Disaggregating Slavery and the Slave Trade

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Online ISSN: 2643-7759

Recommended Citation


DOI: https://dx.doi.org/10.25148/lawrev.16.3.5

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DISAGGREGATING SLAVERY AND THE SLAVE TRADE

Jocelyn Getgen Kestenbaum*

ABSTRACT

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

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

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

* Associate Professor of Clinical Law, Benjamin N. Cardozo School of Law. I am eternally grateful to Patricia Viseur Sellers, who pushes my intellectual curiosity and understanding at the intersections of international human rights and international criminal law and with whom I journey on this slavery and slave trade scholarly path. I want to thank Khensani Mathebula and Ameen Khadir for their research assistance. Several additional colleagues provided comments along the way who deserve a heartfelt thanks, including Janie Chuang, Lisa Davis, Michel Rosenfeld, Gabor Rona, Deborah Pearlstein, Mark Drumbi, Christopher Buca fusco, Kyron Huigens, Alex Reinert, Kate Levine, Warren Binford, Jane Aiken, Julie Dahlstrom, Allison Freedman, Faraz Sanei, Cori Alonso-Yoder and Sital Kalantry. This article is dedicated to the Yazidi survivors and all others tirelessly fighting for justice and accountability for slavery and slave trade crimes perpetrated against them. All errors are my own.
playing “fast and loose” with distinct prohibitions undermines international law’s institutional legitimacy. In the long term, state practice and opinio juris that moves away from enforcing against slavery and slave trade harms might lessen or even erode these protective customary international law prohibitions.

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I. INTRODUCTION

Throughout human history and in law, slavery1 and the slave trade2 have been foundational institutions and practices for societies globally. International law, for example, served to legitimate the violent, large-scale abduction and forced removal of millions of Africans to the Americas between the 16th and 19th centuries.3 Over the past two centuries, abolitionist movements have worked to prohibit the slave trade, slavery, and other servitudes—which has included “slavery-like practices” of forced labor, debt bondage, servitude, servile marriage, and child trafficking—in international law.4 In the 19th century, states began taking concrete legal steps toward

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

2 The slave trade is defined as:

. . . all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

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

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

4 See, e.g., 1926 Slavery Convention, supra note 1; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter 1956 Supplementary Slavery Convention]; JEAN ALAIN, SLAVERY IN INTERNATIONAL LAW OF HUMAN EXPLOITATION AND TRAFFICKING 10, 105 (2012); JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012) (examining the origins of international human rights law through the lens of slavery and the slave trade). Each of these harms in international law has a relationship to slavery and the slave trade, and to a greater or lesser extent has been
abolition, first by suppressing the slave trade, prohibiting the Trans-Atlantic and East African Slave Trades through unilateral declarations and bilateral or multilateral treaties.5

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

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

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


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

7 Press Release, Legal Action Worldwide (LAW), LAW Files Groundbreaking Case on Behalf of Migrant Domestic Worker in Lebanon (Oct. 8, 2020). For additional information on the kafala system, see LEGAL ACTION WORLDWIDE, POLICY BRIEF: THE KAFALA SYSTEM IN LEBANON: HOW CAN WE OBTAIN DIGNITY AND RIGHTS FOR DOMESTIC MIGRANT WORKERS? (2020) (arguing that the system amounts to slavery and slave trading under international law).
did not permit her to contact her family. As Meseret’s case demonstrates, the kafala system’s reliance on private sponsors and lack of labor protections make the system particularly susceptible to slavery and the slave trade.

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

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

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8 Press Release, supra note 7.
11 CNN Team Recounts Uncovering Slavery in Libya, supra note 10; cf. Hackwill, supra note 10.
and Selling of Slaves have carried out the Caliphate’s distribution of Yazidis at organized slave markets.\textsuperscript{15} IS policies have permitted fighters to “buy, sell, or give as a gift female captives” who were “war spoils.”\textsuperscript{16} The policy intentionally reduced into slavery “non-believing” women (\textit{sabaya}) and boy and girl children\textsuperscript{17} and deemed them Caliphate\textsuperscript{18} property.\textsuperscript{19}

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

\begin{figure}
\centering
\includegraphics[width=\textwidth]{image.png}
\caption{Graphical representation of the text content.}
\end{figure}

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


\textsuperscript{17} \textit{The Revival of Slavery Before the Hour}, 4 DABIQ 15.


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


\textsuperscript{22} ‘\textit{They Came to Destroy},’ supra note 15 §§ 40, 82, 93. See also Johanna Groß, \textit{Day 9 of the Trial—Main Trial Against Taha Al-J} (09 June 2020), AMNESTY INT’L (June 15, 2020), https://amnesty-voelkerstraafrecht.de/9-verhandlungstag-hauptverhandlung-gegen-taha-al-j-09-juni-2020/.
Despite their continued perpetration, slavery and the slave trade have received scant legal attention as international human rights violations. Today, these practices receive no protections in international law, whether in times of war or peace. Slavery and the slave trade prohibitions are peremptory norms, prohibitions and crimes under customary international law, humanitarian law prohibitions, and non-derogable human rights. The International Court of Justice (ICJ) has ruled that protection from slavery is an erga omnes obligation of states under human rights law. Under the Rome Statute of the International Criminal Court (ICC), “enslavement”—defined as slavery, and including slavery in the course of human trafficking—is a


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

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

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

\textsuperscript{28} U.N. General Assembly, Rome Statute of the International Criminal Court art. 7(2)(c), 2187 U.N.T.S. 90, entered into force July 1, 2002. “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” Id. The slave trade is not enumerated or defined within the Rome Statute of the ICC. For an in-depth discussion as to the problems that this omission poses for international law, as well as justice and accountability for victims, see Sellers & Kestenbaum, supra note 5.


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

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


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

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

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35 See, e.g., Allain, supra note 4 (arguing the need to understand the law criminalizing exploitation and including both slavery and human trafficking); see Kevin Bales, Disposable People: New Slavery in the Global Economy (1999); Kevin Bales, Understanding Global Slavery (2005); Kevin Bales, Ending Slavery: How We Free Today’s Slaves (2007); Kevin Bales & Ron Soodalter, The Slave Next Door: Human Trafficking and Slavery in America Today (2009).

36 Klara Skrivankova, Between Decent Work and Forced Labour: Examining the Continuum of Exploitation 16 (2010).

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

38 Another reason for the “exploitation creep,” as scholar Janie Chaung has coined the term, is due to the increased attention on slavery enumerated as a form of exploitation within the definition of trafficking under the Palermo Protocol. See Allain, supra note 4 (clarifying the international law definition of slavery for the purpose of understanding the definition of human trafficking).
as points along a continuum of exploitation assumes the existence of factors that can be—but do not have to be—present in slavery or slave trade harms and, thus, may miss important ways in which the intent to enslave is perpetrated and the powers attaching to ownership rights are exercised.\textsuperscript{39} Consequently, the law is discriminatorily applied, excluding certain harms and certain victims, especially with regard to children (\textit{i.e.}, children born into situations of slavery or slave traded from one situation of slavery to another).\textsuperscript{40}

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

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

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


\textsuperscript{43} See, e.g., Chuang, \textit{supra} note 42. \textit{But see} Vijeyaras & Bello y Villarino, \textit{supra} note 41, at 60–61 (examining \textit{Rantsev v. Cyprus and Russia}, finding without further analysis that: “[a]s such, the standards for slavery were reached and the conduct of Mr. X.A., the owner of the cabaret, as well as that of the other owners of cabarets using ‘artisté’ visas, should be considered as slave trade within the meaning of the [1926] Slavery Convention.”); ALLAIN, \textit{supra} note 4, at 10, 105. Patricia Viseur Sellers and I have begun to explore these distinctions in international criminal and humanitarian law, as well as customary international law. \textit{See} Sellers & Kestenbaum, \textit{supra} note 5.
to revitalize and recommit the human rights law framework to slavery and the slave trade—in addition to human trafficking legal frameworks where appropriate—to ensure full protection and accountability under international law of all persons enslaved, slave traded, and trafficked.\textsuperscript{44}

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

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

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

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

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

\textsuperscript{47} Unless \textit{lex specialis} applies in conflict. \textit{See} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) [hereinafter Nuclear Weapons case]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9), [hereinafter Wall case].
trade and human trafficking—allows a surfacing of these harms and perpetrators for judicial redress at the domestic and international levels. {48} Correct delineation of these prohibitions untangles the confluences and confusions of juridical safeguards to ensure full redress to survivors of human trafficking, slavery, and the slave trade. {49} In many domestic contexts, perpetrators are getting away with committing acts of slavery and slave trade, and survivors are not receiving full redress for these harms, even when human trafficking is prosecuted and punished. Finally, normative clarity generally is important to ensure effective state implementation and enforcement in international and domestic law. {50}

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

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50 See GALLAGHER, supra note 31, at 7 (“As long as the law remains unclear, [states] can continue to argue about it. As long as the law remains unclear, they will, almost certainly, not be brought to task for failing to apply it.”).
Part I traces the evolution of slavery and the slave trade as related, yet distinct prohibitions in general international law and international human rights law. It also examines the parallel evolution of human trafficking prohibitions in international and transnational law. The purpose of this historical analysis is to delineate these prohibitions, understand drafters’ intent, and recognize their normative status under international human rights law. Part II outlines the legal and jurisdictional distinctions among slavery, the slave trade and trafficking in their respective human rights frameworks to account for the multiplicity of distinct harms. Part III then provides examples demonstrating the way in which international human rights law in practice conflates and confuses slavery, the slave trade and trafficking, while rarely invoking slavery and completely overlooking slave trade harms as human rights violations. Part IV concludes, arguing for a revitalization of slavery and slave trade prohibitions in addition to the separate prohibition of human trafficking for a more comprehensive protective regime in international law and state accountability for human rights violations.

II. Origins of Slavery, the Slave Trade and Human Trafficking Prohibitions in International Law

A. 1926 Slavery Convention and 1956 Supplementary Slavery Convention

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

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

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

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

Specifically, the 1926 Slavery Convention calls on states “to prevent and suppress the slave trade” and “to bring about . . . the complete abolition of slavery in all its forms.” The Convention defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” and the slave trade as:

... all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange

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


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

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


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

59 Id.

60 Id. at art. 1(1).
of a slave acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves.\(^{61}\)

Article 3 of the 1956 Supplementary Slavery Convention\(^{62}\) updated the slave trade’s definition, adding:

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

The 1956 Supplementary Convention, without explanation or debate, also expanded the slave trade definition by changing “all acts of disposal … of a slave” to “all acts of disposal … of a person,” protecting individuals who may be disposed of before entering into slavery.\(^{64}\)

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

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

\(^{62}\) 1956 Supplementary Slavery Convention, supra note 4.

\(^{63}\) Id.

\(^{64}\) Id.; Allain, supra note 4, at 95.

\(^{65}\) Sellers & Kestenbaum, supra note 20, at 379.


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

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

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

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\(^{68}\) Sellers & Kestenbaum, supra note 20, at 379. *But see* Vijeyarasa & Bello y Villarino, supra note 41, at 56. The travaux préparatoires indicate that, in order to obtain the broadest possible agreement, and with some states being reluctant to inclu

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

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

\(^{71}\) Temporary Slavery Commission 1926 Report, supra note 67, at 2–3.

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

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

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

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

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


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

Id. at 38–39.

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


⁷⁸ The Second Session meeting minutes of the Temporary Slavery Commission in 1925 describe that “concubinage” fits squarely within the intended meaning of slavery as it is distinguished from wives. Temporary Slavery Commission Second Session Minutes, supra note 74, at 62 ¶ 71.
nature of the acts (or non-acts) that masters forced enslaved persons to perform (or not to perform). Importantly, the Commission intended to outlaw any demonstration of powers attaching to the right of ownership over a person. Therefore, it crafted the definition to comprise any current exercise of powers of ownership that comply with this definition of slavery, as well as future novel acts of slavery by any name.

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

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

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79 Sellers & Kestenbaum, supra note 20, at 379 n.102.
80 ALLAIN, THE LAW AND SLAVERY, supra note 73, at 423–24. At that time, neither the Commission nor subsequently the drafters of the 1926 Slavery Convention intended to outlaw what was considered to be forced labor. Drafters determined that, although evidence of constrained conditions existed, no powers of de jure or de facto ownership were exercised over persons. Thus, forced labor was not equal to, or necessarily included within, slavery. Jean Allain, The Definition of ‘Slavery’ in General International Law and the Crime of Enslavement Within the Rome Statute, in GUEST LECTURE SERIES OF THE OFFICE OF THE PROSECUTOR 5, 6 (2007) [hereinafter Allain, The Definition of “Slavery”].
81 Sellers & Kestenbaum, supra note 20.
82 The 1926 Slavery Convention drafters referred to “domestic slavery” interchangeably with “non-Western slavery,” “African Slavery,” “indigenous slavery,” or slavery as practiced in the colonies of Africa. Domestic slavery was in contrast to imported slavery practiced by European colonizers in the trans-Atlantic slave trade. See SUSAN MIERIS, BRITAIN AND THE ENDING OF THE SLAVE TRADE 118 (1975).
83 Allain, The Definition of “Slavery,” supra note 80, at 5–6 (emphasis added).
84 1926 Slavery Convention, supra note 1.
85 See Sellers & Kestenbaum, supra note 5. Where persons are born into slavery, for instance, the crime of the slave trade does not precede slavery. Id.
86 See ALLAIN, TRAVAUX, supra note 66.
87 See Sellers & Kestenbaum, supra note 49.
88 See id.
case, the perpetrator commits slave trade, but not slavery, crimes. In fact, slavery, although intended, may never materialize.

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

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

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


92 Id. at 20.

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

... if a person held in bondage by that belligerent be captured . . . by . . . the United States, such person is immediately entitled to the rights and privileges of a freeman.

To return such person into slavery would amount to enslaving a free person . . . made free by the law of war is under the shield of the law of nations.

Id. at 16, ¶ 43.

94 See Sellers & Kestenbaum, supra note 5, at 13 n.85 (noting that “Lieber’s recognition of the slave trade’s illegality was rooted in the 19th century legal philosophy of ubi societas ibi jus, whereby ‘civilized nations have come to constitute … a commonwealth of nations, under the restraint and protection of the law of nations.’”). Lieber markedly views the law of nations as governing prohibitions
Today, the 1926 Slavery Convention’s and 1956 Supplementary Slavery Convention’s slavery and slave trade definitions represent the most widely accepted protections under international custom and treaty law.95 Multiple subsequent international instruments that include slavery crimes definitions mirror the Slavery Convention definitions.96 The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956 Supplementary Convention)97 reinforces the international prohibitions that slavery and the slave trade in all their forms “are and shall remain prohibited at any time and in any place whatsoever.”98

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

95 Allain, supra note 6, at 240; JEAN-MARIE HENCKAERTS & LOUISE DOWSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 328 (2005) (Rule 94 states that, “[t]he military manuals and the legislation of many States prohibit slavery and the slave trade, or “enslavement.””).

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

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

98 AP II, supra note 25.


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

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

B. \textit{“White Slave Traffic” Conventions and the Palermo Protocol}

i. \textit{“White Slave Traffic” Conventions}

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

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

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\begin{itemize}
  \item \footnote{102} \textit{Slavery, the Slave Trade, and Other Forms of Servitude, supra note 101.}
  \item \footnote{103} Jean Allain, \textit{White Slave Traffic in International Law}, 1 J. TRAFFICKING & HUM. EXPLOITATION 1, 2 (2017) (noting that the 1904 Agreement “found its origins in a Victorian paternalism of the late nineteenth century which sought to control women in the face of communicable diseases which were playing havoc on troops destined to engage in Europe’s colonial project.”).
\end{itemize}

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

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

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

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107 Commission Législatif, Rapport présenté par M. Ferdinand-Dreyfus, Annexe au Procès-Verbal de la Quatrième Séance, Ministère des Affaires Étrangères, Conférence Internationale pour la Répression de la Traite des Blanches, Documents Diplomatiques, 1902, 122; [Correspondence respecting the International Conference on the ‘White Slave Traffic,’ held in Paris, July 1902, House of Commons Parliamentary Papers (United Kingdom), Miscellaneous No. 3 (1905), Cd. 2667, 9].
108 Id.
109 Id. at 123.
111 Demleitner, supra note 106, at 167.
112 International Agreement for the Suppression of the “White Slave Traffic” art. 1, May 18, 1904, 1 L.N.T.S. 83.
and European-descended women from being corrupted, or “debauched.” These international agreements bore a narrow gendered scope, criminalizing exploitation of adult women in prostitution and all prostitution of girls. Moreover, both the 1904 Agreement and the 1910 Convention distinguish between women who are trafficked as prostitutes and women who are trafficked into forced prostitution. Neither the 1904 Agreement nor the 1910 Convention criminalize prostitution per se or protect victims of trafficking held in brothels because the legality of trafficking’s ends (i.e., prostitution) were contested, varied among states, and thus viewed as a matter of domestic jurisdiction.

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

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115 Allain, supra note 103, at 24.
116 Demleitner, supra note 106, at 168 (“Is the woman no longer a slave or victim once she arrives at the destination of the trafficker and has begun to work as a prostitute?”).
117 Id. at 169.
118 League of Nations Covenant art. 23, ¶ 1(c).
119 GALLAGHER, supra note 31.
121 Demleitner, supra note 106, at 170.
123 GALLAGHER, supra note 31, at 13.
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In the aftermath of World War II, international human trafficking law’s scope significantly broadened under United Nations’ auspices, evinced by the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (“1950 Convention”).124 The 1950 Convention requires States Parties to punish:

any person who, to gratify the passions of another:

(1) procures or entices or leads away, for the purposes of prostitution, another person, even with the consent of that person;

(2) exploits the prostitution of another person, even with the consent of the person.125

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

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

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125 Id. at art. 1.
126 Id. The lack of travaux preparatoires make these omissions difficult to analyze. See GALLAGHER, supra note 31, at 13–14.
127 1950 Convention, supra note 124, at art. 1. The lack of travaux preparatoires makes these omissions difficult to analyze. See GALLAGHER, supra note 31, at 13–14.
128 Demleitner, supra note 106, at 173.
women\textsuperscript{130} even though the legal frameworks remained distinct in international law.


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

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

\textsuperscript{130} \textit{Gallagher, supra} note 31, at n.14 (“[B]y 1991, ‘prevention of traffic in persons and the exploitation of the prostitution of others’ was the main agenda item for the Group’s annual meeting.”).


\textsuperscript{132} Palermo Protocol, \textit{supra} note 33, at art. 3.

\textsuperscript{133} See \textit{Gallagher, supra} note 31.

\textsuperscript{134} Palermo Protocol, \textit{supra} note 33, at art. 3; \textit{U.N. Off. on Drugs and Crime, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto}, at 339, n. 2, U.N. Sales No. E.06.V.5 (2006) (“The discussion on the definition of ‘sexual exploitation’ at the informal consultations held during the fifth session of the Ad Hoc Committee was based on the proposal submitted by the United States (A/AC.254/L.54). Two delegations expressed reservations regarding the proposal. The Netherlands suggested replacing the definition of the term “sexual exploitation” with a definition of the term ‘slavery’ that read as follows: ‘Slavery shall mean the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including forced prostitution
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The Palermo Protocol’s significantly broader definition of human trafficking contrasts greatly with the 1904 Agreement’s definition. Not only does the Palermo Protocol extend the 1950 Convention’s removal of a transportation requirement, but it also solidifies a conflation with slavery and the slave trade through its enumeration of exploitation. The Palermo Protocol defines trafficking as requiring an act (the movement, recruitment, receipt, or harboring of persons) accomplished by a means (by force, threat of force, fraud, deception, coercion, abduction) for a purpose (exploitation, defined as at a minimum: exploitation of prostitution, forced labor, slavery, or slavery-like practices, servitude, or removal of organs). The travaux préparatoires demonstrate that the drafters did consult the 1956 Supplementary Slavery Convention and understood the legal definition of slavery as the exercise of any or all powers attaching to the right of ownership over a person. Still, the drafters determined to enumerate slavery even though exploitation is indicia or evidence of exploitation to prove slavery. The sine qua non of slavery is the exercise of powers attaching to the right of ownership over a person. Slavery does not require—although often does include—exploitation.

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

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

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

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

137 Palermo Protocol, supra note 33, at art. 3; Rana M. Jaleel, The Wages of Human Trafficking, 81 BROOK. L. REV. 563, 574 (2016); U.N. OFF. ON DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES DE LA CONFÉDÉRATION DE LA LOI D’ÉPURATION DES NATIONS UNIES CONTRE LE TRAFIC ANGLAIS ET DU DES MÉNAGES ORGANISÉS CRIME ET LA PROTOCOLS D’ÉTHERES, at 344, n. 26, 29, U.N. Sales No. E.06.V.5 (2006) (“Exploitation’ shall mean reduction to servitude, subjectation to prostitution, slavery, forced labour or child pornography . . . most delegations favoured including the reference to ‘servitude.’ Those opposed to the inclusion cited a lack of clarity as to the meaning of the term and duplication with the reference to ‘slavery or practices similar to slavery.’ It was also noted that, if the word “servitude” was to be deleted from this subparagraph.”).

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

139 Proposals to add “involuntary” before “servitude” during the drafting of both the 1956 Supplementary Slavery Convention, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957), and the ICCPR, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999
never consent to be enslaved as personal freedom is inalienable. As will be explained in Part III infra, the trafficking elements permit the possibility of consent as a defense to the means element of human trafficking of adults.

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

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

C. Legal Distinctions

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

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

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

141 See supra note 33, at art. 3(a) for the definition of human trafficking under the Palermo Protocol. Exploitation includes, but is not limited to, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. U.N. Gen. Assembly, Revised Draft Protocol to Prevent, Suppress and Punish
not require exploitation for acts to constitute slavery. Instead, the definition of slavery turns on the exercise of powers attaching to the rights of ownership over a person.\textsuperscript{142} In contrast, the slave trade requires neither ownership nor exploitation; rather, the slave trade turns on intent to reduce someone into, or maintain someone in, slavery, or to dispose of a person enslaved.\textsuperscript{143} Thus, the purpose of prohibiting human trafficking is to criminalize the transfer of individuals into any form of exploitation and to prevent individuals from falling victim to various exploitative practices. The purpose of the slavery prohibition is to prevent the exercise of powers attaching to the rights of ownership over persons. Finally, the purpose of the slave trade is to eradicate the reduction of human beings into slavery and the transfer of slaves from slaveholder to slaveholder.\textsuperscript{144} The slave trade also prohibits the ways in which persons are reduced to slavery or transported as slaves.\textsuperscript{145}

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

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

\begin{thebibliography}{99}
\item 1926 Slavery Convention, supra note 1, at art. I(1).
\item Id. at art. I(2).
\item Id.
\item Palermo Protocol, supra note 33, at art. 3(a).
\item Sellers & Kestenbaum, supra note 20.
\end{thebibliography}
him, or to trade or transport slaves.\textsuperscript{149} The slave trade, however, does not require any subsequent exploitation or even slavery as an outcome; the intent to reduce or maintain someone in slavery or to dispose of a person either enslaved or intended to be enslaved is enough to prove the crime.\textsuperscript{150}

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

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

ii. Coercion and Consent

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

\begin{footnotesize}
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\item \textsuperscript{149} 1926 Slavery Convention, \textit{supra} note 1, at art. I(2); 1956 Supplementary Slavery Convention, \textit{supra} note 4.
\item \textsuperscript{150} 1926 Slavery Convention, \textit{supra} note 1, at art. I(2); \textit{see} Sellers \& Kestenbaum, \textit{supra} note 5, at 534.
\item \textsuperscript{151} \textit{See} Sellers \& Kestenbaum, \textit{supra} note 5, at 534; Sellers \& Kestenbaum, \textit{supra} note 49.
\item \textsuperscript{152} \textit{See} Sellers \& Kestenbaum, \textit{supra} note 5 (discussing the international crimes of slavery and the slave trade in international criminal and humanitarian law frameworks). Children born into slavery, for example, would not be enslaved as a direct result of an act of the slave trade. \textit{Id.}
\item \textsuperscript{153} Sellers \& Kestenbaum, \textit{supra} note 5, at 534; Sellers \& Kestenbaum, \textit{supra} note 49.
\item \textsuperscript{154} \textit{SKRIVANKOVA, supra} note 36.
\item \textsuperscript{155} Chuang, \textit{supra} note 31, at 1709.
\item \textsuperscript{156} \textit{ALLAIN, supra} note 4.
\end{itemize}
\end{footnotesize}
maltreatment.\textsuperscript{157} Trafficking’s inclusion of the element of \textit{means} is meant to demonstrate the adult victim’s lack of consent.\textsuperscript{158} To prove this element, it must be shown that the perpetrator acted with “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”\textsuperscript{159} Defendants to a trafficking charge can challenge the proof of this element and claim a defense of consent with regard to the adult trafficking victim.\textsuperscript{160}

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

\textsuperscript{157} See Palermo Protocol, supra note 33, at art. 3(a); see also U.N. OFF. ON DRUGS & CRIME, TRAVAUX PRÉPARATOIRES DE LA CONVENTION CONTRE LE TRAVESTISSEMENT DE LA TRAFIC DE PERSONNES DEPAUVILLÉES 235, U.N. Sales No. E.06.V.5 (2006) (explaining the legislative history surrounding the language and elements of the Palermo Protocol).

\textsuperscript{158} See Siller, supra note 34, at 417.


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


\textsuperscript{162} See Slavery Convention; see Prosecutor v. Kunarac, Kovač & Vuković, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment, ¶ 540–43 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002). The Court defines the crime of enslavement as including only the elements of \textit{mens rea} and \textit{actus reus}. Id. The Court describes factors or methods of control “to be taken into consideration in determining whether enslavement was committed.” Id.
Another closely related difference among these prohibitions is that human trafficking permits an alleged perpetrator to use consent (dependent upon the victim’s age) to negate the prosecutor’s evidence of coercive means. Only when “any of the means set forth in [Article 3][a] have been used”\(^{163}\) does the Palermo Protocol disallow consent as a defense to trafficking.\(^{164}\) The alleged trafficker may raise a consent defense to negate the essential *prima facie* element of coercive means by arguing that the victim was informed and agreed to being trafficked.\(^{165}\) In fact, according to the UNODC, in most trafficking cases, the defendants raise the issue of consent, which often is rebutted by the evidence of severe exploitation.\(^{166}\) Thus, while the Special Rapporteur on trafficking in persons has stated that “no person willingly consents to the suffering and exploitation that trafficking of persons entails,”\(^{167}\) an ability to raise a consent defense exists and is historically permissible evidence to negate means under law.\(^{168}\)

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

> ... consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power;

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\(^{163}\) Palermo Protocol, *supra* note 33, at art. 3(b).


\(^{166}\) U. N. Off. on Drugs and Crime, *Evidential Issues in Trafficking in Persons Cases: Case Digest 141–72* (2017) (identifying various cases within the Human Trafficking Case Law Database that found the issue of consent to be relevant to convicting a perpetrator of human trafficking).

\(^{167}\) Huda, *supra* note 164, at ¶ 6.

\(^{168}\) The United Nations Office on Drugs and Crime has indicated that “[c]onsent of the victim can be a defence in domestic law, but as soon as any of the improper means of trafficking are established, consent becomes irrelevant and consent-based defences cannot be raised.” See U. N. Off. on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* 6–7 (2008), https://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf.
the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.\textsuperscript{169}

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

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

iii. Status in International Law

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

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


\textsuperscript{171} Siller, supra note 34, at 417.

\textsuperscript{172} ALLAIN, supra note 4, at 110. This term was originally coined by James Crawford. James Crawford, Multilateral Rights and Obligations in International Law, in COLLECTED COURSES OF THE HAGUE ACADEMY 452 (2007).
First, slavery and the slave trade are \textit{jus cogens} norms,\textsuperscript{173} and, as such, are \textit{erga omnes} obligations.\textsuperscript{174} Norms that attain \textit{jus cogens} status are peremptory norms in international law—similar to the concept of strict liability in domestic law—meaning that no justification exists to avoid state responsibility for a breach of prohibitions of slavery or the slave trade.\textsuperscript{175} As \textit{jus cogens} norms, slavery and the slave trade require attendant \textit{erga omnes} obligations of states, which means “owed by everyone to all”; thus, if breached, any state may claim injury and thus invoke state responsibility for violations of slavery and slave trade prohibitions.\textsuperscript{176} The human trafficking prohibition does not enjoy \textit{jus cogens} status, nor do states have \textit{erga omnes} obligations to remedy violations of human trafficking.

In addition to their peremptory status, slavery and the slave trade are core international crimes,\textsuperscript{177} prohibitions and crimes under customary


\textsuperscript{177} Rastan, supra note 24, at 123.
international law, and humanitarian law prohibitions. Under the Rome Statute of the International Criminal Court (ICC), “enslavement”—defined as slavery, and including acts of the slave trade as constituting evidence of exercising powers attaching to ownership rights over persons—is a constituent crime of crimes against humanity in international criminal law.

International law does not permit statutes of limitations for international

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180 Rome Statute of the International Criminal Court, supra note 28, at art. 7(2)(c) and accompanying text.
crimes\textsuperscript{181} and \textit{jus cogens} norms;\textsuperscript{182} thus, slavery and the slave trade can be prosecuted at any time. The slave trade crime also enjoys universal jurisdiction, meaning that courts with such powers could try such crimes based on the gravity of the offense, even when no other basis for jurisdiction (\textit{i.e.}, territory, nationality, etc.) exists.\textsuperscript{183}

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

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\textsuperscript{183} RASTAN, supra note 24, at 265; M. Cherif Bassiouni, \textit{The History of Universal Jurisdiction and Its Place in International Law, in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law} 48, 49 (Stephen Macedo ed., 2004).


\textsuperscript{185} Palermo Protocol, supra note 33, at art. 3; \textit{see also} Allain, supra note 184, at 118; Harmen van der Wilt, \textit{Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts}, 13 CHINESE J. INT’L L. 297, 297 (2014) (“While enslavement as a crime against humanity may
States prosecute human trafficking independently on a domestic, “rather than . . . on an international basis.”\textsuperscript{186} As such, “the crime of trafficking is transnational in both commission and effect.”\textsuperscript{187} Scholars find that, “[w]hile enslavement as a crime against humanity may belong to the jurisdictional realm of international criminal tribunals and the International Criminal Court [“ICC”] (provided that domestic jurisdictions have proved to be ‘unwilling’ or ‘unable’), other forms of human trafficking are . . . best left to national courts.”\textsuperscript{188}

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

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

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

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\textsuperscript{188} Van der Wilt, supra note 144, at 297.

\textsuperscript{189} Rome Statute of the International Criminal Court, supra note 28, at art. 9.

\textsuperscript{190} Sellers & Kestenbaum, supra note 5, at 517–42.


\textsuperscript{193} Id.; see Siller, supra note 34, at 415.

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

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

D. Jurisdictional Distinctions

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

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198 Customary international law (CIL) is a source of international law and refers to the international obligations of states arising from general and consistent practice of states (state practice) followed from a general sense of legal obligation (opinio juris). Statute of the International Court of Justice (ICJ), art. 38. See, e.g., MALCOLM N. SHAW Q.C., supra note 46 (providing a treatise on international law, including custom as a source of international law); William S. Dodge, supra note 46 (finding that the article arguing for Congressional action for courts to apply customary international law misinterprets international law).
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and international bodies can enforce the human rights law of slavery and the
slave trade on the one hand, and human trafficking on the other. 199

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

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

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

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

201 Article 8(1) reads: “No one shall be held in slavery; slavery and the slave-trade in all their


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

204 CEDAW art. 17, Dec. 18, 1979, 1249 U.N.T.S. 13; Articles 2 through 4 of the Optional
Protocol to the CEDAW list the Committee’s criteria for considering an individual complaint. Optional
includes men in its definition of human trafficking, the treaty does not establish an international court or treaty monitoring body; instead, the Palermo Protocol provides for transnational cooperation of states and relies on domestic jurisdictions to enforce human trafficking crimes.205

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

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

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

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


205 Palermo Protocol, supra note 33.

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

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

Urmila Bhoola & Kari Panaccione, Slavery Crimes and the Mandate of the United Nations Special Rapporteur on Contemporary Forms of Slavery, 14 J. INT’L CRIM. JUST. 363, 368 (2016). This reasoning is flawed, however, given that the Human Rights Committee (HRC), a treaty monitoring body charged
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trade, she argues, would have hindered more than helped the development of
an international human rights regime.207 This historical renunciation,
however, is critical to an understanding of these prohibitions in international
human rights law.

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

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

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

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

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207 MARTINEZ, supra note 4.

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

[hereinafter UDHR].

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

211 U.N. ESCOR, Comm’n on Hum. Rts., Drafting Comm., Memorandum on Historical

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

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

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

221 Id. at 1695 (U.N. Doc. E/CN.4/SR.53).
stage.222 Otherwise, the United Nations Commission on Human Rights focused primarily on slavery when drafting the UDHR provision.223

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

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

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

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

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223 See SCHABAS, supra note 213, at 1696.
225 Id. at 215.
226 Id. at 217. Cassin considered forced labor, involuntary servitude and the slave trade to be forms of slavery and argued consistently for language that prohibited “slavery in all its forms.” See, e.g., SCHABAS, supra note 213, at 1695.
definitions under international law today. As noted in Part I.A supra, the legal definition of slavery under the 1926 Slavery Convention is broad, encompassing both the status and condition of a person over whom any and all powers attaching to the right of ownership are exercised, thereby including both de jure and de facto situations of slavery.\footnote{229}

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

\begin{quote}
[Although] servitude and slavery were frequently confused, there was a clear distinction in law: slavery implied the destruction of the juridical personality, whereas servitude, in the strict meaning of the word, implied only a state of complete personal dependence.\footnote{231}
\end{quote}

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

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

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\footnote{229} See Part I.A., supra notes 51–102 and accompanying text.


\footnote{231} Id. at ¶ 74.

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

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

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

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

**F. Human Rights Committee**

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

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

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235 *Id.*
237 Slave policy programs and deportation to slave labor, however, were included and prosecuted at Nuremberg (and Tokyo) as crimes against humanity and as war crimes. Possibly, the concentration on non-armed conflict slavery and slave trade (colonial) distorted the drafters’ view which wanted to look away from the (black) slave trade and concentrate on the (white) trafficking legal route.
238 MARTINEZ, supra note 4, at 157.
240 Optional Protocol to the ICCPR. The Human Rights Committee considers the petitions from individuals who have exhausted domestic remedies so long as the same matter is not before another international body.
issued a General Comment on Article 8’s prohibitions of slavery and the slave trade.\textsuperscript{242} In General Comment No. 28, interpreting Article 3 (Equality Rights between Men and Women, 2000), however, the Committee has made explicit reference to Article 8 obligations:

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

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

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


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

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

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

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

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

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

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249 But see STOYANOVA, supra note 214 at, 233–40 (arguing that, through case law, the right to juridical personality has been expanded to include situations of de facto slavery and servitudes, although courts have not ruled on the issue of slavery as yet).
In addition, the right to juridical personality has not been interpreted beyond “access to the legal system in order to have these rights and obligations enforced” under the ICCPR and that “the individual is bearer of rights and duties.” Further, the slave trade does not resemble the destruction of the juridical personality, nor does it include any exercise of the powers attaching to the rights of ownership; thus, the slave trade likely would be overlooked in any claims brought before the HRC under Article 16.

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

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

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


253 Id. at ¶ 2.5.


255 These facts are similar to the Sepur Zarco case from Guatemala in which sexual slavery was charged. Tribunal de Mayor Riesgo [Municipal Court] 2016, Sentencia C-01076-2012-00021, caso Guatemala v. Estelmer Francisco Reyes Girón y Heriberto Valdez Asig (Guat.).
pronounce the state’s violation of human rights under any and all ICCPR provisions. Overlooking slavery and the slave trade violations denies the full expressive functions of international human rights law for the victims-survivors of these harms. Further, addressing factual circumstances accurately under slavery and slave trade violations would assist in revitalizing and implementing these human rights norms for substantive, and possibly structural, transformative change at the domestic level.

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

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

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\(^{259}\) Article 8(3)(c) reads:

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


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

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

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

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


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

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

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

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

267 G.A. Res. 34/180, CEDAW, art. 6 (Dec. 18, 1979).
268 See U.N. Secretary-General, International Instruments and National Standards Relating to the Status of Women: Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Elimination Discrimination Against Women, Annex 1, art. 4, U.N. Doc. E/CN.6/573 (Nov. 6, 1973) (“Each State Party agrees to take all appropriate measures, including legislation, to combat all forms of traffic in women and exploitation of prostitution of women in accordance with international conventions and agreements in this regard.”).
271 Id. at ¶¶ 112–113 (The meeting minutes do not explain the Netherlands’ withdrawal of its proposed amendment, despite Romania and other states sharing these concerns).
forms of traffic in women and exploitation of prostitution of women.”

This language was based on article 8 of the Declaration on the Elimination of Discrimination Against Women and the relevant articles of the 1949 Convention. Thus, the CEDAW does not suppress prostitution as such; rather, it suppresses the exploitation of prostitution.

H. CEDAW Committee

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

i. General Recommendations

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

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

273 Id. at ¶¶ 115–16.

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


to preventing the erasure of the slave trade by the trafficking in persons legal framework, at least rhetorically if not legally.\footnote{This includes: child marriage of girls fleeing humanitarian crises (A/71/303 (2016), para. 34; A/72/164 (2017), para. 20; A/72/164 (2017), paras. 27, 40, CEDAW/C/TUR/COL/7); sexual exploitation in refugee camps, temporary reception centres and informal settlements (A/72/164 (2017), para. 35); recruitment of women forced to sell their babies (A/71/261 (2016), para. 41) or give them up for adoption (CEDAW/C/MHL/CO/1-3); forced begging (A/HRC/34/55/Add. 1 (2016), para. 25); sexual exploitation by peacekeepers (A/71/303 (2016), paras. 43-44); forced recruitment or abduction into military service or by armed forces (A/71/303 (2016), paras. 31-32) or by terrorist groups for purposes of forced marriage, forced pregnancy, sexual slavery, domestic servitude, to serve as combatants including as suicide bombers, for sale or for ransom, and for purposes of being gifted to fighters as a reward to increase the recruitment and retention (A/71/303 (2016), para. 33; A/72/164 (2017), paras. 19, 21, 26; CEDAW/C/NER/CO/3-4). CEDAW, \textit{General recommendation on Trafficking in Women and Girls in the Context of Global Migration}, ¶ 12 n.17, https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx.}

The General Recommendation includes factual circumstances that the drafters characterized as “trends of trafficking in women and girls.”\footnote{CEDAW, \textit{General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration}, ¶ 13, 15, U.N. Doc. CEDAW/C/GC/38 (Nov. 6, 2020); CEDAW, \textit{General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19}, ¶ 16–17, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017).} The drafters enumerated many factual circumstances that also could be characterized as slavery or slave trading crimes and human rights violations. In addition to torture, the CEDAW Committee noted that trafficking harms also may constitute crimes of slavery or the slave trade, the prohibitions of which are peremptory (\textit{jus cogens}) norms in human rights law, and that survivors retain concurrent protection under each of these prohibitions.\footnote{CEDAW, \textit{General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration}, ¶ 14, U.N. Doc. CEDAW/C/GC/38 (Nov. 6, 2020).} Additional clarification may be needed, however, to delineate these various crimes because of their different statuses and definitions under international law. Given that the Rome Statute does not include the slave trade,\footnote{See Sellers & Kestenbaum, supra note 5, at 517–42. The Rome Statute omits the slave trade. \textit{See U.N. G.A., Rome Statute of the International Criminal Court}, U.N. Doc. A/CONF.183/9 (July 17, 1998).} the General Recommendation also could have included customary international
law protections to encourage practitioners to pursue the slave trade in addition to slavery, enslavement, and acts of trafficking as proof of enslavement in international criminal law.\textsuperscript{283}

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

\section*{ii. Communications and Concluding Observations}

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

\begin{table}
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\textbf{283} & Sellers & Kestenbaum, \textit{ supra} note 278. \\
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\textbf{287} & \textit{Id.} Notably, the facts presented indicate that perpetrators may have committed crimes of slavery and the slave trade. These prohibitions, however, are not enumerated in the CEDAW. (“Ms. Zheng stayed with a young man for one night. Then a Chinese woman took her into her house and made her do heavy housework. When, some eight months later, her pregnancy began to show, she was put out on the street.”). \textit{Id.} at ¶ 2.2. The author also claims that she was a victim of “slavery and prostitution.” \textit{Id.} at ¶ 3.4. \\
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\textbf{289} & \textit{See} infra Part III.
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international crime such as trafficking in persons and to have law enforcement officials adequately trained. . .”

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

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

291 Id. at ¶ 8.6.
293 CEDAW, Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Nigeria, ¶¶ 7, 15(c), U.N. Doc. CEDAW/C/NGA/CO/7-8 (July 24, 2017). Notably, the CEDAW also describes a situation of child-slaves born into slavery of mothers who are slaves of Boko Haram.
I. Convention on the Rights of the Child (CRC)

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

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

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

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296 *Id.* at art. 36.


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

\textbf{J. Committee on the Rights of the Child}

\textbf{i. General Recommendations}

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

\textbf{ii. Communications and Concluding Observations}

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


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


freedoms as well as a form of torture. At times, slavery is discussed alongside forced labor and human trafficking, but are not necessarily conflated with one another. When it comes to the slave trade, however, the Committee’s concluding observations discuss “abductions,” “recruitment,” “trafficking,” or “sale” of children for various types of enslavement. The slave trade is not explicitly mentioned.

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

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

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


subsume and obscure the slave trade in international human rights discourse.\textsuperscript{313}

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

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

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


\textsuperscript{316} \textit{Id.} at 313. The Human Rights Commission has since been replaced by the Human Rights Council.


\textsuperscript{318} \textit{Id.} at 2.

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

for the Suppression of Traffic in Persons and the Exploitation of the
Prostitution of Others of 1949. . .”

Thus, although Awad recognized two
separate legal frames—slavery/slave trade and trafficking in persons—his
report may have recommended a convergence or subsuming of the slave trade
by trafficking in persons.

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

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

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

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322 See Gulnara Shahinian (Special Rapporteur on Contemp. Forms of Slavery, including its

323 *Id.* at ¶ 6. The definition of slave trade is not quoted correctly. See definition *supra* note 61.
The mandate also covers practices analogous to slavery from the 1956 Supplementary Slavery
Convention, namely: debt bondage, servitude, servile marriage and sale of children. These practices are
not necessarily “lesser” forms of slavery or exploitation, as scholars often claim. They are different harms
with different legal definitions and may constitute slavery if the slavery definition—“the exercise of any
or all powers attaching to the right of ownership over a person”—also is met. *See, e.g.*, Alexandra Adams,
*Sexual Slavery: Do we Need this Crime in Addition to Enslavement?* 29 CRIM. L. F. 279, 284, 290 (2018).
forced exploitation of their labour.”\textsuperscript{324} This definition deviates from the legal definition in two critical ways—focusing on \textit{exploitation} rather than \textit{ownership} and including circumstances better characterized as trafficking (\textit{i.e.}, “dealing with human beings \textit{leading to exploitation}”) or slave trade if slavery is the end harm—while also conflating slavery with forced labor, a separate human rights prohibition.\textsuperscript{325}

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

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


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

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

\textsuperscript{327} Id. at ¶ 9 (quoting Kevin Bales & Peter T. Robbins, “No One Shall Be Held in Slavery or Servitude”: A Critical Analysis of International Slavery Agreements and Concepts of Slavery, 2(2) HUM. RTS. REV. 18, 52 (2001).

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

\textsuperscript{329} Id. at ¶¶ 17–25.
between trafficking in persons and domestic servitude without mentioning the slave trade,\textsuperscript{330} even though the report also describes slave trade as: “the [domestic slavery] victim and her children are considered to be their master’s property and can be rented out, loaned or given as gifts to others.”\textsuperscript{331} When reporting on “servile marriages,” the Special Rapporteur describes acts of the slave trade—selling wives, inheriting widows, and bride kidnapping—without characterizing them as such.\textsuperscript{332} In her 2019 report, the UNSR outlines emerging slavery trends, including for-profit “orphanages” serving as “gateways into child slavery,” recognizing that children may be trafficked into such situations,\textsuperscript{333} but not slave traded.

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

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

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

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

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

\textsuperscript{330} Id. at ¶ 28.
\textsuperscript{331} Id.
\textsuperscript{332} Id. at ¶¶ 66–71.
\textsuperscript{335} Id. at 367.
serfdom, child marriage, and child trafficking— but did not characterize such sale of children into slavery as the slave trade. This mandate seems most suited to address harms that can be characterized also as the slave trade under international human rights law, at least with regard to the sale of children into slavery. Additionally, the Rapporteur broadened “sale” to include other forms of exchange in which there exists “exploitation of the child, which usually entails the action of another benefiting from the child in violation of his/her[their] rights.” Although the “anti-slavery conventions” are mentioned as part of the international law framework, no explicit mention of slavery or the slave trade was reported to have guided the original mandate’s scope. Further, the Special Rapporteurs who have held this position have not focused on the “sale” or other form of exchange for purposes of ownership as the slave trade; instead, the focus is on the exploitation or abuse as forced labor, trafficking, or slavery.

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


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

338 Muntarbhorn, supra note 336, at ¶ 10.

339 Id. at ¶ 39.


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

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

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

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

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

343 Id.
344 Id. at ¶ 28.
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slave trade." When describing the legal and policy framework of trafficking, the UNSR incorrectly indicates that human trafficking was addressed in the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention. In addition, when describing ISIS crimes—including “sexual slavery”—against Yazidi women and girls, the abductions are characterized as trafficking, but not as slave trading:

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

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

347 Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), Promotion and Protection of all Human Rights., Civ., Pol., Econ., Soc. and Cultural Rts., including the Right to Dev., ¶ 30, U.N. Doc. A/HRC/29/38 (Mar. 31, 2015). The only mention of the word “traffic”—used at that time almost interchangeably with the term “trade”—is in the preamble of the 1926 Slavery Convention when it finds that signatories at the “Brussels Conference of 1889-90 declared that they were equally animated by the firm intention of putting an end to the traffic in African slaves . . . .” 1926 Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 254.
The human rights impact of returns, especially mass returns, cannot be underestimated. For instance, the deportation from Libya of 3,480 young Nigerians, mostly girls and women, following the shocking video on slavery-trade markets, reveals that some victims of human trafficking encounter considerable obstacles when they return home. . . . 350

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

V. CONCLUSION

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

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

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

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

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

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