

Trading in Humans: A New Haven Perspective

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Abstract

Human trafficking is the third largest criminal industry after the drug trade and arms dealing, and it is also one of the fastest growing international crimes. Its victims are exploited in sex trafficking in large urban areas, vacation and tourist spots, near military bases; in labour trafficking fuelled by the demand for unskilled labour, present in seasonal agriculture, tourism, construction, fisheries and domestic servitude. This modern-day slavery is an affront to the dignity of the human being and a violation of core human rights. It is also a crime against the state that undermines labour relations, health, safety and security of every country it touches as a source of victims, place of transit or final destination. Concerted efforts locally and globally are necessary to combat it. Through the lens of the New Haven School of Thought, also known as Policy-Oriented Jurisprudence, this article analyses the problem of trafficking in human beings, presents the decisions made to address it, and develops recommendations to improve solutions.

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I. Introduction

There is no such a thing as trading without limits. In our globalized world, as countries interact commercially inter se and enjoy the advantages of free trade, they also establish policies, enact laws and impose rules to regulate the flow of goods in and out of their borders. They restrict trade for many reasons, mostly to protect their domestic industries and resources. They establish quotas, tariffs, subsidies, licenses, embargoes, standards – all in an effort to exercise some control on reasons of protecting national security, an infant industry or a strategically important branch of the economy.

But, are they doing enough to check the flow of people moving with the intention to serve, but ending up traded across international borders? Are governments protecting the most valuable resource of a nation? How are they performing towards ending the modern-slave trade? Through the lens of the New Haven School of Thought, globally also known as Policy-Oriented Jurisprudence, this article aims at analysing the problem of trafficking in human beings and the process of society's communication in trying to solve this problem of utmost gravity. The methodology employed will help delimit the problem of trafficking in human beings, exemplified in the context of the Asia-Pacific region; it will identify the conflicting claims and lay out past trends in decision, laws and policies established to combat this phenomenon, to be followed by the projection of future trends in this region. The study will conclude with an appraisal of past practices and recommend better approaches to the problem, in order to enhance the prospects for a world public order of human dignity, a slave-free global society.

II. Delimitation of the Problem

Hong Kong and Singapore rose atop the 2010 Asia-Pacific index *Good Governance for International Business*¹ produced by Vriens & Partners,² followed by New Zealand and Australia. Open economies attracting foreign investment seem to be good places for legitimate business activity in these two dynamic cities of a region boasting of diverse emerging economies. However, while

¹ DutchCham Singapore, 'Good Governance for International Business index in Asia Pacific for 2010'; available at: www.dutchcham.sg/good-governance-for-international-business-index-in-asia-pacific-for-2010.

² Vriens & Partners, is a political risk consultancy focused on Asia.

governance, business and investment seem to be satisfying the criteria set out by the index as it regards Rule of Law, Openness to International Trade & Business, Taxation, Corruption, Public Sector Quality & Effectiveness, and Fiscal & Monetary Administration, a whole underground of illegitimate activity stains the fabric of trade and production in the region. For starters, trafficking of women and children across the Asia-Pacific region seems to represent 'the largest slave trade in ... history'.³ Notoriously known as the hub of human trafficking, particularly for sexual exploitation, the region has also been blamed for paying mere lip service to this issue and the lack of systematic research into this phenomenon.⁴

Just last year, in July 2011, the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) held the Asia-Pacific Business Forum in Bangkok under the overarching theme: 'Facing Challenges, Capturing Opportunities'.⁵ The discussion mostly focused on issues related to Asia and the Pacific's potential and capacity to lead global business, to improve business connectivity, to harness business-government partnerships, to secure agricultural sustainability and food security, green economy and energy security, as well as opportunities that arise from free trade agreements.⁶ However, to their credit, in a side event entitled 'Ending Human Trafficking is Smart Business', organized by ESCAP in collaboration with the organization End Human Trafficking Now (EHTN), the meeting focused on sharing experiences and tools used to identify and to prevent human trafficking, as developed by a partnership between Microsoft and the and the UN's Global Initiative to Fight Human Trafficking (UN.GIFT). It is important to note that in its conclusions and recommendations, human trafficking was considered a business problem requiring action on the part of businesses to identify trafficking hidden in the supply chain.⁷ While the idea to add restrictions to business and trade is not

³ Calvin C Cheung, 'Protecting Sex Trafficking Victims: Establishing the Persecution Element', (2007) 14 *Asian Am LJ* 31 quoting Kul Gautum, the Deputy Executive Director of the United Nations Children's Fund: *ibid*, note 13.

⁴ Nicola Piper, 'A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania' (2005) 43 *International Migration* 203.

⁵ See Report of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (Asia-Pacific Business Forum 2011, Bangkok, Thailand, 25-26 July 2011).

⁶ *Ibid*, p 2, para 11.

⁷ *Ibid*, p 7, paras 3, 5. One of the recommendations has to do with encouraging businesses to commit to the Athens Ethical Principles, which are also supported by the Secretary General of the United Nations, in order for them to develop an effective anti-trafficking strategy.

necessarily a popular view,⁸ it is nevertheless a crucial necessity, if governments and businesses indeed intend to be serious about combating and ending human trafficking.

Human trafficking cannot be combated effectively if it is not seen in the larger framework of rebalancing macroeconomic gaps in a globalized world. This socio-economic asymmetry is created mostly through a readily available supply from the developing world⁹ and a constant and even increasing market demand for cheap labour, products and services in industrialized countries.¹⁰ The traffickers, in their highly clandestine *modus operandi*, are filling in the gaps created by the changing of societal priorities, mostly directed towards cross-border trade and investment,¹¹ and the inability of governments and inter-governmental organizations to manage migration properly.¹² The markets and industries demand labour resources and services. The people driven by poverty and uneven distribution of wealth demand a better life and rush to wherever their skilled or unskilled labour is needed. Because of the development of technology and communications, people tend to dream big and in the process of planning to realize their dreams, their defences are weakened as they are more and more predisposed to overlook the potential risks,¹³ and fall victim to fraudulent promises of lucrative jobs. They ultimately end up bought and sold into de facto enslavement.

⁸ ESCAP and End Trafficking Now presented a proposal that dealt with the potentiality of a specific certification on business free of trafficking, but this proposal immediately cautioned against 'excess of certification' that could turn into an obstacle for business and trade: *ibid*, p 8, paras 6, 7.

⁹ Louise Shelley, *Human Trafficking: A Global Perspective* (Cambridge, 2010), pp 92-93; Ko-lin Chin, *Smuggled Chinese: Clandestine Immigration to the United States* (Temple University Press, 1999).

¹⁰ Mike Kaye, 'The Migration-Trafficking Nexus: Combating Trafficking Through the Protection of Migrants' Human Rights' (The Asia Pacific Forum of National Human Rights Institutions, New Delhi, India, 11-12 November 2002), at p 13. See also Luz Estella Nagle, 'Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude' (2008) 26 *Wis Int'l LJ* 131.

¹¹ See Bimal Ghosh, *Managing Migration: Time for a New International Regime?* (OUP, 2003); Philip L Martin *et al*, *Managing Migration: The Promise of Cooperation* (Lexington Books, 2006).

¹² Great Britain Parliament Joint Committee on Human Rights *The Trade in Human Beings: Human Trafficking in the UK*, Sixth Report of Session 2008-09: Oral and Written Evidence (2009), p 211.

¹³ Stefano Volpicelli, *Understanding and Counteracting Trafficking in Persons: The Acts of the Seminar for Women Religious* (IOM, December 2004), p 8.

Human trafficking is a hallmark activity of the dark underside of international commerce. It is estimated to generate US\$31-\$32 billion of profits annually for organized crime syndicates around the world. Such proceeds mark it as the most profitable illicit trade globally and as a fountain for the growth of organized crime. Indeed, it is a fast-growing black market industry throughout the planet: no country is immune from this criminal enterprise. It affects communities across the board, on a micro- and macro-level, be they countries of origin, transit or destination.

People are falling into modern-day slavery in galloping numbers. It is estimated that up to 27 million people in the world today are under a form of human trafficking.¹⁴ The ILO had estimated that about 12.3 million people are exploited in forced labour, bonded labour, forced child labour, or sexual servitude.¹⁵ In 2006, the United States records indicated that about 800,000 people were trafficked across international borders yearly, 80% of which are women and 50% of the latter are minors.¹⁶ Human trafficking challenges the rule of law through perpetuating the culture of corruption¹⁷ and aggravating the status of safety, security and preservation of law of every nation involved.¹⁸ Feminization of poverty and migration, civil and political conflicts and strife, natural disasters, globalization generally and ease of global communications – are all factors that interact to create an unlimited supply of people ready to be trafficked. On the other side, a growing demand for prostitution, adult-entertainment, mail-order brides, cheap labour, human organs and tissue, as well as stringent immigration policies, tougher border control, topped with the unfortunate decrease in morality and faith, and the increase in greed – all create fertile ground for a black market necessity. Based on the above definition of the problem, the consequence is clearly a ruptured public order.

¹⁴ Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press, 2000), p 8.

¹⁵ US Department of State, *Trafficking in Persons Report* (10th edn, June 2010); and International Labour Organization, *ILO Action against Trafficking in Human Beings* (2008), p 2.

¹⁶ See US Department of State (note 15 above), p 6.

¹⁷ See Sheldon X Zhang and Samuel L Pineda, 'Corruption as a Causal Factor in Human Trafficking' in Diana Siegel and Hans Nelen (eds) *Organized Crime: Culture, Markets and Policies* (Springer, 2008), pp 45-46; Malinvisa Sakdiyakorn and Sutthana Vichitrananda, 'Corruption, Human Trafficking and Human Rights: The Case of Forced Labor and Sexual Exploitation in Thailand' (2010) 3 *NACCJ* 54.

¹⁸ United Nations Office on Drugs and Crime, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (2008), pp 81-101.

So, what next? The New Haven School leads us to analyse the response to the problem in the past and in the future, with the ultimate goal of ‘protection, restoration and improvement of public order’.¹⁹ Michael Reisman delineated several specific sanctioning goals that could help restore and improve public order, namely: *preventing* imminent discrete public order violations; *suspending* current public order violations; *detering*, in general, potential future public order violations; *restoring* public order after it has been violated; *correcting* the behaviour that generates public order violations; *rehabilitating* victims who have suffered the brunt of public order violations; *reconstructing* in a larger social sense to remove conditions that appear likely to generate public order violations. All of these sanctioning goals are practically applicable at different stages of addressing the societal problem of human trafficking. The following sections of this article will address some of these goals. But before we do that, it is necessary to identify what, at present, does the community say it wants. Who claims what? The next pages focus on answering these questions by identifying claims, claimants, their identifications, perspectives, and bases of power.

III. Conflicting Claims, Claimants, Identifications, Perspectives, Bases of Power

Having defined above the societal global problem of human trafficking, it is prudent to analyse the claims raised within the community, as their conflict constitutes the problem the law has to address. In a general sense, all individuals and groups aim at maximizing their access to the processes that shape and share all things human beings value, ie power, wealth, affection, well-being, enlightenment, skills, rectitude and respect. In the expansive scheme of trafficking in human beings, there are numerous claimants with their respective claims, perspectives and bases of power, such as perpetrators, victims and their families, vulnerable communities and society at large, including the private sector and civil society. They all have values at stake, and certain roles to play in the trafficking chain of exploitation either by exploiting or being exploited. For the purposes of this paper, only two categories of claimants will be discussed: the perpetrators and the victims.

¹⁹ W Michael Reisman, ‘Legal Responses to Genocide and Other Massive Violations of Human Rights’ (1996) 59 *L & Contemp Probs* 75.

A. The perpetrators of human trafficking

For the perpetrators of the public order, the values at stake for violation through trafficking in humans, and in their view up for grabs, are mainly power and wealth. There are, however, several kinds and layers of perpetrators, who could be reaching out even beyond power and wealth. They are men and women from all walks of life. Let us examine the dynamics of several layers of violators.

1. Organized criminal groups engaged in cross-border trafficking of persons

Historically, when the opportunity has presented itself, criminal groups aiming to expand their wealth and also their power have engaged in illicit profit-making interconnecting schemes of criminal acts across, at times, several international borders.²⁰ Transnational crime is not a new phenomenon; however, it has been perceived to have spread exponentially because of more freedom in the movement of people, goods and services with the development of globalization during the last few years.²¹ Human trafficking is no different. It most often involves cross-border circulation of criminals and their 'merchandise' – human trafficking victims, as well as circulation of proceeds from this criminal activity.²² In what is considered to be a conservative calculation, the annual profits from transnational organized crime are estimated to be between US\$500 to US\$1500 billion,²³ whereas the proceeds from trafficking in human beings range from Interpol's 2001 estimate of US\$19 billion²⁴ to a business group's finding of over US\$31 billion a year.²⁵ Transnational organized crime, including human

²⁰ See, for instance, the involvement of Russian organized crime and the Mexican cartels in the commercial sex trade of young girls in Florida. Cf Michael Williams, 'Human Trafficking is Happening in Palm Beach County' (*News Channel 5*, 29 February 2012); available at: http://www.wptv.com/dpp/news/local_news/special_reports/human-trafficking-is-happening-in-palm-beach-county.

²¹ Peng Wang and Jingyi Wang, 'Transnational Crime: Its Containment Through International Cooperation' (2009) 5(11) *Asian Social Science* 25.

²² Council of the European Union, Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings, 6865/10, GS/ACA/tt, Brussels (25 February 2010).

²³ Wang and Wang (note 22 above).

²⁴ Nico A Gemmill, 'Human Trafficking. The Effects of Modern-day Slavery on the Global Economy'; available at: <http://www8.georgetown.edu/centers/cndls/applications/posterTool/index.cfm?fuseaction=poster.display&posterID=1752>.

²⁵ SMWIPM, 'The Business Community against Human Trafficking'; available at: http://www.endhumantraffickingnow.com/?page_id=113.

trafficking, weapons and drug trade, continues to pose a great threat to the territories and population of many countries, and has been described as the dark side of globalization. It is one of the most serious security problems in our contemporary world, globally recognized as one of the six kinds of national and international security threats by the United Nations in 2004.²⁶ The amount of wealth involved, as highlighted in the figures listed above, as well as the enormous influence it could generate underlines the gravity of the threat.

It is understandable that human traffickers harbour the same economic and political motivations as other transnational criminal organizations and they resort to the same methods of coercion and deception of their victims, as well as corruption of government officials and other sectors of the society.²⁷ They are amongst the most important mechanisms to unlawfully redistribute national wealth, to unduly influence markets, political power and societal relations in any community. The Convention Against Transnational Organized Crime defines an organized criminal group as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses...in order to obtain, directly or indirectly, a financial or other material benefit'.²⁸ It should come as no news that organized crime is attracted to human trafficking because of its high profits and its historically low risk of detection,²⁹ as evidenced in the fact that slavery and practices akin to it never really disappeared.

To organized trafficking crime syndicates, individuals are nothing more than 'a good commodity, not easily perishable, transportable over long distances, and able to be re-used and re-sold'.³⁰ By the very nature of the 'commodity' this business ensures long-term exploitation of individuals, and it results

²⁶ Those threats are: (1) economic and social threats, including poverty, infectious disease and environmental degradation; (2) inter-State conflict; (3) internal conflict, including civil war, genocide and other large-scale atrocities; (4) nuclear, radiological, chemical and biological weapons; (5) terrorism; and (6) transnational organized crime: *ibid.*

²⁷ Shelley (note 9 above), pp 83, 112.

²⁸ United Nations Convention Against Transnational Organized Crime, Art 2

²⁹ Louise Shelley, 'Trafficking in Women: The Business Model Approach' (2003) 10 *Brown J World Aff* 119 121.

³⁰ Raimo Vayrynen, *Illegal Immigration, Human Trafficking, and Organized Crime* (United Nations University Discussion Paper No 2003/72, 2003), p 3; available at: http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en_GB/dp2003-072/.

in continuous income for the traffickers. There is stability and regularity of income through human trafficking and this provides a good basis for criminal organizations to expand their activities, but also to broaden the reach of their organization.³¹ Exerting power through money is no news either as will be shown below in the section on corruption.

2. Single-person enterprise of traffickers

This is a category present in every country, where trafficking flourishes within the borders of a sovereign nation.³² Research has shown that individuals, working single-handedly, have been able to recruit, transport and exploit their victims³³ and have managed to access profits, increase their well-being and even accumulate wealth.³⁴ In their quest for dominance, they have abused their position of power in multiple types of relationships: parent-child,³⁵ husband-wife,³⁶ caretaker-person-to-be-cared,³⁷ or boyfriend-girlfriend,³⁸ to mention but

³¹ United Nations Office on Drugs and Crime (UNODC), 'An Introduction to Human Trafficking: Vulnerability, Impact, and Action' (UN, 2008), p 96; available at: http://www.ungift.org/doc/knowledgehub/resource-centre/GIFT_Intro_to_Human_Trafficking_background_paper_2008.pdf.

³² Human Smuggling and Trafficking Center, *Domestic Human Trafficking – An Internal Issue* (December 2008); available at: www.state.gov/documents/organization/113612.pdf.

³³ See Elaine Silvestrini, 'Man Pleads Guilty To Sex Trafficking Of Minors' (*Tampa Bay Online*, 29 February 2012); available at: <http://www2.tbo.com/news/breaking-news/2012/feb/29/man-pleads-guilty-to-sex-trafficking-of-minors-ar-364098/>.

³⁴ Jayashri Srikantiah, 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87 *BU L Rev* 157, 164 (explaining how domestic workers and especially trafficked domestic workers do a large amount of work with little or no pay).

³⁵ US Department of State, *Trafficking in Persons Report* (June 2009), p 7; Albertine de Lange, 'Trafficking for Labor Exploitation in West and Central Africa' in Hugh D Hindman (ed) *The World of Child Labor: An Historical and Regional Survey* (ME Sharpe, 2009), p 196; Amanda Kloer, *The Role of Parents in Child Trafficking* (change.org, 2009).

³⁶ Women News, 'Human Trafficking – 24 Year Old Husband Attempts to Sell Wife into Prostitution in India' (19 October 2011); available at: women-news.org/2011/10/19/262/.

³⁷ Jennifer S Abrams, "'The Kids Aren't Alright": Using a Comprehensive Anti-Trafficking Program to Combat the Restavek System in Haiti' (2010) 24 *Temp Int'l & Comp LJ* 443.

³⁸ The most typical situation that falls under this category is where trafficking recruiters date women and girls for a while to earn their trust or establish control over them before they turn them to the initially intended purpose, see *United States v Jerome E Todd* 584 F 3d 788 (2009); *United States v Jimenez-Calderon et al* 183 Fed Appx 274 (2006).

a few such interpersonal constellations. In the process, they have also aimed at gaining or imposing affection – a value that humans usually desire most intensely.³⁹

3. Businesses

In their boundless quest for maximizing profits and drastically reducing costs,⁴⁰ a good number of businesses frown at no means that would help them reach their end. Used to power and wealth and the respect that flows from them, they make good use of, and abuse, what the market has to offer, including human beings.⁴¹ Driven by socially accepted consumerism,⁴² they often make no difference as to what they trade, buy or sell.

4. Clients of commercial sex and sex tourists

In a perverse pursuit of instant well-being, the ugly reality of ‘cash for sex with unwilling girls or young women at brothels’⁴³ is pervasive in virtually every part

³⁹ According to policy-oriented jurisprudence, human values as empirical human aspirations are classified as wealth, well-being, enlightenment, respect, rectitude, affection and power. The most comprehensive statement elaboration on this concept of values can be found in Harold D Lasswell and Myres S McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (Martinus Nijhoff Publishers, 1992), pp 336-38. For a brief explanation, see Siegfried Wiessner and Andrew R Willard, ‘Policy-Oriented Jurisprudence’ (2001) 44 *German YB Int’l L* 96, 107-08.

⁴⁰ See, generally, Karen Ho, *Liquidated: An Ethnography of Wall Street* (Duke University Press, 2009), pp 36, 122-29; William Lazonick and Mary O’Sullivan, ‘Maximizing Shareholder Value: A New Ideology for Corporate Governance’ (2000) 29 *Economy & Society* 13; Herbert Gintis and Rakesh Khurana, ‘Corporate Honesty and Business Education: A Behavioral Model’ in Paul J Zak, *Moral Markets: The Critical Role of Values in the Economy* (Princeton University Press, 2008), p 300.

⁴¹ *United States v Kil Soo Lee* 159 F Supp 2d 1241 (D Haw 2001); Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* ((University of California Press, 2009), pp xvii, 62-65, Ch 6. In the Asian context, see Simon Parry, ‘Nail Bar Blues’ (*South China Morning Post*, 26 September 2012), describing the harsh reality of Vietnamese migrants and bonded laborers – victims of human trafficking – exploited in nail salon businesses throughout Europe and North America.

⁴² Benjamin R Barber, *Consumed: How Markets Corrupt Children, Infantilize Adults, and Swallow Citizens Whole* (WW Norton & Co, 2007); Peter N Stearns, *Consumerism in World History: The Global Transformation of Desire* (Routledge, 2001).

⁴³ See Michael Williams, ‘Human Trafficking is Happening in Palm Beach County’ (*News Channel 5*, 29 February 2012); available at http://www.wptv.com/dpp/news/local_news/special_reports/human-trafficking-is-happening-in-palm-beach-county.

of the world, irrespective of the status of the laws regulating or criminalizing prostitution. In addition to the realistic claim of instant sexual gratification, the clients and sex tourists also often claim, quite incredibly, that they are doing a favour to the women or children involved:⁴⁴ this way, they argue, the victims are having access to food, clothes and shelter, which they would, in their view, otherwise not be able to secure.

5. Corrupt government officials at all levels

Blinded with power, government officials at all levels have been nurturing their untamed self-indulgence for money and wealth in the easiest way possible: through corruption. The high level of corruption generated and maintained by organized trafficking crime groups or individuals engaging in this trade is characteristic of many countries. Since transnational trafficking of human beings involves crossing of national borders, efforts by the states for stricter immigration and border control has increased the criminal organizations scope of bribing public officials. In many countries there is a prevalent culture of corruption and this makes it easier for traffickers. In fact, no culture seems to be totally immune to it. One such example is an American diplomat in India who was sought out by an organized trafficking group, put in a compromising position and then blackmailed. Playing the card of his vulnerabilities, the group demanded, successfully, that he provide visas which resulted in large sums of money to the organization as a result of their ability to move victims to the United States. A United Kingdom diplomat was found in the same position in Albania. In addition to embassy officials, traffickers also target border patrol officials, law enforcement, lawyers and travel agencies to acquire fraudulent visas and passports, residence permits, and access through airports and other border crossings that would otherwise be denied.

B. Victims

The paradigm of the modern-day slavery is the holding of a person in exploitation, such as sexual exploitation, a traumatizing experience of constant and abiding humiliation. Cut off from contact with the outside world, prostitutes are but objects in the hands of their masters. Similar situations

⁴⁴ See Richard J Estes and Neil Alan Weiner, *The Commercial Sexual Exploitation of Children in the US, Canada and Mexico* (University of Pennsylvania, School of Social Work, 2001); available at: http://www.sp2.upenn.edu/restes/CSEC_Files/Exec_Sum_020220.pdf; US Department of Justice, *Commercial Sexual Exploitation of Children: What Do We Know and What Do We Do About It?* National Institute of Justice Special Report (December 2007); available at: <https://www.ncjrs.gov/pdffiles1/nij/215733.pdf>.

of abiding servitude are observed in the labour sector, particularly in the agricultural field, manufacturing, food service industries, mining, in situations of domestic help abuse, in what is called the adult entertainment industry, and even in the provision of spouses across borders, facilitated by the business of offering mail-order brides. Victims are of all genders and of diverse ages: men, women, and children.⁴⁵ Some groups are targeted specifically for their particular vulnerability, such as migrant workers, illegal migrants, internally displaced persons, refugees etc. Victims of human trafficking are the *raison d'être* of any effort made to end trafficking. Their aspirations, and claims to everything that humans value, warrant a more detailed analysis.

No matter of what gender or age, these victims all have claims to the value of *well-being*, their human right to life, liberty and security, including social security. They have a right to rest and leisure and the right to be free from torture, cruel or inhuman treatment or punishment. In a trafficking situation the victims are virtually deprived of any of these rights.

In their claim to *affection*, victims aspire for true love and friendliness. They have a right to marry and to found a family, and they should not be forced into marriage or deprived of it. They want to engage in congenial association with their peers, also peacefully assemble and associate. Most trafficking victims in domestic servitude are kept in solitude, away from their peers, completely deprived of support systems of any kind.

Respect is another value at stake in the case of trafficking victims. The first article of the Universal Declaration of Human Rights affirms that 'all human beings are born free and equal in dignity and right'. Trafficking victims are neither free nor treated with dignity. Living in de facto slavery or servitude, their honour and reputation are constantly under attack, many times they lose the respect of even their closest family and friends.

Being on the supply side of the trafficking scheme, abused because of their position of vulnerability, they virtually have no *power*, though it is but natural that they aspire for recognition everywhere as a person, also before the law. They should be entitled to an effective remedy for years of hardship and exploitation, awarded by competent tribunals.

There is nothing wrong with the aspiration to accumulate *wealth*: most people, no matter where they come from, look at wealth as a desired value. Victims of trafficking are no different: they aim at earning and owning material goods and property as well. In their quest for a better standard of living that

⁴⁵ US Department of Health and Human Services, 'Fact Sheet: Human Trafficking'; available at: www.acf.hhs.gov/trafficking/about/fact_human.html.

would be adequate for their individual well-being and the well-being of their family, they fall prey to fraudulent promises of wealth, sometimes to be acquired beyond the borders of their respective countries. They end up in exploitative schemes and circumstances.

A large number of trafficking victims fall prey to false promises about access to education, *enlightenment* and *skills*. In the trafficking paradigm, the process most of the time starts with the victim being recruited to work in some kind of job that seems to be freely chosen, or is transported into a country with the idea to be schooled, or employed, in a job that needs her talents or looks. As the victims struggle against unemployment, they believe that they can do better elsewhere, particularly as they are explicitly told so by traffickers, who most of the time are people they know, or someone a trusted person introduces them to.

Victims, their families and injured communities aspire to values that the law itself, namely human rights law, nationally and internationally, has recognized as rights of human beings. There is no scenario of exploitation that could more drastically and gravely affect all of the individual rights of human beings, than trafficking in human beings. Viewed from the perspective of the victim, the several rights at issue here would be the right to safety; the right to privacy; the right to information; the right to legal representation; the right to be heard in court; the right to compensation for damages; the right to medical assistance; the right to social assistance; the right to seek residence; and the right to return to their country of origin.⁴⁶ It is these rights that the trafficking victims now claim to have been violated. They hope to use whatever power base they might have to secure a response by the law that would restore their rights.

IV. Past Trends in Decision and Their Conditioning Factors

In light of the claims delineated above, this section explores the trends of decision relating to our problem and the factors that conditioned such decisions. The New Haven School conceives of law not reductively as a body of commands of the sovereign but as a process of authoritative and controlling decisions over time – decisions that are subject to critical appraisal and change. A legal decision is a message with *policy content* ('You shall do this ...' or 'refrain from doing that

⁴⁶ St Thomas University School of Law, 'The Miami Declaration of Principles on Human Trafficking' (2006) 1 *Intercultural Hum Rts L Rev* 12, 13, para 4.

...’) emanating from a person or persons with *authority* in a given community (ie persons who the community expects to make legally binding decisions, such as legislators, judges, policemen) and showing *control intent* (ie backed up by the threat of severe deprivations in the case of non-compliance and/or high indulgences in the case of compliance).⁴⁷

What are these trends then in the context of human trafficking? Who is making the decisions? Is there enough of a showing of control intent? We answer these questions by looking at the law in a certain community, namely in an international and regional context, as well as in a domestic jurisdiction.

A. Decisions by and for the International Community

1. Human trafficking as modern-day slavery

i. The 1926 Slavery Convention

Trafficking in human beings has been an issue frequently revisited by international bodies and domestic decision makers. It has been properly designated as ‘modern-day slavery’, and it has drawn the attention of states since the beginning of the 20th century. The first response came in 1904 with the ‘White Slave Traffic’ Convention. At that time we see the emergence of the concept of ‘traffic’ as it refers to the white slave. A proliferation of the trafficking of women throughout Europe caused alarm amongst the kings and queens and other ruling elites of the countries affected to come together and try to stop the enslavement of white women (though women and children were being sold and bought into the sex slave trade from all races, not just the white one). It was well accepted that the abolition of slavery worldwide had actually put an end to the consideration of a human being as a *de jure* form of property, a commodity to be bought and sold or inherited. However, it was clearly perceived that slavery-like practices were rampant throughout the globe, while a new wave of exploitation had made its way, entirely regardless of the colour of the skin – now white women were falling prey to commercial sexual exploitation in other countries, even beyond Europe.

At that time, the international decision making process focused on a two-pronged approach to combating slavery-like practices and forced labour. It acted through the League of Nations and pertinent several conventions, as well as through specialized agencies such as the International Labour Organization

⁴⁷ For details, see W Michael Reisman, ‘International Lawmaking: A Process of Communication’ (1981) 75 *Proceedings of The American Society of International Law* 101, 108-11); Siegfried Wiessner, ‘The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law’ (2010) 18 *Asia Pacific L Rev* 45, 47.

(ILO). Overwhelmingly, human trafficking possesses functionally large-scale similarities with the old, institutionalized phenomenon of chattel slavery.⁴⁸ Hence, it adequately required concerted efforts by the community of nations to confront the abiding phenomenon of most outrageous aspects of slavery, that were not necessarily institutionalized as chattel slavery, nor were they necessarily legally permanent or even legally sanctioned, as the hereditary system of slavery was.

By 1926, international decision makers aimed at outlawing forced labour in conditions analogous to slavery. They did this through the Slavery Convention of 1926,⁴⁹ which is primarily concerned with forced labour. In art 1, the Slavery Convention redefines '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'.⁵⁰ While chattel slavery was already condemned and outlawed virtually throughout the entire world,⁵¹ practices similar to slavery were becoming prevalent. Hence the international community recognized slavery in a redefined formulation where the exercise of '*any*' not only '*all*' powers attached to the right of ownership sufficed for the purposes of the definition of slavery. Except for the fact that modern slaves retain their legal personality, they are *de facto* enslaved: the subsequent exploitation of trafficked persons effectively amounts to slavery. This redefinition helped characterize the crime of enslavement, broadly defined, as an international crime, as it will be discussed below.

ii. Enslavement in international criminal law

In its traditional sense, slavery, as an institution where human beings were legally owned by other human beings, is part of the exclusive circle of offensive acts that was prohibited under all circumstances – a charter member of the club of *jus cogens* norms.⁵² As a crime against humanity, it was also part of the

⁴⁸ See, generally, Fara Gold, Note, 'Redefining the Slave Trade: The Current Trends in the International Trafficking of Women' (2003) 11 *U Miami Int'l & Comp L Rev* 99, 118.

⁴⁹ Slavery Convention pmbl, art 5, 25 September 1926, TS 778, 60 LNTS 253 amended by Slavery Convention Protocol, opened for signature, 7 December 1953, 7 UST 479. Its forerunner was the General Act of the Brussels Conference of 1889-90, which declared that its signatories were mindful of and firmly intent on putting an end to the traffic in African slaves: *ibid*, pmbl.

⁵⁰ *Ibid*, art 1.

⁵¹ Roza Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground' in '*Rantsev v Cyprus & Russia*' (2011) 29 *B U J Int'l L* 9, 100.

⁵² Cf Wetzler *et al*, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (Metzner, 1978), arts 53, 60.

Nuremberg Charter,⁵³ the Tokyo Charter,⁵⁴ and the Statutes of the ICTY⁵⁵ and ICTR.⁵⁶ However, it was not defined in any of these documents. Human rights conventions also prohibited 'slavery' on a universal or regional level, but they did not define the concept elementally. Various cases in the context of World War II could be read as including forced or compulsory labour under enslavement as a crime against humanity.⁵⁷ A significant development came with the Rome Statute establishing the International Criminal Court, (ICC), and later in the case law dealing with the atrocities committed in the former Yugoslavia.

The 1998 Rome Statute included 'enslavement' as a crime against humanity in art 7(1)(c).⁵⁸ It also defined 'enslavement' as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.⁵⁹ This definition not only resembles the 1926 definition of slavery in the Slavery Convention, but it also brings in a similitude of human trafficking to enslavement. The decision makers were keeping abreast with the changes in environmental and social factors, as enumerated above in the delimitation of the problem – factors that had created fertile grounds for the uncontrolled movement of people and their subsequent exploitation. The increase in demand for cheap labour and promiscuous entertainment coupled with the simultaneously readily available supply of people mired in poverty and want, war and civil unrest, significantly conditioned the decisions of the authoritative actors.

This law on the books found perfect application in practice, as evidenced by the International Criminal Tribunal (ICTY) in the case of *Prosecutor v Kunarac*

⁵³ Charter of the Int'l Military Trib of 1945, art 6(c), 8 August 1945, 59 Stat 1544, 82 UNTS 279.

⁵⁴ Charter of the Int'l Military Trib for the Far East, art 5(c), 19 January 1946, TIAS 1589, 4 Bevans 20.

⁵⁵ Statute of the Int'l Crim. Trib for the Former Yugoslavia, SC Res 827, art 5(c), UN Doc S/RES/827 (25 May 1993).

⁵⁶ Statute of the Int'l Crim Trib for Rwanda, SC Res 49/955, art 3(c), UN Doc S/Res/955/Annex (8 November 1994).

⁵⁷ IMT Judgment reprinted in 22 *Trial of Major War Criminals Before the International Military Tribunal* (1947), pp 565-66 (regarding Baldur von Schirach); *US v Milch*, Opinion and Judgment of the US Military Trib II reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10* (1997), pp 773, 789.

⁵⁸ Rome Stat of the Int'l Crim Ct of 1998, 17 July 1998, 2187 UNTS 93, art 7(1)(c) (hereinafter, ICC Statute).

⁵⁹ *Ibid*, art 7(2)(c).

(2002). In this case, a leader of a Bosnian Serb reconnaissance unit, Dragoljub Kunarac, and two of his underlings, were put on trial and convicted of the multiple torture and rape of Bosnian Muslim women and girls in the city of Foča.⁶⁰ This case also represents the first convictions of enslavement as a crime against humanity.⁶¹

The ICTY interpreted slavery not to require a 'right of ownership', but the 'presence of one or more of the powers attached to such a right'. The Trial Chamber puts forward the factors to be taken into consideration in determining whether enslavement was committed.

These are the 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 labour: para 543.

Here is how the court portrays enslavement in the context of the case:

The Trial Chamber ... accepts that the witnesses were not free to go where they wanted to, even if ... they were given the keys to the house at some point. ...[T]he girls, ... had nowhere to go, and had no place to hide from Dragoljub Kunarac ... [who was] fully aware of this fact: para 740.

The [girls] ... were denied any control over their lives by Dragoljub Kunarac ... during their stay there. They had to obey all orders, they had to do household chores and they had no realistic option whatsoever to flee the house in Trnova or to escape their assailants. They were subjected to other mistreatments, such as ... rape ... The two women were treated as the personal property of Kunarac ... [who] personally committed the act of enslavement: para 743.

Reading the above paragraphs one discerns a striking resemblance to the dynamics and the paradigm of human trafficking victims, who are constantly subjected to violence, force, physical and psychological coercion. These elements

⁶⁰ *Prosecutor v Dragoljub Kunarac et al*, Case No IT-96-23-T & IT-96-23/1-T, Trial Court Judgment, 178, para 520 (Int'l Crim Trib for the Former Yugoslavia 22 February 2001), 14-15, para 9.

⁶¹ *Ibid*, 281, para 883.

give the trafficker absolute control over the victim – an element of power attached to the right of ownership. This interpretation finds confirmation at another level internationally: human rights law, as can be seen in the 2010 landmark decision of the European Court of Justice in *Rantsev v Cyprus and the Russian Federation* (2010).⁶²

iii. Decisions in the field of human rights

In the case of *Rantsev v Cyprus and Russia*, a 7 January 2010 decision of a seven-member chamber of the First Section of the European Court of Human Rights (ECHR) under art 4 (the right to be free from slavery, servitude, forced or compulsory labour) of the European Convention on Human Rights, the court pushed the envelope further by functionally recognizing human trafficking as slavery and articulating distinct duties of when a state must act to combat this crime generally and in individual cases. The novelty of the *Rantsev* case lies in its application of *Kumarac's* definition of enslavement and its consideration of human trafficking as falling within the scope of art 4.

The ICTY's analysis helped the ECHR recognize that human trafficking is, by its very nature and exploitative aim, an exercise of powers attached to ownership. It further described trafficking as a phenomenon that treats human beings as 'commodities to be sold and bought', 'put to forced labour with little or no payment', that implies 'close surveillance of the activities of the victims', 'involves violence and threats against victims', and forces them to 'live and work under poor conditions', ultimately reiterating that human trafficking is the 'modern form of the old worldwide slave trade', a 'regime of modern slavery'.⁶³ On all those grounds, the court decided that human trafficking, as a vicious threat to human dignity, is incompatible with the values of a democratic society, and it considered it 'unnecessary' to discuss further whether any treatment within the ambit of human trafficking identifies with any of the terms used in art 4, namely 'slavery', 'servitude', and 'forced or compulsory labour'. It concluded that human trafficking as defined in art 3(a) of the Palermo Protocol falls within the scope of art 4. Within the meaning of art 4, the court stated that states have an obligation 'to take operational measures to protect victims or potential victims of trafficking' in the circumstances when the state authorities knew or should have known that 'an identified person had been or was at real

⁶² *Rantsev v Cyprus and Russia* App No 25965/04 (Eur Ct HR 2010). For a comment on the case see Roza Pati, 'Der Schutz der EMRK bei Menschenhandel: *Rantsev v Zypern und Russland*' (2011) 3 *Neue Juristische Wochenschrift* 128.

⁶³ *Ibid.*, 68-69, paras 280-81.

and immediate risk of being trafficked or exploited within the meaning of Article 3 of the Palermo Protocol'.⁶⁴ Failing to take such measures would result in a violation of art 4. The court also mandated training for law enforcement and immigration officials.⁶⁵

The court finds it 'logical' that in light of a state's general obligation to investigate alleged trafficking offences under art 4, it must 'establish jurisdiction over any trafficking offence committed in its territory', bearing in mind that human trafficking, also a cross-border crime, entails countries of origin, transit and destination, and trafficking offences can happen in any such country. This also establishes a duty to cooperate amongst states in cases when events related to trafficking might happen outside of a state's own territory. The court also discussed procedural obligations of Russia to investigate human trafficking, with particular emphasis on recruitment, because Rantseva had been recruited in Russia. The court stated that a failure to investigate recruitment would result in impunity for 'an important part of the trafficking chain'. It found that Russia had an obligation to investigate the possibility of the involvement of Russian individuals or networks in the trafficking of Rantseva to Cyprus and the means of such recruitment. The failure to investigate recruitment amounted to a violation of Russia's procedural obligation to investigate allegations of trafficking under art 4.⁶⁶

In *Rantsev*, the ECHR was able to hold Cyprus and Russia accountable for breaching their positive obligations. It formulated novel state duties arising from the construction of human trafficking as de facto slavery.⁶⁷ Such obligations range from raising awareness about the phenomenon of human trafficking to the training of law enforcement and immigration officials on issues related to human trafficking, and from administrative measures to regulate the operation of businesses that cover up human trafficking to necessary changes in policy and law. These state duties are related to immigration, criminalization, and the investigation and prosecution of all aspects of trafficking.

To conclude, international criminal law and the premier system of human rights law therefore agree on the inclusion of certain forms of human trafficking in the concept of enslavement or slavery.

⁶⁴ *Ibid*, 70, para 286.

⁶⁵ *Ibid*, para 287.

⁶⁶ *Ibid*, 76, paras 307-09.

⁶⁷ See Pati (note 51 above), 95-98. See also Roza Pati, 'Addressing the Scourge of Human Trafficking: The Challenge Ahead' (2006) 1 *Intercultural Hum Rts L Rev* 75.

2. Specific international legal responses to human trafficking

i. Global Decisions: UN Protocol to Prevent, Suppress and Punish

Trafficking in Persons Especially Women and Children (2000)

The Palermo Protocol is undoubtedly, at the global level, the most important modern-day instrument dealing specifically with the complex issue of trafficking in human beings. It supplements, and forms part of, the United Nations Convention against Transnational Organized Crime (TOC Convention).⁶⁸ In its art 3, it provides the globally accepted definition of human trafficking, meaning:

the action of '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.

It further determines the scope of its application, as well as that of the TOC Convention to trafficking activities. It defines the scope of application relating to the prevention, investigation and prosecution of the Palermo Protocol offences, and the protection of victims. As the most comprehensive and detailed universal treaty on the subject of trafficking in persons today, the Palermo Protocol applies to trafficking in persons involving organized criminal groups, which is generally transnational in nature. However, it is necessary to note that in its Art 34 (2) the TOC Convention requires that offences will be 'established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group...'. It further clarifies that elements of transnationality and organized crime are only necessary as regards the applicability of the TOC Convention and the Palermo Protocol between the state parties. Making this difference is essential to understanding that human trafficking happens even within the borders of one country, without crossing international borders.

The Palermo Protocol provides a common basis for the criminalization of trafficking activities, the formulation of laws, ie the delimitation of offences and sanctions in respective national legal systems, the drafting of procedures

⁶⁸ The United Nations Convention against Transnational Organized Crime, 15 November 2000, TIAS No 13, 127, 2225 UNTS 209 (entered into force 29 September 2003). The Convention is supplemented by three protocols, which target specific areas and manifestations of organized crime.

in investigating and prosecuting the trafficking crime, but it also provides for support and assistance of victims. The Protocol further promotes a global approach to human trafficking, ie it requires cooperation between states (Art 2). The Convention and Protocol facilitate investigation and prosecution of criminal activities across borders, and the Convention specifically provides for more specific and detailed requirements for extradition (Art 16, TOC Convention) and mutual legal assistance (Art 18, TOC Convention); it also endeavours to set substantive and procedural standards to harmonize anti-trafficking legislation and to mitigate differences.⁶⁹ These last elements go the heart of combating transnational organized crime of trafficking.

But what is the reality of investigating and prosecuting the trafficking crime across borders? In a recent report on the TOC Convention,⁷⁰ the Conference of the Parties, which is the monitoring body of compliance with the Convention, provides us with what it calls a catalogue of examples of cases involving extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the TOC Convention. The item of that round of monitoring was for the States Parties to report on the issue of compliance with the TOC Convention as regards international cooperation, with particular emphasis on extradition, mutual legal assistance and international cooperation for the purpose of confiscation, and the establishment and strengthening of central authorities. The aim was to assess whether and how states are using the TOC Convention. Alas, this catalogue includes only a few examples of cooperation in combating human trafficking. Looking deeper into the reality of such cooperation, one observes that there is much to be desired in the concerted efforts to combat the crime.

As seen above, the trafficking reality demonstrates that transnational criminal networks, which are ever more complex and pervasive, are creating new challenges for national, local and international authorities in their efforts to control them. Hence, transnational criminal containment through international cooperation has become an increasingly urgent and sophisticated issue for criminologists and governments alike.⁷¹ They continue to explore new ways of

⁶⁹ A good analysis of the Palermo Protocol is found in Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Hum Rts Q* 975.

⁷⁰ Conference of the Parties to the United Nations Convention against Transnational Organized Crime (Fifth session, Vienna, Austria, 18-22 October 2010) CTOC/COP/2010/CRP.5.

⁷¹ Peng Wang and Jingyi Wang, 'Transnational Crime: Its Containment Through International Cooperation' (2009) 5(11) *Asian Social Science* 25.

cooperation in order to receive information, to analyse risks, to ascertain trends and to police effectively, through designing comprehensive anti-trafficking strategies. Such strategies cover global and regional issues and have proven to be of varying efficacy.⁷² A transnational crime like human trafficking can only be combated in a systematic way: by establishing systems of understanding the specifics of the crime, its models, its environment and *modus operandi*, as well as designing and operationalizing international cooperation in all its aspects, in ways tailored to the specifics of the trafficking crime.

ii. A regional decision: the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and Other Instruments in Asia

In Asia, efforts to combat trafficking in persons are spread across various sub-regions and are not unified. There is however a treaty, adopted by the South Asian Association for Regional Cooperation (SAARC).⁷³ The treaty concerns mainly trafficking for prostitution purposes, and its art I(3) provides a limited definition of trafficking. Article III requires states parties to the Convention to criminalize trafficking and effectively prosecute it. Further, it provides, among others, that measures be taken to extradite offenders, prevent trafficking as defined, protect and care for victims and implement its provisions. Its strength lies in the fact that its provisions focus on all important issues that reflect a victim-centered approach. However, it also suffers from a serious weakness: it focuses exclusively on one form of human trafficking, that of commercial sexual exploitation, and on one group of the exploited population, ie women and children. The reality in the region demonstrates that other forms of trafficking, such as forced labour and domestic servitude, are also prevalent, and vulnerable men are also a target group for exploitation, mostly in forced labour.

Also of interest is the Regional Conference on Trafficking in Women, 3-4 November 1998, resulting in the Bangkok Accord and Plan of Action to Combat Trafficking in Women,⁷⁴ which was convened by the UN Economic and Social Commission for Asia and the Pacific (UN ESCAP). The Bangkok Accord makes

⁷² Roza Pati, 'Combating Human Trafficking Through Transnational Law Enforcement Cooperation: The Case of South Eastern Europe' in G Andreopoulos (ed) *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control* (Springer, forthcoming 2012).

⁷³ See 'SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prosecution', opened for signature 5 January 2002; available at: <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>.

⁷⁴ Bangkok Accord and Plan of Action to Combat Trafficking in Women; available at: http://www.unescap.org/esid/GAD/Resources/Plan_of_action/poa-bkk.pdf (hereinafter, Bangkok Accord).

recommendations for participating states to adopt plans of action nationally and regionally in fighting trafficking in persons in the areas of prevention, protection and prosecution. Such recommendations cover the conduct of situation analysis on the issue, criminalization and adoption of stiff penalties, training of personnel, education of women and children, conduct of research, prevention of re-victimization, protection of victims and witnesses, provision of legal assistance to victims, prevention of the criminalization of victims, safe return of victims to their home countries and the reintegration of victims. It also recommends enactment and adoption of a treaty on this issue, the implementation of regional actions plans, establishment of regional task force, and creation of a mechanism to implement the Bangkok Accord.

Another interesting initiative is what is known as the Bali Statements,⁷⁵ and now called the Bali Process. This is an effort from the region containing recommendations for the prevention and combating of human trafficking by participating countries. The Bali Statements, from where the Bali Process originated, did not focus exclusively on human trafficking but considered and included recommendations for combating people smuggling, illegal migration and other crimes as well. A voluntary mechanism was developed from these conferences to promote sustainable and effective measures to combat people smuggling, human trafficking and other crimes in the region. The Bali Process follow-up is a joint effort that focuses on exploring practical measures to combat human trafficking, smuggling and other organized crime. About 50 countries and numerous international agencies, such as the International Organization of Migration (IOM) and the UNHCR, participate in it, and it is co-chaired by the Governments of Indonesia and Australia.⁷⁶ In 2009, they created an Ad Hoc Group mechanism to bring together countries of origin, transit and destination in order to come up with a more effective regional response to current irregular migration in the Asia-Pacific region and to explore ways to deal with the present challenges. In 2011, the 4th Bali Regional Ministerial Conference on People, Smuggling, Trafficking in Persons and Related Transnational Crime opted for 'an inclusive but non-binding Regional Cooperation Framework (RCF)'

⁷⁵ Ministry of Foreign Affairs of Japan, Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime; available at: http://www.mofa.go.jp/POLICY/i_crime/people/conf0202.html.

⁷⁶ For more information about the Bali Process see: <http://www.baliprocess.net/index.asp?pageID=2145831400>.

that would constitute a more effective way for the management of migration in the region.⁷⁷ They also suggested the creation of a Regional Support Office (RSO) to coordinate common efforts in the Asia-Pacific region, with specific goals for short-term and long term activity. Information-sharing amongst States on issues related to refugee protection, international migration including irregular migration and border management, capacity building and exchange of best practices, as well as pooling of common technical resources are amongst priorities of the RSO. The Regional Cooperation Framework foresees that by the end of June 2012 an Action Plan with timeframe with specific activities will be developed. The process seems promising. It waits to be seen how it will further develop and what fruit it will come to bear.

In conclusion, these regional instruments show the engagement of regional elites in the societal problems that have become the face of human exploitation and their efforts to solve such problems in the context of the region, its culture and its sensitivities. So, institutional and legislative responses to control slavery and its derivative, human trafficking are not missing. However, their effectiveness depends on the implementation of their provisions and on the compliance of nation states with their obligations under these regional instruments. Institutional responses are not enough. Social responses through civil society and healthy partnerships amongst all stakeholders are necessary to ensure the intended effects of protection and reintegration of victims, preventive measures both at the demand and the supply end, and also cooperation in the field of identification, investigation and prosecution of the trafficking crime. Such cooperation would also ensure better utilization of human and financial resources and prevent their fragmentation.

B. Decisions of domestic jurisdictions

1. An Asia-Pacific response

Combating human trafficking effectively at national level requires specific laws that criminalize conduct related to human trafficking at all stages, as well as clear enforcement of such legislation. So while laws create a basis for more aggressive action against traffickers and their accomplices, some Asian states lack proper systems and effective internal government operations to enforce the laws, and

⁷⁷ Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Co-Chairs' Statement (Bali, Indonesia, 29-30 March 2011).

even worse, some government officials are themselves complicit in trafficking: they facilitate it rather than combat it.⁷⁸ Let us take a brief look at a national jurisdiction in the Asia-Pacific region, also in light of the US Department of State TIP Report of 2011.

According to TIP Report 2011, *Australia* is a Tier 1 country from the Asia-Pacific region that fully complies with the minimum standards for the elimination of trafficking. It is considered to be mostly a destination country for women and children subjected to forced prostitution, though women and men are also exploited in forced labour. Trafficking to Australia originates mostly from Thailand, Malaysia, South Korea, China, but also from India and Vietnam. It is thought that brothels in Australia are run by Asian organized crime groups. They, typically, recruit Asian women, procure visas fraudulently and bring them to work in brothels.

Australia has a law that prohibits sex and labour trafficking and trafficking-related offences. Divisions 270 and 271 of the Commonwealth Criminal Code contain offences relating to slavery, sexual servitude and deceptive recruiting. Section 270.3 creates offences of possessing a slave or exercising a power of ownership over a slave, engaging in slave trading, entering into a commercial transaction involving a slave and exercising control or direction over, or providing finance for, a commercial transaction involving a slave or an act of slave trading. Slavery offences are further divided into intentional offences (s 270.3(1)) and offences involving recklessness (s 270.3(2)). Division 271 created a comprehensive set of offences related to international and domestic human trafficking, with a focus on debt bondage. The sanctions range from 12 to 25 years' imprisonment and fines of up to AU\$152,000.

Another piece of legislation, the Migration (Employer Sanctions Amendment) Act 2007 (Cth), prohibits exploiting migrant employees through forced labour, sexual servitude or slavery. Civil society has reported that existing laws focus on physical force as a means to perpetrate the crime and they do not sufficiently cover non-physical forms of coercion, fraud or deceit. Another criticism has to do with the inadequacy in the criminalization of deceptive recruitment for labour services, which seems to be a growing concern in Australia. Investigations also seem to focus mostly on sex trafficking, and they constitute 70% of the investigations in the previous year, according to the TIP report. The report further notes that, to date, there have only been three prosecutions of slavery outside the sex industry, though trafficking for forced labour and domestic servitude is not scarce anymore.

⁷⁸ Mindy M Willman, 'Human Trafficking in Asia: Increasing Individual and State Accountability through Expanded Victims' Rights' (2009) 22 *Colum J Asian L* 283, 293.

One such important case is *R v Kovacs*,⁷⁹ which deals with domestic servitude as a form of labour trafficking. The victim is a 25 year old Filipina woman trafficked to Australia in 2002 through a sham marriage arranged by Mr and Ms Kovacs. She was forced to work in slave-like conditions in their home and store, and was sexually assaulted on several occasions. The Queensland Court of Appeal, finding the defendants guilty of intentionally possessing a slave and intentionally exercising ownership over a slave, made visible a major problem, that of domestic servitude, an unexplored area of concern in Australia's actions against human trafficking.⁸⁰ The defendants were charged on the basis of Division 270.3(1) of the Commonwealth Criminal Code, with intentionally possessing a slave and intentionally exercising over a slave a power attaching to the right of ownership. This language of the court's interpretation of slavery is in conformity with international law as discussed above. The defence tried to argue on the grounds of slavery being defined as legal ownership of a person as property, maintaining that reducing a person to a state of slavery cannot be 'transitory in nature', as legal ownership disqualifies such. To its credit, the court held that: "The offence of slavery is not one constituted by the doing of prescribed acts. It is an offence which, in this case at least, is constituted by a course of conduct which comprises a number of acts over an extended period." The court further referred to the de facto conditions that held the victim in slavery with no realistic opportunity to leave. For the court, the freedom that the victim had was 'illusory or non-existent', because there were numerous factors that prevented her from leaving: her family's dire poverty, her mother's sickness, threats of ending up in jail if she left, limited knowledge of the English language, the lack of friends, the unspecified amount of debt the Kovacs claimed from her, the remoteness of the house, the fact that she was not in possession of her passport, but the Kovacs were. This case is of great importance in the region, because it not only follows the international trend in the interpretation of the concept of slavery and its changing meaning, but also because it very carefully discerns and describes subtle forms of coercion used to hold a victim in modern-day slavery.

⁷⁹ *R v Kovacs* [2007] QCA 143 [2]; *Kovacs* [2009] 2 Qd R 51 [7] (*Kovacs*). See, generally, The University of Queensland, Human Trafficking Working Group, Case Report (Criminal), *Zoltan Kovacs & Melita Kovacs*; available at: <http://www.law.uq.edu.au/documents/humantrafficking/case-reports/kovacs.pdf>.

⁸⁰ For a good analysis, see Andreas Schloenhardt and Jarrod Jolly, 'Honeymoon from Hell: Human Trafficking and Domestic Servitude in Australia' (2010) 32 *Sydney L Rev* 671.

To conclude, as a response to breaches of public order or the potential breaches, the past trends in decision exemplify various prescriptive devices and institutional arrangements, backed up with mechanisms of accountability. They constitute major contributions to the struggle against the trade in human beings that reduces them to slaves, while simultaneously influencing our public order to approximate more closely an order of respect for the dignity of the human person. With the above analysis in mind, in light of conditioning factors, the New Haven approach suggests an effort to predict future decisions in the field.

V. Future Decisions in Light of Changed and Changing Conditioning Factors

What is clearly foreseeable is an upward trajectory of anti-trafficking action. Never before has there been so much focus on anti-trafficking efforts from around the world, including the Asia-Pacific region. Though legislative efforts to criminalize various activities of the trafficking chain are relatively new to some countries, they nevertheless have yielded success in several parts of the region. A number of other countries that do not have adequate laws will most likely catch up with the rest of national jurisdictions. Additionally, a number of regional initiatives such as the Bali Process, the Manila Process, the Asia-Pacific Consultations, the Bangkok Declaration on Irregular Migration, as well as other activities under the auspices of ASEAN and SAARC will most likely contribute to more serious cooperation in creating harmonized and mutually enforceable mechanisms in combating trafficking. Though most of these groups and activities have an economic and trade focus, they all strongly condemn trading in people and are developing strategies to effectively put an end to this problem.

Another trend appears to be concerted efforts to establish and implement public-private partnerships to work towards effective sanctioning of modern-day slavery. Reality has proven that government alone cannot put an end to trafficking in human beings. It needs the private sector in all its components, ie corporations, small businesses, NGOs, religious groups and academic institutions in order to be able to prevent, to arrest and deter trafficking, prosecute perpetrators and protect and rehabilitate the victims.

Linked intrinsically to migration, trafficking will not see a decrease unless governments put more efforts into managing migration, particularly through facilitating or removing the discouraging restrictions on the movement of people from East to West and from South to North. This is, however, not a popular trend with the governments, whose decisions are predominantly framed by aspects of national security and stringent border control. There will most likely be some movement in that regard, particularly within regional frameworks. However, progress will be very slow and it will follow the same pattern

experienced thus far: the traffickers will be a step ahead filling the gap in the thirsty labour and services market, and the governments will remain reluctant to modify their migration policies that would facilitate a legal redistribution of labour across boundaries. Having foreseen a general path towards sanctioning human trafficking, can we now devise new paths, better ones for the community and a public order of human dignity, as we appraise the steps taken so far? The last section addresses this question.

VI. Appraisal, Alternatives and Recommendations of Solutions in the Common Interest

A. Appraisal

The next step in the suggested procedure of the New Haven School is the evaluation of whether the public order goals in sanctioning the global evil of human trafficking have been achieved. To that end, I will assess the effectiveness of the above-listed trends in decision and other measures in achieving the following goals: preventing human trafficking; arresting ongoing acts of human enslavement; deterring human traffickers and correcting their behaviour; rehabilitating the victims; and restoration of public order and civil society.⁸¹

As to *avoiding* the scourge of human trafficking, the progress achieved has been small. It is primarily a function of public awareness, both in the countries of destination and, importantly, in the countries of origin. The success of trafficking often hinges on the fact that it is a hidden offence, successfully concealed in the crevices of the criminal underworld. The demand side of this market can be affected by concentrated and publicized government action, including prosecution of the exploiters. The supply side of the equation, the warning of potential victims in the countries of origin, is at least equally important. Even though governments' geostrategic political interests in this field may be less than obvious, the US State Department's annual Trafficking in Persons Report has raised the level of consciousness among governments and moved some to focus on information campaigns regarding this issue. The media's attention to this matter is another key factor, such as the most recent CNN

⁸¹ Adopting Professor Reisman's sanctioning goals (see note 19 above) to the context of human rights abuses, as listed in Siegfried Wiessner and Andrew R Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses' in 'Internal Conflict: Toward a World Order of Human Dignity' (1999) 93 *Am J Int'l L* 316, 327 *et seq.*

series on modern slavery. Many media involved in anti-trafficking campaigns, however, often focus on the issue for a short time and then there is a long period of silence. Non-governmental organizations (NGOs) have made tremendous contributions, but, realistically speaking, there is a mixed bag of success:

- Struggling for funds, particularly in the developing world, organizations are split amongst those flirting with the government and singing the government's praises for every little accomplishment, fearing to express any criticism of the deficiencies of government action – and those who see governments' record of work as entirely negative, no matter what. Striking the balance here remains a challenge.
- Misallocation of resources has been occurring, as funds have been given without consideration of the needs on the ground in particular countries. Donors follow their own agenda.
- Lack of transparency about data: misguided apprehension about what information can be shared and what cannot be shared may heavily impair helpful studies in the field. It is very hard to conduct proper research because many organizations are unwilling to share their data.
- The academic world, in general, has focused little of its attention to the phenomenon of human trafficking. There are precious few research programmes, courses, seminars, modules for training or clinics in the field.

Ultimately, however, the problem can only be sustainably prevented if its root causes, often economic, are addressed and, to the extent possible, eradicated. Sexist, racist and classist cultural attitudes in society further aggravate the problem of trafficking.

To *arrest* ongoing acts of human trafficking, effective prosecution and police action is essential. The record of law enforcement is suboptimal: more pro-active investigations and prosecutions are needed. Certain governments pay mostly lip service to the cause of trafficking and consider anti-trafficking work more of an academic exercise, relegated to seminars and conferences. Real operational activity within the ministries of interior and law enforcement agencies is lacking, and the enactment of legislation is considered enough of an anti-trafficking effort. This is reflected in the dearth of allocation of human and financial resources to the struggle: for many governments, human trafficking remains at the bottom of their list of priorities. In many countries, the person in charge of trafficking does numerous other tasks as well, resulting in a lack of specifically assigned and trained staff to address human trafficking. Corruption and the resulting disrespect for the rule of law often also seriously hamper the effort at stopping these violations.

In many cases, a requirement for effective prosecution is the victim's cooperation. Providing adequate resources for comprehensive victim protection and assistance remains a challenge, as the current economic crisis exacerbates the

problem of funding for investigation, prosecution and victim services.

As this is often a transnational phenomenon, cross-border police cooperation is key to stopping this harmful sequence of events. Such cooperation is increasing, but falls far short of what is necessary. Cooperation amongst law enforcement agencies at all levels (federal, state, local and international) remains minimal.

An ultimate remedy to arrest ongoing acts of human trafficking on a massive scale could be humanitarian intervention across country lines. This tool has not been contemplated yet, even though enslavement is an international crime.

To *deter* human traffickers and to *correct* their behaviour, both international and domestic prescriptions have been established. They have been analysed above in the section on past trends in decision. The Palermo Protocol, the Council of Europe and the SAARC treaties on human trafficking are important legal milestones in the international effort to deter those who would contemplate engaging in the trafficking in persons. They mandate criminalization of the act, investigation and prosecution. In addition, international criminal law now includes human trafficking as part of the definition of the crime of enslavement in Art 7(2)(c) of the Statute of Rome. The International Criminal Tribunal for the former Yugoslavia has rendered its first decision in the *Kunarac* case applying such definition to a situation of continuing confinement and rape of forcible displaced women.

Domestic laws criminalizing trafficking in persons have now proliferated, encouraged both by the Palermo Protocol and the pertinent regional treaties, as well as the threat of sanctions under the US State Department's monitoring regime of the annual global Trafficking in Persons Report. The problem, though, is their implementation. As stated above, various obstacles stand in the way of effective enforcement action against perpetrators of the offence, many caused by the lack of will, others by the inability of government actors. When criminal sanctions are employed, however, care should be taken that the offenders are also encouraged to mend their ways by offering instruction to correct their future behaviour. Also, civil litigation is currently successfully used to deter traffickers, yielding significant damages awards against them.

Another public order goal is the *rehabilitation* of the victims of human trafficking. The trauma inflicted on these victims, particularly in the field of sex trafficking and if they are children, is so profound that it often needs years of therapy and counselling to be overcome, if that can ever be done.⁸² Civil suits

⁸² Cf Elizabeth Hopper and Jose Hidalgo, 'Invisible Chains: Psychological Coercion of Human Trafficking Victims' (2006) 1 *Intercultural Hum Rts L Rev* 185; Steven R Tracy, *Mending the Soul: Understanding and Healing Abuse* (Zondervan, 2005).

can yield the money for these efforts, if such judgments can ever be enforced against the abusers. As this is often not the case, reliance on governmental programmes and private initiatives is predominant. In many countries, shelters have been established to provide immediate protection; long-term physical, mental and psychological help as well as vocational training and education is, however, necessary to restore the victims' sense of dignity and make them again functioning members of society.

The *public order* frayed by the scourge of trafficking in persons has to be *restored*. Government officials at all levels are in many places involved in the violation of the laws regarding human trafficking, induced by bribery and other forms of corruption. Corruption is often pervasive, as law enforcement officials in the police force or prosecution enrich themselves by simply ignoring the problem, in effect creating safe havens for traffickers. Corrupt or inept justice systems exacerbate the problem when traffickers brought before courts end up acquitted or let go with a simple fine to go back to the streets to continue their pernicious work. The final task is to *restore civil society* at large. This remains a particularly challenging task, especially in the countries of origin. It is not only the trafficked person herself that is severely victimized, but also her family and, possibly, the larger region and social context. Long-term, the root causes for falling prey to trafficking need to be addressed, be they economic, educational, attitudinal – resting in patterns of prejudice that have been developed over long periods of time.

B. Alternatives and recommendations in the global common interest

The invention, appraisal and selection of alternative solutions to the problem is the culminating, and most distinctive, task in the New Haven procedural toolkit.⁸³ This can be a particularly creative endeavour, as it can and should be tailored to the specific challenge a problem poses. Human trafficking in various regions and areas of human activity has different faces, different participants and different challenges. They are analysed in the four steps indicated before. With regard to the particular aspect of human trafficking at hand, a variety of community responses are possible; they may involve authoritative and controlling action by local and/or international decision makers or actions by private actors.

⁸³ Wiessner, (note 47 above), pp 45, 52-53.

These arrangements⁸⁴ may include:

- Further prescription of anti-trafficking laws both international law and domestic, including human rights law, international criminal law, humanitarian law, state responsibility, as well as individual domestic and international responsibility. In particular, this should include the express redefinition of slavery in human rights documents as including human trafficking as defined in the Palermo Protocol;
- Enhanced prosecution of offenders in domestic courts, even when they committed their acts outside the territory of the prosecuting state, based on the doctrine of universal jurisdiction, as well as prosecution before the ICC, where available, based on the crime of enslavement;
- Enhanced cooperation, in particular with respect to judicial assistance and extradition of alleged perpetrators to foreign and international criminal courts;
- Denial of sovereign or diplomatic immunity for the crime of enslavement;
- Creation of national civil remedies; and
- National and international programmes for the rehabilitation of victims and their reintegration into society.

These solutions are to be tailored, after careful contextual analysis, to the individual problem at hand.

In conclusion, as with respect to any other societal problem, the New Haven School of Jurisprudence allows for maximizing intelligence on a given social issue, and for the making of better, more informed choices. The fight against human trafficking can only benefit from the use of this precisely targeted and comprehensive interdisciplinary methodology.

⁸⁴ For details, see W Michael Reisman, 'Institutions and Practices for Restoring and Maintaining Public Order' (1995) 6 *Duke J Comp. & Intl L* 175 and Wiessner and Willard (note 81 above), p 333, with further references.