

Chapter 2

Human Trafficking and the International Law

2.1 Human Trafficking: a historical overview. From slavery to modern-slavery thought the international law

Modern Slavery or Human Trafficking, according to O'Connell (2013), has some differences. Firstly, HT does not live in a condition of locked up locks and chains or sold, and more in the specific slaveholder cannot have the right on property on the person (slaver) (Cullan Du Pont 2009). Historically, the definition of human trafficking has gone through a massive different interpretation (Gallagher, 2010) and also changed according to the convention used. Until December 2000, there was no definition in the international law for "trafficking," and the debate was spent more on the difference between illegal smuggling and illegal migration (Gallagher 2010: 13).

According to the definition made by the United Nations Palermo Protocol: "human trafficking is the recruitment, transportation, transfer, harboring, or receipt of persons utilizing the threat or use of force or other forms of coercion, of abduction, of fraud or deception, of the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for exploitation (UN 2000)." However, the definition of human trafficking depends on how the problem is identified and how it can be fought (Wijers and Lap-Chew 1999). Starting with a historical perspective, the existence of slavery is old, running through all the ages

from the Judeo-Christian Old to New Testaments or in the Qur'an, even in the classic text of ancient Greece is clear the presence of slavery in the early societies (Cullen -DuPont 2009). For instance, the Roman empire enslaved millions of people that were also used as labor and proved that the existence of enslaved people is reported in the society pre-colonization in Africa (Sylvester, 2000).

1500 to 1800 see a rise of the commercial enslaved person that has transported 13 million people, men, women, and children from Africa to Europe or America for slave labor. This period is noted as the transatlantic slave trade, which ended in 1807. After that, Great Britain declared no longer legalized the slave trade in the empire. Many other countries started to abandon slavery and the stipulation of various congresses, such as in 1865 in the U.S. However, just in 1890, with the Final Act of the Brussels Conference, slavery was internationally condemned (Allain, 2018). Even after the end of slavery by the major western empire and the stipulation of various congresses, such as the first Convention against White Slavery in 1094, the problem of slavery and trafficking was not the result, especially for two categories women and children.

When the League of Nations was created, two other international instruments emerged, the International Convention for the Suppression of the Traffic Women and Children in 1921 and the Suppression of the Traffic in Women of full Age in 1933. The International Convention for the Suppression of the Traffic Women and Children 1921 applied to punish all the offenses as set out in the 1910 Convention. However, at the same time, punish the "attempts to commit, and,

within the legal limits, of acts preparatory to the commission of the crime of trafficking.” Moreover, the convention extends not only to women and girls but also to boys.

Therefore, to address the issue of trafficking, especially the international traffic of women for sexual exploitation, the Suppression of the Traffic in Women of full Age in 1933. This convention mandated the holding of individuals responsible for trafficking (Allian, 2018). Until 1933, all the treaties did not define traffic or trafficking. However, these treaties concerned the “organized” and the coerced movement of women and girls abroad for prostitution, and all these agreements were limited to the process of recruitment (Gallagher, 2010). In 1949, the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others was adopted. The convention expanded, as was for the 1921 and 1933 conventions at the time, the legislation on trafficking to all who “procures, entices or leads away, for prostitution, another person, even with the consent of that person and anyone who ‘exploits the prostitution of another person, even with the consent of that person” (Art 1 and 2 of the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others).

2.2 The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others: an unclear definition of trafficking

The regulations and treaties on trafficking found a single instrument in 1949: the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, the final international Convention until

the Palermo Protocol. This Convention was enacted after the second world war, and the structure of the Convention marks the historic period when it was created (Lammasniemi, 2020). The Convention declares the trafficking and the prostitution “incompatible with the dignity and worth of the human person and endangers the welfare of the individual, the family, and the community”¹, and to prohibits the trafficking, procurement, and exploitation intel or cross-border (Gallagher 2010).

According to the Convention, in the specific, the art 2: the Parties to the present Convention further agree to punish any person who: (1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel; (2) knowingly lets or rents a building or other place or any part of for the purpose of the prostitution of others (1949 convention art 2)”. Moreover, the convention increased the role of the cross-border cooperation, especially Art 8 and 9 and the Atr13 to the 15 of the convention. In particular, the extradition of traffickers is envisaged. In addition, the details for internal coordination with the trafficking and protection of victims are indicated. In the case of foreign victims, they must have the same rights as normal citizens, including being part of the proceedings against traffickers. According to McAdam (2019), "1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others" was used to harmonize and consolidate the previous laws on trafficking, with a focus on p sexual exploitation but not just on women and children but to "any person."

¹ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others Approved by General Assembly resolution 317 (IV) of 2 December 1949 (preamble)

Therefore the 1949 Convention was important, especially after the second world war. However, the convention does present weaknesses, and it will become obsolete. More importantly, 1949 presents a weakness in terms of Human Rights. Moreover, women are not regarded as agents but as vulnerable beings needing protection (Gallagher 2010, McAdam 2019). In 1956 made, a supplementary slavery definition noted with the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention) revised the 1926 definition of an enslaved person by adding to this category²:

- *Debt bondage*: ‘the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined’ (Article 1(a)).
- *Serfdom*: ‘the condition or status of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status’ (Article 1(b)).
- *Servile forms of marriage*: any institution or practice whereby ‘(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or

² Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, done 1 April 1957, entered into force 30 April 19

otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person' (Article 1 (c)).

- *Sale of children for exploitation of children*: 'any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor' (Article 1(d))

2.3 The important of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC)

In 1979, the General Assembly of the United Nations adopted the CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women. According to the CEDAW Convention, all States Parties are obligated to have appropriate regulations to suppress all forms of traffic in women and exploitation of the prostitution of women. According to Gallagher 2010, the CEDAW convention is different from the earlier treaties. Moreover, the CEDAW's focus on the exploitation of prostitution can be analyzed as rejecting the explicit abolitionist stance of the preceding treaties, including the 1949 Convention (Gallagher 2010: 64).

Moreover, the CEDAW, reference to the prohibition of all forms of traffic, covers also labor, forced marriage, and forced prostitution (Knaus, Kartusch, and Reiter 2000). However, as noted by Gallagher, the CEDAW has a vagueness of provision that makes it difficult to ascertain the nature of States Parties. The 1989 General Assembly adopted the Convention on the Child's Rights (CRC). The CRC

is a contemporary international human rights treaty to protect the rights and dignity of children. Every country ratified it except the U.S. According to the CRC art 32:

- States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
- States Parties shall take legislative, administrative, social, and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - (a) Provide for a minimum age or minimum age for admission to employment;
 - (b) Provide for appropriate regulation of the hours and conditions of employment;
 - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article “

Moreover, art 34 and 35 of the convention said that the States Parties should protect the child from sexual exploitation, sexual abuse, and the children's sale and traffic through the agreement of national, bilateral, and multilateral measures. However, even if the CRC is an important agreement that explains the rights of children, explaining who children are and what responsibility the government must

take towards them, it has some gaps; in particular, the CRC Protocol does not deal specifically with this issue (Gallagher, 2010) even if do define sale children.

2.4 The Palermo Protocol

During early 2000 the U.N.G.A adopted the Palermo protocols for stopping transnational and organized crime, the U.N. Convention against Transnational Organized Crime (UNTOC) also noted the Palermo Protocol. According to Gallagher (2010), the protocol was made starting with a relation made by trafficking and migrant smuggling. The Palermo protocols are composed of three protocols adopted by the United Nations to enforce the Convention against Transnational Organized Crime or Palermo Convention. According to the report by the United Nations Office on Drugs and Crime (2004), the Convention is composed of three protocols.

1. Legislative guide for the implementation of the United Nations Convention against Transnational Organized Crime
2. Legislative guides for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime

3. Legislative guide for the implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components, and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

Palermo protocols are nowadays the international instruments against trafficking. According to Zanser and Thinyane (2021), the Palermo protocol is the first International Legislation to regulate human trafficking. Moreover, according to Wijers (2021), the protocol was necessary because of the change in the political order with the fall of the URS. In fact, after the end of the Soviet Union in Russia and the fall of the Berlin Wall, the crime of trafficking against the Eastern Europeans, especially women, has grown.

The Convention entered into force in September 2003 after two years of negotiation at the UN Centre for International Crime in Vienna and today sees the signing of 190 parties. According to Goździak and Vogel (2020), the protocol was lobbying by religious and feminist, and human rights advocates with different points of view on whom to represent and classify prostitution as legitimate labor, as was the thought of the Human Rights Caucus. On the other hand, religious and feminist organizations like the Coalition Against Trafficking in Women (CATW) see prostitution as violating women's human rights (Doezema, 2005). One issue in the negotiations was the "definition" of human trafficking. In particular, the definition promoted by the Coalition highlight that trafficking should include all forms of recruitment and transportation for prostitution, even if there is no use of

force or deception (Goldscheider 2000, Goździak and Vogel 2020). However, on the other hand, the Human Right Caucus aimed at the primary definition of "use of force or deception" as necessary acts for the definition of human trafficking for not discriminating against the people who had chosen prostitution as consensual work. Moreover, for the Human Rights Caucus, the definition of trafficking is extended to women, men and children and was not just limited to prostitution but to any force work like agriculture or sweatshop (Human Rights Caucus 1999, Goździak and Vogel 2020).

Therefore, according to Gallagher (2001), not only did Human Rights Caucus want a distinction between prostitution as consensual work and prostitution through the use of force, but also the Global Alliance Against Traffic in Women (GAATW) and the International Committee for Prostitutes' Rights (ICPR) stating that the anti-trafficking regulation had to focus on the use of force as a means, exploitation and abuse. In the end, was accepted the definition which refers to article number 3 of the UN Protocol "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs" (art3 (a) UN Protocol)"

Moreover, the art 3 (c) adds: “The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article” Moreover, important for this research and for the data taken from the NGOs in Indonesia the definition of child-trafficking and adults trafficking. According to the Palermo Protocol, the stage is not a requirement for child trafficking, as is for adult trafficking (table 1.) This is because children cannot give informed consent can exploit even if he/she understands what he/she is going through. According to the Palermo Protocol the 3 stages for identifying a person as a victim of TPs: process, means and purpose, the table below give an example for each stage (Table 2). In case of children trafficking the stage of means cannot be use.

*Table 1.
Definitions of trafficking in persons and smuggling of migrants*

	<i>Trafficking in persons (adults)</i>	<i>Trafficking in persons (children)</i>	<i>Migrant smuggling</i>
<i>Victim's age</i>	Over 18	Below 18	Irrelevant
<i>Mental element</i>	Intention	Intention	Intention
<i>Material element</i>	<ul style="list-style-type: none"> • Act • Means • Exploitative purpose 	<ul style="list-style-type: none"> • Act • Exploitative purpose 	<ul style="list-style-type: none"> • Act: Procurement of illegal entry • Purpose: For financial or other material benefit
<i>Consent of the trafficked or smuggled person</i>	Irrelevant once the means are established	Irrelevant. Means do not need to be established	The smuggled person consents to the smuggling
<i>Transnationality</i>	Not required	Not required	Required
<i>Involvement of an organized crime group</i>	Not required	Not required	Not required

Source: UNODC 2009

Table 2.

Definitions of trafficking in persons and smuggling of migrants

ICMC and Solidarity Center Trafficking Framework

Process	+	Means	+	Purpose
Recruitment		Threat		Prostitution
OR		OR		OR
Transportation		Coercion		Pornography
OR		OR		OR
Transferring	AND	Abduction	AND	Violence/Sexual Exploitation
OR		OR		OR
Harboring		Fraud		Forced Labor
OR		OR		OR
Receiving		Deceit		Slavery/Similar Practices
		OR		
		Deception		
		OR		
		The Abuse of Power		
1		1		1

Source: *Trafficking of women and children in Indonesia 2007: 15*

In the next paragraph it will discuss the national law against the human trafficking in Indonesia and the international ASEAN convention, trying to analyze both the Indonesian national law on trafficking and the ASEAN convention, looking at the strengths and weaknesses.

2.5 The law N 21 2007 Human Trafficking Act (UU PTPPO) and the ASEAN convention in 2017 against human trafficking in specific women and children (ACTIP)

After analyzing the history of human trafficking through international law until the Palermo Protocol, this part analyzes Indonesia's national regulation in terms of material of human trafficking. The law that is applied in the case of

trafficking in human beings and Law No. 21 2007 Human Trafficking act (Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang UU TPPO). According to the law No. 21 2007: "human trafficking is an act recruiting, transporting, harboring, sending, transferring or receiving a person by means of the threat of force, use of force, kidnapping, confinement, fraud, fraud, abuse of power or a position of vulnerability, debt bondage or giving payments or benefits, so as to obtain the consent of a person having control over another person, whether carried out within countries or between countries, for the purpose of exploitation or result in people being exploited" (UU PTPPO art1 paragraph 1).

From a perspective of law history in Indonesia, before the adoption of the UU TPPO No 21 2007 (Nuraeni dan Kania 2017), the policy on the material of human trafficking, especially in women and children, was regulated by the provisions of laws and regulations in the "book of criminal code" (Kitab Undang-Undang Hukum Pidana KUHP). Moreover, the Law No 39 1999 on Human Rights that follow the National Action Plan for the Elimination of Trafficking women and children (Rencana Aksi Nasional Penghapusan Perdagangan Perempuan dan Anak (RAN-P3A) law No 88 2002. However, the prevention against the TPs does not see enforcement at the national level. As a member of ASEAN, Indonesia agreed and participated in the Convention against human trafficking in specific women and children 2017. Human trafficking has been on ASEAN's transnational crime agenda since 1990 (Kranrattanasuit 2014). According to Pakeer (2011), ASEAN has have made strategies for combatting human trafficking by also making two aparat, the AICHR (Inter-Governmental Commission on Human Rights) and the ACWC

(Commission on the Promotion and Protection of the Rights of Women and Children)

Therefore, various agreements made by the ASEAN, in contrast to human trafficking, sin on their lack of force and the use of ASEAN to adopt a mechanism of soft law (Kranrattanasuit, 2014) that, according to D'Amato (2010), lack in the detailed directives. Furthermore, ASEAN has made a few legal instruments as the ASEAN Declaration against Trafficking in person, particularly Women and Children in 2004, the Leader's Joint Statement on Enhancing Cooperation Against Trafficking in Persons in South East Asia in 2011, ASEAN Human Rights Declaration in 2012, and the latest ASEAN Convention Against TIPs, Especially Women and Children/ ACTIP in 2017 (Solim, 2019). Through Law No. 12 in 2017, the Government of Indonesia has ratified the convention.