trafficking for the purpose of organ removal and other forms of human trafficking, which is essential in attempting to tackle the problem.

Concerning domestic legislation, there is often a lack of knowledge or political will to enforce the law. While domestic laws may prohibit a country's citizens from purchasing or selling an organ on the black market, they do nothing to address the displacement effect that occurs or the problems of organ shortages.[113] Addressing the organ trade requires both a legal and an extra-legal approach. The legal amendments made in the Netherlands, discussed in paragraph IV.1.3 of this article, arguably do take on a more problem-driven approach as they do not solely focus upon criminalization. Specifically, the amendment made to the Health Insurance Act recognizes the nature of transplant tourism. While Article 2.4(1) (c) ensures that insurers no longer reimburse transplants conducted with non-next of kin donors outside the EU and the EEA, it does little to alleviate the problem for victims or tackle the social and economic factors driving organ trafficking. The introduction of the Subsidy Scheme focuses more upon the underlying societal issues; it aims to increase organ donation during life, thereby hopefully decreasing the demand for organs from trafficked persons from abroad.

V. Recommendations: towards a more problem-driven solution

The problem is a complex one which needs to be addressed from legal, medical and ethical perspectives. Given its often transnational nature, the ease and affordability of international travel and the possibility that the internet can easily be used to recruit new donors, both legal and extra-legal measures must be taken to reign in this illicit and exploitive trade. From a legal perspective, it is likely that the establishment of an international binding legal instrument which, instead of adopting a criminal law framework, is more victim-focused and emphasises removing the causes of organ trafficking would be more effective in eradicating the crime.[114] In order to tackle the causes, the factors underlying the organ trafficking market must be examined and targeted. Inherent to the market for trafficked organs is the demand for organs. As such, measures must be taken to meet the demand for organs in other ways. Instead of taking an approach which is predominantly criminal law-focused, and thus post-hoc, in nature, States can and should take all actors involved in the process of organ trafficking into account in order to reduce the demand for trafficked organs.[115] In addition to government officials, offenders and victims, the facilitators in the process must also be taken into account: members of the medical and health care community, health insurers, tour operators and community leaders can all be seen as important actors within the issue of human trafficking for the purpose of organ removal. For instance, it has been noted that health insurance companies preferentially support

[113] When India's Transplantation of Human Organs Act went into effect in 1994, Malaysian transplant patients immediately found a new destination in China, Shimazono, Y., Public Health Reviews – The state of the international organ trade: a provisional picture based on integration of available information, *Bulletin of the World Health Organization*, vol. 85, ed. 12, 2007, 955-961.

[114] Kelly 2013, *supra*, nt. 105, 1339.

[115] UNODC 2008, *supra*, nt. 7, 532.

illegal practices in some countries.[116] According to the United Nations Office on Drugs and Crime, the following conditions are fundamental in decreasing the demand for organs: "The need to (1) reduce the health conditions which lead to organ failure; (2) Increase the supply of organs donated through channels which guard against exploitation of donors who are willing and able to donate their organs."[117]

Two approaches to meet the demand can be taken. In order to foster an increase of the supply of organs through regulated or legal channels, the establishment of an effective system of cadaver organ donation in each country is essential.[118] One way in which this could be done is by implementing a "presumed consent" or "opt out" system, meaning that a person is automatically presumed to be an organ donor upon death unless the person specifies that he or she refuses to be a donor (this or similar systems are in place in Austria, Belgium, France, Hungary, Poland, Portugal and Sweden). In 2003, in countries in which the presumed consent system or opt-out system was in place, the vast majority of the population expressed effective consent. This varied from a low of 85,9% in Sweden to 99,98% in Austria. By contrast, in explicit consent or opt-in countries, the percentage of organ donors is much lower. Only 4,25% of the population in Denmark, 12% in Germany, 17,2% in the UK and 27,5% of the population in the Netherlands are organ donors.[119] Organizations (such as the Multi Organ Harvesting Aid Network Foundation (MOHAN)) can provide pre-death counseling to family members which could increase the donation of cadaver organs.[120] The second approach involves transparency and regulating the system using live donors so that impoverished donors can provide their organs in exchange for money, but at the same time are aware of their rights and receive excellent post-operative care.[121]

Only a multi-tiered and broad approach can ensure the successful prevention and eradication of the illicit organ trade. It is essential that if domestic laws exist, there is political will and adequate awareness of the law to ensure its enforcement. Countries which have proposed a ban upon the buying and selling of organs should not permit their nationals to travel to destination countries to procure organs which may have been obtained as a result of human trafficking, after which they return to their home countries to acquire insured health care.[122] Above all, the human rights and health of the most vulnerable members of society must be protected. This can be done through pre-emptive legal measures, effective self-regulation by the medical community, increased awareness and the establishment of measures to ensure an increase in cadaver donations.

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[116] Budiani-Saberi & Delmonico 2008, *supra*, nt. 11, 928.
[117] UNODC 2008, *supra*, nt. 7, 532.
[118] Budiani-Saberi & Delmonico 2008, *supra*, nt. 11, 928.
[119] Johnson, E.J., and Goldstein, D.G. "Do defaults save lives?" *Science,* vol. 302, ed. 5649, 1338–1339.
[120] GTZ GmbH 2004, *supra*, nt. 34.
[121] Scheper-Hughes 2004, *supra*, nt. 29.
[122] *Ibid*.

Trapped at Sea. Using the Legal and Regulatory Framework to Prevent and Combat the Trafficking of Seafarers and Fishers.

Rebecca Surtees[1]

Keywords
HUMAN TRAFFICKING, SEAFARERS, FISHERS, INTERNATIONAL LAW, 3PS (PREVENTION, PROTECTION, PROSECUTION), LEGAL AND REGULATORY FRAMEWORK.

Abstract
The breadth and diversity of trafficking for forced labour has become increasingly recognised over the past several years, including heightened attention to human trafficking within the seafaring and commercial fishing industries. Not only are these sectors where trafficking abuse can and does take place, but there are also aspects of these sectors that may lend themselves particularly to human trafficking abuses due to the nature of this form of trafficking as well as the legal and regulatory framework in place. The article begins by framing what constitutes trafficking at sea, both in the commercial fishing sector and in the merchant fleet and then presents the legal and regulatory framework to combat trafficking at sea – namely, international anti-trafficking law, international maritime law and the international law of the sea. The article then considers the "three P paradigm" of anti-trafficking (that is, prevention, protection and prosecution) and how improved policies, regulation and legislation (and, as importantly, enforcement) in these areas have the potential to contribute to an improved situation for seafarers and fishers—to both prevent and combat trafficking in commercial fishing and the merchant fleet, while also noting differences between the two sectors. The analysis also draws on the perspective and experiences of men trafficked in the seafaring and commercial fishing sectors to firmly situate the discussion in the practical realm and articulate what, in concrete terms, can be done to effectively prevent and combat trafficking of seafarers and fishers.

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I. Introduction[2]

The breadth and diversity of trafficking for forced labour has become increasingly recognised over the past several years—amongst researchers, practitioners and policy-makers as well as within national and international justice systems. This has included increased attention on trafficking and exploitation within the seafaring and commercial fishing industries. Not only are these sectors where trafficking abuse can and does take place, but there are also aspects of these sectors that may lend themselves particularly to human trafficking abuses due to the nature of this form of trafficking (i.e. isolation at sea, limited contact with authorities on land and at sea) as well as the legal and regulatory framework in place (including lopsided regulation and lack of enforcement). There are three key areas where improved policies, regulation and legislation (and, as importantly, enforcement) have the potential to contribute to an improved situation for seafarers and fishers—to both prevent and redress human trafficking within these labour sectors. These can generally be framed around what is known as the "three P paradigm" of prevention, protection and prosecution to guide action and interventions in combating human trafficking.[3]

After framing, in Part II, what constitutes trafficking at sea, Part III presents the legal and regulatory framework to combat trafficking at sea (namely, international anti-trafficking law, international maritime law and the international law of the sea). The article then considers, in subsequent sections, each of the "three Ps" with attention to how gaps and issues in the legal and regulatory frameworks of the

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[3] The '3P paradigm'--referring to "prevention" of the act of trafficking, "protection" of victims of trafficking, and "prosecution" of perpetrators of trafficking--is a framework used by governments around the world to combat human trafficking. The paradigm was pioneered by the United States government in 1998 in accordance with efforts to combat violence against women and trafficking in women and girls. Samarasinghe, V., "Confronting Globalization in Anti-trafficking Strategies in Asia", *Brown Journal of World Affairs* vol. 10, ed. 1, 2003, 91-104.In 2009, United States Secretary of State Hillary Rodham Clinton announced the addition of a 'fourth P' to the paradigm--"partnership"--which will serve as a pathway to progress in the efforts against trafficking. United States Department of State, "The '3P' Paradigm: Prevention, Protection, and Prosecution", *Democracy and Global Affairs*, 14 June 2010, available online at <www.state.gov/documents/organization/144603.pdf> (accessed 6 October 2013). The 3P paradigm is outlined in the United States' Trafficking Victims Protection Act (TVPA) and in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime of 15 November 2000, 2237 *UNTS* 319, subsequently referred to as the Trafficking Protocol.

seafaring and commercial fishing sectors provide space for trafficking exploitation and also limit options for remedy. The article also explores how improved and tailored legislation, policies and regulations—centred around these three Ps—have the potential to both prevent and combat trafficking in commercial fishing and the merchant fleet, while also noting differences between the two sectors. The analysis also draws on the perspective and experiences of men trafficked in the seafaring and commercial fishing sectors to firmly situate the discussion in the practical realm and articulate what, in concrete terms, can be done to effectively prevent and combat trafficking of seafarers and fishers.

II. Trafficking at Sea. Framing the Discussion

There are various forms of labour for which people are trafficked, including within the seafaring sector (or merchant fleet) and the commercial fishing sector. The United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, the primary source of international anti-trafficking law, defines trafficking in human beings in article 3a as:

> […] 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.[4]

"Trafficking at sea", in the context of this discussion, involves seafarers and fishers undertaking at-sea activities (including fishing, transportation and fish processing while on vessels, rafts, fishing platforms or otherwise offshore). It does not include other examples of trafficking in the fishing sector,[5] nor does it include shore-based operations (e.g. fish/seafood processing and packaging, port-based work and shore-based fish harvesting).[6]

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[4] Art. 3(a) Trafficking Protocol. Article 3 further specifies that 'The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a)' and defines a child as any persons under eighteen years of age. *Idem* Art. 3(c)-(d).

[5] See, for example, FAO and ILO, Afenyadu, D., *Child Labour in Fisheries and Aquaculture, A Ghanaian Perspective*, FAO Workshop on Child Labour in Fisheries and Aquaculture in Cooperation with ILO FAO Headquarters, 2010, available online at <fao-ilo.org/fileadmin/user_upload/fao_ilo/pdf/WorkshopFisheries2010/WFPapers/DAfenyaduChild_LabourGhana.pdf> (accessed 6 October 2013); ECLT, Donda, S. and Njaya, F., *Review of Child Labour Potential in the Malawi's Fisheries Sector*, Paper for the National Conference in Eliminating Child Labour in Agriculture in Malawi, 2012, available online at <eclt.org/site/wp-content/uploads/2012/10/Child-labour-in-Fisheries-in-Malawi-FINAL.pdf> (accessed 6 October 2013); Golo, H., *Poverty and Child Trafficking in Ghana: A Study of the Fishing Sector*, Institute of Social Studies, 2005, available online at <thesis.eur.nl/pub/9703/> (accessed 6 October 2013); Johansen, R., "Child trafficking in Ghana", *UNODC Perspectives*, vol. 1, 2006, 4-7; and FAO and ILO, Westlund, L., *Guidance on addressing child labour in fisheries and aquaculture*, 2013, available online at <fao.org/docrep/018/i3318e/i3318e.pdf> (accessed 6 October 2013).

[6] Trafficking into land based seafood processing factories, while not explored here, has been documented in Southeast Asia and elsewhere. See, for example, On Point, Ashbrook, T., *Exploited*

A fisher, according to Article 1(e) of the ILO Work in Fishing Convention, is:

> a person employed or engaged in any capacity or carrying out an occupation on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons carrying out work aboard a fishing vessel and fisheries observers.[7]

Thus, in lay terms, a fisher is any individual who is a member of the crew on board a fishing vessel.[8] When someone is involved in some aspect of fishing—e.g. getting fish out of the sea, processing and handling fish, transporting and storing in the refrigerator, navigating or operating the fishing vessel—s/he is a fisher.

A seafarer differs from a fisher according to Article II(f) of the Maritime Labour Convention, which defines a seafarer as: 'any person who is employed or engaged in any capacity on board a ship to which this Convention applies'.[9] The MLC applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing.[10] Seafarers hold a variety of professions and ranks on board commercial ships and each role[11] carries unique responsibilities that are essential to the successful operation of the vessel.[12] Despite differences, there is an overlap between seafarers and fishers, particularly in relation to fish carriers. For example, in a recent study of trafficked seafarers from Ukraine, a number of men were trafficked to Russia to work aboard illegal crabbing vessels.[13] While professional

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Labor in the USA, 10 July 2012, available online at <onpoint.wbur.org/2012/07/10/forced-labor-in-the-usa> (accessed 6 October 2013); Solidarity Center, Brennan, M., *Out of sight, out of mind. Human trafficking and exploitation of migrant fishing boat workers in Thailand*, 2009, available online at <solidaritycenter.org/files/thailand_Out_of_Sight_Eng.pdf> (accessed 6 October 2013); International Organization for Migration; Robertson, P., *Trafficking of fishermen in Thailand*, 2011, available online at <iom.int/jahia/webdav/shared/shared/mainsite/activities/countries/docs/thailand/Trafficking-of-Fishermen-Thailand.pdf> (accessed 6 October 2013); Solidarity Center, REPORT: *The Degradation of Work: The True Cost of Shrimp*, 2008, available online at <solidaritycenter.org/files/pubs_True_Cost_of_Shrimp.pdf> (accessed 6 October 2013); Surtees, R., *After trafficking. Experiences and challenges in the (re)integration of trafficked persons in the GMS*, UNIAP and NEXUS, 2013, available online at <nexusinstitute.net/publications/pdfs/After%20trafficking_Experiences%20and%20challenges%20in%20%28Re%29integration%20in%20the%20GMS.pdf>; and Verite, REPORT: *Research on Indicators of Forced Labour in the Supply Chain of Shrimp in Bangladesh*, 2012, available online at <verite.org/sites/default/files/images/DOL-BANGLADESH-FINAL- ADA COMPLIANT.pdf> (accessed 6 October 2013).

7 Work in Fishing Convention (WIF Convention), 14 June 2007, ILO Convention 188.

8 According to the WIF Convention a fishing vessel is 'any ship or boat, of any nature whatsoever, irrespective of the form of ownership, used or intended to be used for the purpose of commercial fishing.' Art. 1(g) WIF Convention.

9 Maritime Labour Convention (MLC), 7 February 2006, ILO Convention.

10 Art. 2 MLC.

11 The wide variety of roles seafarers hold include being responsible for navigation; supervising crew; cargo operations; maintaining the vessel including maintaining and repairing deck equipment and engineering equipment; maintaining stores and accommodations; and even preparing and serving meals.

12 The MLC excludes fishing vessels, inland navigation, naval ships and ships below 200 gross tonnage in coastal areas from the scope of the convention. Art. 2 MLC.

13 Surtees, R., *Trafficking in men, a trend less considered. The case of Ukraine and Belarus*, International Organization for Migration, *Migration Research Series* 36, 2008. The overlap is evident here as the men used their training as seafarers to work operating the crabbing vessels, but they also worked as

seafarers, they carried out their occupation on fishing vessels and many were also forced to engage in fishing. As such, they fall under the definition of fishers according to the WIF Convention. Because international law provides seafarers and fishers different protections and because the conditions of work are different between the merchant fleet and the commercial fishing sector, this discussion distinguishes between seafarers and fishers according to the type of vessel (fishing or commercial) on which they work.

Trafficking has generally been documented within the fishing industry and, arguably, most commonly as part of illegal, unreported and unregulated (IUU) fishing operations.[14] IUU fishing vessels are those that operate without or in contravention of appropriate fishing licenses, in marine protected areas or without reporting their catch in accordance with applicable fishing regulations. [15] IUU fishing vessels may remain at sea for extended periods of time, avoid contact with authorities and are often substandard (i.e. of poor quality or even dangerous due to their age, design, construction or equipment). Crew on IUU fishing vessels often either do not have contracts or have entered into contracts with complicit recruitment agencies that cannot be pursued when labour or human rights violations occur or when a crew or vessel is arrested. As a consequence of its clandestine nature, IUU fishing exposes fishers to a range of risks and violations, including the possibility of human trafficking.[16] Fishers on IUU fishing vessels often suffer physical and/or psychological mistreatment, inhumane living and working conditions and, in some cases, crew members have been locked in their quarters or even placed in chains. Crew members who are considered 'inefficient' or who 'cause problems' on board IUU fishing vessels are sometimes abandoned in foreign ports.[17] Trafficked fishers on IUU fishing vessels are forced to commit fisheries crimes (i.e. to engage in illegal fishing), which can potentially influence how they are perceived and received by authorities—i.e. as perpetrators of fishery crimes rather than as victims of human trafficking.

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fishers directly responsible for the crab catch. That being said, as all of their work took place on board a fishing vessel, for the purposes of this discussion they must be considered fishers.

[14] The complete definition of IUU fishing can be found in Art. 3.1-3.3, Food and Agriculture Organization of the United Nations, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001, available online at <fao.org/docrep/003/y1224e/y1224e00.HTM> (accessed 12 October 2013), subsequently referred to as IPOA-IUU. Some organisations and experts also refer to IUU fishing as 'fisheries crime' or 'marine living resource crime'.

[15] Some forms of IUU fishing are also transnational organised environmental crime. See, e.g., Norwegian National Advisory Group Against Organized IUU-Fishing, Stolsvik, G., *Cases and materials on illegal fishing and organized crime*, 2009, available online at <regjeringen.no/upload/FKD/Vedlegg/Diverse/2010/FFA/CasesAndMaterials_FFApubl.pdf> (accessed 12 October 2013).

[16] Environmental Justice Foundation (EJF), REPORT: *All at Sea: The Abuse of Human Rights Aboard Illegal Fishing Vessels*, available online at <ejfoundation.org/oceans/all-at-sea-report> (accessed 12 October 2013).

[17] Australian Govt. Dept. of Agriculture Fisheries & Forestry & ITF, Gianni, M. and Simpson, W., *The Changing Nature of High Seas Fishing - How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing*, 2005, 33-34, available online at <daff.gov.au/fisheries/iuu/high-seas> (accessed 12 October 2013). See also UNODC, De Coning, E., *Transnational organised crime in the fishing industry. Focus on trafficking in persons, smuggling in migrants and illicit drugs trafficking*, 2011, available online at <unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf> (accessed 12 October 2013); International Transport Worker's Federation, REPORT: *Out of sight, out of mind: Seafarers, Fishers & Human Rights* (ITF Report), 2006, available online at < itfseafarers.org/files/extranet/-1/2259/HumanRights.pdf> (accessed 12 October 2013) ; and Whitlow, J., *The Social Dimension of IUU Fishing*, 2004, available online at <hoecd.org/dataoecd/32/32/31492524.PDF> (accessed 12 October 2013).

While trafficking at sea is often associated with IUU fishing, it also occurs within regulated fishing sectors. One study of sixty-three Filipino fishers trafficked through Singapore onto long haul fishing vessels describes how the men were isolated at sea, with vessels only docking once a year unless repairs were needed. Even when vessels were berthed in Singapore, the captain withheld the men's passports to prevent them from entering the port. The men were deceived about the conditions and nature of the work and were subjected to threats and intimidation, substandard living and working conditions, surveillance and arbitrary punishment, inadequate provision of medical treatments and the non-payment of salary.[18] Similarly, a study of foreign charter vessels (FCVs)[19] in New Zealand's Exclusive Economic Zone (EEZ) found that serious physical, mental, sexual and contract abuse was commonplace, with many crews forced to work in substandard and often inhumane conditions. Foreign crew also did not receive the legal minimum wage entitlements outlined under the New Zealand Code of Practice (CoP).[20] In some (perhaps very many) instances, the exploitation of fishers rose to the level of human trafficking because they were prohibited from leaving the vessel, were deceived about work and payment, had wages withheld and were forced to work by the threat or use of force or other forms of coercion.[21]

Trafficking has also been documented amongst seafarers in the merchant fleet.[22] Ukrainian men trafficked to Turkey as seafarers were tasked with transporting cargo to

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[18] Yea, S., *Troubled Waters: Trafficking of Filipino Men into the Long Haul Fishing*, 2012, available online at <twc2.org.sg/wp-content/uploads/2013/01/Troubled_waters_sallie_yea.pdf> (accessed 12 October 2013).

[19] Foreign charter vessels (FVCs) are foreign vessels, complete with foreign crew, that in this case are chartered by New Zealand companies to fish in New Zealand's Exclusive Economic Zone (the sea zone between 12 and 200 nautical miles from New Zealand's coast in which New Zealand has exclusive rights to the use of marine resources). Interdisciplinary Project on Human Trafficking, Gallagher, A., "Exploitation in the Global Fishing Industry: New Zealand Researchers and Advocates Secure a Rare and Important Victory", 4 May 2013, available online at <traffickingroundtable.org> (accessed 12 October 2013).

[20] New Zealand Asia Institute: University of Auckland, Stringer, C., Simmons, G. and Coulston, D., *Not in New Zealand's waters surely? Labour and human rights abuses aboard foreign fishing vessels*, 2011, 13, available online at <humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/Not-in-NZ-waters-surely-NZAI.pdf> (accessed 12 October 2013). As a result of this study, internal activism, external pressure and its own investigation into FVCs, New Zealand's Government recently announced that, after 2016, all commercial fishing vessels operating in New Zealand waters will need to be registered as New Zealand ships and carry the New Zealand flag. In other words, beginning in 2016, FVCs will no longer be allowed to fish in New Zealand's EEZ. Gallagher, A., *supra* nt. 19. A recent threat to this 'success', however, came in August 2013 when New Zealand's Primary Production Select Committee allowed a loophole in the new rules governing foreign charter vessels, which will permit some foreign vessels to continue to fish in New Zealand waters. Harre, T., Press Release of 1 August 2013 for Slave Free Seas, available online at <slavefreeseas.org/workspace/downloads/slave-free-seas-press-release-1-august-2013.pdf> (accessed 12 October 2013).

[21] The difference between exploitative or bad labour conditions and human trafficking is important to distinguish as it is only when a situation becomes trafficking that the related legal frameworks can be applied to protect and assist trafficking victims. In the fishing sector in particular, where labour conditions are notoriously difficult, trafficked fishers may not even realise that they are victims. See, e.g., International Organization for Migration, Surtees, R., *Trafficked at Sea. The exploitation of Ukrainian seafarers and fishers*, 2012, 117-118, available online at <publications.iom.int/bookstore/free/Trafficked_at_sea_web.pdf> (accessed 12 October 2013). In some cases, while the labour conditions on board a vessel may be atrocious and there may be labour or human rights issues at stake, if fishers are not being exploited by the threat or use of force or other forms of coercion then the situation cannot be characterised as trafficking.

[22] *Idem*, 37.

ports along the Mediterranean coastline. They occupied different positions on the vessel: as captain, senior assistant, cook, electrician and regular rank and file seafarers. Not only were work conditions harsh and dangerous, but living conditions were also very difficult with inadequate food and water and no electricity for light or warmth. Their documents were withheld and they were regularly threatened by the vessel owner.[23] Similarly, numerous reports of Filipino seafarers point to labour abuses on ships, including situations of slave-like conditions in the cruise-ship industry and on board commercial cargo ships.[24]

By definition, trafficked seafarers and fishers are exposed to a wide range of abuses and violations that constitute trafficking exploitation.[25] Trafficked seafarers and fishers in different situations, in different regions, have described the lack of basic necessities and inhumane conditions:

> Food that was delivered for ten days was stretched out for a month. Food was extremely scarce... There was almost no drinking water. We had to collect rainwater or melt snow (Ukrainian seafarer/fisher trafficked on a Russia crabbing vessel).[26]

> Workers aboard many vessels were required to bathe in salt water, causing rashes. They would often find that the water heater was switched off before their shift had ended. Drinking water for crew was a rusty colour and unboiled, while the officers enjoyed boiled or bottled water. A number of interviewees from different vessels complained of food being inadequate in quality or past its use by date. On one vessel after about twenty days into a forty day voyage, food supplies were rationed and the galley locked. Often crews were fed just fish and rice or indeed in the case of one entire crew they were fed rotten fish bait (Foreign fishers aboard Korean foreign charter vessels in New Zealand's EEZ).[27]

Seafarers and fishers are forced to work long hours, sometimes days on end, with only a few minutes of break in this time. They generally work for little or no pay; wages are commonly withheld.[28] One Thai boy, trafficked aboard a fishing boat in Indonesian waters, worked from early morning until late at night, placing nets and

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[23] *Idem,* 69-81.

[24] Verité, REPORT: *Hidden Costs in the Global Economy: Human Trafficking of Philippine Males in Maritime, Construction and Agriculture*, Verité Grant # S-GTIP-07-GR-007, 2009, 11-12, available online at <verite.org/sites/default/files/images/Verit%C3%A9%20TIP%20Report%20Male%20Trafficking.pdf> (accessed 13 October 2012).

[25] Cf. Brennan, M., *supra* nt. 6; International Labour Office, International Labour Organization, De Coning, E., *Caught at Sea: Force Labour and Trafficking in Fisheries*, 2013, available online at <ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf> (accessed 13 October 2013); EJF, *supra* nt. 16; Robertson, P., *supra* nt. 6; Stringer, C., et al., *supra* nt. 20; Surtees, R., *supra* nt. 21; Surtees, R., *supra* nt. 6; and Yea, S., *supra* nt. 18.

[26] Surtees, R., *supra* nt. 21, 73.

[27] Stringer, C., et al., *supra* nt. 19, 9.

[28] Cf. Brennan, M., *supra* nt. 5; De Coning, E., *supra* nt. 24; EJF, *supra* nt. 16; Environmental Justice Foundation, REPORT: *Sold to the Sea - Human Trafficking in Thailand's Fishing Industry*, 2013, available online at < ejfoundation.org/sites/default/files/public/Sold_to_the_Sea_report_lo-res-v2.pdf> (accessed 13 October 2013); Robertson, P., *supra* nt. 5; Stringer, C., et al., *supra* nt. 19; Surtees, R., *supra* nt. 21; Surtees, R., *supra* nt. 6; and Yea, S., *supra* nt. 18.

pulling them from the sea, sorting and packing fish and moving them to the freezer storage. He was permitted only a short time to rest and eat. When the supervisor was 'unsatisfied', he was physically and verbally abused. He could not escape because the boat was far out at sea for months at a time. He received only a tiny fraction of his promised in wages.[29] Similarly, Ukrainian seafarers and fishers suffered brutal working conditions, leading to serious injuries, illness and even death:

> When we were on the Russian crabbing boat, we slept only two hours a day and all the time we were working. Sometimes people got really hurt when they were standing next to the crab traps. Sailors were standing and literally almost sleeping. The traps were falling and sometimes people lost their hands or legs. Nobody cared about this there (Ukrainian seafarer/fisher trafficked on a Russia crabbing vessel) .[30]

Violence and assault is, for many trafficked fishers and seafarers, commonplace. One man from Myanmar trafficked onto a fishing boat in Thailand described extreme violence perpetrated against fellow workers resulting in serious injury and death:

> I saw that the owner did not like the workers to take time off even when they were not feeling well. They whistled to start working and, if some did not appear, they would pour boiling water on them. Some died from the injuries. They also threw ice at them, beat them with tools. One Thai man died from the beatings he suffered. I also saw one [foreign-looking] man who was beaten up and lost his teeth because he could not work well as he did not understand the language and instructions. I also saw some people die from accidents [on board]. If someone fell into the water, they would not bother rescuing.[31]

Another Myanmar man trafficked in Thailand for fishing suffered extreme violence while trafficked. He was threatened with a gun and told that he would be shot if he tried to escape. Two other workers were shot and killed in front of him when they tried to escape. The work was harsh and he was forced to work even when he was seriously ill. He was exploited for four and a half years.[32] Ukrainian seafarers/fishers trafficked to Russia also described extreme violence and abuse as a means of compelling them to work:

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[29] Surtees, R., *supra* nt. 6, 216. See also Verite, REPORT: *Research on Indicators of Forced Labor in the Supply Chain of Fish in Indonesia: Platform (Jermal) Fishing, Small-Boat Anchovy Fishing, and Blast Fishing*, 2012, available online at <digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2779&context= globaldocs> (accessed 13 October 2013).

[30] Surtees, R., *supra* nt. 21, 75.

[31] Surtees, R., *supra* nt. 6, 119.

[32] Surtees, R., *supra* nt. 6, 128. Similar reports of violence have surfaced in recent years. For example, in an analysis of forty-nine Cambodian men and boys trafficked onto Thai long-haul fishing boats, 59% of the victims reported having witnessed a murder by the boat captain. UNIAP, *Exploitation of Cambodian Men at Sea: Facts About the Trafficking of Cambodian Men Onto Thai Fishing Boats*, SIREN series CB-03, 2009, available online at <no-trafficking.org/reports_docs/siren/siren_cb3.pdf> (accessed 13 October 2013).

> There was a sort of supervisor. He was overseeing people, making sure everybody was working. He was sometimes beating people. One [man] was bruised so badly, he was spitting blood... [33]

> When I wrote a [request] to be sent home, the senior watchman beat me and kicked out my teeth. He threatened to cripple and cut me. There was the same treatment for every one of the sailors.[34]

While not all cases of harsh labour conditions and labour exploitation at sea constitute human trafficking, many do. Greater appreciation is needed of the full range of factors—e.g. deception, coercion, violence, exploitation and abuse—experienced by seafarers and fishers including when and how cases rise to the level of human trafficking. For example, many seafarers and fishers willingly enter into contracts with crewing/manning agencies but are deceived about the conditions and outcomes—e.g. in terms of the kind of work, the conditions of work, wages (if they get paid at all), the amount of debt to be repaid and so on—all of which can add up to labour trafficking. Addressing violence and violations in the seafaring and commercial fishing sectors requires an effective and appropriate legal and regulatory framework, which is transnational in scope and enforced across jurisdictions and legal regimes. Understanding the various legal and regulatory opportunities to prevent and combat trafficking at sea is an essential starting point for future discussion and intervention.

III. The Legal and Regulatory Framework to Combat Trafficking at Sea

Understanding and addressing human trafficking at sea involves disentangling a raft of legal and jurisdictional complexities. Trafficking at sea involves persons who have left home and are exploited at sea, outside their country of origin.[35] Trafficked seafarers and fishers may find themselves aboard vessels that are un-flagged or flagged to another State[36], exploited by nationals of their own or other nations, ashore in a foreign port or never entering port and/or suffering abuse and exploitation on the high seas or in waters that fall within the territory of one or various States. A further complication is that seafarers and fishers are often recruited through crewing agencies that may or may not have an official presence in their home countries.

International law that may be used to combat trafficking at sea falls generally into three areas: 1) international anti-trafficking law, including human rights law as it applies to trafficking-related exploitation; 2) international maritime law; and 3) the international law of the sea. While these three legal and regulatory frameworks overlap to varying degrees, understanding the laws that can be used to improve the situations of fishers and seafarers requires parsing the complex bodies of international law relevant to trafficking at sea. For example, the law of the sea is not synonymous with maritime law. The law of the sea is the body of public international law that

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[33] Surtees, R., *supra* nt. 21, 78.

[34] *Ibid*.

[35] In the trafficking context, a "destination country" refers to the location to which the victim is (or is intended) to be exploited. A "transit country" refers to any State through which a victim passes while being trafficked and an "origin country" is the source State from which a trafficking victim originated (usually the victim's country of origin).

[36] At sea a ship must fly the flag of the country to which it is registered. Art. 91 UNCLOS, *infra* nt. 38.

primarily draws on the *United Nations Convention on the Law of the Sea* (UNCLOS).[37] In general, the law of the sea deals with relationships between States (e.g. issues such as national versus international waters) and defines the rights and responsibilities of nations in their use of the world's oceans. By contrast, international maritime law addresses relationships between private individuals or companies.

This section provides an overview of the three intersecting legal frameworks applicable to combating trafficking in this context. It also outlines the international laws and regulations currently in place that can potentially contribute to the prevention of trafficking at sea, the protection of trafficked fishers and seafarers and the prosecution of trafficking crimes that take place at sea. This includes attention to how gaps and issues in the legal and regulatory frameworks provide space for trafficking exploitation and limit options for remedy.

III.1. International Anti-Trafficking Law

The primary source of international anti-trafficking law is the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons*[38] (hereafter referred to as the Trafficking Protocol). The Trafficking Protocol was adopted by the United Nations in 2000 and entered into force in 2003. Currently it has 155 States Parties.[39] In addition to providing an agreed definition of trafficking in persons (see Part II), the Trafficking Protocol contains provisions (of varying normative strength) on preventative measures, assistance to and protection for victims and the criminalisation of trafficking crimes. The Trafficking Protocol stipulates that States Parties shall adopt or strengthen legislative or other measures to establish trafficking crimes as criminal offenses (Article 5) and establish comprehensive policies to prevent and combat trafficking (Article 9). The Trafficking Protocol also encourages (but does not require) States Parties, in Article 6, to implement measures to provide for the assistance and protection of trafficking victims.[40]

Another important source of international anti-trafficking law is the *Council of Europe Convention on Action against Trafficking in Human Beings* (CoE Convention),[41]

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[37] United Nations Convention on the Law of the Sea of 10 December 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, subsequently referred to as UNCLOS.

[38] GA Resolution 39574 (55th) of 15 November 2000, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2237 *UNTS* 319; Doc. A/55/383, available online at <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang =en> (accessed 20 October 2013). The Trafficking Protocol is also known as the 'Palermo Protocol' or 'UN TIP Protocol'.

[39] *Ibid*. As of June 2013 the Trafficking Protocol has been ratified by 155 States.

[40] Assistance measures may be offered by governmental, non-governmental or international organisations and might include but are not limited to: accommodation/housing, medical care, psychological assistance, education, vocational training, life skills, employment and economic empowerment, legal assistance, transportation and family mediation/counselling. Surtees, R., "Re/integration of trafficked persons: how can our work be more effective?", *KBF & NEXUS Institute Issues paper # 1*, 2008, 48.

[41] Council of Europe Convention on Action against Trafficking in Human Beings of 3 May 2005, *CETS* No. 197, subsequently referred to as CoE Convention. The Council of Europe is an international organisation which comprises 47 countries of Europe. The CoE Convention is only directly relevant for Council of Europe members. In spite of its limited application in the international setting, the CoE Convention is an important regional treaty with the potential to influence treaty-making processes beyond Europe. See, e.g., de Boer-Buquicchio, M., "The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation", Speech given at the UNODC Panel Session, 15 February 2008, available online at

which is a comprehensive regional treaty primarily focused on the protection of trafficking victims and the safeguarding of their rights, although it also aims to prevent trafficking and prosecute traffickers. A noteworthy distinction from the Trafficking Protocol is that the CoE Convention obliges States Parties to assist and protect trafficking victims. The CoE Convention stipulates that States Parties shall protect the private life and identity of victims (Article 11), provide victims with a reflection period and residence permit in appropriate cases (Articles 13 and 14), provide trafficked persons with free legal assistance and the right to compensation (Article 15) and provide assistance to victims that includes, at a minimum, standards of living capable of ensuring their subsistence; access to emergency medical treatment; translation and interpretation services, when appropriate; counselling and information in a language that they can understand; assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; and access to education for children (Article 12).[42] The CoE Convention also stipulates that States Parties shall adopt such legislative or other measures as may be necessary to appropriately identify trafficking victims (Article 10).[43]

While the Trafficking Protocol and the CoE Convention are legally binding instruments that provide an anti-trafficking framework for the international community, their effectiveness will ultimately depend on how their key obligations are incorporated into national law and practice. To encourage EU Member States to incorporate these key obligations and to develop legal norms and standards to prevent and punish trafficking (and protect and assist victims), the EU Council has issued directives and plans on trafficking and related issues, the most significant being the 'Directive of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims'.[44] The 2011 EU Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings and introduces common provisions, taking into account the gender-specific phenomenon of trafficking, to strengthen the prevention of trafficking and the protection of victims thereof.[45] Non-treaty instruments such as the 2011 EU Directive

<coe.int/t/dg2/trafficking/campaign/Docs/News/DSGVienna2_en. asp> (accessed 20 June 2013).

42 The CoE Convention entered into force in 2008. As of June 2013 it has been ratified by 40 States. *Infra* Council of Europe Treaty Office, available online at <http://conventions.coe.int/> (accessed 20 June 2013).

43 Identification is the process by which a trafficked person is formally identified as trafficked (or potentially trafficked) in an appropriate, sensitive and timely fashion and referred for assistance at home and/or abroad, depending on the situation. Fafo Institute & NEXUS Institute, Brunovskis, A. and Surtees, R., REPORT: *Out of sight? Factors and challenges in the identification of trafficked persons*, 17 April 2012, available online at <fafo.no/pub/rapp/20255/20255.pdf> (accessed 20 October 2013).

44 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 L101, 15 April 2011, 1–11, subsequently referred to as the EU Directive.

45 Art. 1 EU Directive. The EU Directive recognises the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes and states that for this reason, 'assistance and support measures should also be gender-specific where appropriate'. Par. (3) EU Directive. Further, the EU Directive notes that 'push' and 'pull' factors in trafficking may be different depending on the sectors concerned. *Ibid.* These recognitions are of critical importance in combating trafficking at sea, as the fishing and seafaring sectors are unique lines of work where trafficking victims are most commonly men.

play an important role in reiterating and expanding existing legal principles of international anti-trafficking law.[46]

Finally, trafficking is a human rights violation and, as such, international human rights law can be applied to trafficking-related exploitation and used to combat trafficking. International human rights treaties contain prohibitions on practices that are closely associated with trafficking, such as forced labour and child labour.[47] Further, these treaties prohibit behaviours or practices that have been linked to trafficking, such as ethnic or racial discrimination, slavery, torture and inhumane treatment.[48] International human rights law aids in anti-trafficking as human rights law guarantees basic rights to individuals and access to remedies for violations of those rights. For individuals trafficked at sea, the laws of the State able to exercise jurisdiction over the vessel will be critically important to the provision of assistance and protection to victims and to the prosecution of trafficking crimes. Therefore it is critical that States bring their national laws in accordance with the primary instruments of international anti-trafficking law, including human rights law as it applies to trafficking-related exploitation.

III.2. International Maritime Law

International maritime law (also referred to as admiralty law) is the body of laws, conventions and treaties that govern international private business or other matters involving ships and shipping. Its relevance for anti-trafficking efforts at sea comes from the key obligations in international maritime law that make vessels and life at sea safer. The regulation of private vessels provides indirect opportunities to combat trafficking at sea. Obligations of maritime law that seek to directly protect crews and ensure fair and humane working conditions at sea can be used to protect and assist trafficked seafarers and fishers.

The primary sources of international maritime law are the instruments that collectively comprise the international regulatory regime for quality shipping: the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), the International Convention for the Prevention of Pollution from Ships (MARPOL) and the Maritime Labour Convention (MLC). The International Maritime Organization (IMO), the specialised agency of the United Nations

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[46] Gallagher, A., *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Office of the United Nations High Commissioner for Human Rights, 2010, 26. For an in-depth discussion of 'soft law' (non-binding) instruments that serve as sources of international anti-trafficking law, see *idem,* 24-28.

[47] *Idem,* 37-39. For example, the 1930 Convention Concerning Forced and Compulsory Labour (ILO Convention 29), the 1957 Convention Concerning the Abolition of Forced Labour (ILO Convention 105) and the 1999 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention 182) all address forced labour and child labour.

[48] *dem,* 21. See, e.g., the 1966 International Covenant on Civil and Political Rights; the 1979 Convention on the Elimination of all Forms of Discrimination against Women (which requires States Parties to take all appropriate measures, including legislation, to suppress all forms of trafficking in women); the 1984 Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture); and the 1989 Convention on the Rights of the Child (which specifically prohibits trafficking in children for any purpose as well as the sexual exploitation of children and forced or exploitative labour). For a complete list of the relevant human rights treaties important to the international legal framework around trafficking see *idem*, 20-22.

responsible for measures to improve the safety and security of international shipping and to prevent marine pollution from ships, is responsible for supporting States in the effective implementation of their obligations under SOLAS, STCW and MARPOL. The MLC is an International Labour Organization (ILO) convention; the ILO supports States Parties in complying with obligations under the MLC.

Importantly, maritime law offers different protections depending on the classification of a ship (i.e. whether a SOLAS vessel[49] or non-SOLAS vessel[50]) and the individuals on board. That is, under maritime law, fishing vessels are less regulated than the merchant fleet and crew aboard fishing vessels are, arguably, more vulnerable to abuse and exploitation, including human trafficking. It is, therefore, important to distinguish between a fishing vessel (and fishers) and a merchant vessel (and seafarers) because each is regulated by a distinct and specific body of applicable international maritime law. These bodies of law and their relevance in tackling human trafficking will each be considered in turn.

III.2.1. Maritime Law Related Specifically to Seafarers

With regard to seafaring, SOLAS (1974), STCW (1978) and the MLC (2006) [51] are the primary instruments of international maritime law that offer mechanisms and impose obligations on States that, in some cases, may help to prevent and combat human trafficking.[52]

The International Convention for the Safety of Life at Sea (SOLAS) is an international maritime safety treaty that, in its successive forms, is generally considered the most important international treaty concerning the safety of merchant ships. SOLAS entered into force in 1980 and requires flag States[53] to ensure that their ships comply with minimum safety standards in construction, equipment and operation, mechanisms that could be used indirectly to prevent trafficking in the seafaring sector. For example, Chapter 1 states that the inspection and survey of ships to ensure SOLAS compliance shall be carried out by officers of the State whose flag the ship is entitled to fly and the government concerned must fully guarantee the

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[49] International Convention for the Safety of Life at Sea of 1 November 1974, 1184 *UNTS* 3, subsequently referred to as *SOLAS*. All commercial vessels are categorised as either SOLAS or non-SOLAS. SOLAS-convention vessels ships are all commercial vessels that fit within the definition of a SOLAS ship, which is any ship to which the SOLAS regulations apply, namely: a passenger ship engaged on an international voyage or a non-passenger ship of 500 tons gross tonnage or more engaged on an international voyage. Chapter 1, Regs. 1-5 SOLAS.

[50] Fishing vessels are not generally covered by the SOLAS convention due to differences in their design and operation Chapter 1, Reg. 2(i) SOLAS defines a fishing vessel as 'a vessel used for catching fish, whales, seals, walrus or other living resources of the sea' and Chapter 1, Regulation 3 exempts fishing vessels from SOLAS.

[51] Another key instrument of maritime law is MARPOL, the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. MARPOL consists of regulations aimed at preventing and minimising pollution from ships and includes six technical Annexes, the final of which entered into force in 2005. See The International Convention for the Prevention of Pollution from Ships of 2 November 1973, 12 *I.L.M.* 1319, subsequently referred to as MARPOL. MARPOL might be relevant to the trafficking of individuals at sea if it inadvertently provided an opportunity to identify victims, such as when port officials board a ship to examine the certificates required under MARPOL and determine whether they are valid and appropriate. However, the language of MARPOL does not directly aim to make life at sea safer or to protect seafarers or fishers, therefore it is not discussed in depth.

[52] ITF Report, *supra* nt. 17, 9.

[53] Vessels must fly the flag of the country to which they are registered: the State under whose protection the ship sails and to whose laws it must adhere. This is known as flag State responsibility. Art. 91, UNCLOS.

completeness and efficiency of the inspection and survey.[54] These guaranteed inspections result in certificates that must be carried on board the ship. The same Chapter authorises port States to verify that these valid certificates are on board a ship and to prevent a ship from leaving port if the certificate does not exist or if the vessel conditions do not appear to match the certification.[55] These opportunities under SOLAS for flag State and port State ship inspections may provide opportunities to identify trafficking if authorised inspectors know what to look for during inspections and are able (and willing) to extend inspections to include crew on-board. Inspections could also translate into opportunities for legal recourse when violations occur and increased inspection and monitoring of the merchant sector could potentially serve as a deterrent in exploiting and trafficking seafarers. However, in most situations, inspectors are chiefly concerned with the condition of the vessels and are not necessarily trained to identify trafficking. Moreover, inspectors interact mainly with senior crew and have limited opportunities for interacting with seafarers and fishers.

SOLAS also offers some indirect protection to trafficked seafarers on board a SOLAS-convention ship; ships that comply with SOLAS regulations may afford more opportunities for trafficked seafarers to seek out and receive assistance. For example, the SOLAS requirement that all vessels (including fishing vessels) have VHF-transponders on board (automatic identification system or AIS) means that law enforcement officials could potentially track vessel movement and detect unusual behaviour at sea (AIS radio signals can be picked up from shore and by satellite). Further, the requirement that each vessel's AIS transponder have a unique vessel identifier means the vessel's identity can be traced. AIS data is accessible on a number of websites, making it possible to track the position and movement of vessels and may, therefore, provide an opportunity to identify and assist trafficked seafarers by anticipating and intervening at their next port of call.[56] Seafarers who have been "out of touch" (and, in some cases, possibly trafficked or at least in a difficult situation) might potentially be identified through such a mechanism. SOLAS-convention ships are also safer ships, as they must meet the extensive safety standards set forth in the regulations in order to be certified, which may, in some situations, serve to prevent trafficking aboard such vessels.[57]

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[54] Chapter 1, Reg. 6 SOLAS.

[55] Chapter 1, Reg. 19 SOLAS. Specifically: 'Such certificate shall be accepted unless there are clear grounds for believing that the condition of the ship or of its equipment does not correspond substantially with the particulars of that certificate. In that case, the officer carrying out the control shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew.'

[56] Chapter 5, Reg. 19.2.4, SOLAS. Even though fishing vessels are included, the protections offered to fishers under this Chapter remain limited as flag States may exempt fishing vessels from the requirement. Further, 'persons on board [fishing] vessels have been known to disengage the transponder when they reach the fishing grounds or when they engage in criminal activities. The Torremolinos Protocol contains provisions on radio communication equipment in Chapter IX, but these are not yet in force.' De Coning, E., *supra* nt. 25, 35. The European Union has attempted to address this issue for fishers. Since Council Regulation (EC) No. 2371/2002 came into force, all large-scale fishing vessels flagged to EU Member States are prohibited from engaging in fishing unless they have a Vessel Monitoring System (VMS) installed. A satellite-based VMS enables authorities to monitor a vessel's location through the receipt of hourly electronic reports on a vessel's location, course, and speed. EJF, *Pirate Fishing Exposed: The Fight Against Illegal Fishing in West Africa and the EU*, 2012, available online at <ejfoundation.org/sites/default/files/public/Pirate%20Fishing%20Exposed.pdf> (accessed 20 October 2013), 27.

[57] Chapter 5 requires States Parties to ensure that all ships are sufficiently and efficiently manned in terms of safety of life at sea. Chapter 4 sets forth detailed regulations for radio communications from

The International Convention on Standards of Training, Certification and Watch keeping for Seafarers prescribes minimum standards relating to training, certification and watch keeping on an international level for seafarers, which countries are obliged to meet or exceed.[58] Aimed at improving crews' competence and increasing the security of ships, the STCW entered into force in 1984 and underwent major revisions in 1995 and 2010. STCW sets forth requirements for minimum training and hours of rest and the 2010 amendments increased the rest hour requirements; expanded the application of work hours and rest periods to more personnel; and required the recording of rest hours.[59] Minimum rest hour requirements are likely to be enforceable by Port State Control Officers who are authorised to check that ships maintain accurate records demonstrating that individual seafarers have been provided with the requisite minimum rest. For example, currently seafarers must have at least ten hours rest in a 24 hour period. To help further reduce the possibility of fatigue, much of the flexibility that previously applied under STCW has now been removed.[60] The 2010 amendments also provided improved measures to prevent fraudulent practices associated with certificates of competency and to strengthen the monitoring of STCW compliance.[61] The enforcement of these STCW protections for seafarers provides opportunities to identify trafficking situations when checking that ships are in compliance with STCW requirements and directly protects seafarers by setting forth training and rest requirements for crew.

The *Maritime Labour Convention* (MLC) is considered the 'fourth pillar' of the international regulatory regime for quality shipping.[62] Adopted in 2006, it entered into force on August 20, 2013.[63] As an ILO convention, it differs from those of the IMO in that it focuses on the rights of individual fishers and seafarers.[64] Also known as the 'Seafarers' Bill of Rights', the MLC consolidates and revises 36 ILO Conventions and one Protocol, aiming to establish a comprehensive international instrument to govern seafarers' working and living conditions and create conditions of fair competition for ship owners.[65] The MLC establishes specific standards and detailed guidance on implementing these standards at the national level through its Articles, Regulations and Code. Because of its focus on seafarers' rights, the MLC is arguably the strongest tool of international maritime law in combating trafficking in the seafaring sector. However, the scope of the MLC is limited to seafarers; fishers currently lack a comparable instrument.

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a ship. Chapter 1 requires a State to conduct investigations of any casualty occurring on any ship entitled to fly its flag and to share the findings with the IMO. These opportunities for communication with an investigation of a merchant vessel may serve to identify a trafficking situation and to protect and assist trafficked seafarers.

58 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of 7 July 1978 (STCW), as amended, 1361 *UNTS* 2.

59 United States Coast Guard, "Implementation of the 2010 Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978-Hours of Rest and Security-Related Training", *Federal Register*, 4 January 2012.

60 International Centre for Advancing the Legal Protection of Seafarers, "ICS reminds ship owners to comply with STCW from the New Year", 23 December 2011.

61 The 2010 amendments go as far as to require measures to prevent drug or alcohol abuse among seafarers.

62 As an ILO Convention, the ILO is responsible for supporting States Parties to the MLC in properly implementing the provisions they have agreed to. See ILO, *Maritime Labour Convention*, available online at <ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm> (accessed 20 June 2013).

63 *Ibid.*

64 ITF Report, *supra* nt. 17, 9.

65 ILO, *supra* nt. 62.

Article III of the MLC requires States Parties to ensure that the provisions of their national law and regulations respect the fundamental rights to freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[66] Article IV guarantees seafarers the right to a safe and secure workplace; fair terms of employment; decent working and living conditions on board ship; and health protection, medical care, welfare measures and other forms of social protection.[67] Article V requires a State to ensure that a ship eligible to fly its flag carries a maritime labour certificate and a declaration of maritime labour compliance. Failure to do so potentially exposes a ship to Port State Control actions. Authority is given to States Parties other than the flag State to determine if the ship is in compliance when a ship to which the MLC applies is in a port. This is an opportunity for inspection focused on the well-being of seafarers and is, therefore, an opportunity to identify trafficking on ships engaged in commercial activities.[68]

Further, the MLC regulations establish fourteen areas subject to mandatory compliance for certification and the issuance of certificates.[69] The MLC regulations aim to protect seafarers from the vulnerabilities that often accompany or can lead to human trafficking situations at sea. For example, Regulation 1.4 states that all 'seafarers shall have access to an efficient, adequate and accountable system for finding employment on board ship without charge to the seafarer.' Regulation 2.1 seeks to ensure that seafarers have a fair employment agreement. Regulation 2.2 states that all seafarers shall be paid for their work regularly and in full accordance with their employment agreements and sets wage standards. Regulation 2.3 regulates hours of work and rest and 2.4 ensures that seafarers have adequate leave. States that have ratified the MLC must comply with all of the provisions of the MLC (i.e. the Articles, Regulations and Standards).[70]

III.2.2. Maritime Law Related Specifically to Fishers

With regard to the fishing sector, the Torremolinos Protocol (1993) and its successive forms (i.e. the Cape Town Agreement) as well as the accompanying International Convention on Standards of Training, Certification and Watchkeeping for Fishing

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66 Art. III, MLC.

67 Art. IV, MLC.

68 Fishers are excluded from the MLC. Art. II, MLC.

69 The areas that must be inspected for compliance include: minimum age; medical certification; qualifications of seafarers; use of any licensed or certified or regulated private recruitment and placement services; seafarers' employment agreements; payment of wages; hours of work and rest; manning levels for the ship; accommodation; on-board recreation facilities; food and catering; on-board medical care; health and safety and accident prevention; and on-board complaint procedures. See Waldron, J. and O'Neill, P., "U.S. Implementation of the Maritime Labour Convention", *Lexology*, 14 May 2013, available online at <lexology.com/library/detail.aspx?g=f4b421e9-1008-4feb-8619-205f667b833f> (accessed 20 June 2013).

70 The MLC Code also has Guidelines, which must be taken into consideration by ratifying States. The MLC Articles contain general statements of obligations and rights and the specific details of such obligations and rights are set out in the Regulations and the Code. The difference between the Regulations and the Code is that the Regulations are normally worded in very general terms, with the details of implementation being set out in the Code (i.e. the Standards and the Guidelines). See ILO, *Maritime Labour Convention 2006 Frequently Asked Questions*, online revised ed., 2012, available online at <ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_177371.pdf> (accessed 26 August 2013).

Vessel Personnel (STCW-F)[71] are the primary instruments of international maritime law that offer mechanisms that could potentially be used to combat the trafficking of fishers.[72] Both are IMO Conventions that focus on the fishing industry. Also of importance is the ILO Work in Fishing Convention (WIF Convention).

The Torremolinos Protocol was adopted in 1993 to update, amend and absorb the original 1977 Torremolinos Convention, which addressed the design, construction, equipment and port State maintenance and inspection standards for fishing vessels.[73] Because sub-standard ships pose serious risks to the marine environment and the lives and health of fishers working on them[74], the Torremolinos Protocol aimed to improve technologies and working conditions on fishing vessels and ensure activities were carried out in a sustainable manner.[75] However, it never entered into force and was amended and 'replaced' by the Cape Town Agreement of 2012.[76] In ratifying the Cape Town Agreement, States agree to amendments to the provisions of the 1993 Torremolinos Protocol so that they can come into force as soon as possible.[77] If and when the Cape Town Agreement enters into force, it will offer protections to fishers similar to the protections that SOLAS currently offers seafarers, at least in relation to vessels connected to States Parties. Through this agreement there may be increased opportunities for trafficked fishers on board to be identified and assisted. For example, if port States are authorised to inspect and ensure compliance of fishing vessels with the Cape Town Agreement, there will be potential opportunities to identify trafficking situations. However this requires that authorised inspectors know what to look for and/or how to assist trafficked fishers as well as pursue legal recourse when violations occur. That being said, increased inspection and monitoring of the fishing sector could potentially deter the exploitation and trafficking of fishers.

The STCW-F Convention mandates common standards for crew members on board fishing vessels. STCW-F entered into force in 2012 and is the first attempt to provide a binding international framework to improve the training and certification of crew in the globalised fishing industry. It aims to reduce the high accident rate by improving safety standards for crew on vessels greater than 24M in length that are

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71 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel of 7 July 1995, subsequently referred to as STCW-F.

72 SOLAS is directly relevant for seafarers but fishing vessels are exempt from most of its provisions. The STCW applies to seafarers, but not to fishers. The MLC does not apply to ships engaged in fishing or similar operations.

73 Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977 of 2 April 1993, subsequently referred to as Torremolinos Protocol.

74 International Commission on Shipping, REPORT: *Ships, Slaves and Competition*, 2000, 21.

75 The Torremolinos Protocol contained safety requirements for the construction and equipment of new, decked, seagoing fishing vessels of 24 metres in length and over, including those vessels also processing their catch. Existing vessels were covered only in respect of radio requirements. Chapters covered matters such as: construction, watertight integrity and equipment; machinery and electrical installations and unattended machinery spaces; fire protection, detection, extinction, and fire-fighting; protection of the crew; life-saving appliances; emergency procedures, musters and drills; radiotelegraphy and radiotelephony; and ship borne navigational equipment.

76 Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977, of 29 October 2012, IMO Document SFV-P/CONF. 1/16, subsequently referred to as Cape Town Agreement.

77 The Cape Town Agreement will enter into force 12 months after the date on which not less than 22 States the aggregate number of whose fishing vessels of 24 m in length and over operating on the high seas is not less than 3,600 have expressed their consent to be bound by it. See IMO, *International Conference on the Safety of Fishing Vessels*, 12 October 2012, available online at <www.imo.org/About/Events/fishingconf/Pages/default.aspx> (accessed 31 May 2013).

non-SOLAS vessels. Like the STCW (which applies to seafarers), the STCW-F aims to improve the competence of crew and to increase the security of ships. In requiring the enforcement of these protections for fishers by ratifying States, the STCW-F will provide identification opportunities when checking that ships are in compliance with the requirements of STCW-F and pursue legal recourse when violations occur.[78] However, the STCW-F Convention does not deal with manning issues[79] and significant gaps remain in international maritime law in terms of providing fishers with individual rights.

The Work in Fishing Convention (WIF Convention) was developed as a parallel instrument to the MLC to address precisely the current gaps in the protection of fishers. The WIF Convention, supplemented by a WIF Recommendation (No. 199), was adopted in 2007 to protect the rights and promote the working conditions of fishers, including establishing minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; and medical care and social security.[80] The WIF Convention applies to all fishers and commercial fishing vessels and revised ILO Conventions specifically concerning the fishing sector[81] to bring them up to date and to reach a greater number of the world's fishers, particularly those working on board smaller vessels. However, the WIF Convention is not yet in force and, to date, has received only two ratifications.[82]

III.3. The Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) is largely a codification of customary international law dealing with navigation and other uses of

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[78] Since neither the Torremolinos Protocol nor the STCW-F are applicable to fishing vessels under 24m in length, and recognising that the great majority of fishing vessels are smaller than this, voluntary guidelines have been prepared by the Food and Agricultural Organization (FAO), IMO and ILO covering the design, construction and equipment of fishing boats between 12m and 24m in length. These guidelines aim to serve as a guide to those concerned with framing national laws and regulations. See IMO, *Fishing Vessel Safety*, available online at <http://www.imo.org/OurWork/Safety/Regulations/ FishingVessels/Pages/Default.aspx> (accessed 2 June 2013). These non-mandatory instruments include the *FAO/ILO/IMO Document for Guidance on Fishermen's Training and Certification* and the revised *Code of Safety for Fishermen and Fishing Vessels*, 2005, and the *Voluntary Guidelines for the Design, Construction and Equipment of Small Fishing Vessels*, 2005.

[79] This was 'to make ratification and implementation easier for all concerned.' IMO, *International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel*, available online at <www.imo.org/ourwork/humanelement/pages/stcw-f-convention.aspx> (accessed 31 May 2013).

[80] *Ibid.*

[81] Namely: the Minimum Age (Fishermen) Convention, 1959 (No. 112), the Medical Examination (Fishermen) Convention, 1959 (No. 113), the Fishermen's Articles of Agreement Convention, 1959 (No. 114), and the Accommodation of Crews (Fishermen) Convention, 1966 (No. 126).

[82] As of May 2013 the WIF Convention had only been ratified by Argentina and Bosnia and Herzegovina. The WIF Convention will come into force twelve months after the date on which it receives the ratification of ten Members, eight of which must be coastal States. In May 2012, representatives of the social partners at the EU level in the sea fisheries sector signed an agreement on working conditions for workers on board fishing vessels, an important step toward implementing the WIF Convention at the EU level. The social partners intend to ask the European Commission to give the agreement legal force by means of a directive. European Commission, *Press Release: Working conditions in fisheries key agreement signed by social partners*, 21 May 2012, available online at < http://europa.eu/rapid/press-release_IP-12-493_en.htm?locale=en> (accessed 22 June 2013).

the ocean and is almost universally recognised[83] as establishing the regime of law and order in the world's oceans and seas.[84] UNCLOS establishes the jurisdictional regime applicable to sea-based activities,[85] which, in practice, is critical in determining who is responsible for the identification of and assistance to trafficked persons as well as any prosecutions of trafficking crimes at sea. The issue of jurisdiction is particularly relevant in the context of trafficking at sea given the increased likelihood of trans-jurisdiction, with merchant and fishing vessels moving easily and often between jurisdictions. Determining who has legal and regulatory responsibilities to address trafficking at sea not only depends on the nationality of the victim and of the trafficker(s), but also on where the vessel is (i.e. the ports and waters it may enter) and the country to which the vessel is registered. The law of the sea provides the legal framework to make this determination.

UNCLOS divides the world's waters into multiple zones that, for present purposes, can be placed into three main categories—1) the high seas; 2) coastal State territory; and 3) territory where a coastal State may exercise some jurisdiction. Arguably, the national law of the flag State is always going to have weight. However, in territorial waters and ports, the national law of a coastal State may come into play.

The first category under UNCLOS comprises waters under neither sovereignty nor jurisdiction of any State: the high seas. The high seas (sometimes referred to as international waters) are all parts of the sea that are not included in the territorial sea or in the internal waters of a State; in exclusive economic zones (EEZs: sea zones prescribed by UNCLOS in which a State has sole exploitation rights over all natural resources[86]); or in the archipelagic waters of an archipelagic State.[87] On the high seas jurisdiction is reliant on the system of flag State control. UNCLOS confers jurisdiction over a vessel to the flag State; ships have the nationality of the State whose flag they are entitled to fly.[88] UNCLOS applies to all vessels (e.g. both merchant and fishing) and gives a flag State the authority and responsibility to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[89] Flag States are required to take measures so that ships that fly their flags comply with the

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[83] UNCLOS entered into force in 1994 and, as of 2012, 164 countries and the European Union have joined in the Convention. While the United States has not ratified UNCLOS, it does recognise the treaty as a codification of customary international law and the U.S. Navy and U.S. Coast Guard operate under its guidelines even in the absence of ratification. See Bower, E., *Advancing the National Interests of the United States: Ratification of the Law of the Sea*, Center for Strategic & International Studies, 25 May 2012, available online at <http://csis.org/publication/advancing-national-interests-united-states-ratification-law-sea> (accessed 31 May 2013).

[84] Customary international law refers to international obligations arising from established State practice ('a general practice accepted as law') as opposed to obligations arising from formal written international treaties. Article 38(1) of the Statute of the International Court of Justice. However, there are sections of UNCLOS that are new (i.e. not a codification of existing customary rules) such as the section on deep seabed mining and provisions on environmental protection.

[85] UNCLOS is, therefore, also a source of maritime law. See United Nations, *The Law of the Sea: Obligations of States Parties under the United Nations Convention on the Law of the Sea and Complementary Instruments*, 2004.

[86] The EEZ stretches from the seaward edge of the State's territorial sea up to 200 nautical miles (370 kilometres; 230 land miles) from its coast. Art. 57 UNCLOS.

[87] Art. 86 UNCLOS.

[88] Art. 91 UNCLOS. Article 91 specifies: 'There must exist a genuine link between the State and the ship.'

[89] Art. 94 UNCLOS.

standards laid down in the IMO treaties that they have ratified.[90] Monitoring the condition of vessels includes measures needed to ensure that vessels are appropriately surveyed as to condition, equipment and manning.[91] Flag States also have an obligation to take any steps necessary to secure observance with generally accepted international regulations, procedures and practices.[92] The flag State's obligations in international law, including those imposed by treaties the State has ratified, extend to vessels on its register. In terms of trafficking at sea, if a State has ratified the Trafficking Protocol, the CoE Convention, related human rights treaties or any IMO and ILO conventions that are relevant in addressing the trafficking of seafarers or fishers, the legal obligations of those instruments apply.

Flag States also have specific obligations for inspection, the enforcement of jurisdiction and administration of their registered vessels. Not only must flag States provide ships registered under their flag with appropriate certificates to demonstrate that the ship has been inspected and complies with international laws and standards, but flag States must also enforce penal jurisdiction when there are breaches of regulations that lead to incidents. In other words, the flag State is in control of criminal and disciplinary powers. The flag State determines the national law governing the ship and how and where an action can be enforced in relation to that ship.[93] In practice, this means that even in territorial seas, foreign States will usually defer to the law of the flag State when dealing with a vessel.[94] On the high seas, the national anti-trafficking laws of the flag State will be critically important in identification and the provision of assistance and protection to victims and to the prosecution of traffickers.

Implementation and enforcement of flag State responsibility is not as simple as it may appear. Vessel owners (i.e. any person or corporation possessing title to a vessel

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[90] Flag States will, therefore, necessarily be responsible for such issues as manning, labour conditions and crew training, construction, maintenance and seaworthiness of ships, prevention of collisions and so on.

[91] Flag States issue vessel safety certificates indicating compliance with the main international conventions, which are key to the port State control inspection system. See Hare, J., "Flag, Coastal and Port State Control - Closing the Net on Unseaworthy Ships and their Unscrupulous Owners", *Sea Changes*, vol. 16, 1994.

[92] *Ibid.,* and Hare, J., "Port State Control: Strong Medicine to Cure a Sick Industry", *Georgia Journal of International Comparative Law – Special Admiralty Issue*, vol. 26, ed. 3, 1997. See also Art. 94 UNCLOS.

[93] There are some exceptions, namely in relation to piracy or slavery. Article 101 of UNCLOS defines piracy and Article 105 sets forth that 'on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft or a ship or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.' Arts. 100-105 UNCLOS. The legal framework in place for the international community collectively to combat piracy and prosecute pirates is useful in drawing parallels to combatting trafficking and prosecuting traffickers at sea. See, e.g., Surbun, V., "The developing jurisprudence to combat modern maritime piracy: a crime of the high seas?", *The Comparative and International Law Journal of Southern Africa* 43, 2010. In terms of trafficking, further research is also needed on the use of UNCLOS Article 99 which states: 'Every State shall take effective measures to prevent and punish the transport of slaves in ships authorised to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.' Art. 99 UNCLOS specifies the 'transport' of slaves, which has important differences from the exploitation of seafarers and fishers on board vessels.

[94] Yang, H., *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, International Max Planck Research School for Maritime Affairs at the University of Hamburg, 2006, 97.

and the proceeds of its services) need not be (and often are not) present on board the vessel, which limits accountability when problems occur, including human trafficking. Some vessel owners charter the vessel to an operator, although this differs by context and region. Some registered vessel owners are essentially shell companies in a tax haven, particularly when the vessel is registered in a State that is unable or unwilling to exercise its jurisdiction and duties over the ship.[95] It is difficult for flag States to exercise jurisdiction over a company with no assets or personnel in their territory.

In reality, many vessels fly what are known as 'flags of convenience' (FoCs). This refers to the business practice of registering a merchant ship or fishing vessel in a sovereign State different from that of the ship owners to reduce operating costs or avoid certain regulations.[96] FoCs are from States with an open register that usually are unable or unwilling to take seriously their flag State responsibilities either in terms of enforcing their existing national laws or in terms of implementing laws that comply with their responsibilities under IMO and ILO treaties.[97] This, then, provides space for the perpetration of a raft of potential violations, including the exploitation of seafarers and fishers in ways that constitute human trafficking at sea. Lack of regulation further limits opportunities for identification of those already aboard vessels or for escape from trafficking. There are also going to be limits to opportunities for prosecuting those perpetrating trafficking crimes when FoC States do not take their responsibilities seriously.

Liberia, for example, is a commonly used FoC. The Liberian Registry is one of the largest and most active shipping registers, with approximately 4,000 ships registered to the Liberian flag in 2013. But, according to the 2013 *Trafficking in Persons Report* issued by the U.S. Department of State, the Government of Liberia does not fully comply with the minimum standards for the elimination of trafficking.[98] The Liberian government only recently achieved its first trafficking conviction using its 2005 anti-

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[95] INTERPOL has recognized the lack of transparency of vessel ownership information through the use of secrecy jurisdictions coupled with registration in flags of convenience or statelessness as a key challenge in law enforcement at sea. INTERPOL, REPORT: *Meeting on the formation of an INTERPOL ad hoc Fisheries Crime Working Group*, 16-17 February 2012.

[96] For example, for workers on board ships with United States vessel owners but registered to a FoC, FoCs 'severely limit recourse to US or other courts in disputes over wages or a workplace injury. A US court ruled in 2003 that claims related to a boiler explosion aboard NCL's *Norway*, which killed 8 workers and injured 20, had to be filed in the Philippines to comply with the employment contract that had been signed in the Philippines. Similarly, the employment contract of a worker on a Bahamian-registered ship states any dispute or claims 'shall be governed and adjudicated pursuant to the laws of the Bahamas, regardless of any other legal remedies that may be available.' Klein, R.A., *Cruise Ship Squeeze: The New Pirates of the Seven Seas*, New Society Publishers, Gabriola Island, 2005, 48.

[97] The EJF notes that FoC States allow foreign vessels to fly their flag for 'a few hundred dollars' and then 'notoriously overlook illegal practices such as the evasion of taxes and fisheries management regulations.' EJF, *supra* nt. 17, 18.

[98] United States Department of State, REPORT: *Trafficking in Persons Report 2013*, available online at <state.gov/j/tip/rls/tiprpt/2013/> (accessed 28 October 2013). Liberia was placed on the Tier 2 Watch List for the third year in a row in 2013. According to the TIP Report, Tier 2 countries are those 'whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards' and countries fall on the Tier 2 Watch List if 'a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or c) The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.' Tier 3 comprises 'countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.'

trafficking law and, overall, has made only minimal efforts to protect trafficking victims.[99] If a trafficking situation were to be identified on a ship flying Liberia's flag on the high seas, Liberia's anti-trafficking legislation would apply and the protection of trafficked seafarers or fishers on board would depend on the Government of Liberia's ability or willingness to enforce that legislation. It is concerning that the most common FoCs, like Liberia, are those of States that have not brought their national laws and anti-trafficking efforts in accordance with the requirements of the Trafficking Protocol and, where relevant, the CoE Convention.[100]

The practice of "flag hopping" further complicates issues of flag State responsibility as vessels can re-flag and change names several times in a season, moving from one FoC to another.[101] This is a common practice among IUU vessels used to confuse authorities and avoid prosecution. Flag hopping can be done frequently and cheaply since applications for new flags can often be sent by fax or made online and processed within 24 hours.[102] Finally, there is the associated issue of 'flags of non-compliance' (FoNCs), States that, while not having an open registry like FoC States, nonetheless fail to enforce flag State obligations, particularly on the high seas or in distant water fisheries.[103]

The second category under UNCLOS comprises waters that are coastal State territory and, therefore, under the jurisdiction of coastal States. These include internal waters (waters on the landward side of a baseline such as rivers, canals and small bays) and territorial waters (coastal waters up to twelve nautical miles or twenty two kilometres from the baseline of a coastal State, also called the territorial sea). Within territorial waters, the coastal State sets laws and regulates the use of any resources. Coastal States are prevented, under UNCLOS Article 24, from hampering the 'innocent passage' of foreign ships through the territorial sea.[104] Passage is 'innocent' as long as it is continuous and expeditious[105] and is not 'prejudicial to the peace, good order or security of the coastal State' and takes place in conformity with UNCLOS and other rules of international law.[106] Passage will not be considered 'innocent' if the vessel engages in one or more activities outlined in Article 19 of UNCLOS,[107] the two

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99 *Ibid.*

100 The States considered to be FOCs by the ITF's Fair Practices Committee (see *infra* nt. 303) that were included in the 2013 TIP Report are all ranked Tier 2 or lower. Antigua and Barbuda - Tier 2; Bahamas - Tier 2; Barbados - Tier 2 Watch List; Belize - Tier 2; Bolivia - Tier 2; Burma - Tier 2 Watch List; Cambodia - Tier 2 Watch List; Comoros - Tier 2 Watch List; Cyprus - Tier 2; Equatorial Guinea - Tier 3; Georgia - Tier 2; Honduras - Tier 2 Watch List; Jamaica - Tier 2; Lebanon - Tier 2 Watch List; Liberia - Tier 2 Watch List; Malt - Tier 2; Marshall Islands - Tier 2 Watch List; Mauritius - Tier 2; Moldova - Tier 2; Mongolia - Tier 2; Panama - Tier 2; St Vincent - Tier 2; Sri Lanka - Tier 2 Watch List; Tonga - Tier 2.

101 INTERPOL has recognized the lack of transparency of vessel identity including renaming and re-flagging as another key challenge in law enforcement at sea. INTERPOL, *supra* nt. 95.

102 EJF, *supra* nt. 17, 20.

103 *Ibid.*

104 Art. 17 UNCLOS.

105 This may include stopping and anchoring if it is incidental to ordinary navigation or proves necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. Art. 18 UNCLOS.

106 Art. 19 UNCLOS.

107 Outlawed are: (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State; (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State; (d) any act of propaganda aimed at affecting the defence or security of the coastal State; (e) the launching, landing or taking on board of any aircraft; (f) the launching, landing or taking on board of any military device; (g) the loading or unloading of any commodity, currency or person contrary

most relevant for trafficking at sea being 1) the loading or unloading of any commodity or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; and 2) any fishing activities.[108]

In spite of the primacy of flag State responsibility, a coastal State is also important in combating trafficking at sea when ships are present in waters under a coastal State's jurisdiction. A coastal State can, under international law, take certain (albeit) limited steps to regulate the activities of foreign vessels in its waters to protect its interests. A court of a coastal State will generally hear cases resulting from accidents or disputes that occur in the State's territorial or internal waters or ports.[109]

UNCLOS addresses criminal jurisdiction on board a foreign ship in territorial waters in Article 27, stating that:

> the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage except in four cases: 1) if the consequences of the crime extend to the coastal State; 2) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; 3) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or 4) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[110]

While trafficking at sea, arguably, could be considered a crime that both disturbs 'the good order of the territorial sea' and 'with consequences that extend to the coastal State', under UNCLOS a State other than the flag State still has to notify the flag State and facilitate contact between the flag State and the ship's crew before taking steps to address the crime.[111]

A coastal State could potentially exercise criminal jurisdiction on board a foreign ship if a trafficking situation was identified in the coastal State's territorial waters. In such a situation the coastal State's courts could hear the case and the coastal State's national laws would apply. While not a trafficking case, the *McRuby Case* is an

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to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; (h) any act of wilful and serious pollution contrary to this Convention; (i) any fishing activities; (j) the carrying out of research or survey activities; (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (l) any other activity not having a direct bearing on passage. Art. 19 UNCLOS.

[108] Irrespective of whether passage is innocent or not, under UNCLOS Article 27(1) States retain the capacity to enforce their criminal law in respect of crimes committed on passing ships in a number of specified situations of which some have relevance for human trafficking – namely if the consequences of the crime extend to the coastal State; if the crime disturbs the peace of the country or the good order of the territorial sea; or if the master of the vessel or its flag State has requested the coastal State to assist. However, there are restrictions on the capacity of a coastal State to enforce national laws on vessels merely passing through the territorial sea. Gallagher, A. and David, F., *The International Law of Migrant Smuggling*, Cambridge University Press, Cambridge, forthcoming 2013.

[109] Yang, H., *supra* nt. 94, 97.

[110] Art. 27 UNCLOS.

[111] For example, in France, port authorities are understood to be able intervene in three hypotheses: if the crime is committed by a non-crew member; if the intervention of local authorities was requested by the Master of the vessel or if the peace and good order of the port was compromised. Bardin, A., "Coastal State's Jurisdiction over Foreign Vessels", *Pace International Law Review*, vol. 14, 2002, 30-31.

example of a coastal State asserting criminal jurisdiction over a foreign vessel and demonstrates the complex jurisdictional issues owing to the multi-national nature of cases at sea. In the 1994 *McRuby Case*, ten stowaways (nine from Ghana and one from Cameroon) were found on board the McRuby vessel (owned by MC Shipping of New York, managed by V-Ships of Monaco, registered in the Bahamas, crewed by Ukrainians and off Portugal when the crime took place). The stowaways were discovered on the high seas and all but one were killed by the crew to avoid having to return them back to Ghana. The surviving stowaway (who escaped and hid on the vessel) contacted the police upon arrival in France and the French court ruled that it had jurisdiction because part of the crime had been committed in the territorial waters of France.[112] It, therefore, seems that if a trafficked seafarer or fisher contacted the police in a coastal State to report a trafficking crime, the coastal State should be able to exercise jurisdiction and apply its national laws in protecting and assisting the victim(s) and prosecuting the trafficker(s).

That being said, the *McRuby Case* is unique and, in practice, flag State jurisdiction is generally favoured. Because of this and as a result of problems with FoCs and flag State implementation (such as FoNCs), States have signed Memorandum of Understanding (MoUs) to put into place a system of Port State Control (PSC), which extends a coastal State's jurisdiction to allow for the inspection of foreign ships in national ports to verify that the conditions, equipment, labour conditions and operation of the ship comply with the requirements of maritime law's international conventions.[113] PSC seeks to ensure that as many ships as possible are inspected while, at the same time, preventing ships being delayed by unnecessary inspections. The primary responsibility for a ship's standards still rests with the flag State but PSC provides a 'safety net' to catch substandard ships.[114] It is up to port States to exercise PSC in a manner consistent with their own domestic legislation, with due attention to international instruments and ILO and IMO resolutions. Many States have promulgated domestic legislation to give effect to the notions of port State control.

Under PSC, once a ship voluntarily enters port, it becomes fully subject to the laws and regulations prescribed by the officials of that territory.[115] MoUs establish regional PSC organisations responsible for the implementation of PSC measures.[116] PSC is a cooperative regime that attempts to make PSC procedures uniform in all ports to prevent the diversion of vessels to ports where there are no PSC measures or where a coastal State may be unwilling or unable to exercise PSC measures. Under PSC, the

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[112] The court found that as the crew members had still been searching for the surviving stowaway when the McRuby entered the French territorial sea, these searches were 'subsequent to the sequestrations and executions and all the facts constituted an indivisible whole. It is common practice in France for the courts to hear matters concerning acts committed outside the country by foreigners, if the acts are indivisible and part of them are undertaken on French territory'. Bardin, A., *supra* nt. 111, 38. Further, the suspects were detained on French soil and the prosecutor argued that therefore a French court could try them. Nundy, J., "Stowaways 'killed and thrown overboard'", *The Independent*, 27 November 1994.

[113] Yang, H., *supra* nt. 94, 98.

[114] International Maritime Organization, "Port State Control", 2013, available online at <www.imo.org/ourwork/safety/implementation/pages/portstatecontrol.aspx> (accessed 22 June 2013).

[115] Hare, J., *supra* nt. 92.

[116] Europe and the North Atlantic are covered by the Paris MoU; Asia and the Pacific are covered by the Tokyo MoU; Latin America is the Acuerdo de Viña del Mar; the Caribbean is the Caribbean MoU; West and Central Africa are the Abuja MoU; the Black Sea region is covered by the Black Sea MoU; the Mediterranean is the Mediterranean MoU; the Indian Ocean is the Indian Ocean MoU; and finally the Gulf Region is covered by the Riyadh MoU.

power of port States over foreign vessels does not come from international conventions, but from their territorial jurisdiction over the ships in their ports. In this sense, even non-parties to the IMO and ILO conventions can enforce the conventions' provisions by transferring them into their national laws and implementing them against foreign vessels in their ports.[117] The system of PSC extends coastal State jurisdiction and is potentially important in providing opportunities to intervene in identifying and ending trafficking situations while vessels are in port.

The third category under UNCLOS comprises those areas not in a coastal State's territory but nonetheless where a coastal State may exercise some jurisdiction. These include contiguous zones[118] (a zone contiguous to a coastal State's territorial sea) and EEZs. In an EEZ, a coastal State has the sovereign right to explore, exploit and protect resources, but not sovereignty over the waters. In other words, because an EEZ is not a coastal State's territory, innocent passage does not apply; in an EEZ, a coastal State may only interfere in the freedom of navigation by a foreign vessel if it can be shown that its activities are prejudicial to the protection of resources.[119] Under the law of the sea, the enforcement of mechanisms that could be used to prevent and combat the trafficking of seafarers or fishers will depend on the State exercising control over a vessel.

III.4. Building from the Existing Legal and Regulatory Framework

While international anti-trafficking law, international maritime law and the law of the sea provide a legal framework for the international community to prevent and combat trafficking at sea, significant gaps still exist. How the key obligations of these three bodies of international law work in practice and, equally, how they intersect with one another, is not uncomplicated. The application of anti-trafficking policies and laws within the fishing and seafaring sectors (and across different legal jurisdictions) is complicated by the very specific and distinct nature of fishing and seafaring. And the ways in which the existing legal and regulatory framework for the seafaring and fishing sectors may be relevant for addressing human trafficking has not been extensively explored and tested.

A commitment is needed by States to implement the existing key obligations from international anti-trafficking law, international maritime law and the law of the sea that can be used to combat trafficking. This will require education, assistance, persuasion, promotion, economic incentives, monitoring, enforcement and sanctions, all of which are accompanied by the setting up or improvement of administrations and associated costs.[120] The quality of current national legislation in many States remains a limiting factor and States need to bring their legislation in line with their obligations

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[117] Yang, H., *supra* nt. 94, 98.

[118] UNCLOS sets forth that in a contiguous zone, a coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations and punish infringement of those laws. The contiguous zone may not extend beyond 24 nautical miles from the baseline, therefore contiguous zones are those between 12 and 24 nautical miles from a baseline over which a coastal State may exercise some jurisdiction. Art. 33 UNCLOS.

[119] An EEZ is a *sui generis* zone where foreign nations maintain most of the rights guaranteed on the high seas. Pedrozo, R., "Which High Seas Freedoms Apply in the Exclusive Economic Zone?", *LOS Reports,* vol. 1, 2010, 5.

[120] Fisheries and Aquaculture Department, REPORT: *Safety at sea as an integral part of fisheries management*, FAO Fisheries Circular No. C966, 2001.

under anti-trafficking law and maritime law (and enforce their laws on their vessels as required by the law of the sea).

States may also potentially exercise jurisdiction over their nationals for crimes they commit or are complicit in wherever they occur. This is an aspect of national law that merits further discussion when exploring the legal and regulatory framework in tackling criminal activities at sea. States can criminalise and prosecute their own nationals' involvement in illegal activities on board foreign vessels in any maritime zone.[121] The nationality theory of jurisdiction is a well-established means by which a State can claim jurisdiction over extraterritorial conduct.[122] While a State cannot arrest an individual within the territory of another State, it may arrest its own citizens in a locality that is not within the jurisdiction of any nation, such as the high seas.[123] And, if extradition treaties are in place, a State may also request that a foreign State arrest and extradite the requesting State's national for prosecution.[124]

This article is a starting point in considering where and how improved policies and regulations may contribute to an improved situation for seafarers and fishers. It is not an exhaustive exploration, but rather a preliminary consideration of what changes may positively impact anti-trafficking efforts in the commercial fishing and merchant fleets. The following sections explore the three P's of anti-trafficking – prevention, protection and prosecution – with attention to how gaps and issues in the legal and policy frameworks (or lack of enforcement) provide space for trafficking exploitation and also limit options and opportunities for remedy. The article also seeks to disentangle the specificities and challenges when considering how to prevent and combat trafficking in the merchant fleet as well as (and in contrast to) the commercial fishing sector. However, it is important to stress that the merchant and fishing industries are dynamic and changing industries and must necessarily be a part of the process of reviewing and amending the legal framework to comprehensively address trafficking at sea. Seafarers and fishers themselves must also be brought into the discussion as they can provide essential information toward making laws more effective and in guaranteeing the protection of their rights.

IV. Prevention

Discussions of trafficking prevention typically centre on awareness raising and the dissemination of information about trafficking risk connected to migrating and accepting work offers. Underpinning such approaches is the assumption that, in the case of sufficient information about trafficking, potential migrants would not expose themselves to dangerous migration and work situations.

Certainly specific information about trafficking and migration risks is needed in terms of the seafaring and commercial fishing sectors and can, in some cases, prevent risky decision-making that can lead to trafficking.[125] For example, trafficked seafarers/

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[121] De Coning, E., *supra* nt. 24, 26.

[122] Blakesley, C., "United States Jurisdiction Over Extraterritorial Crime", *Scholarly Works* Paper 318, 1982.

[123] Clark, P., "Criminal Jurisdiction Over Merchant Vessels Engaged in International Trade", *Journal of Maritime Law and Commerce* Vol. 11, No. 2, 1980.

[124] See, e.g., Model Treaty on Extradition, G.A. res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A) at 212, U.N. Doc. A/45/49, 1990.

[125] This might include information about the specific risk factors for seafarers and fishers (and the differences between the two sectors) as well as advice in researching ships, crewing agencies, placements, and so on. As important is information about avenues for assistance in case of difficulties – e.g. through ITF, port authorities, embassies and so on. Surtees, *supra* nt. 20.

fishermen from Ukraine stressed the need for more information about risks as part of the overall education of seafarers in maritime colleges and training programmes to allow for more informed choices and safe, verified placements.[126]

However, information in and of itself is unlikely to be sufficient to prevent seafarers and fishermen from accepting what might be risky placements. The same study from Ukraine noted risk factors that had little to do with lack of information, but rather were a function of constrained work opportunities and life situations.[127] Certain types of seafarers were particularly vulnerable to offers from unscrupulous crewing agencies—namely those with limited experience, older seafarers who were 'less desirable' on the job market, those facing a financial crisis and those who had been unemployed for some time.[128] Similarly, in Southeast Asia, where there is an increasing awareness amongst migrants that the fishing sector poses risks and problems, migrant workers continue to accept positions on fishing boats because of constrained economic options and, in some cases, economic aspirations that are at play in migration decision-making.[129] In addition, some fishers are completely deceived, literally tricked into working on fishing boats, in which case such information is not helpful or relevant.

Moreover, preventive measures that are limited to awareness raising amongst fishers and seafarers unjustifiably rests some responsibility for trafficking crimes on victims. In other words, while awareness raising can be a positive, emphasising awareness raising as the primary approach implies that trafficked persons are primarily responsible for decisions about migration and employment that result in their being trafficked. However, this perspective ignores the responsibility of States to regulate the labour sector, for both domestic and foreign placements, in ways that protect their citizens and prevent them being trafficked.

Currently, in many countries legally registered and licensed crewing agencies are, through a lack of legislation, policy and enforcement, afforded unfettered opportunity to abuse and exploit seafarers and fishers.[130] There is a need for better regulation of labour recruitment agencies to protect prospective migrants and prevent trafficking. Current recruitment practices facilitate trafficking—for example: the payment of recruitment fees by seafarers/fishers; the practice of offering contracts in languages not spoken by seafarers/fishers; the lack of accountability of crewing agencies and the use of fraud and deception during recruitment. How these practices contribute to trafficking (and how this can be prevented) is discussed in the following sections.

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126 Surtees, *supra* nt. 20, 44.
127 *Ibid.*
128 *Idem*, 43-47 and De Coning, E., *supra* nt. 17, 41.
129 See, e.g., Brennan, M., *supra* nt. 6, 24.
130 Surtees, R., *supra* nt. 21, 51.

IV.1. Recruitment Fees Borne by Seafarers/Fishers Amplify Trafficking Vulnerability

Crewing agencies are companies that match seafarers and fishers with ship owners, usually in exchange for a recruitment fee. International standards—including the MLC,[131] various ILO conventions[132] and the WIF Convention[133]—prohibit the payment of recruitment fees by seafarers and fishers. Fees are to be borne by the employer.

Yet, the payment of recruitment fees by seafarers and fishers is an entrenched practice in many countries.[134] The majority of seafarers and fishers trafficked from Ukraine paid recruitment fees varying from 700USD to 1600USD, typically equivalent to one to two months wages promised in their contract (and they generally never received any payment).[135] Similarly, Indonesian seafarers/fishers sent to the United Kingdom each paid 500USD to their local manning agent in Indonesia to secure their positions.[136] And Indonesian fishers working on South Korean vessels in the New Zealand EEZ found that they paid high recruitment fees; between 30% and 50% of their monthly salary was generally withheld until the successful completion of the contract.[137]

Recruitment fees borne by the individual fisher or seafarer amplify vulnerability in that they bind them to their exploitative situation.[138] Many seafarers and fishers go into debt to cover recruitment fees and then, as a consequence, feel unable to leave a trafficking situation because they need to repay their debt, which could also be compounded by interest. One Ukrainian seafarer, who was chronically unemployed

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[131] The MLC prohibits the payment of recruitment fees. MLC Regulation 1.4 states that all seafarers shall have access to an efficient, adequate and accountable system for finding employment on board ship without charge to the seafarer. MLC Standard A1.4 states that States Parties shall, in their laws and regulations or other measures, at a minimum require that no fees or other charges for seafarer recruitment or placement or for providing employment to seafarers are borne directly or indirectly, in whole or in part, by the seafarer, other than the cost of the seafarer obtaining a national statutory medical certificate, the national seafarer's book and a passport or other similar personal travel documents, not including, however, the cost of visas, which shall be borne by the ship owner.

[132] Two ILO conventions deal specifically with the regulation of recruitment and placement agencies and prohibit the payment of recruitment fees by seafarers. ILO convention No. 9 is the *Placing of Seamen Convention*, 1920 and states in Article 2 that 'the business of finding employment for seamen shall not be carried on by any person, company, or other agency, as a commercial enterprise for pecuniary gain; nor shall any fees be charged directly or indirectly by any person, company, or other agency, for finding employment for seamen on any ship' and that laws shall provide punishment for violating this Article. ILO convention No. 179 is the *Recruitment and Placement of Seafarers Convention*, 1996.

[133] The WIF Convention requires that no fees or other charges for recruitment or placement of fishers be borne directly or indirectly, in whole or in part, by the fisher. Art. 22 WIF Convention. However, the WIF Convention is not yet in force and as of May 2013 has only been ratified by two countries.

[134] See, e.g., EJF *supra* nt. 28; ITF Report *supra* nt. 17; Bloomberg Business Week, Skinner, E., "The Fishing Industry's Cruelest Catch", 23 February 2012, available online at <www.businessweek.com/articles/2012-02-23/the-fishing-industrys-cruelest-catch> (accessed 23 June 2012); and Yea, S., *supra* nt. 18.

[135] Surtees, R., *supra* nt. 21, 54.

[136] International Transport Workers' Federation (ITF), REPORT: *Migrant Workers in the Scottish and Irish Fishing Industry: Forced or Compulsory Labour or Plain Modern Day Slavery*, 2008, 2.

[137] Stringer, C., et al., *supra* nt. 20, 13.

[138] Vulnerability to trafficking created by certain recruitment practices is also discussed in Verité, *Fair Hiring Toolkit: What Should You Look For? Identifying Company Risk & Vulnerability to the Human Trafficking and Forced Labor of Migrant Workers*, 2011, available online at <https://www.verite.org/node/695> (accessed 22 June 2013).

for several years, borrowed 1000USD from the bank to pay the recruitment fee; he used his contract as evidence of his ability to re-pay the debt.[139] Some recruitment fees and contractual commitments clearly led to debt bondage—for example, one Indonesian fisher signed a contract, which stated that he would owe 3500USD should he leave the boat before completing his contract, far more money than he had at his disposal.[140]

Paying recruitment fees may also result in seafarers and fishers not having resources to negotiate out of their trafficking situation. Some trafficked seafarers/fishers exploited in Russia were offered the option of 'buying their freedom' after they embarked on the vessel and realised the real situation. However, as one man explained, none had the money to do so:

> At sea they told us the conditions of the contract, which differed completely from the one we signed in Ukraine... Slavery started literally from the very first day of arrival on board the vessel. When we arrived and they told us about the new conditions, I, as the eldest and more experienced, asked a question: "How can we get home?" We had completely different contract conditions and, since the contract conditions were violated, we were not about to work there. I was told that, if we wanted, there was a boat that could come and take us from the ship for 2000USD. Certainly no seafarer had more than 100 or 200USD with him. That is why we had to agree to stay for the minimum period of time that they offered us.[141]

Debt may also mean accepting another risky or exploitative job offer to repay the debt incurred during a trafficking situation, thus potentially leading to re-trafficking.

Ensuring that recruitment fees are borne by employers rather than seafarers and fishers, should aid in trafficking prevention by eliminating vulnerabilities linked to debt or depleted resources before embarkation. This will require implementation by States of the obligations set forth in the key international instruments on this issue—namely the MLC[142] and the WIF Convention.[143] These obligations already exist in international law, although they have not been widely ratified—for example, ILO Convention No. 9, which seeks to eliminate the finding of employment for seamen as a commercial enterprise for pecuniary gain (and the charging of fees for finding employment for seamen), has been in force since 1921 but has only 41 ratifications.[144] Similarly, ILO Convention No. 179 addresses the recruitment and placement of seafarers and, arguably, also of fishers[145] but has only ten ratifications. Convention No.

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[139] Surtees, R., *supra* nt. 21, 54.

[140] Skinner, E., *supra* nt. 134. See also Stringer, C., et al., *supra* nt. 19.

[141] Surtees, R., *supra* nt. 21, 71.

[142] The MLC entered into force on August 20, 2013. As of June 2013, however, the MLC had only 40 ratifications, with Ukraine, Indonesia, Cambodia, Thailand and Myanmar among the countries yet to ratify. ILO, *supra* nt. 62.

[143] Further ratification of both the MLC and the WIF Convention is also needed. States should ratify these conventions and commit to bringing their national laws in accordance with the important protections they seek to provide to seafarers and fishers.

[144] ILO Convention No.9: Placing of Seamen Convention, 10 July 1920, C009, subsequently referred to as ILO Convention No. 9. Ukraine, Indonesia, Cambodia, Thailand and Myanmar have not ratified ILO Convention No. 9.

[145] ILO Convention No. 179 defines a 'seafarer' as 'any person who fulfils the conditions to be employed or engaged in any capacity on board a seagoing ship other than a government ship used for military or non-commercial purposes' and provides that it can be extended (after consultation

179 states that seafarers should not be subject to fees or other recruitment charges and requires governments to regulate recruitment agencies for seafaring employment[146] and enact national legislation prohibiting the payment of recruitment fees to crewing agencies by seafarers and fishers. Yet, many countries from which seafarers and fishers originate or are recruited to do not currently have such protections.

Beyond the legal response, an important role can be played by employers and ship owners in prohibiting the payment of recruitment fees by seafarers and fishers to the crewing agencies they use. For example, in its tool kit of fair hiring practices, Verité outlines sample benchmarks of good practice in recruitment and hiring which include, amongst other things, that companies have a written policy, containing enforcement as well as verification mechanisms against workers paying to secure a job and, moreover, do not use brokers, agents or sub-agents that charge recruitment fees. Additional safeguards are that company job advertisements include the statement that no fees shall be charged at any phase of recruitment and hiring, that workers who are charged fees will be repaid and contracts with brokers charging fees are to be terminated.[147]

IV.2. (Non)accountability of Crewing Agencies in Terms of Job Placements can Lead to Trafficking at Sea

Formal labour recruitment should, in principle, offer a clear and accountable framework through which recruitment and job placements for seafarers and fishers take place. Crewing agencies should offer only placements that live up to the conditions offered at recruitment and outlined in the individual contract. In practice, however, there is enormous scope for abuse and manipulation by crewing agencies due to inadequate legislation surrounding recruitment practices and/or because of weak enforcement of the legal and regulatory framework. [148]

Take, for example, Ukraine, where the Ministry of Labour and Social Policy licenses crewing agencies. While crewing companies must be formally licensed and regularly monitored, in practice the existing mechanism does not provide sufficient safeguards to protect seafarers/fishers against fraudulent recruitment. Crewing companies can be registered in Ukraine fairly easily and monitoring the high volume of crewing agencies in the country is unlikely considering inadequate government staff and resources.[149] While complaints registered by seafarers and fishers may lead to an investigation and sometimes the suspension of a crewing company's license, industry experts in Ukraine report that this is not inevitable.[150] This means that if crewing

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with the representatives of organisations of fishing vessel owners and fishers or of those of owners of maritime mobile offshore units and seafarers serving on such units) to fishers or seafarers serving on maritime mobile offshore units. ILO Convention No. 179, The Recruitment and Placement of Seafarers Convention, 1996, *C179*, subsequently referred to as ILO Convention No. 179.

146 ILO Convention No. 179 entered into force in 2000 with 10 ratifications and 8 denunciations. Again Ukraine, Indonesia, Cambodia, Thailand and Myanmar are among the many origin countries to have not ratified ILO Convention No. 179.

147 Verité, *Fair Hiring Toolkit*, available online at <verite.org/helpwanted/toolkit> (accessed 22 June 2013).

148 In its 2005 Final Report, the International Commission on Shipping found that the issue of manning agents and their recruitment and crew welfare practices 'is a major one' and highlighted the great need to reform and regulate this area. International Commission on Shipping, *Final Report: Review of responses to Ships, Slaves and Competition*, ICONS, 27 July 2005, 7.

149 Surtees, R., *supra* nt. 21, 54-55.

150 *Ibid.*

companies wish to pursue unethical and illegal practices, there is room and opportunity within the system due to a lack of oversight.

Additionally, under Ukrainian legislation crewing agencies are not responsible or liable for the well-being (or violation of the rights of) of seafarers and fishers whose placement aboard a vessel they arrange. Agencies are not required to assure the work conditions and salaries promised at recruitment, contrary to international standards,[151] as one seafaring unionist explained:

> The crewing company finds the employee for the employer and the employer for the employees. They are just intermediaries…They sign the contract between [the seafarer] and other parties but they are not involved. They are just a connector and that is all. If there are any problems on board or repatriation is needed, they are not dealing with these issues because [they say]: 'We are only looking for a working place for seafarers and fishers and looking for new staff for the employer'.[152]

Even in countries where crewing agencies may be held legally accountable for exploitative or bad placements, contracts and agreements with fishers and seafarers are often arranged in ways that de-incentivise or blatantly prohibit complaints. Consider a contract signed by (an illiterate) Nepalese fisher with a Singaporean recruitment agency in which it explicitly stated that, should the crew member be unhappy with the arrangement or dismissed from the job, he had 'fully understood' that he would not 'claim back any amount of money spent for securing this job' (in other words, the recruitment fee).[153] While such contracts may (or may not) be legally binding, the legal legitimacy is likely to be unclear to the individual fisher or seafarer, particularly when illiterate, with limited education or not well versed in the law.

Lack of accountability of crewing agencies is at odds with international standards. The MLC Code requires States Parties to have competent authorities closely supervise and control all seafarer recruitment and placement services, and ensure that crewing agency licenses are granted or renewed only after verification that the agency meets the requirements of national laws and regulations.[154] But for the MLC Code to take effect, States need to ratify the MLC and implement these standards in national law and regulations.

There is also a potential role to be played by ship owners in deciding which crewing agencies they will (and will not) use. Ethical and responsible practice for ship owners *vis-a-vis* job placement agencies and labour brokers would include employers/ship owners ensuring that crewing agencies they use operate legally, are

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[151] The MLC Code requires a State to ensure that seafarer recruitment and placement services operating in its territory meet a detailed list of obligations to safeguard seafarers. Under the MLC recruitment agencies are legally responsible for the placement of seafarers and culpable for complaints that arise out of their activities (including being required to establish a system of protection to compensate seafarers for monetary loss that they may incur as a result of the failure of the agency to meet its obligations to them). Standard A1.4 MLC. For fishers, when it comes into force, the WIF Convention will address recruitment and placement services, as well as placement aboard vessels. For example, the WIF Convention sets forth that States shall determine the conditions under which any licence, certificate or similar authorization of a private recruitment or placement service may be suspended or withdrawn in case of violation of relevant laws or regulations and specify the conditions under which private recruitment and placement services can operate. Art. 22 WIF Convention.

[152] Surtees, R., *supra* nt. 21, 55.

[153] EJF, *supra* nt. 28, 13.

[154] MLC Standard A1.4.

certified or licensed by the competent authority and do not engage in fraudulent behaviour that places workers at risk of labour trafficking. This includes performing due diligence checks on the agency involved in hiring and placement and implementing effective measures to ensure the company's legal compliance of sub-contractors in each jurisdiction in which they operate.[155] The difficulty in practice is that this relies on ship owners to wish to (or be legally required to) employ scrupulous and accountable crewing agencies, which is not always the case. Many ship owners and companies also deliberately register their vessels in countries where such requirements are not legally enshrined.

IV.3. Recruitment of Seafarers and Fishers May Involve Fraud and Deception

Fraud and deception in the recruitment of seafarers and fishers can rise to the level of trafficking if used to recruit individuals for intended exploitation that, at a minimum, includes forced labour or services, slavery or practices similar to slavery.[156] Trafficked fishers and seafarers have reported fraud and deception in the recruitment process, generally in the form of lies about the severity of work conditions or salary payment.[157] In some instances, written contracts are not provided, allowing for later changes to and violations of the (verbal) work agreement. Many fishers who embark on fishing vessels in Thailand do not have written contracts; they have made verbal agreements with recruiters, captains or ship owners that are not honoured.[158] In other cases, seafarers or fishers find at embarkation that contracts will not be honoured and less favourable terms are unilaterally imposed.[159] In still other instances, seafarers and fishers are forced to sign contracts in a language that they do not understand.[160] Some individuals are fraudulently recruited for service at sea with no vessel to join—e.g. Indian cadets who paid up to 5000USD to fake manning agents but were left stranded without work upon arrival in the United Arab Emirates.[161] Some individuals do not even know that they are being recruited for service on a ship. A number of trafficked fishers in Thailand did not know that they would be working on a fishing boat until the broker took them to the pier.[162]

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[155] Verité, *supra* nt. 147.

[156] Art. 3(a) Trafficking Protocol. Art. 3(b) of the Trafficking Protocol goes on to state 'The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used'. This means that even if a seafarer or fisher 'consents' (e.g. via contract) in the recruitment process to being exploited, if fraud or deception are used by recruiters to achieve such consent with the intent of exploitation, such consent is irrelevant.

[157] Vulnerabilities to trafficking created by certain recruitment practices are also discussed in Verité, *What Should You Look For? Identifying Company Risk & Vulnerability to the Human Trafficking and Forced Labor of Migrant Workers*, available online at <https://www.verite.org/node/695> (accessed 22 June 2013).

[158] Robertson, P., *supra* nt. 6, 20.

[159] This was the case amongst Ukrainian seafarers trafficked to Russia (Surtees, R., *supra* nt. 21, 71) as well as amongst fishers working in the Scottish fishing industry where the contracts agreed by them were changed after their arrival in the UK. For example, one Filipino man had his salary reduced from 1,100USD per month to 550USD per month without his agreement. ITF, *supra* nt. 136.

[160] Cf. De Coning, E., *supra* nt. 24; EJF, *supra* nt. 27; Skinner, E., *supra* nt. 134 (Indonesian men on South Korean vessel); and Surtees, R., *supra* nt. 21 (Ukrainian men in Turkey).

[161] ITF Report, *supra* nt. 17, 24.

[162] 'Brokers will often promise other types of work to migrants, such as work in factories, as well as a high salary to entice migrants to agree to the recruitment.' Robertson, P., *supra* nt. 6, 19.

Under the MLC, terms and conditions of employment must be clearly set out in contracts and freely agreed to by the seafarer.[163] Similarly, the WIF Convention specifies that a State 'shall adopt laws, regulations or other measures requiring that fishers working on vessels flying its flag have the protection of a fisher's work agreement that is comprehensible to them and is consistent with the provisions of the Convention.'[164] Moreover, it is the responsibility of the fishing vessel owner to ensure that each fisher has a written fisher's work agreement (signed by both the fisher and the fishing vessel owner) that provides decent work and living conditions on board the vessel as required by the Convention.[165] Under Article 43(1), a flag State that 'receives a complaint or obtains evidence that a fishing vessel that flies its flag does not conform to the requirements of the Convention shall take the steps necessary to investigate the matter and ensure that action is taken to remedy any deficiencies found.'[166] This highlights the need for all countries (but perhaps most pressingly for flag States and countries where recruitment takes place) to ratify international treaties and codify these protections in national law. As critical is the enforcement of national legislation as a potential means of trafficking prevention.

Ship owners and employers must also be engaged in 'prevention'; they can be central in ensuring that they do not employ persons who have been deceived, thereby becoming complicit in recruitment abuses that may constitute human trafficking. They should ensure that they comply with the requirements of the MLC or WIF Convention (depending on the type of vessel they own/operate) and ensure that, prior to deployment, all workers are provided a signed copy of their original contract, in a language they understand. Ship owners and employers should also explain the terms and conditions of the contract and have the means to verify that said terms are clearly understood and fully agreed to by workers. When initial contracts are to be signed with crewing agencies, the ship owner/employer must ensure that the details of working conditions described at recruitment are consistent with the details contained in the employment contract at the time of hiring and with actual job conditions and responsibilities. Moreover, ship owners/employers should implement a policy that prohibits the substitution of original contract provisions with those less favourable to the worker. Any amendments made to improve conditions should be made with the knowledge and the informed, written consent of the worker.[167]

Practical tools can also potentially be helpful in preventing the deception and fraud of prospective fishers and seafarers. Tools or programmes that allow seafarers and fishers to check the legality, authenticity and background reports of their proposed placements may play an important role in preventing trafficking. At a minimum, such tools should allow seafarers/fishers to view images of the ship and its current licenses, check its location, establish whether there have been complaints or lawsuits filed by previous crew, check the legality of the contract and check the history and reliability of placement firms. Existing tools include the ITF vessel registry, the Equasis project (an information system developed jointly by the European Commission and the French Maritime Administration that collects existing safety-related information on ships) and

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[163] Regulation 2.1 of the MLC stipulates that: 1) The terms and conditions for employment of a seafarer shall be set out or referred to in a clear written legally enforceable agreement and shall be consistent with the standards set out in the Code and 2) Seafarers' employment agreements shall be agreed to by the seafarer under conditions which ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing.

[164] Art. 16 WIF Convention.

[165] Art. 20 WIF Convention.

[166] Art. 43(2) WIF Convention.

[167] Verité, *supra* nt. 147.

the FAO's Global Record of the Fishing Fleet. These and similar initiatives should be incorporated into verification systems and awareness of them increasingly disseminated amongst seafarers and fishers—including through maritime schools/colleges, unions, seafaring missions and so on. Finally, on-board complaint mechanisms should be established to allow for the fair, effective and expeditious handling of complaints by seafarers and fishers.[168] These practical tools can also be used by States in furthering their monitoring efforts.[169]

V. Protection

Protection typically refers to a range of interventions starting with identification through various stages of assistance and toward long term recovery and sustainable (re)integration. Initial identification of trafficked persons, in some cases, involves their removal from their trafficking situation and, in other cases, follows their exit from trafficking. Once identified, trafficked persons are to be offered (voluntary) assistance and support, which may be available abroad and/or at home. The Trafficking Protocol provides for the assistance to and protection of trafficking victims in Article 6. In addition to requiring States Parties to endeavour to provide for the physical safety of victims of trafficking while they are within their territory, the Trafficking Protocol recommends that States implement measures to provide for the physical, psychological and social recovery of victims of trafficking in persons.[170] Other instruments, not least the Council of Europe Convention, go further than the Trafficking Protocol in requiring that States actively identify and assist trafficked persons.[171]

Failure to identify and assist trafficked seafarers and fishers means their exposure to on-going risk and problems. A study of trafficking in the fishing sector in Thailand found that many trafficked fishers escaped on their own, without intervention or subsequent assistance.[172] These self-rescues involved either jumping overboard and swimming away (either near shore or further out and with the hope of being picked up by another ship); running away when the boat came into port; or, in some cases, sabotaging the vessel or overpowering the captain and commandeering the boat to come into port.[173] Similarly, Ukrainian seafarers and fishers were identified generally only after seeking out intervention on their own—e.g. from law enforcement in ports,

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[168] The MLC obligates States Parties to require ships flying their flag to have on-board procedures in place for the handling of complaints by seafarers. Reg. 5.1.5 MLC.

[169] Surtees, *supra* nt. 21, 125. *Lloyd's List*, a leading daily newspaper for the maritime industry, is another tool that could potentially be used toward trafficking prevention in that it provides information about all aspects of shipping and could, in principle, be used to convey current information about vessels and inspections, information that can impact flag ship owners and operators. See *Lloyd's List*, available online at <www.lloydslist.com/ll/> (accessed 11 August 2013). *Lloyd's List* provides current information about vessels that could be used by individual seafarers, unions, States or even crewing agencies to monitor the conditions and activity of ships and the results of inspections.

[170] Art. 6 Trafficking Protocol. As discussed above, under the CoE Convention the assistance and protection of victims is required.

[171] Arts. 10-16 CoE Convention.

[172] UNIAP, *supra* nt. 32.

[173] Robertson, P., *supra* nt. 6, 27 and UNIAP, *Exploitation of Cambodian Men at Sea*, SIREN series CB-02, 2007, available online at <no-trafficking.org/reports_docs/siren/SIREN%20CB-02%20Exploitation%20 of%20Cambodian%20men%20at%20sea.pdf> (accessed 28 November 2013).

the ITF and so on—in spite of having come into contact with authorities while trafficked at sea.[174]

Trafficking at sea often means different things in terms of how identification and assistance may (or may not) take place and by whom. In the case of trafficked seafarers and fishers, the governments that have legal and regulatory responsibilities that can be brought to bear on this crime would be flag States, coastal States and port States as well as the trafficked persons' countries of origin. Therefore, the protection of trafficked seafarers and fishers involves different legal and regulatory frameworks and also different institutions than for trafficked persons exploited on land, which will require increased engagement of authorities and frameworks in terms of ensuring identification of and assistance to trafficked persons.

Identifying and assisting trafficked seafarers and fishers also requires a better understanding of the opportunities (and limitations) presented by flag State responsibility, coastal State responsibility and Port State Control (PSC) as well as various external entry points for and barriers to intervention. What follows is a consideration of some of the barriers and problems in the identification and assistance of trafficked seafarers and fishers as well as, wherever possible, suggestions of measures that might offer some form of protection. The following discussion explores issues of identification on the high seas; in territorial waters and EEZs; in ports; and in 'destination countries', beyond ports. It also explores the, to date, inadequate provision of assistance to trafficked seafarers and fishers—both abroad and at home.

V.1. Inadequate Identification of Trafficked Seafarers and Fishers on the High Seas

Identification of trafficking cases at sea is difficult precisely because it takes place on the high seas and, therefore, is essentially "out of sight". Some vessels spend months and even years at sea.[175] Many of the Ukrainian seafarers/fishers trafficked to Russia were on vessels that never entered ports.[176] In Thailand's deep-sea fishing industry, trafficked fishers routinely spend a year or more on fishing vessels beyond Thailand's territorial waters. They are sometimes moved between vessels while at sea to meet crewing needs.[177] A deputy boat captain on a Thai fishing vessel reported, 'Once a captain is tired of a guy, he's sold to another captain for profit. A guy can be out there for ten years just getting sold over and over.'[178] Further, ship owners and captains may be well-versed in how to evade the authorities, moving between different

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[174] Surtees, R., *supra* nt. 21, 97.

[175] Brennan, M., *supra* nt. 6; Cf. De Coning, E., *supra* nt. 17; De Coning, E., *supra* nt. 25; EJF *supra* nt. 16; EJF *supra* nt. 28; Robertson, P., *supra* nt. 6; Verité, *supra* nt. 24; and Yea, S., *supra* nt. 18.

[176] There are reports that large numbers of fishers are kept in 'work camps' on board derelict vessels, functioning as mother ships to fleets of fishing vessels, some 200 nautical miles off shore. EJF *supra* nt. 28.

[177] UNIAP, *supra* nt. 32, 5. See also The Asia Foundation, Bollinger, K. and McQuay, K., *Human Trafficking Rampant in Thailand's Deep-Sea Fishing Industry*, 2012, available online at <http://asiafoundation.org/in-asia/2012/02/08/human-trafficking-rampant-in-thailands-deep-sea-fishing-industry/> (accessed 22 June 2013); Brennan, M., *supra* nt. 6; EJF *supra* nt. 16; EJF *supra* nt. 28; and Robertson, P., *supra* nt. 6.

[178] Winn, P., "Desperate Life at Sea", *Labour Rights Promotion Network*, 21 May 2012. The inability to escape the sea and the psychological effects of never setting foot on land while trafficked (sometimes for years) are complicating factors that must be considered in the assistance of identified trafficked seafarers and fishers and efforts should be made to tailor assistance to the unique needs of trafficking victims rescued from sea.

jurisdictions—from the high seas to the territorial waters of different countries as well as in and out of EEZs[179] —and to ports with lax control.

Some ship owners/vessels make a conscious effort to remain out of sight to avoid coming into contact with the authorities—e.g. because they are engaged in IUU fishing, have substandard vessels, 'employ' trafficked crew members and so on. In other instances, being out of sight is, at least in part, a function of how fishing is increasingly taking place far out at sea, due to depletion of fish stocks closer to shore. Many fishing vessels are equipped to stay at sea for prolonged periods of time, with food, fuel and supplies, and sometimes even crew brought aboard at sea via supply vessels. Many high seas fishing vessels tranship their catches to refrigerated cargo vessels while at sea and depend on at-sea refuelling and resupply vessels to allow them to fish longer and at lower costs.[180]

While trafficked seafarers and fishers are generally out of sight while at sea, there are nonetheless some potential opportunities for identification worth pursuing, but the system of flag State responsibility means that these entry points will frequently depend on the willingness of the flag State to monitor vessels on its registry and to allow opportunities for identification through inspection to occur. Flag States have primary jurisdiction over vessels on the high seas; they are obliged to take any steps necessary to secure observance with international regulations, procedures and practices.[181] Thus, in terms of human trafficking, the flag State needs to assume responsibility for duties to identify and assist victims of trafficking. Indeed there are very few instances in which it would be legally permissible for a vessel to be boarded while on the high seas, without the consent of the vessel operator, who is under the jurisdiction of the flag State.[182] One respondent interviewed for a study of exploitation aboard FCVs in the New Zealand EEZ, when asked why abused crew did not complain to port State authorities, focused on the issue of flag State jurisdiction: 'in raising health and safety issues especially on Korean vessels…[you are] told [you] are on Korean soil and there's nothing we can do about it.'[183]

As has been discussed, enforcement of flag State responsibility is weak. Flag States generally fail to enforce their laws when crimes are committed against the environment or people. Further the IMO does not have enforcement power and cannot sanction a State for failing to exercise jurisdiction over a vessel on its register and/or meet its responsibilities under IMO conventions. In general, the conventions adopted under the aegis of the IMO provide for reporting obligations of States Parties but the IMO has no further control or enforcement functions.[184]

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[179] Surtees, *supra* nt. 21, 84-85.

[180] At-sea transhipment, resupply and refuelling is not, for the most part, illegal. However, as part of fishing operations, they are often unregulated (a number of States regulate at- sea transhipments). At least some vessels in these fleets provide services to IUU fishing fleets as well as legitimate fishing fleets. Gianni and Simpson, *supra* nt. 17, 4.

[181] Hare, J., *supra* nt. 91; Hare, J., *supra* nt. 92.

[182] UNCLOS Article 94(2)(b) requires the flag State to assume jurisdiction not only over ships flying its flag, but also over the master, officers and crew of such ships. Article 94 is recognised as a basis for the flag State exercising jurisdiction over the skipper, officers and crew of fishing vessels. Hosanee, N., *A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of the 1982 United Nations Convention on the Law of the Sea*, Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, 2009, 26.

[183] Stringer, et al., *supra* nt. 20, 11.

[184] The STCW Regulation I/7 provides for an exception to the rule in that it directs that the IMO, on the basis of information to be provided by Member States, establish a so-called 'white list' of States deemed to comply fully with the requirements of the STCW; thus a control function is given to the IMO with regard to implementation of the STCW. However, the only real control possibility the

Flags of convenience (FoCs) and flags of non-compliance (FoNCs) pose a particular challenge to meaningful flag State responsibility and, by implication, the identification of trafficked seafarers and fishers. Vessels flying under FoCs are, arguably, more likely to employ poor labour practices and potential trafficking situations are not likely to be monitored, identified or prosecuted. And, while in the seafaring sector the lack of flag State law enforcement is, to some extent, compensated by the PSC regime when vessels come to port, there is a lack of an international legal framework for the safety or working conditions of fishers on board fishing vessels, including in ports.[185] An additional complication in the case of FoCs is the lack of a 'genuine link' between ship owner and flag State (as specified in article 91 of UNCLOS), making it difficult for the flag State to exercise any jurisdiction over a company with no assets or personnel in its territory. A genuine link would mean that a ship owner has some presence in the flag State in terms of assets and resources to hold them accountable for violations of international law. [186]

In other cases, inadequate enforcement of flag State responsibility is due to a lack of resources or capacity. This is especially likely to be the case for less developed countries or new registries, which may need the assistance of other States to enforce flag State obligations. Consider Mongolia, a landlocked country, which, since opening its registry in 2003, has registered more than 1,600 ships to its flag.[187] While Mongolia has partnered with Singapore to facilitate its registry, questions arise as to how a State without a port and with its registry based in a different country can ensure the inspection and monitoring of ships flying its flag, particularly when the Maritime Law of Mongolia states that 'the board of vessels flying the State flag of Mongolia shall be in exclusive jurisdiction of Mongolia'.[188] Another example is Thailand, where the Department of Fisheries (DoF) under the Ministry of Agriculture and Cooperatives (MoAC) is responsible for licensing types of fishing gear and equipment, delimiting how the gear is used and setting methods for and areas where types of equipment can be used. However, according to a study of trafficking on Thai fishing vessels, inspections and monitoring rarely take place.[189]

Even if a flag State is willing and able to meet its obligations under IMO and ILO treaties, there may be practical constraints in terms of when/how human trafficking can realistically be observed and whether vessels that employ trafficked labour would be surveyed and inspected. For example, in the fishing industry, a number of States

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IMO has, which is the establishment of the list, should not be overestimated. Witt, J., *Obligations and Control of Flag States*, LIT VERLAG Dr.W.Hopf, 2007, 207.

185 De Coning, E., *supra* nt. 17, 57.

186 ITF Report, *supra* nt. 17, 10-11. To address the problems of FoCs, in 1948, the ITF launched the FoC campaign. The FoC Campaign has two elements: (1) a political campaign aimed at eliminating the flag of convenience system by achieving global acceptance of a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers and (2) an industrial campaign designed to ensure that seafarers who serve on flag of convenience ships, whatever their nationality, are protected from exploitation by ship owners. The ITF's maritime unions have developed a set of policies that seek to establish minimum acceptable standards for seafarers working on FoC vessels. Currently, approximately one third of all FoC vessels are covered by ITF agreements, thus giving direct protection to well over 150,000 seafarers. See ITF, *About the FoC Campaign*, available online at <http://www.itfseafarers.org/FOC_campaign.cfm> (accessed 23 June 2013).

187 Mongolia Ship Registry, available online at <www.mngship.org/> (accessed 23 June 2013).

188 Art. 3.2 Maritime Law of Mongolia, May 28, 1999.

189 Robertson, P., *supra* nt. 6, 13.

require the presence of observers[190] on board licensed fishing vessels who, in principle, would be well positioned to observe and report on problems in the vessel's living and working conditions. However, one recent study of organised crime within the fishing industry found that individuals likely to interact with trafficking victims on board fishing vessels, such as fisheries observers, were unaware that forced labour conditions might amount to human trafficking,[191] and such issues are generally considered beyond the scope of their work. According to a spokesman for the government of New Zealand, observers are not formally tasked with assisting abused crew, although they may report abuses to the Department of Labour. In some cases, when fishers have reported abuses to New Zealand observers, they were told that this was not a part of their job.[192] Moreover, observers are often poorly paid and may be bribed or threatened while on board the vessel, which they generally are for prolonged periods of time.[193]

In the merchant sector, marine surveyors inspect the safety of vessels and on-board conditions but generally do not travel with the vessel to sea, thereby limiting opportunities to interact with crew. They might occasionally be in a position to identify trafficking[194]—for example, when interacting with (and even interviewing) crew while conducting inspections in port. However, there are no established international guidelines to determine the certification of marine surveyors, which raises questions about universal capacity.[195] Flag States also generally contract surveying out to local classification or non-exclusive marine surveyors, which may

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[190] A fisheries observer (sometimes called a scientific observer) is an independent specialist who serves on board commercial fishing vessels or in fish processing plants and other platforms and is employed by a fisheries observer programme, either directly by a government agency or by a third party contractor. Observers spend anywhere from one day to three months out at sea before returning to be 'debriefed'. A debriefing consists of reviewing any unusual occurrences or observations, violations observed, and any safety problems or other hardships they endured during the trip. These data are then integrated into the regional agency's database used to monitor fish quotas. See, e.g., Association for Professional Observers, available online at <http://www.apo-observers.org/> (accessed 23 June 2013).

[191] De Coning, E., *supra* nt. 17, 57.

[192] Skinner, E., *supra* nt. 134. That being said, the MLC, which entered into force in August 2013, aims to have inspections (by both flag State and port State officials) that will include interviews with crew. That is, compliance and enforcement obligations for both flag and port States involve vessels earning a Maritime Labour Certificate, certifying that they have been inspected and verified to be in compliance with the Convention requirements. Certification will require a new approach from the flag State inspection regime, including the training of inspectors in how to examine crew agreements, interview crew members about their contracts and inspect a range of additional fields, such as accommodation and food. In practice, 'the company systems and procedures will be placed under the microscope, as never before'. Grey, M., *The Maritime Labour Convention - Shipping's "Fourth Pillar"*, available online at <http://www.seafarersrights.org/seafarers-subjects/maritime-labour-convention-mlc/> (accessed 23 June 2013). For fishers it seems likely that if the WIF Convention comes into force, regulations to implement its obligations would include similar measures.

[193] See, e.g., Public Employees for Environmental Responsibility, *High Seas Harassment of Fisheries Observers More Than Doubles: Nearly One in 5 Victimized Yearly, 160% Jump Since 2007 Yet Few Cases Prosecuted*, 16 May 2013, available online at <www.commondreams.org/newswire/2013/05/16-3> (accessed 3 June 2013).

[194] There are generally four types of marine surveyors: government surveyors who can be flag State or port State representatives; classification surveyors who can be a representative or inspector of ships; private surveyors (generally hired by marine insurance companies) who examine ship cargo, on board conditions, fuel quality, investigate accidents, and prepare reports; and yacht and small craft surveyors who specialise in smaller vessels, power and recreational sailing. See Marine Surveyor Services, available online at <www.marinesurveyors.com/tools/marine-surveyor-services/> (accessed 23 June 2013).

[195] Cf. Hare, J., *supra* nt. 91; Hare, J., *supra* nt. 92; and Society of Accredited Marine Surveyors, available online at <www.marinesurvey.org/faqs.html> (accessed 23 June 2013).

raise a conflict of interest when the ship owner is at least indirectly paying the surveyor.[196] There are also logistical challenges in terms of what is feasible for surveyors to be able to identify on a large ship working under time pressures from owners and charterers.[197]

Additional barriers to identification by observers include lack of a common language for communication and issues of trust, with seafarers or fishers likely uncertain as to whether disclosure will lead to rescue or might instead mean being left in the hands of the captain and controllers on-board. Trafficked fishers and seafarers may also have concerns about not being paid, should they self-identify as abused or trafficked and ask for assistance. This is especially likely given that payment is often withheld until the completion of a contract. In one case, an Indonesian man trafficked aboard a South Korea-flagged ship was coerced by an agent into signing a contract in English, which he did not understand, under which he surrendered thirty percent of his salary, which the agency would hold until completion of the work. The contract further stipulated that he would be paid nothing for the first three months and, if the work was not completed to the company's satisfaction, he would be sent home and charged more than $1,000 in airfare.[198]

Moreover, it is unlikely that vessels with trafficked seafarers or fishers will operate with an observer and/or use a marine surveyor, due to involvement in fisheries crime, lack of a license, substandard vessel conditions or otherwise.[199] This means that for some (and perhaps many) trafficked fishers and seafarers, their main avenue for identification and assistance rests with a flag State, which may do little or nothing to offer them protection.

V.2. Barriers to the Identification of Trafficked Seafarers and Fishers in Territorial Waters and EEZs

While generally out of sight, merchant and fishing vessels do nonetheless come into contact with various coastal authorities—for instance, coastguards, the navy and border officials. A coastal State can exercise its rights and jurisdiction under Articles 56 and 73 of UNCLOS to prevent infringement of its laws by ships sailing in its territorial waters—for example, by regulating the activities of foreign vessels in its waters to protect its own interests.[200] A coastal State also has sovereign rights over resources in its EEZ and, therefore, can impose strict fishing regulations, including policies about fishers' right and working conditions while fishing within the EEZ.[201]

However, depending on institutional jurisdiction, the focus of authorities' monitoring efforts may be on issues other than human trafficking—e.g. IUU fishing, pollution or other such violations. For example, Ukrainian seafarers were, on at least one occasion, stopped by maritime authorities, but these officials were concerned with the ship and its catch, missing the opportunity to identify these trafficked

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196 Hare, J., *supra* nt. 91.

197 Hare, J., *supra* nt. 91; Hare, J., *supra* nt. 92.

198 Skinner, E., *supra* nt. 134. See also Stringer, C., et al., *supra* nt. 20.

199 De Coning, E., *supra* nt. 17, 113.

200 In 2007, United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea advised New Zealand that FCV activities can be regulated by the coastal State in accordance with Article 62(4) of UNCLOS, since the list contained in that provision was not exhaustive. Stringer, C., et al., *supra* nt. 20, 9.

201 De Coning, E., *supra* nt. 17, 38. The Work in Fishing Recommendation (WIF Recommendation) of 14 June 2007, International Labour Organization, No. 199 calls upon coastal States to require compliance with WIF when issuing licenses to fish in their EEZ. Art. 55 WIF Recommendation.

seafarers/fishers.[202] This highlights the need for a greater awareness of (and commitment to addressing) human trafficking in the commercial fishing and seafaring industries including in terms of training and providing tools to intervene in trafficking cases – e.g. screening tools, translators, legal authority, a specialised toolkit for routine at-sea inspections and so on. In addition, lower ranking crew members generally do not have contact with law enforcement authorities (and this seems especially likely for those who are trafficked and exploited). Generally, senior officers are interviewed when coast guards conduct routine inspections at sea and the issue of human trafficking (or labour abuse in general) is not a part of the standard questions used by law enforcement during such inspections.

As has been mentioned, language barriers between seafarers/fishers and persons who might identify them as trafficked (or at least in need of assistance) are a complicating factor. Without a common language, it is difficult for authorities to screen for vulnerability and risk. It is equally difficult for seafarers or fishers to ask for assistance or to comprehend identification or assistance offers.[203] Tools are needed for broader communication across (often multiple) language barriers. Coast guards and other authorities are increasingly accompanied by interpreters when boarding vessels, although interpreters are not always available in resource-poor countries and even when interpreters are available, the crew may speak a dialect or language not within the interpreters' range of proficiency. At a rudimentary level, addressing language barriers might involve a list of translated phrases for screening, which would allow seafarers and fishers to request assistance. More sophisticated (although costly) responses could involve the use of audio and/or video technology to reach different nationalities and overcome language barriers.[204]

However, even when law enforcement attempts to screen for human trafficking aboard vessels in territorial waters, trafficked seafarers and fishers may not feel able to speak out, even if interviewed individually and separate from their exploiters. They may, for example, fear being arrested for their involvement in any illegal activities on board. One Ukrainian seafarer/fisher trafficked to Russia described his vessel being detained by Russian authorities but being unable to seek help because the authorities were concerned with illegal catch and not the men's situation.[205] The possibility that the crew has been forced to engage in the ship's illegal activities must be considered by law enforcement personnel in terms of how seafarers/fishers are approached, their situation understood and interventions undertaken.

Another issue is that trafficked seafarers and fishers may, quite reasonably, fear being left in the hands of their traffickers after disclosing abuse and trafficking, particularly in countries with corruption. Corruption (or fear of corruption) will impact decisions about whom to approach for assistance in leaving a trafficking situation as well as which authorities one is able or willing to trust. One trafficked Ukrainian seafarer explained how he opted not to approach authorities whom he believed were complicit in the illegal crabbing operation into which he was trafficked and, thus, unlikely to help him. Another trafficked Ukrainian seafarer described how men who had fled the vessel when it was in port had been brought back by local law enforcement authorities:

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[202] Surtees, *supra* nt. 21, 84.
[203] Surtees, *supra* nt. 21, 85.
[204] *Idem*, 127.
[205] *Idem*, 84.

> It was slavery-like conditions; people could not stand it any longer and tried to escape to the shore. But these criminals had it all covered there because the local police caught the seafarers [who escaped] and brought them back to the ship.[206]

One study also noted that, while some fisheries enforcement officials had observed that fishers on some of the fishing vessels they inspected seemed to be living and working under 'slave-like' conditions, they had not considered this in the context of human trafficking. Moreover, many fisheries officials said that it was outside of their mandate to investigate instances of human trafficking.[207] That is, the law of the sea provides that a coastal State does not have sovereignty over the exclusive economic zone but only sovereign rights over the marine living resources in the area. The primary jurisdiction relating to the well-being of the crew rests with the flag State.

Another constraint for coastal State authorities in identifying and protecting trafficked seafarers/fishers is limited resources. For example, in Thailand, the Royal Thai Marine Police (RTMP) is the lead law enforcement agency at sea, with authority to board and search vessels in coastal waters and should, ideally, have a prominent role in identifying instances of human trafficking on fishing boats. However, the RTMP are under-resourced, with inadequate budgets for maintaining and operating their patrol boats. One recent study found that the Songkhla Marine Police, purportedly one of the most active squadrons in suppressing trafficking of fishers, only has fuel to run each boat for seven to eight hours per month.[208]

That being said, there is evidence of coastal States taking action to protect fishers and seafarers in territorial waters. For example, in Myanmar, under the terms of a fishing concession between the Government of Myanmar and the Government of Thailand, all crew on Thai fishing boats in Myanmar territorial waters (with the exception of the captain and his top officers) are required to be Myanmar nationals with a Myanmar identification card. The Myanmar Navy inspects Thai fishing boats before allowing them to fish in its territorial waters and compiles a crew list. Upon leaving Myanmar territorial waters, the boat is again inspected and, if any injuries or crew disappearances are identified, the captain is liable for significant fines.[209]

Similarly, in New Zealand the government initiated a parliamentary inquiry into the operation of FCVs in 2011 following research into and media attention on cases of labour violations and human trafficking on FCVs in New Zealand's EEZ. Based on inquiry findings,[210] the Government decreed that from 2016, commercial fishing vessels operating in New Zealand waters must be registered as New Zealand ships and carry the New Zealand flag.[211] Flagging vessels to New Zealand can be important as foreign crew will therefore be protected by New Zealand laws including those related to employment and maritime safety.[212]

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[206] *Idem*, 86.
[207] De Coning, E., *supra* nt. 17, 57.
[208] Robertson, P., *supra* nt. 6, 15.
[209] Robertson, P., *supra* nt. 6, 28-29.
[210] New Zealand Ministry of Agriculture and Forestry, *Report of the Ministerial Inquiry into the use and operation of Foreign Charter Vessels*, 2012, available online at <fish.govt.nz/NR/rdonlyres/1CD50F2C-5F55-481D-A3CB-9A7EC25CBE54/0/2012foreignchartervesselsreport.pdf> (accessed 26 October 2013).
[211] Some vessels will be exempted from this requirement, arguably weakening New Zealand's efforts to combat trafficking at sea. Harre, T., *supra* nt. 20.
[212] Gallagher, A., *supra* nt. 19.

Another potential means by which coastal States may improve opportunities to identify trafficked fishers would be to require that fishing vessels licensed to fish in a State's EEZ tranship in port in order to monitor catch and landings. In addition to aiding detection of illegal fishing, this may serve to increase fishers' opportunities to leave a trafficking situation and contact authorities for assistance. A number of States have already implemented such measures.[213]

V.3. Barriers to Identification in Ports

Ports constitute one of few places where trafficked seafarers and fishers might have access to external authorities that may be able to identify and assist them. This would include port authorities and the port State control regime. It would also, in some cases, include external stakeholders working on the welfare of seafarers and fishers – e.g. International Transport Workers Federation (ITF) inspectors,[214] seafarer associations or unions and seafarer centres (e.g. Mission to Seafarers).[215]

Port State Control (PSC) can be an important means of oversight when vessels come into port, particularly in the absence of flag State enforcement and oversight. Under PSC, port States exercise their territorial jurisdiction over foreign vessels in their ports. PSC ensures compliance with international safety regulations and labour standards in merchant shipping. It is carried out through regionally coordinated Memoranda of Understanding (MoUs); MoU members share information, set inspection targets and cooperate on enforcement.[216] However, unseaworthy vessels or those engaged in illegal activities undermine the PSC system by moving to ports with lax control and law enforcement regimes—a problem known as displacement.[217]

PSC is normally based on SOLAS and STCW and, therefore, fishing vessels are normally not covered by the PSC regime. While some port States do conduct unilateral PSC of fishing vessels, this is mostly uncoordinated among port States.[218] Fishing vessels are also not covered by the International Ship and Port Facility Security Code (ISPS Code), which is a comprehensive set of measures to enhance the security of ships and port facilities,[219] which, in turn, means that no security clearance

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[213] De Coning, E., *supra* nt. 25, 39.

[214] The ITF represents the interests of seafarers worldwide, of whom over 600,000 are members of ITF affiliated unions. The ITF Seafarers Section maintains a network of over 100 ITF inspectors around the world. See ITF Seafarers, available online at <itfseafarers.org/> (accessed 26 October 2013).

[215] Seafaring centres provide a range of outreach services and may be particularly useful for anti-trafficking efforts. For example, the Mission to Seafarers runs centres in over 100 ports where seafarers can contact home, receive assistance with problems faced and get a break from life on board ship. Mission to Seafarers, available online at <missiontoseafarers.org/about-us> (accessed 26 October 2013).

[216] De Coning, E., *supra* nt. 25, 25.

[217] *Ibid*.

[218] *Ibid.* and Surtees, R., *supra* nt. 6, 87.

[219] The ISPS Code was developed in response to the perceived threats to ships and port facilities in the wake of the 9/11 attacks in the United States. The ISPS Code is implemented through SOLAS chapter XI-2 Special measures to enhance maritime security. The purpose of the Code is to 'provide a standardised, consistent framework for evaluating risk, enabling Governments to offset changes in threat with changes in vulnerability for ships and port facilities through determination of appropriate security levels and corresponding security measures.' International Maritime Organization, International Convention for the Safety of Life at the Sea (SOLAS) XI-2 and the International Ship and Port Facility Security Code, available online at <imo.org/OurWork/Security/Instruments/Pages/ISPSCode.asp> < (accessed 26 October 2013).

is needed for fishing vessels and, by implication, fishers are not afforded the same protections as seafarers.[220]

That being said, a number of States inspect and control vessels' compliance with fisheries management conservation regulations, either as part of their national plans of action to prevent, deter and eliminate IUU fishing (NPOA-IUU) or through their participation in Regional Fisheries Management Organizations (RFMOs). And the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) is expected to soon receive sufficient ratifications to come into force.[221] PSMA contains various provisions that may serve to augment opportunities to identify trafficked fishers—e.g. provisions on the entry of fishing vessels into port including pre-entry notification (Article 8), in-port inspections (Article 12) and requisite designation of ports for landing fish (Article 7).[222]

Under the WIF Convention, port States will also be able to exercise jurisdiction through the Port State Control provisions contained in Part VII. For example, Article 43 allows a State in whose port a fishing vessel calls in the normal course of its business or for operational reasons, to take action if it receives a complaint or obtains evidence that such a vessel does not conform to the requirements of the WIF Convention. Such a complaint may be submitted by a fisher, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the vessel, including an interest in safety or health hazards to the fishers on board.[223] Breaches of the WIF Convention include: unsanitary accommodation, catering, and ablution facilities; inadequate ventilation, air conditioning, or heating; and, sub-standard food and drinking water.[224]

However, seafarers and fishers do not automatically come into contact with port authorities, particularly if they are prevented from leaving their vessel. Access to port is often hampered by international security regulations, which may require foreign crew to stay on board the vessel whilst in port.[225] Immigration restrictions—i.e. being required by the port State's national law to possess a transit or entry visa for the port of call—may also prevent seafarers and fishers from being able to disembark. Moreover, hundreds of seafarers and fishers move in and out of ports each day making the sheer volume of workers an obstacle to identification.[226]

In addition, PSC inspections are more likely to occur when there already appear to be issues with a vessel—e.g. conditions that would trigger inspections, a complaint being launched and so on. Even when vessels are under scrutiny of the authorities, it may not be the most exploited individuals who are interviewed, as the authorities will generally communicate with those of higher seniority.

For counter-trafficking purposes, interviews with crew in ports would only be useful if port authorities had a sufficient understanding of the indicia of forced labour and human trafficking and the duress that trafficked seafarers/fishers may be under,

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[220] Surtees, R., *supra* nt. 21, 87.

[221] The PSMA will enter into force thirty days after the date of deposit with the Director-General of FAO of the twenty-fifth instrument of ratification, acceptance, approval or accession. It currently has 23 signatures. Art. 29 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 23 November 2009, FAO, subsequently referred to as PSMA. See also Fisheries and Aquaculture Department, *Port State Measures Agreement*, available online at <fao.org/fishery/topic/166283/en> (accessed 26 October 2013).

[222] De Coning, E., *supra* nt. 25, 41.

[223] Art. 43 WIF.

[224] Artt. 25-28 WIF.

[225] Kahveci, E., *Port based welfare services for seafarers*, ITF Seafarers' Trust and Seafarers International Research Centre, Cardiff University, 2007, 8.

[226] Surtees, R., *supra* nt. 21, 85.

which would inform what to ask and how and where to conduct interviews and screening. And port authorities (and even their ITF and union colleagues who are often present in ports and cooperate with authorities) may not always be well positioned or trained to interview crew and screen for signals of human trafficking.[227] Lack of a common language may also serve as a barrier when interviews do take place. The "culture of the sea" may also influence what seafarers and fishers disclose to port authorities. One respondent in a study of FCVs in New Zealand's EEZ, when asked why abused crew did not complain to port State authorities, explained: 'What happens at sea stays at sea. No one talks about it. That's always been the culture…'[228] That exploitation is, it seems, normative amongst seafarers and fishers (or at least not uncommon) can further reinforce the culture of silence and non-disclosure/non-complaint.

Moreover, contacting authorities while in port is often complicated for seafarers and fishers, who may fear the authorities and not trust that they will be recognised as trafficked or, at minimum, in need of assistance. This was a deterrent for Ukrainian men trafficked to Turkey who feared the authorities and worried that they would replace one bad situation with another (i.e. being imprisoned in Turkey).[229] Similarly, one Ukrainian seafarer who wanted to escape the Russian vessel on which he was trafficked did not want to be rescued, despite his horrendous ordeal, because he feared (complicit) authorities.[230] Concerns about corruption have also been voiced in Southeast Asia—for example in a recent study in Thailand where, in spite of pre-departure inspections being conducted on various boats and interviews being conducted with fishing crews by law enforcement, in cooperation with the National Fisheries Association of Thailand (NFAT), no cases of human trafficking were identified.[231]

Fishers and seafarers may also be concerned about their legal status in a country if they escape. Many have their passports and documents held by the captain or ship owner.[232] Even those in possession of their documents may not have (or may have been told they do not have) the appropriate documents and visas, which would, if encountering authorities, lead to arrest and detention.

Fear of being blacklisted (and thus barred from future positions) also inhibits disclosure. Some recruitment agencies and vessel owners exploit this vulnerability by

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[227] This should, to some extent be addressed as the MLC begins to be implemented. For more on this point see *supra* nt. 192. The EU Directive addresses this issue as well noting that: 'Officials likely to come into contact with victims or potential victims of trafficking in human beings should be adequately trained to identify and deal with such victims. That training obligation should be promoted for members of the following categories when they are likely to come into contact with victims: police officers, border guards, immigration officials, public prosecutors, lawyers, members of the judiciary and court officials, labour inspectors, social, child and health care personnel and consular staff, but could, depending on local circumstances, also involve other groups of public officials who are likely to encounter trafficking victims in their work.' Par. 25 of 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.

[228] Stringer, C., et al., *supra* nt. 20, 14.

[229] Surtees, R., *supra* nt. 21, 88.

[230] *Idem*, 87.

[231] Robertson, P., *supra* nt. 6, 15.

[232] Cf. Derks, A., "Migrant Labour and the Politics of Immobilisation: Cambodian Fishermen in Thailand", *Asian Journal of Social Science,* 38(6), 2010, 915-932; De Coning, E., *supra* nt. 25; ITF Report, *supra* nt. 17; Pearson, E., Punpuing, S., Jampaklay, A., Kittisuksathit, S., and Prohmmo, A., *Mekong Challenge: Underpaid, Overworked and Overlooked: The Realities of Young Migrant Workers in Thailand*, vol. 1, ILO/IPEC, 2006; Robertson, P., *supra* nt. 6; and Surtees, R., *supra* nt. 21.

excluding (or threatening to exclude) seafarers and fishers from future employment opportunities through 'blacklisting'; blacklists are circulated among recruitment agencies.[233] The practice not only hinders future employment opportunities, but is also used to intimidate seafarers and fishers from lodging complaints. One Indonesian man, trafficked aboard a fishing vessel in New Zealand, left the vessel while in port after several months of abuse and exploitation but was, as a consequence, blacklisted by the crewing agency, which prevented him finding placements through other crewing agencies. The agency also withheld his personal documents and professional accreditations (essential in finding future job placements) and his outstanding wages (about 1100USD).[234] Although the practice of blacklisting is pervasive, by its nature it is difficult to regulate and document.

There needs to be a commitment on the part of port authorities to identify and then protect trafficked seafarers—removing them from their trafficking situation and offering appropriate services for recovery and return home.[235] Commercial interests of port authorities can, at times, conflict with the goals of organisations assisting seafarers and fishers, as one ITF representative explained:

> The port is not always so cooperative because it is commercial and to let the vessel stay for two to three days while the ITF inspector makes some claims to the court, it just takes time.[236]

Further, authorities may be concerned with the implications (i.e. liability) of detaining a vessel that is later assessed to be satisfactory as the costs of Port State Control inspections are borne by the port State authority.[237]

Opportunities for identification will necessarily differ from port to port. Just as there are FoCs, there are also 'ports of convenience', where the port is unable or unwilling to enforce its own State's maritime law. Such ports do not enforce fisheries management and conservation regulations and may be open to corruption in ways that facilitate lax enforcement of fishing quotas and licensing requirements.[238] Lack of enforcement and opportunities for corruption represent serious obstacles in efforts to identify and assist trafficked seafarers and fishers.[239] Fishing vessels that are unseaworthy or are engaged in illegal activities often make use of or move to ports with lax control and law enforcement regimes, which undermines other States' unilateral attempts to inspect and control fishing vessels.[240]

The above points notwithstanding, there have been rescues of trafficked fishers in ports—by, for example, joint operations of law enforcement and NGOs in Thailand. A recent trafficking study in the GMS involved a number of men and boys trafficked for fishing (from Thailand, Cambodia and Myanmar) who were rescued through law enforcements raids in ports.[241]

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233 ITF Report, *supra* nt. 17, 26.
234 Skinner, E., *supra* nt. 134. See also Stringer, C., et al., *supra* nt. 20.
235 Surtees, R., *supra* nt. 21, 87.
236 *Idem*, 88.
237 Domestic legislation in both Australia and New Zealand absolves PSC of liability in such cases. It has become relatively common practice for States to levy a maritime safety charge upon vessels calling at their ports. And once a vessel is detained for non-compliance, provision is usually made for all costs to be borne by the ship owner. Hare, J., *supra* nt. 92.
238 De Coning, E., *supra* nt. 17, 57 and 113.
239 Surtees, R., *supra* nt. 21, 85-87.
240 De Coning, E., *supra* nt. 25, 25.
241 Surtees, R., *supra* nt. 6, 87-93.

V.4. Lack of Identification of Trafficked Seafarers and Fishers Beyond Ports

Some trafficked seafarers/fishers escape themselves—e.g. jumping off boats and swimming to shore or another vessel, escaping while in port, negotiating their release and so on. In such situations, they come into contact with various authorities who should be in a position to identify them as trafficked (or, at minimum, as vulnerable) and assist or refer them to appropriate authorities. However, it is not uncommon that they go unidentified due to, at least in part, a lack of knowledge of human trafficking in the fishing and seafaring sectors.

Many Cambodian and Burmese fishers have escaped from boats in Thailand, Malaysia and Indonesia and then ended up stranded without documents or a way to return home and also at risk of recapture or harm by the captain. One Cambodian man escaped the fishing vessel where he was exploited when it came into port in Indonesia. He and his colleagues fled the vessel and hid for some time but had little food and eventually approached the authorities for help. They explained their situation and asked for help but the law enforcement official did not recognise their case as trafficking and did not provide any help. Similarly, one Cambodian man trafficked to Malaysia for fishing escaped and went to the Malaysian authorities for help. He was not officially screened for trafficking but was instead detained as an irregular migrant and then deported.[242]

Overall, there is a need to increase collaboration between the anti-trafficking community and the seafaring and commercial fishing sectors, most pressingly in terms of identifying trafficked fishers and seafarers and offering them protection and assistance. Much of what is currently considered labour exploitation within the fishing and seafaring industry may, in fact, be human trafficking. And much of the anti-trafficking community is unaware (or only becoming aware) of the presence of trafficking at sea. Inter-organisational dialogue, accompanied by collaboration on cases and awareness-raising efforts, will assist in better addressing this phenomenon. In addition, it is important to engage organisations for both fishers and seafarers. National organisations for seafarers on merchant ships do not always represent fishers; fishers usually have their own organisations.[243]

In some cases, embassies have been involved in identifying and repatriating trafficked fishers and seafarers. One Cambodian man trafficked to Malaysia on a fishing boat was initially arrested by the Malaysian police and charged with illegal migration but was later recognised as a trafficking victim by staff of his embassy when they visited the prison and interviewed Cambodian nationals there. The embassy worked with a Cambodian NGO to secure his release and arrange his return. Similarly, the Thai embassy was instrumental in the identification and return of Thai nationals trafficked for fishing who came into port in Yemen and contacted the embassy for assistance.[244] That being said, this is only an option when there is a diplomatic presence in the country of identification, which was not the case, for

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[242] *Ibid.* Other Cambodian men who were trafficked onto Thai vessels and escaped to Malaysia were then re-trafficked into forced labour on plantations. Without proper identification and assistance, the risks of re-trafficking, including into other sectors, is very high due to the vulnerability of fishers and seafarers who have escaped their initial trafficking situation on their own. UNIAP, *supra* nt. 33, 6.

[243] Surtees, R., *supra* nt. 21, 130.

[244] Surtees, R., *supra* nt. 6, 45.

example, for Cambodian men trafficked to South Africa as fishers who then faced great difficulty in findings help and getting home.[245]

At the same time, many fishers avoid contact with authorities because they are not aware of help that might be offered or trust that assistance would be forthcoming. For example, one Ukrainian fisher managed to negotiate his release from the Russian crabbing vessel on which he was trafficked, saying that his father was seriously ill. He was eventually released (but not paid) and made his way home by borrowing money from his Russian colleagues. When asked whether he considered seeking help in Russia he explained that he did not trust the Russian authorities and was also worried about exiting the country before his visa expired, fearing he would be arrested as an illegal migrant. He also did not feel able to approach the embassy, worried that they could not offer him any assistance.[246] Similarly, one man from Myanmar trafficked on a Thai fishing boat managed to escape but avoided contact with Thai authorities because he feared being arrested and returned to his traffickers. He instead made his own way home and was identified as a trafficking victim only once he returned to Myanmar.[247]

Therefore, in addition to equipping authorities and stakeholders in destination countries with skills to identify trafficked seafarers and fishers, it is also important that seafarers and fishers are equipped with information about organisations and institutions from which they can solicit assistance in case of difficulty while in foreign ports/countries. Knowing whom to contact and how can be an important first step in identification, particularly in countries where authorities may not come into contact with trafficked seafarers and fishers unless they self-identify. This might include the ITF, seafarers and fishers associations and unions, organisations or institutions in destination countries and different anti-trafficking organisations. This might also include law enforcement authorities in transit or destination countries. Seafarers and fishers should be encouraged to travel with (and, if needed, hide) charged and credited mobile phones and establish a system of regular communication with family or friends on shore, the interruption of which can serve as a warning signal for possible difficulties.[248]

V.5. Inadequate Provision of Assistance to Trafficked Seafarers and Fishers – Abroad and at Home

As discussed above, the Trafficking Protocol encourages States Parties, in Article 6, to implement measures to provide for the assistance and protection of trafficking victims.[249] Most countries have ratified the Trafficking Protocol and have, within their national legislation, provisions for the assistance and support to trafficking victims

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[245] Sen, D. and Danson, C., 'Fishermen trafficker charged', *Phnom Penh Post,* May 13, 2013, available online at <phnompenhpost.com/2013051365574/National/fishermen-trafficker-charged.html> (accessed 20 November 2013).

[246] Surtees, R., *supra* nt. 21, 97.

[247] Surtees, R., *supra* nt. 6, 46.

[248] Surtees, R., *supra* nt. 21, 97.

[249] Measures, programmes, and services aimed at the recovery of trafficked persons may be offered by governmental, non-governmental or international organisations in countries of destination, transit and origin. These might include but are not limited to: accommodation/housing, medical care, psychological assistance, education, vocational training, life skills, employment and economic empowerment, legal assistance, transportation and family mediation/counselling. Assistance may involve one or multiple services. Surtees, R. and Somach, S., *Methods and models for mixing services for victims of domestic violence & trafficking in persons in the Europe and Eurasia region*, USAID, Creative Associates, Aguirre Division of JBS International and the NEXUS Institute, 2008, 48.

who originate from, transit through or are trafficked to their country. Yet there appears to be inadequate provision of assistance and support to trafficked seafarers and fishers, both at home and abroad. Ukrainian seafarers and fishers trafficked to Russia and Turkey went unassisted in destination countries, often funding their own travel home. They received assistance only once they returned to Ukraine and even upon return there were barriers and issues in terms of how assistance was offered, which served to impede the provision of adequate support.[250] Similarly, in a study of (re)integration in the Greater Mekong Sub-region, men and boys trafficked aboard fishing boats did not generally receive adequate support and assistance either in destination countries or in their own countries after return.[251]

Even when assistance was available, it was not always designed to meet the specific needs of trafficked seafarers and fishers. In Southeast Asia, the assistance framework for men is generally underdeveloped, which means trafficked fishers generally are unassisted or underassisted as a consequence. One man from Myanmar, trafficked for fishing, was detained by Thai officials and deported to Myanmar. After giving a statement to the Myanmar police and identified as a trafficking victim, he was given a bag of basic supplies. He returned home to his family and received no further support. Similarly, one Cambodian trafficked aboard a fishing boat explained how he was offered only very limited assistance from a list of pre-defined options with little assessment of his individual needs or situation: 'After identifying me [as a trafficking victim], they…asked me to choose between a motorcycle, water pump machine, a bicycle or 150USD'.[252]

The needs of trafficked seafarers and fishers, while not always dissimilar to victims of other forms of labour trafficking, may have some features which merit particular attention. The decision of whether to remain in the merchant fleet or commercial fishing sector (and how to work in this sector safely) is of immediate concern. To the extent that the needs of trafficked seafarers and fishers are distinct from those of other trafficking victims, governments and victim assistance groups should be prepared to meet those needs. Such support should be available in countries from which trafficked persons originated as well as where they were exploited or identified, including accommodating the legal issues associated with foreign nationals being assisted abroad (i.e. temporary residence permits including the right to work).[253]

Developing this specific assistance system may require building the skills and capacity of service providers to be able to work effectively with this group of trafficked persons. Experts from the seafaring and fishing sectors would be able to bring in a range of knowledge and resources that can help address many of the needs of trafficked seafarers and fishers. Anti-trafficking organisations, particularly service providers, have an equally important role to play in offering services (such as medical care, counselling and so on) to trafficked seafarers and fishers, particularly where government services are lacking.

Responsibility for offering assistance to trafficked fishers and seafarers rests not only with countries from which trafficked persons originate, but also with flag States of the vessels on which they are exploited. In addition, coastal States and port States where trafficked persons may be identified also have responsibilities to offer assistance. The cost of this assistance should be borne not only by countries of origin and where victims are identified or escape, but also by flag States on whose ships trafficked

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[250] Surtees, R., *supra* nt. 21, 113-120.
[251] Surtees, R., *supra* nt. 6, 53-56.
[252] Surtees, R., *supra* nt. 6, 99.
[253] Surtees, R., *supra* nt. 21, 127.

persons are exploited.[254] For example, the MLC sets forth that seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code.[255] The MLC Code stipulates that if a ship owner fails to make arrangements for or to meet the cost of repatriation, the flag State is then responsible for arranging the repatriation of the seafarers concerned. If the flag State fails to do so then the State from which the seafarers are to be repatriated or the State of which they are nationals may arrange for their repatriation and recover the cost from the flag State.[256] The MLC also seeks to ensure that seafarers have access to shore-based welfare facilities.[257] States Parties are required, where welfare facilities exist, to ensure that they are available for the use of all seafarers.[258] Further, States Parties are required to promote the development of welfare facilities in appropriate ports and to encourage the establishment of welfare boards to regularly review welfare facilities and services to ensure they are appropriate in light of the changing needs of seafarers.[259] For fishers, the WIF Convention ensures their right to repatriation in Article 21.[260]

Offering a comprehensive assistance framework for this transnational crime will also require establishing links between organisations in origin and destination/flag State countries. Lack of communication channels between government agencies and victim assistance groups presents a major obstacle in return efforts as well as reintegration support and later civil lawsuits and prosecution. Organisations in origin countries should establish regular channels of communications and directories with organisations where trafficked seafarers and fishers are commonly identified or escape. They should share information about emergency contacts and avenues for assistance in order to improve transnational collaboration. Anti-trafficking organisations in the flag State should also be aware of their country's involvement in trafficking and should work with other countries to respond appropriately to the issue of human trafficking. International institutions, like Interpol, and international organisations, could play a role in communication and links between different countries.[261]

VI. Prosecution

Trafficked seafarers and fishers should have the opportunity to pursue legal recourse against their exploiters. The Trafficking Protocol requires, in Article 5, that States Parties adopt legislative and other measures to establish human trafficking as a criminal offense.[262] States Parties, under Article 6, must ensure that measures are

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[254] *Ibid.*

[255] Regulation 2.5 MLC.

[256] Standard A2.5 MLC. Standard A2.5 covers repatriation in depth, requiring States Parties to facilitate the repatriation of seafarers serving on ships which call at their ports or pass through their territorial or internal waters, as well as their replacement on board and further ensuring that States Parties do not refuse the right of repatriation to any seafarer because of the financial circumstances of a ship owner or because of the ship owner's inability or unwillingness to replace a seafarer.

[257] Regulation 4.4 MLC.

[258] Irrespective of nationality, race, colour, sex, religion, political opinion or social origin and irrespective of the flag State of the ship on which seafarers are employed or engaged or work. Standard A4.4 MLC.

[259] *Ibid*.

[260] Art. 21 WIF.

[261] Surtees, R., *supra* nt. 21, 131. For example, in Bangkok in February 2012, a meeting was held on the formation of an INTERPOL *ad hoc* Fisheries Crime Working Group. The aim of the *ad hoc* FWG is to promote cost effective, predictive, efficient and timely fisheries law enforcement and crime detection. INTERPOL, *supra* nt. 95.

[262] Art. 5 Trafficking Protocol.

implemented to provide trafficking victims, when appropriate, with information on relevant legal and administrative proceedings and assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders. Article 6 also requires States Parties to ensure that their domestic legal systems include measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.[263] Similar provisions are contained in the other major relevant treaty: the *Council of Europe Convention against Trafficking.*

Effectively prosecuting trafficking at sea and offering compensation opportunities to trafficked seafarers and fishers is key to an anti-trafficking response. Prosecutions should serve to deter the exploitation of seafarers and fishers and contribute to a more robust and better enforced regulatory framework on the high seas as well as within territorial waters and EEZs. Providing compensation to trafficked seafarers and fishers, particularly when costs are borne by ship owners, should also serve as a deterrent in a profit driven industry. Compensation payments can also play an important role in the successful (re)integration of trafficked persons; returning home with money can support one's economic stability and success as well as ease relations (and mitigate stigma) within the family and community.

However, legal recourse in the case of trafficking at sea is complex. For trafficked seafarers and fishers there are various barriers and issues that serve to complicate their access to justice and the viability (and ultimate success) of criminal prosecutions and other forms of legal recourse. The raft of issues include: lack of legislation and legal expertise to address trafficking crimes at sea; difficulty discerning legal rights and the jurisdiction in which those rights can be enforced; the risk that trafficking victims will not be identified as victims and will be prosecuted for crimes committed while trafficked; inadequate prosecution of higher level traffickers; and lack of State accountability for trafficking at sea. The impunity of labour recruitment agencies is another impediment to successful prosecutions and civil litigation in trafficking at sea cases.

VI.1. Lack of Adequate Legislation and Legal Expertise in all Relevant Fields of Law

Access to legal recourse for trafficked seafarers and fishers requires an appropriate and relevant legislative framework. And yet in many situations the legislation needed to prosecute trafficking at sea is inadequate—either in terms of weak or lacking anti-trafficking legislation or problems in legislation related to the fishing and seafaring sector.

The Trafficking Protocol requires States Parties to adopt legislative and other measures to establish human trafficking as a criminal offense. This should mean having in place effective anti-trafficking legislation that criminalises all forms of exploitation and includes effective, proportionate and dissuasive criminal penalties. And yet some human trafficking laws are limited to trafficking for sexual exploitation and/or the trafficking of women and children, inapplicable to trafficked seafarers and fishers who are typically adult male victims of labour trafficking.[264] Moreover, in some countries there is no anti-trafficking legislation, making trafficked persons subject to

[263] Art. 6 Trafficking Protocol.

[264] As of 2012, 19 of 162 countries and territories studied had 'partial' anti-trafficking legislation – that is, legislation that focused only on women or children or only one type of trafficking, such as sexual exploitation. See United Nations Office on Drugs and Crime, REPORT: *Global Report on Trafficking in Persons*, United Nations, 2012, 83.

greater uncertainties in terms of legal recourse (and their traffickers potentially facing reduced risks and penalties).[265]

Article 6 of the Trafficking Protocol requires States Parties to ensure that their domestic legal systems contain measures that offer victims the possibility of obtaining compensation for damages suffered. This provision does not obligate a State to provide compensation or restitution to victims, but under the Protocol, States Parties must ensure that mechanisms for providing compensation to trafficking victims exist.[266] It is generally agreed that victims should be informed of their rights to compensation for: unpaid or underpaid wages; legal fees; excessive, fraudulent or illegal deductions from wages; reimbursement of illegal fees paid to a crewing agency; medical expenses; loss of opportunities; pain and suffering; and/or degrading and inhumane treatment.[267] States should also be empowered to trace, freeze and seize assets in order to fund victim compensation payments or to establish a State-funded or subsidised compensation scheme to guarantee payments to trafficking victims.[268]

States also need to bring their national laws related to the fishing and seafaring sector into accord with the primary instruments of international maritime law that offer mechanisms to prevent and combat the trafficking of seafarers and fishers. Prosecuting a case of trafficking at sea requires national laws that guarantee seafarers and fishers the rights to a safe and secure workplace; fair terms of employment; and decent working and living conditions on board ship. Many States have not implemented the provisions of the IMO and ILO treaties that aim to ensure the rights of seafarers and fishers, leaving seafarers and fishers unprotected and vulnerable to trafficking. States should ratify the applicable IMO and ILO conventions, particularly the MLC and WIF Convention. The IMO and the ILO should continue to update and amend treaties already in force to address the changing needs of seafarers and fishers. For example, the 2010 amendments to the STCW (which increased the weekly rest hours required for seafarers and require the recording of rest hours) offer an

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[265] That being said, the number of countries without anti-trafficking legislation is decreasing. By 2012, of 162 countries and territories examined there were 134 that had enacted legislation criminalising all or most forms of trafficking and only nine that did not have an offence on trafficking in persons in domestic law (compared to thirty five in 2008). This is a positive trend. *Idem*, 82-83.

[266] Pursuant to Article 15 of the CoE Convention, States Parties are required to take steps to guarantee the compensation of victims.

[267] United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners*, United Nations, 2009, Module 13, available online at <unodc.org/documents/human-trafficking/TIP_module13_Ebook.pdf> (accessed 15 November 2013). Indeed, under the Trafficking Protocol, States Parties must ensure that their domestic legal systems contain measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered. Art. 6 Trafficking Protocol.

[268] See, e.g., Gallagher, A. and Karlebach, N., *Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice*, OHCHR, 2011, available online at <works.bepress.com/cgi/viewcontent.cgi?article=1019&context=anne_gallagher> (accessed 2 November 2013). According to the UNODC Legislative Guide for the Implementation of the Trafficking Protocol, generally States have developed one or more of the following three possibilities for obtaining compensation or restitution: (a) Provisions allowing victims to sue offenders or others under statutory or common law torts for civil damages; (b) Provisions allowing criminal courts to award criminal damages, or to impose orders for compensation or restitution against persons convicted of offences; and (c) Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as the result of a criminal offence. United Nations Office on Drugs and Crime*, Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto,* 2004, par. 369, available online at <unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf> (accessed 2 November 2013).

opportunity for vigorous enforcement by PSC officers and legal recourse for seafarers.[269] Legislators should ensure that national laws are in accordance with the obligations of States Parties under the IMO and ILO conventions to guarantee seafarers and fishers the minimum rights to a safe and secure workplace; fair terms of employment; and decent working and living conditions on vessels.

Also critical is the implementation of relevant existing legislation and regulations. Prosecutors and investigators should actively pursue cases of trafficking at sea in order to create robust case law and to streamline future prosecutorial efforts. Prosecutors should ensure that crewing agencies are investigated and attached to lawsuits involving trafficking on vessels on which trafficked persons have been exploited. Identifying competent legal experts might be possible by partnering with law firms that currently work on behalf of seafarers and fishers facing labour difficulties. These firms, while not generally well-versed in trafficking legislation, often advocate and pursue legal recourse for seafarers and fishers who face problems not dissimilar to trafficking. The ITF also has experience in helping seafarers secure outstanding wages and could serve as a resource in pursuing compensation for trafficked seafarers.[270] Targeted trainings for prosecutors, police and judges on the handling of trafficking cases in the maritime context will be crucial in effectively pursuing these cases.[271]

Beyond legislation is the need for legal expertise in the relevant fields of law. Representing trafficked seafarers and fishers may involve international maritime law, the law of the sea, and various national laws (including labour laws, anti-trafficking legislation and so on), all of which require highly specialised attorneys to effectively litigate. Access to such expertise may be limited and serve to constrain and undermine prosecutorial efforts. For example, Ukrainian seafarers felt that they had inadequate access to competent legal representation, as one seafarer explained:

> They told us that he [the lawyer] would take care of our legal case.... But we realised that this lawyer would not be competent enough, since he did not know the seafaring field in any detail. [Arguing a case like this] requires specific knowledge of the seafaring industry.[272]

There is a need to build a comprehensive legislative framework for the prosecution of trafficking at sea. Legislators should ensure accountability laws contain no loopholes (such as operations in international waters or by flying a flag under a non-cooperative jurisdiction) and that both criminal and civil reactions are commensurate with the gravity of the crime.

Legislators should also ensure that laws establish liability for negligent or wilfully ignorant placement of crew members that leads to trafficking. Legal accountability should also be pursued in terms of the registered owner of the vessel, the operator and

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[269] Amendments to the STCW Convention and Code of 25 June 2010, available online at <www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx> (accessed 19 November 2013).

[270] For example, in May 2013 a group of Ukrainian and Russian seafarers, assisted by the ITF, brought proceedings against the owner of a Belize-flagged freighter (the freighter had been left stranded in Dublin and the crew had not been paid since December 2012) to retrieve their unpaid wages. The Dublin High Court allowed the ship to be sold to cover the wage debts. The bank then guaranteed to pay the crew wage arrears of €247,361 (US$321,000), plus their repatriation, while it resolved its dispute with the ship's owners. See ITF Seafarers, *Maritime News*, 21 May 2013, available online at <itfseafarers.org/maritime_news.cfm> (accessed 15 November 2013).

[271] Surtees, R., *supra* nt. 21, 129.

[272] *Idem*, 106.

the trader of illegal catch, where relevant. This would ideally serve as a deterrent for persons and companies that currently benefit from such activities.[273]

Finally, collaboration is needed between relevant legal specialists and fields of law. Legal professionals will need the knowledge and experience of specialists to effectively represent trafficked seafarers and fishers. Organisational rosters of relevant attorneys, online collaboration or consultation forums and inter-specialty academic study can contribute to increasing the links between these legal fields. Creating a central repository of case law in the seafaring and commercial fishing sector can be a useful tool in further pursuing cases involving trafficking at sea. This should include relevant treaties, international agreements, customary law, case law, national legislation, academic articles and any other resources that may be useful to an attorney attempting to pursue civil or criminal action on behalf of a victim of trafficking at sea. Jurisdictional issues will likely be one of the main obstacles faced in such cases, which makes it essential for governments to communicate, cooperate and learn from each other.[274]

VI.2. Barriers Between Different Jurisdictions and Legal Systems

The investigation and prosecution of trafficking cases is often stymied by barriers between different jurisdictions and legal systems. Barriers include the cross border nature of the crime, the different jurisdictions involved, the different legal frameworks, the involvement of different law enforcement agencies, transfer of evidence, issues of language/translations and so on. Tackling these complex and interrelated challenges requires cooperation between law enforcement agencies and judicial systems across borders beyond the formal means of mutual legal assistance treaties.

One major impediment in many transnational trafficking prosecutions is difficulties in accessing and the availability of victim/witnesses. While many trafficked Ukrainian seafarers were willing to serve as witnesses in criminal or civil proceedings, they were unable to do so because of long distances between their homes and the sites of their lawsuits and the associated (and prohibitive) costs of travelling to serve as victim/witnesses. Other obstacles included leaving family members behind, staying away for an unknown period of time, losing income while not working and potentially missing out on new employment opportunities during their absence.[275]

The importance of international cooperation to the investigation and prosecution of trafficking crimes is widely recognised.[276] Bilateral or multilateral agreements that serve to overcome barriers between different jurisdictions and legal system might cover such matters as evidence sharing, testimonial admission, database collaboration and the like, and are crucial to the successful investigation and prosecution of trafficking cases. It is also worth exploring links to related crossover crimes, such fisheries crimes, and how cooperation between these sectors/issues can strengthen investigations and

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[273] *Idem*, 129.

[274] *Ibid.*

[275] *Idem*, 107.

[276] One of the three basic purposes of the Trafficking Protocol is to promote international cooperation to prevent, suppress and punish trafficking in persons and the primary aim of the United Nations Convention Against Transnational Organized Crime (UNTOC) is international cooperation to prevent and combat transnational organised crime. See UNODC, *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases*, UNODC and Australian Government Aid Program, 2010, available online at <unodc.org/documents/human-trafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf> (accessed 15 November 2013).

prosecutions. Mutual legal assistance—the process by which States request other States to provide information and evidence for the purpose of an investigation or prosecution—is a cooperation mechanism that could be used to take evidence or statements from persons in a foreign jurisdiction that would be admissible in a criminal trial.[277] Both informal cooperation (such as the exchange of information between law enforcement in different States) and formal cooperation (such as mutual legal assistance or treaty-based cooperation) are necessary in overcoming existing barriers between different legal jurisdictions and systems in prosecuting trafficking at sea.

Such obstacles apply in almost any form of trafficking litigation but are perhaps more pressing in the case of trafficking at sea with so many jurisdictions and legal frameworks involved. Experimentation in addressing this problem will contribute to non-seafaring cases as well. Conversely, efforts made in other areas of trafficking to overcome these barriers may be learned from, or carried over, to the seafaring and fishing sectors.

VI.3. Prosecution and Penalisation of Trafficking Victims for Crimes Committed While Trafficked

Trafficked persons may be required to or unknowingly commit criminal offences or other violations of the law directly connected with, or arising out of, their trafficking situation.[278] Trafficked fishers may be involved in IUU fishing or various forms of marine resource crime. Trafficked seafarers may be at risk of criminalisation for a range of crimes—e.g. breaching port rules; violating customs rules; ferrying illegal cargo; criminal negligence in discharging their duty as seafarer; using false certificates; carrying undeclared goods; and false logbook entry—even if their rank means the crimes committed are outside of their area of knowledge or competence.[279] Both trafficked fishers and seafarers are also at risk of being charged with immigration offences.[280] Fear of being charged with criminal activities undertaken while trafficked can serve as a deterrent in approaching authorities or answering questions truthfully when interviewed by authorities who may be able to identify and assist them.

The criminalisation of trafficked fishers and seafarers goes against protection obligations and may cause authorities to miss the opportunity to prosecute traffickers. The principle of non-prosecution has been given some limited legal expression, most particularly within Europe.[281] The CoE Convention, for example, emphasises the

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[277] Taking evidence or statements from persons is a common type of mutual legal assistance.

[278] See Organization for Security and Co-operation in Europe (OSCE), *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team*, SEC.GAL/73/13, 22 April 2013.

[279] For a list of criminal charges faced by seafarers, see Seafarers' Rights International, *Seafarers and the Criminal Law*, available online at <seafarersrights.org/seafarers_subjects/seafarers_criminal_law > (accessed 2 November 2013). .

[280] CoE Convention and EU Directive. The criminalisation of seafarers (and not just trafficked seafarers) is an issue that is garnering increasing attention in the merchant sector. Seafarers' Rights International, *supra* nt. 279. The awareness and concern in recent years over environmental pollution has also had the 'unfortunate side effect' within the maritime industry of the tendency to criminalise seafarers for 'offenses committed unintentionally and/or unavoidably during the course of their professional duties.' ITF Report, *supra* nt. 16, 29.

[281] OSCE, *supra* nt. 278, citing Art. 26 CoE Convention and EU Directive. The UNOHCHR's *Recommended Principles and Guidelines on Human Rights and Human Trafficking* also offer considerations on non-punishment of trafficked persons, namely Principle 7, concerning protection and assistance,

importance of ensuring that victims of human trafficking are not prosecuted or otherwise held responsible for offences, be it criminal or other, committed by them as part of the crime of trafficking. Article 26 states:

> Each Party shall, in accordance with the basic principles of its legal system, provide for 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.[282]

Legislators should implement provisions to ensure that trafficked seafarers and fishers are not held criminally or administratively liable (such as subject to fines) for offences committed as a result of being trafficked. In spite of any existing legislation that protects trafficking victims from criminalisation, indirect violations of the principle of non-criminalisation still may occur—e.g. from the failure of authorities to identify a person as a trafficking victim. In other cases, authorities dealing with an offence committed by a trafficked seafarer or fisher may be aware that the individual is, in fact, a victim of trafficking but still fail to attach appropriate significance to that fact when determining responsibility for the crime.[283] States must, therefore, also take action to ensure that trafficked seafarers/fishers are identified, which necessitates training the appropriate authorities in identification and the (sensitive and appropriate) handling of trafficking cases. In all cases where criminal charges are brought against fishers and seafarers, they should be offered interpretation and translation services if needed, legal representation and clear information about their legal rights.

VI.4. Lack of Prosecution of Higher Level 'Traffickers' – i.e. Ship owners, Ship Operators

In trafficking at sea there are many parties who may somehow play a role in trafficking—e.g. the broker or crewing agency, captains, non-trafficked crew on board a ship, ship owners, the flag State and so on. But the person with knowledge (or even who *should* have knowledge) that trafficking is occurring on a vessel and who may be subject to criminal prosecution will vary by case.[284] Many questions arise as to who is

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which states 'Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.' OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights* (E/2002/68/Add.1), available online at <ohchr.org/Documents/Publications/Traffickingen.pdf> (accessed 2 November 2013).

[282] Art. 26 CoE Convention. The 2011 EU Directive emphasizes this point: 'Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.' Para. 14 EU Directive.

[283] OSCE, *supra* nt. 278, 12.

[284] A recent report from the ILO notes that while in cases of forced labour the employer is the perpetrator, in cases of trafficking at sea the perpetrators may additionally include 'brokers, recruitment agencies, corrupt border or port officials, migrant smugglers, senior crew on board vessels and the fishing operator deriving profit from the exploitation.' De Coning, E., *supra* nt. 25, 21.

a 'trafficker', which is important not only in a criminal prosecution, but also in claims for compensation or restitution.

Take, for example, the recent successful prosecution of the Samaesan Case in Thailand, in which nine men from Myanmar were sold to a broker who exploited them on fishing trawlers. After two victims were able to secure their release, they contacted the Thai authorities and the Thai Department of Special Investigation rescued the remaining victims. The broker was arrested, charged and found guilty of seven charges including human trafficking.[285] He was sentenced to 33 years imprisonment. While this is an example of successful prosecution, questions remain about the other individuals involved in their exploitation.[286]

Targeting brokers or senior crew for their role in trafficking at sea may give some relief in individual cases. However, while exploitation of fishers may be meted out by senior crew, others may be complicit in the trafficking situation.[287] Thus, pursuing the larger organisational structure will arguably have a more lasting effect.[288] For example, fishing operators are likely to gain profit from the criminal activity and may be in a better position than senior crew to influence and put an end to abusive practices. Fishing operators' participation in forced labour and human trafficking offences must be identified and investigated.[289] There are some tools that can be drawn upon, not least the WIF Convention, which provides that the fishing vessel owner (fishing operator) has the overall responsibility to ensure that the skipper has the necessary resources and facilities to comply with the provisions of the Convention.[290] Issues such as salaries, food and medical supplies and maintenance and construction of vessels are likely to be influenced by the fishing operator.

That being said, it may prove difficult to target ship owners or individuals higher up the organisational ladder. Shipping practice is such that there is often a web of corporate identities involving the ship and various actors placed between the seafarer and the ship owner (such as manning agencies or ship management firms).[291] For fishers, targeting criminal fishing operators (and the profit they make) is also challenging as they will often avail themselves of the protection of non-transparent corporate structures in jurisdictions that hide the identity of the ownership interests in the fishing company.[292] In spite of the challenges, legal accountability should be pursued in terms of the registered owner of the vessel, the operator and the trader of illegal catch, where relevant. This would ideally serve as a deterrent for persons and

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[285] The seven charges were: deprivation of liberty of others; deprivation of liberty of a child; dishonestly receiving, disposing of, procuring, seducing or taking away of a minor; trafficking in persons for labour exploitation; trafficking in persons committed by an organised criminal group; smuggling of migrants; and assisting illegal immigrants to illegally stay in Thailand. Centre Against International Human Trafficking, Office of the Attorney General, *Samaesan Case*, Criminal Court in Bangkok, 28 January 2013, UNODC Human Trafficking Case Law Database Case No. THA011, available online at <unodc.org/cld/case-law-doc/traffickingpersonscrimetype/tha/2013/samaesan.html?tmpl=old> (accessed 2 November 2013).

[286] *Ibid.*

[287] De Coning, E., *supra* nt. 17, 40.

[288] *Ibid.*

[289] *Ibid.*

[290] Art. 8 WIF Convention.

[291] ITF Seafarers, *How to find your way around the legal maze*, 2006.

[292] The profit gained from their criminal activities will often be laundered through their seemingly legitimate business operations. More research is called for into the role of fishing operators in human trafficking for the purpose of forced labour at sea, how they are structured and how they launder the proceeds of their criminal activity. De Coning, E., *supra* nt. 17, 40.

companies that currently benefit from this activity.[293]

One option to reach members of the larger organisational structure is to engage actors such as the International Transport Workers' Federation (ITF).[294] The ITF does not have arresting power, but it does have inspectors who can liaise with PSC and put pressure on ship owners to resolve problems on board.[295] Further, the ITF can exert political pressure and use its networks to determine the owners of a vessel and support crew in bringing lawsuits against them. For example, in 2007, the ITF assisted the fishing crew of a vessel that had been detained by the Maritime Coastguard Agency (MCA) of Scotland for three weeks for technical reasons. After the detention the vessel owners changed the vessel's name and transferred registration from the British flag to St. Kitts and Nevis, at which point the MCA were no longer able to detain the vessel or assist the crew in their claims for wages and human rights abuses. The ITF enlisted the support of two Scottish unions and had the vessel arrested on behalf of the crew. Shortly thereafter the vessel owners lodged $75,000 into the ITF Solicitors account so that the arrest could be lifted and the crew could be paid what they were due and then repatriated.[296]

States should also consider implementing and enforcing victim compensation schemes that target ship owners and operators. Administrative sanctions are another mechanism that could be used to pursue the larger organisational structure. For example, because under Italian law companies can face sanctions when their employees commit crimes, the owner and operator of the Costa Concordia was fined 1.3 million USD in a plea bargain for the blunders, delays and safety breaches that contributed to the 2012 shipwreck off the coast of the Italian island of Giglio.[297] Such sanctions might be levied against owners of vessels onto which seafarers and fishers are trafficked. Fines against ship owners for pollution are already in place; this might be a model for another tool in targeting the larger organisational structure when prosecuting trafficking at sea.

VI.5. Lack of State Accountability for Trafficking at Sea

The prosecution of trafficking crimes that take place at sea will most often depend on the State exercising control over a vessel. Therefore flag State responsibility is a critical issue in ensuring that trafficked seafarers and fishers have access to legal recourse. The IMO, like the ILO, relies on pressures between States for the enforcement of treaties. If States allow for unaccountability, trafficking at sea can continue with impunity.

The presence of FoCs demonstrate a lack of State accountability; through FoCs it is possible to avoid labour regulation in the country of ownership, pay lower wages,

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[293] Surtees, R., *supra* nt. 21, 129.

[294] The ITF is an international trade union federation of around 700 transport workers' unions representing over 4.5 million transport workers from some 150 countries. It is one of several Global Federation Unions allied with the International Trade Union Confederation (ITUC).

[295] ITF inspectors inspect ships calling in their ports to ensure that seafarers have decent pay, working conditions and living conditions on board. If necessary they are able to assist with actions to protect seafarers' rights as permitted by law. All ITF Inspectors speak English as well as their own native language and--in some cases--other languages. See ITF Seafarers, *About the Inspectorate*, available online at <itfseafarers.org/inspectorate.cfm> (accessed 2 November 2013). See also ITF, *What an ITF Inspector can/can't do*, available online at <www.itfseafarers.org/what-inspector-can-cant-do.cfm> (accessed 2 November 2013).

[296] ITF, *supra* nt. 136.

[297] Criminal charges against the captain of the Costa Concordia are still pending, as are several private civil lawsuits against the owner and operator.

force long hours of work and allow unsafe working conditions.[298] However, it is not only FoC States[299] that are unwilling or unable to contribute to a more transparent and responsible system. There are also the accompanying issues of FoC States and States that allow their national ship owners and operators to register vessels under FoCs to benefit from a system through which they avoid responsibility.

There are some mechanisms to put pressure on States to ensure flag State responsibility. For example, ITF's FoC campaign aims to eliminate the FoC system by achieving global acceptance of a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers.[300] The ITF also has collective agreements with vessels, which set the wages and working conditions for crews on FoC vessels irrespective of nationality, thereby affording protection to nearly 150,000 seafarers and inspecting vessels to ensure compliance.[301] Soft law (such as declarations, statements, action plans and other forms of standard-setting) used by non-State actors, such as multinational corporations, trade unions, pressure groups and other NGOs, should be developed to put pressure on States to ensure flag State responsibility.[302]

For example, the Voluntary IMO Member State Audit Scheme is a tool to achieve harmonised and consistent international implementation of IMO standards. Under the Scheme, IMO Member States volunteer to be audited and receive a comprehensive and objective assessment of how effectively they administer and implement the mandatory IMO instruments covered by the Scheme. In addition, the lessons learned from audits can be provided to all IMO Member States to spread benefits shared.[303] States can also put pressure on each other to comply with their flag State obligations under the law of the sea and maritime law. States can lodge complaints with the IMO Council regarding compliance with the mandatory IMO instruments.

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[298] See ITF Seafarers, *FoCs*, available online at <itfseafarers.org/focs.cfm> (accessed 2 November 2013). The FoC Campaign also encompasses an industrial campaign designed to ensure that seafarers who serve on flag of convenience ships, whatever their nationality, are protected from exploitation by ship owners.

[299] As of August 2013 the ITF's Fair Practices Committee has declared the following 34 countries FoCs: Antigua and Barbuda; Bahamas; Barbados; Belize; Bermuda (UK); Bolivia; Burma; Cambodia; Cayman Islands; Comoros; Cyprus; Equatorial Guinea; Faroe Islands (FAS); French International Ship Register (FIS); German International Ship Register (GIS); Georgia; Gibraltar (UK); Honduras; Jamaica; Lebanon; Liberia; Malta; Marshall Islands (USA); Mauritius; Moldova; Mongolia; Netherlands Antilles; North Korea; Panama; Sao Tome and Príncipe; St Vincent; Sri Lanka; Tonga; and Vanuatu. See ITF, *Current Registries Listed as FoCs*, available online at <itfseafarers.org/foc-registries.cfm> (accessed 2 November 2013).

[300] ITF Seafarers, *About the FoC Campaign*, available online at <itfseafarers.org/FOC_campaign.cfm> (accessed 2 November 2013).

[301] *Ibid.*

[302] For a discussion of the function of soft law in the international community and the consequences the proliferation of soft instruments imply for international labour law in particular, see Duplessis, I., Soft law and International Labour Law, *Labour law: Its role, trends and potential*, ILO Labour Education 2006/2-3 No. 143-144, 2006, available online at <ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_111442.pdf> (accessed 2 November 2013), 37-46.

[303] See IMO, *Voluntary IMO Member State Audit Scheme*, available online at <imo.org/ourwork/safety/implementation/pages/auditscheme.aspx#> (accessed 2 November 2013) and Barchue, L.D., *Making a case for the Voluntary IMO Member State Audit Scheme*, Paper delivered at a seminar on "Auditing Flag States: New Directions for Smaller Maritime States," Malmø, World Maritime University, October 2005, available online at <imo.org/OurWork/Safety/Implementation/ Documents/Voluntary.pdf> (accessed 2 November 2013).

Listings may potentially be a tool in fostering flag State responsibility. The International Chamber of Shipping (ICS), for example, publishes an annual *Shipping Industry Flag State Performance Table*. Unlike other listings, flag States on the ICS performance table are not ranked but are judged against various performance criteria. The ICS performance table is 'intended to encourage ship owners to maintain a dialogue with their flag administrations to effect any improvements that might be necessary in the interests of safety, the environment and decent working conditions.'[304] Ship owners will weigh the performance of a flag State in deciding whether or not to join a registry, putting some pressure on a flag State to do well when being evaluated.

States can also use international relations to emphasise the importance of flag State responsibility. For example, after the United Nations and the United States enacted sanctions against Iran in 2012, several countries were quick to deregister Iranian vessels from their flags. Any State that registered Iran's ships would risk being exposed to the sanctions, particularly a ban from accessing the U.S. financial system.[305] This demonstrates the power that international relations play in the system of FoCs and the potential State pressure can have to ensure flag State responsibility. The United States already uses unilateral sanctions in the fight against trafficking through the issuance of the annual State Department TIP Report and accompanying rankings.[306] The TIP report has exercised a strong influence on the way in which States have responded to human trafficking.[307] The TIP Report could, in addition, include flag State responsibility and performance in ranking countries in their fight against trafficking. If the TIP Report were to highlight trafficking issues in the maritime and commercial fishing sectors and emphasise the need for States to prosecute trafficking crimes that occur on vessels flying their flags and provide legal recourse for trafficked seafarers and fishers, this would go some way in the fight against trafficking at sea.

Finally, part of State accountability is the emerging policy in fisheries management and conservation of 'control over nationals', which could involve pursuing criminal charges against the owners and operators of vessels.[308] States have jurisdiction over

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[304] Marine Log, *ICS Issues Flag State Performance Table*, 14 January 2013, available online at <www.marinelog.com/index.php?option=com_k2&view=item&id=3452:ics-issues-flag-state-performance-table&Itemid=230> (accessed 19 November 2013).

[305] See, e.g., Faucon, B., "Iran Shippers Face Difficulty Dodging Sanctions", *Wall Street Journal*, 28 September 2012.

[306] In addition to outlining major trends and ongoing challenges in combating TIP globally, the United States TIP report provides a country-by-country analysis and ranking based on what progress foreign countries have made in their efforts to prosecute traffickers, protect victims, and prevent TIP. States that do not cooperate in the fight against trafficking and that therefore receive a Tier 3 ranking may be subject to U.S. foreign assistance sanctions. On 13 September 2010, President Barack Obama determined that two Tier 3 countries would be sanctioned for FY2011 without exemption (Eritrea and North Korea) and that four Tier 3 countries would be partially sanctioned (Burma, Cuba, Iran, and Zimbabwe). Siskin, A. and Sun Wyler, L., *Trafficking in Persons: U.S. Policy and Issues for Congress*, Congressional Research Service, 23 December 2010.

[307] Gallagher, A. "Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports", *Human Rights Review*, vol. 12, ed. 3, 2011, 381-400.

[308] For example, the IPOA-IUU states: 'In the light of relevant provisions of the 1982 UN Convention, and without prejudice to the primary responsibility of the flag State on the high seas, each State should, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. All States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing.' Art. 18 IPOA-IUU. The EU Directive also addresses this issue, stating that Member States shall take the necessary measures to establish their jurisdiction over trafficking offences where (a) the offence is committed in whole or in part within their territory; or (b) the offender is one of their nationals. Art. 10 EU Directive.

their nationals for crimes they commit or are complicit in wherever they occur. Therefore, the exercise of criminal jurisdiction over nationals could be a supplementary measure in combating forced labour and human trafficking in the merchant and fishing sectors, in lieu of effective exercise of flag State prescriptive and enforcement jurisdiction. Yet, to effectively exercise control over nationals, States need to criminalise their nationals' participation in forced labour and human trafficking abroad and have access to information about their nationals' involvement in these activities to facilitate investigation and prosecution of suspected offenders. In practice, it is difficult for States to ascertain the involvement of their nationals in criminal activities taking place on board fishing vessels and within the merchant fleet.[309]

VII. Conclusion

Trafficking at sea, while arguably less considered than other forms of labour trafficking, is nonetheless an important part of the overall picture of human trafficking. It is also a highly specific form of trafficking, which is subject to a distinct legal and regulatory framework and necessitates a very specific and targeted response in the fields of prevention, protection and prosecution. Seafaring and commercial fishing have a unique potential to be exploitative and dangerous labour sectors. The very nature of the work--largely out of sight; at sea and, thus, inescapable; and moving between various national and international jurisdictions--lends itself to a high risk of abuse and exploitation. Trafficking at sea is made significantly more feasible by the limited regulation of labour practices in the seafaring and fishing sectors. This is particularly acute in terms of commercial fishing for which the legal and regulatory framework is weaker than for merchant vessels.

The current legal and regulatory framework in which seafaring and fishing operates is generally weak, affording both space and opportunity for dangerous and exploitative practices including human trafficking. This paper has considered the existing mechanisms and gaps within the legal and regulatory framework of the seafaring and fishing sectors, as well as the key differences between the two. It has equally highlighted what legal and regulatory tools exist--under anti-trafficking law, international maritime law and the law of the sea--to combat trafficking at sea.

The paper also presents where changes and improvements can be made to more effectively prevent, protect and prosecute trafficking in the seafaring and commercial fishing sectors, thus outlining possible ways forward for governments, international organisations, non-governmental organisations (NGOs), unions and associations. Key issues that merit attention and could go some way in addressing human trafficking include the following, framed around the 3Ps.

Prevention:

- Prohibit the payment of recruitment fees borne by seafarers/fishers to decrease trafficking vulnerability.
- Enforce accountability of crewing agencies in terms of job placements for fishers and seafarers.
- Improve regulation to prevent the used of fraud and deception in the recruitment of seafarers and fishers.

[309] De Coning, E., *supra* nt. 25, 49.

Protection:

- Improve identification of trafficked seafarers and fishers on the high seas, not least through enhanced flag State responsibility.
- Enhance identification of trafficked seafarers and fishers in territorial waters and EEZs through coastal State engagement and cooperation with flag States.
- Increase identification of trafficked fishers and seafarers, drawing on coastal State jurisdiction, PSC and resources within a port.
- Improve and expand identification efforts of trafficked seafarers and fishers beyond ports, with costs to be borne by flag States as well as countries of origin and destination.
- Ensure adequate provision of assistance to trafficked seafarers and fishers – abroad and at home.

Prosecution:

- Improve legislation and legal expertise in all relevant fields of law to effectively prosecute trafficking at sea.
- Cooperate and coordinate transnationally to overcome barriers between different jurisdictions and legal systems.
- Prohibit the prosecution and penalisation of trafficking victims for crimes committed while trafficked.
- Pursue prosecution of higher level 'traffickers' – i.e. ship owners, ship operators and so on.
- Advocate and act to enforce State accountability for trafficking at sea.

Addressing trafficking within the seafaring and fishing sectors needs to be part of the development of a broader strategy by all stakeholders of how to provide greater protection and rights within the seafaring and commercial fishing sectors, which, in the long term, will serve to both prevent and combat human trafficking at sea.

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The Definition of Trafficking in Adult Persons for Various Forms of Exploitation and the Issue of Consent: A Framework Approach that Respects Peculiarities

Dr. Silvia Scarpa[1]

Keywords
TRAFFICKING, CONSENT, DEFINITION, EXPLOITATION OF THE PROSTITUTION OF OTHERS, SEXUAL EXPLOITATION, FORCED LABOUR OR SERVICES, SLAVERY, PRACTICES SIMILAR TO SLAVERY, SERVITUDE, REMOVAL OF ORGANS.

Abstract
The article discusses the problems determined by the interpretation of the definition of trafficking in adult persons contained in Article 3(a) of the UN Trafficking Protocol as including the element of the improper means and vitiated consent. In particular, it examines whether consent is an issue in the definitional frameworks related to the forms of exploitation associated with trafficking and formulates a recommendation to take eventual definitional conflicts into consideration.

I. Introduction

The aim of this article is to analyse the definition of trafficking in adult persons included in Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children adopted in Palermo in 2000 (UN Trafficking Protocol) and the forms of exploitation associated with it, namely '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'. The international frameworks created for the purpose of fighting against these practices are in some respects conflicting with the element of the improper means and the issue of consent as included in the UN Trafficking Protocol's definition. Therefore, a recommendation is formulated to the Conference of the Parties-- established according to Article 32.1 of the Convention against Transnational Organized Crime-- and to the States Parties to better determine the importance to be assigned to the issue of consent and the use of improper means, as well as the relationship between trafficking and practices that are associated with it as forms of exploitation when implementing and reviewing trafficking legislation in national penal law.

II. The International Definition of Trafficking in Persons: A Historical Analysis

In 2000, the adoption of the UN Trafficking Protocol saw the introduction into international law of the first definition of "trafficking in persons". The concept of "trafficking" was not completely new though; it was instead an evolution of the term

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"traffic" that, since the beginning of the XIX century, had been used with reference to the phenomenon of the "white slave traffic", namely the abduction of European adult women and young girls, their transportation abroad and their final exploitation in brothels. Four main international treaties were adopted in the first part of the XX century for the purpose of fighting against this phenomenon, namely the 1904 International Agreement for the Suppression of the White Slave Traffic,[2] the 1910 International Convention for the Suppression of the White Slave Traffic,[3] the 1921 International Convention for the Suppression of the Traffic in Women and Children[4] and, finally, the 1933 International Convention for the Suppression of the Traffic in Women of Full Age.[5] None of them gave a definition of the phenomenon of the white slave traffic but they all made reference to the procurement of women for "immoral purposes",[6] which was their common denominator. It is interesting to emphasise that none of the white slave traffic conventions dealt with prostitution *per se*, which remained a matter of national jurisdiction. Moreover, the 1921 and 1933 conventions were adopted under the auspices of the League of Nations,[7] which had also promoted the adoption of the 1926 Convention on Slavery aimed at fighting against slavery and the slave trade.[8]

The scope of the white slave traffic conventions was consolidated and extended by the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, whose adoption was promoted by the United Nations.[9] Seven years after the adoption of the 1949 Convention, the United Nations promoted the adoption of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,[10] that was aimed at fighting against debt bondage, serfdom and any institution and practice whereby women and children can be transferred by a person to another in a servile status.[11]

Therefore, the two branches of international law dealing with slavery and the slave trade and the traffic in persons--previously known as the white slave traffic-- were kept by the League of Nations and the United Nations--at least since the 1970s--clearly distinguished and there was no overlapping among them. The line separating them becomes blurred when, in 1974 the Economic and Social Council established the Working Group on Slavery. The mandate of the latter body comprised not only slavery and the slave trade 'in all their practices and manifestations', but also the

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2 The International Agreement for the Suppression of the White Slave Traffic, 1904, 1 *LNTS* 83.

3 The International Convention for the Suppression of the White Slave Traffic, 1910, 8 *LNTS* 278.

4 The International Convention for the Suppression of the Traffic in Women and Children, 1921, 9 *LNTS* 415.

5 The International Convention for the Suppression of the Traffic in Women of Full Age, 1933, 150 *LNTS* 431.

6 See, for instance, Article 1 the 1904 International Agreement for the Suppression of the White Slave Traffic and Article 1 of the 1910 International Convention for the Suppression of the White Slave Traffic.

7 Article 23(c) of the Covenant of the League of Nations attributed to this international organization the supervision on the international agreements in the field of the traffic in women and children.

8 The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention on Slavery, 1926, 60 *LNTS* 253.

9 The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution inof Others, 1951, 96 *UNTS* 271.

10 The Convention, the United Nations promoted the adoption of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1949, 266 *UNTS* 3.

11 Article 7 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

traffic in persons and the exploitation of the prostitution of others.[12] Moreover, in its 30 years of activity the Group did not strictly abode to its mandate and it dealt with many other exploitative practices. In 1988, it was also renamed the Working Group on Contemporary Forms of Slavery, as a way to acknowledge its interest in exploitative practices that were considered as being 'new forms of slavery'. In this respect, it becomes evident how the two branches of international law dealing with slavery and the slave trade and the traffic in persons-- intended by the Working Group as including various forms of exploitation and not only the prostitution of others[13]-- started to be considered as different part of the same broad category of "contemporary slavery" that remains undefined under international law.

This historical analysis clarifies better that the UN Trafficking Protocol's definition of "trafficking in persons" did not emerge in a vacuum. It is instead the final step of the process of approachment among these two branches of international law.

III. The Complexity of the Protocol's Definition of Trafficking in Adult Persons Explained

The definition of trafficking in adult persons included in Article 3.(a) of the UN Trafficking Protocol is composed by three elements: 1. an action--namely 'the recruitment, transportation, transfer, harbouring or receipt of persons'; 2. the use of improper means by traffickers--including 'the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'-- to achieve the consent of the victims; 3. for the purpose of exploitation, including *inter alia* 'the exploitation of the prostitution of others and other forms of sexual exploitation, forced labour or services, slavery and practices similar to slavery, servitude or the removal of organs'. Article 3.(b) then clarifies that in cases in which any of the improper means included in the definition is used, the consent of the victim to the intended exploitation is irrelevant.

This definition suffers from the fact that it tries to incorporate various definitions into a single concept, namely "trafficking in persons", exploitative practices and the international systems aimed at fighting against them and it has, consequently, multiple "souls". First of all, it inherently suffers from the complexity of the previous white slave traffic conventions, in so much as it focuses on the *process* of trafficking individuals. The main difference with the white slave traffic conventions is, however, the fact that the Trafficking Protocol's definition includes in such a process other practices aside to the exploitation of the prostitution of others or other forms of sexual exploitation. A comparison can be made, instead, between the slave trade as being the process that leads to slavery and trafficking in persons as the one that is connected to various exploitative practices. Nevertheless, also in this case, the difference between a

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[12] The mandate also comprised apartheid and colonialism, as forms of "collective slavery". The reference to these two issues can be more easily understood taking into consideration the historical period in which such inclusion was made. They are not of relevance for the analysis conducted in this article, therefore, they are not taken into consideration.

[13] See, for instance, the reference to "traffic in human organs" included in the 1996 Commission on Human Rights Report, 1996, Un Doc. E/CN.4/Sub.2/1996/24 of 19 July 1996, the traffic affecting children, including the phenomenon of child soldiers and the "illegal traffic for the purpose of adoption" in the Commission on Human Rights Report, 1997, UN Doc. E/CN.4/Sub.2/1997/13 of 11 July 1997, and the one to "traffic of migrant workers" in the Commission on Human Rights Report, 1998 UN Doc. E/CN.4/Sub.2/1998/14 of 6 July 1998.

system based on the absolute prohibition of slavery, which is to be implemented by States on the basis of the 1926 definition of slavery and the one of the exploitation of the prostitution of others and other forms of sexual exploitation, which are practices whose definitions, boundaries and regulation are a matter of national jurisdiction, is evident.

On the other hand, if one analyses forced labour, the practices similar to slavery, servitude and the removal of organs, a conclusion can be reached that the Trafficking Protocol's definition connects them for the first time with a process-oriented crime. This process, however, can be long and actions can happen in different moments and places, thus making the prosecution of trafficking cases extremely complex.

Finally, the issue of consent included in the second element of the definition was a highly contested issue during the negotiations that led to the adoption of the UN Trafficking Protocol. However, the debate on its relevance was only conducted in respect of one specific form of exploitation, namely the exploitation of the prostitution of others or other forms of sexual exploitation. Notwithstanding this, as it currently stands, the issue of improper means being used to achieve the consent of trafficking victims applies equally to cases of trafficking in adult persons for all the other exploitative purposes enlisted in the definition. An analysis of these other practices shows, however, that there might be clashes between the way in which the trafficking framework takes into consideration the issue of consent and the one in which some of these practices are defined according to international law.

All the forms of exploitation included in the UN Trafficking Protocol's definition are left undefined; the analysis that follows provides a clarification on how they should be defined and examines how the elements of these definitions fit the ones included in the trafficking framework, focusing in particular on the issue of consent and the use of improper means.

III.1. Trafficking in Persons for the Purpose of the Exploitation of the Prostitution of Others or Other Forms of Sexual Exploitation

The exploitation of the prostitution of others and other forms of sexual exploitation constitute the classical practices associated with the concept of trafficking since the end of the XIX century. They represent the modern translation and clarification of the white slave traffic convention's reference to "the immoral purposes", which proves to be the reasons why young women and girls were transported abroad. In this respect, there is a general continuity: the white slave traffic conventions adopted in the first part of the XX century were received as a framework for States to co-operate for the purpose of eliminating the process of recruitment and transportation abroad of women for "immoral purposes". At the same time, States were very much determined to keep prostitution--and the way in which the practice should be defined--as a matter of national jurisdiction. The only treaty that had made a step in advance in this respect, namely the 1949 Convention for the Suppression of the Traffic in Person and the Exploitation of the Prostitution of Others--which was considered as an abolitionist treaty--had not been ratified by many States, which preferred to keep the regulation of such practice as a matter of national jurisdiction.

As regards the UN Trafficking Protocol, the *Travaux Préparatoires* clarify that the exploitation of the prostitution of others and other forms of sexual exploitation are not

defined by it and that "the Protocol is therefore without prejudice to how States address prostitution in their respective domestic laws".[14]

The UN Trafficking Protocol can, consequently, only offer a framework of cooperation for States in respect of trafficking for the purpose of the exploitation of the prostitution of others and other forms of sexual exploitation. It is difficult, however, to guarantee consistency when States Parties remain free to interpret the practice of trafficking in persons for the exploitation of the prostitution of others and other forms of sexual exploitation as they wish. In this respect, unfortunately, the conclusion reached by Nanda and Bassiouni more than forty years ago – that if one compares the system aimed at prohibiting slavery and the slave trade with the one on the white slave trade or traffic, a conclusion can be reached that the latter was less effective, because a change in the basic values, which permit to tolerate that practice, has never happened[15] – is still accurately representing the reality and can also be extended to the efficacy of the international framework aimed at fighting against trafficking in persons for the exploitation of the prostitution of others and other forms of sexual exploitation.

III.2. Trafficking in Adult Persons for the Purpose of Forced Labour or Services

The analysis of the practice of forced labour as included in the trafficking definition offers interesting perspectives, too. The international definition of forced labour is included in Article 2.(1) of the International Labour Convention (ILO) n. 29,[16] adopted by the International Labour Organization (ILO) in 1930. Accordingly, forced or compulsory labour is 'all work or service which is exacted from any person under the menace of a penalty and for which the said person has not offered himself voluntarily'.

The original, main aim of the ILO Convention n. 29 was to fight against forced labour imposed by States, and in that respect the reference to a penalty was more easily understandable;[17] however, article 4(1), adds that States Parties shall not permit the imposition of forced labour 'for the benefit of private individuals, companies or associations'.

The ILO clarifies that this definition of forced labour contains two main elements, namely the menace of a penalty and the involuntariness. The interpretation provided by the ILO of these two elements has recently seen an evolution. The menace of a penalty was originally associated with psychological or physical coercion and the involuntariness with the idea that individuals 'perform some work that they would

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[14] United Nations, General Assembly (LV), REPORT: Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions – Addendum- Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 3 November 2000, U.N. Doc. A/55/383/Add.1, 12.

[15] Nanda, V.P. and Bassiouni, M.C., "Slavery and the Slave Trade: Steps Towards Eradication", *Santa Clara Lawyer*, vol. 12, , ed. 2, 1972, 424–442.

[16] Convention Concerning Forced or Compulsory Labour, 1930, 39 *UNTS* 55.

[17] In this respect an interesting issue arises: can the offense of trafficking in persons for the purpose of forced labour, as defined by the UN Trafficking Protocol, be committed by States? It would seem obvious from the text of the Protocol that this is not the case, however, the lack on any specific clarification or indication on how to interpret the concept of "forced labour" in the Travaux Préparatoires is to be noted.

otherwise not have accepted to perform at the prevailing conditions'.[18] More recently, the ILO proposed to interpret the term menace of a penalty as including:

> criminal sanctions as well as various forms of coercion such as threats, violence, the retention of identity documents, confinement, or non-payment of wages. The penalty may also take the form of a loss of rights or privileges.[19]

It is worth noting that coercion is included in the list of improper means included in the UN Trafficking Protocol's definition of trafficking in adult persons and it seems to be considered similar to the use of force. There is, therefore, an overlapping in this respect between a fundamental characteristic of forced labour and an improper mean included in the UN Trafficking Protocol's definition. It is not clear, however, whether and how this produces impacts on the issue of consent, as taken into consideration by the UN Trafficking Protocol's definition. Psychological or physical coercion can be considered as a very strong form of pressure that completely overrides discussions on consent by the victim.

However, the UN Trafficking Protocol's definition also refers to other improper means such as 'abduction, fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person' and they might eventually overlap with the elements indicated by the ILO. For example, the retention of identity documents and the non-payment of wages might be related to deception or fraud. Moreover, if coercion is already an element of the crime of forced labour, the relevance of the other improper means in this respect is scarce. Moreover, since the definition also refers to the element of involuntariness, which is considered as being by Nowak 'a fundamental, definitional feature'[20] of forced labour, the lack of consent is already included as an element of this crime.

III.3. Trafficking in Adult Persons for the Purpose of Slavery, Practices Similar to Slavery and Servitude

The UN Trafficking Protocol's definition also includes, among the forms of exploitation associated with trafficking in persons, slavery, practices similar to slavery, and servitude. Slavery is defined by Article 1.1 of the 1926 Slavery Convention as being "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". In this respect it is interesting to emphasise that this definition of slavery does not contain any reference to the issue of consent. Slavery, as defined by the 1926 Slavery Convention, can in fact be both

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[18] Belser, P., De Cock, M. and Mehran, F., *ILO Minimum Estimate of Forced Labour in the World*, International Labour Organization, 2005, 7—8, available online at <ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081913.pdf> (accessed 28 November 2013).

[19] International Labour Organization, Combating Forced Labour: A Handbook for Employers and Business, International Labour Office Publications, Geneva, 2008, available online at <ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101171.pdf> (accessed 8 November 2013).

[20] Nowak, M., "Article 8: Prohibition of Slavery", in: Nowak, M., U.N. Covenant on Civil and Political Rights: CCPR Commentary., 2 rev. ed., N.P. Engel, Kehl am Rhein, Engel, 2005, 201.

voluntary and involuntary.[21] The inclusion of slavery among the practices that can constitute the end result of the process of adult trafficking--done by the UN Trafficking Protocol--leads to the outcome that an additional issue is to be taken into consideration when examining a case of adult trafficking for the purpose of slavery: that consent was given but was vitiated by the use of improper means.

Similar conclusions can be reached for the so-called 'practices similar to slavery'. These practices are defined by Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery as including:

> (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
> (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
> (c) Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person.[22]

By definition, debt bondage, as slavery, might include both voluntary and involuntary cases. Its reference to the "pledge by a debtor" may in fact be interpreted as involving an acceptance to repay the debt with services, while on the other hand the reference to "person under [the] control" raises the issue of members of the family who might be obliged to contribute to the repayment of the debt. In this respect, debt bondage can in fact comprehend both cases of individuals who are consenting to it and those who do not take part in it voluntarily.

A case of adult trafficking for the purpose of debt bondage would not only be identified with reference to the elements included in the definition of debt bondage, but also taking into consideration the improper means and the issue of consent. However, voluntary debt bondage would end up being excluded *a priori* from the trafficking framework, when the use of improper means cannot be demonstrated. On the other hand, assuming that debt bondage--at least in its traditional form--is often

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[21] *Ibid.* Nowak underlines the fundamental difference between slavery and servitude on one side and forced labour on the other, looking exactly at the fact that the former offences are prohibited both in the event of voluntariness and involuntariness.

[22] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, 266 *UNTS* 3. The definition also refers to '(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour'. However, since this article only focuses on trafficking in adult persons, this practice similar to slavery concerning only children is not taken into consideration.

related to conditions of poverty, illiteracy, discrimination (including, in particular, the one based on ethnic, caste and gender grounds), one should speculate on the way in which the abuse of power or of a position of vulnerability should be interpreted so as to include the situations in which individuals consent to such exploitation for lack of real and viable alternatives. Therefore, an interpretation of the abuse of power or position of vulnerability concepts, as used in the UN Trafficking Protocol and how it is transformed in national legislation by States Parties, is fundamental. It would in fact prove useful for the purpose of better understanding how trafficking legislation could eventually be used for the purpose of fighting against cases of debt bondage.

As regards serfdom, the use of the term "bound" in the definition of this term might be interpreted as implying an obligation determined by "custom or agreement".[23] The main characteristics of the definition of this practice are, however, to be identified in the obligation to live and work on a specified plot of land belonging to someone else, to render certain services to the landowner and in the impossibility to leave. Serfdom might, consequently, be either voluntary or involuntary, so that conclusions similar to the ones reached for debt bondage would apply to this practice too.

Finally, for what concerns the practices regarding women--indicated in Article 1.(c) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery--it seems evident from an analysis of the definition that the victim's consent is lacking. In this respect, a clash is evident between the definition of trafficking in adults and the definition of these various practices. The former considers in fact improper means as a way to demonstrate that consent is vitiated. On the other hand, the latter is focused on two elements: first, the fact that the decision regarding the woman is taken by someone else and, secondly, that the final outcome of the decision--the marriage, the transfer or the inheritance of the woman--cannot be challenged by her. Therefore, also in this case doubts might arise as to the applicability of the trafficking framework to these practices affecting women, as the use of improper means should also be demonstrated.

No international treaty defines the term 'servitude', which was however, included in some international human rights conventions. This includes, at the universal level, Article 4 of the Universal Declaration of Human Rights, Article 8.2 of the International Covenant on Civil and Political Rights, and Article 11.1 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. At the regional level it includes Article 4.1 of the European Convention on Human Rights (ECHR), Article 5.1 of the Charter of Fundamental Rights of the European Union,[24] Article 6 of the 1969 American Convention on Human Rights, which however prohibits only "involuntary" servitude, and Article 10.1 of the 2004 Arab Charter on Human Rights.

However, its contours remain vague. For instance, Nowak concludes that the *Travaux Préparatoires* of the United Nations International Covenant on Civil and Political Rights (ICCPR) clarify that slavery has to be intended in its traditional sense, as implying the "destruction of one's juridical personality", while servitude had to be associated with "dominance and degradation". On the other hand, in *Siliadin v. France*, the European Court of Human Rights defined servitude as being 'an obligation to

[23] The reference to law is not taken into consideration as the legal institution of serfdom should have been abolished worldwide.

[24] It is worth noting that, according to the Treaty of Lisbon, the Charter has the same legal value as the treaties.

provide one's services that is imposed by the use of coercion, and is to be linked with the concept of 'slavery'.'[25]

Therefore, there is a primary difficulty associated with the analysis of the practice of servitude as included in the UN Trafficking Protocol's definition, namely the lack of a clear international definition or of general contours for the purpose of identifying its characteristics and differentiating it from other exploitative practices, such as slavery, practices similar to slavery and forced labour. Moreover, as regards the issue of consent in respect of servitude, it is interesting to note that, during the drafting process of the Universal Declaration of Human Rights, the Commission on Human Rights had recommended the addition of the adjective "involuntary" as a way to better qualify the term "servitude".[26] However, this proposal was not accepted by the third Committee of the General Assembly of the United Nations as it was believed that it was necessary to eliminate servitude whether it was voluntary or not, and to avoid offering to slave holders the possibility of arguing that their victims had accepted such a condition in a voluntary way.[27] Thus, also in this case difficulties arise when trying to combine the constituent elements of the practice of servitude with the ones associated with the trafficking framework included in the UN Trafficking Protocol.

III.4. Trafficking in Adult Persons for the Purpose of the Removal of Organs

The removal of organs is the last form of exploitation that is specifically included in the UN Trafficking Protocol's definition of trafficking in persons. A major difference in respect of other exploitative practices included in the definition of human trafficking is the fact that the practice of removing organs can be conducted on both living donors and post-mortem. However, the latter can be excluded from this analysis, as it can legitimately be assumed that the definition of trafficking in persons does not refer to cadavers, but only to living individuals.

It should also be clarified that many States allow the removal of organs from living donors and they regulate the practice according to their national legislation in the field. Thus, a major difference with other practices included in the trafficking definition, such as slavery, servitude or practices similar to slavery, is that there is no absolute prohibition and criminalisation of the removal of organs under international law; the practice can legitimately be conducted, according to the rules and limitations established by national laws in this field. It is worrying that in the field of the removal of organs there is no universal treaty establishing minimum rules on prohibited conducts or common frameworks. On the other hand, a regional framework is to be found in the Council of Europe Convention on Human Rights and Biomedicine and its Additional Protocol on Organs and Tissues of Human Origin.

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[25] European Court of Human Rights, 26 October 2005, *Siliadin v. France*, App. No. 73316/01, para. 124.

[26] United Nations Economic and Social Council, Commission on Human Rights, REPORT: *Report and Summary Record of the Third Session of the Commission on Human Rights*, 28 June 1948, UN Doc. E/800, 11, New York; Commission on Human Rights, *Summary Record of the Fifty-Third Meeting*, UN Doc. E/CN.4/SR.53, 3, New York.

[27] United Nations General Assembly, REPORT: *Report of the Third Committee on the third session of the General Assembly*, 7 December 1948, UN Doc. A/777; United Nations General Assembly, *Summary Record of the Hundred and Ninth Meeting*, 21 October 1948, UN Doc. A/C.3/SR.109, Paris, and United Nations General Assembly, *Summary Record of the Hundred and Tenth Meeting*, 22 October 1948, UN Doc. A/C.3/SR.110, Paris.

According to the United Nations and the Council of Europe, trafficking in human beings for the purpose of the removal of organs is part of a broader phenomenon: trafficking in organs, tissues and cells. The Report jointly published by these two international organizations defines the latter as:

> (a) the illicit removal, preparation, preservation, storage, offering, distribution, brokerage, transport or implantation of organs, tissues and cells […]; and (b) the possession or purchase of organs, tissues or cells with a view to conducting one of the activities listed in (a); solely for financial or other economic gain (for this or a third person's benefit).[28]

The Report fails, however, to take into consideration the fact that the UN Trafficking Protocol's definition makes reference to the improper means and the issue of consent only in respect of adults, but not for children.[29] It also claims that trafficking in persons for the removal of organs is only a "marginal phenomenon",[30] a tiny fraction of the general phenomenon of trafficking in organs, tissues and cells. It is not well clarified how this conclusion was reached by the Report. However, one might speculate on the fact that it is probable that this depends very much on the way in which the phenomenon is defined and included in States Parties' national penal laws. Moreover, the focus on victims' consent and the use of improper means associated with the trafficking framework distracts the attention from the main issues: that the removal of organs is conducted in an illegal way and that the final purpose of the traffickers is to obtain a financial or other material benefit.

IV. Concluding Remarks

The definition of trafficking in adult persons contained in Article 3(a) of the UN Trafficking Protocol represents a compromise among the States' representatives that participated in the negotiations process. While the reference to trafficking as related to multiple forms of exploitation is very much relevant for the purpose of fighting against the complex and varied practices existing worldwide, a rigid interpretation of such a framework does not support such aims and instead risks undermining it. Therefore, a recommendation is formulated to the Conference of the Parties (established according to Article 32.1 of the Convention against Transnational Organized Crime) as well as the States Parties to the Protocol, to promote an interpretation of the definition of trafficking in adult persons in their national penal laws that takes into consideration the multiple frameworks constituted by the various forms of exploitation associated with it. Additionally, they should not place the issue of consent and the related improper means in a cage that hinders the fight against this odious phenomenon of our time.

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[28] United Nations and Council of Europe, *Joint Study on Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*, Council of Europe, 2009, 13. I had also previously referred to the two phenomena, respectively, in terms of trade or market in human organs and trafficking in human organs, see Scarpa, S., *Trafficking in Human Beings: Modern Slavery,* Oxford University Press, Oxford, 2008, 34–39.

[29] *Idem*, 13.

[30] United Nations and Council of Europe 2008, *supra* nt. 28, 93.

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