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DEFINING SEX TRAFFICKING IN INTERNATIONAL AND DOMESTIC LAW: MIND THE GAPS[†]

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INTRODUCTION

Whether as a result of conceptual disagreement regarding what counts as sex trafficking, political disagreement regarding what should be done about it, or simply a lack of political will, there was no internationally recognized definition of sex trafficking until 2000.¹ This is not to say, however, that the international community took no interest in sex trafficking before this time. Indeed, even before 2000, numerous instruments of international law called for

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¹ As Radhika Coomaraswamy, the then-current Special Rapporteur on Violence Against Women, noted in her February 2000 report to the United Nations (“UN”) Human Rights Council:

At present, there is no internationally agreed definition of trafficking. The term “trafficking” is used by different actors to describe activities that range from voluntary, facilitated migration, to the exploitation of prostitution, to the movement of persons through the threat or use of force, coercion, violence, etc. for certain exploitative purposes.

Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶ 10, Comm’n on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (by Radhika Coomaraswamy). Hence Coomaraswamy emphasized “[t]he need for a clear definition of trafficking, thus far lacking in international law.” *Id.* at 4.

the abolition of sex trafficking.² The problem was, none of them offered a definition of what was to be abolished.³ Thus, notwithstanding widespread agreement that something should be done about sex trafficking, there seemed to be little agreement on what, precisely, sex trafficking *was*.

Debates regarding the definition of sex trafficking were supposedly settled in 2000, with the adoption of the United Nations (“UN”) Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Palermo Protocol”)⁴ and its subsequent ratification by more than 146 state parties.⁵ Article 3 of the Palermo Protocol sets out a clear definition of trafficking, and, pursuant to Article 5, state parties are obligated to criminalize trafficking as it is defined in Article 3.⁶ Given these obligations, one would expect to find widespread uniformity in the definitions of trafficking found in the domestic criminal laws of state parties to the Palermo Protocol. Yet, as this Article demonstrates, significant discrepancies persist between trafficking definitions in international law and definitions adopted in the domestic criminal codes of many state

² See Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (with Final Protocol), *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 [hereinafter 1949 Convention]; Protocol To Amend the Convention for the Suppression of the Traffic in Women and Children and the Convention for the Suppression of the Traffic in Women of Full Age, *done* Nov. 12, 1947, 53 U.N.T.S. 13; International Convention for the Suppression of the Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415; Convention for the Suppression of the White Slave Traffic, *done* May 4, 1910, 211 CONSOL. T.S. 45; International Agreement for the Suppression of the “White Slave Traffic,” *done* May 18, 1904, 1 L.N.T.S. 83; Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, Annexes I, II, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993).

³ See Special Rapporteur on Violence Against Women, *supra* note 1, ¶¶ 27–34. “Despite the plethora of international instruments, there is no clear or agreed upon definition of trafficking.” *Id.* ¶ 34.

⁴ Convention Against Transnational Organized Crime, Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *done* Nov. 15, 2000, T.I.A.S. 13127 [hereinafter Palermo Protocol]. The Palermo Protocol, negotiated pursuant to the authority of the UN’s Vienna-based Commission on Crime Prevention and Criminal Justice, was drafted between January 1999 and October 2000 in a series of eleven meetings of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime. Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 975–76 (2001); see also *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT’L L. 387, 408 (2001).

⁵ See *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL ch. XVIII, § 12.a, p. 1 [hereinafter *Palermo Signatories*], available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf>.

⁶ Palermo Protocol, *supra* note 4, arts. 3, 5.

parties. These differences undermine any claim to international agreement regarding the nature of trafficking and destabilize efforts to create a coordinated response to this criminal offense.

I. THE INTERNATIONAL LAW DEFINITION OF SEX TRAFFICKING

A. *Development of the UN Palermo Protocol Definition of Sex Trafficking*

After nearly two years of debate and twenty-four definitions taken under consideration,⁷ a uniform definition of trafficking was agreed upon pursuant to Article 3 of the Palermo Protocol.⁸ More than a decade after its adoption, the definition of sex trafficking set forth in the protocol appears to enjoy strong international support. Of the 192 member states of the UN,⁹ 147 have ratified the protocol.¹⁰ Notably, none of the state parties has made any reservation in respect of the Article 3 definition of trafficking.¹¹

Further illustrating the apparent support for the Palermo Protocol's Article 3 definition of trafficking is the fact that the definition has been utilized by the international law enforcement agency, INTERPOL,¹² and numerous international organizations, including the Council of Europe ("COE"),¹³ the International Organization for Migration ("IOM"),¹⁴ the Organization for Security and Co-operation in Europe ("OSCE"),¹⁵ the International

⁷ See UNITED NATIONS OFFICE ON DRUGS & CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 339–48, U.N. Sales No. E.06.V.5 (2006); *Background Information: Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, UNITED NATIONS OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CTOC/background/adhoc-committee.html> (last visited Feb. 17, 2012).

⁸ Palermo Protocol, *supra* note 4, art. 3.

⁹ *UN at a Glance*, UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml> (last visited Mar. 17, 2012).

¹⁰ *Palermo Signatories*, *supra* note 5, at 1.

¹¹ *Id.* at 3–6. Twenty-nine declarations or reservations have been made by signatories and state parties, most of which invoke Article 15(3) in denying the jurisdiction of the International Court of Justice to adjudicate disputes under the Palermo Protocol. *See id.*

¹² INTERPOL, TRAFFICKING IN HUMAN BEINGS: FACT SHEET 1 (2009), available at <http://www.interpol.int/content/download/796/6455/version/10/file/THB02.pdf>.

¹³ Council of Europe Convention on Action Against Trafficking in Human Beings and Its Explanatory Report art. 4(a), Explanatory Report ¶ 72, May 16, 2005, C.E.T.S. No. 197.

¹⁴ *See Counter-trafficking*, INT'L ORG. FOR MIGRATION, <http://www.iom.int/jahia/page748.html> (last visited Mar. 17, 2012).

¹⁵ *See* SPECIAL REPRESENTATIVE & CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUMAN BEINGS, ORG. FOR SEC. & CO-OPERATION IN EUR., COMBATING TRAFFICKING AS MODERN-DAY SLAVERY: A MATTER OF RIGHTS, FREEDOMS AND SECURITY 21 n.69 (2010), available at <http://www.osce.org/cthb/74730>.

Development Law Organization (“IDLO”),¹⁶ the Arab League,¹⁷ and the North Atlantic Treaty Organization (“NATO”).¹⁸

The apparent consensus surrounding the definition of sex trafficking articulated in Article 3 of the Palermo Protocol inspired the former Special Rapporteur on Trafficking in Human Beings in 2006 to declare with confidence, “The Protocol definition of trafficking stands today as the accepted international definition of trafficking. . . . [It] establishes clear criteria for understanding what counts as trafficking, and makes it possible to frame anti-trafficking initiatives with consistency and clarity.”¹⁹

Framing anti-trafficking initiatives with consistency was indeed a key goal in drafting the Palermo Protocol. As noted in the protocol’s preamble, “effective action to prevent and combat trafficking . . . requires a comprehensive international approach” and to that end, the protocol’s statement of purpose emphasizes the goal of promoting “cooperation among State Parties in order to meet those objectives.”²⁰ Central to establishing this consistency was the obligation each state party undertook to criminalize trafficking using a uniform definition of the offense.

B. Article 5 Obligations To Criminalize Trafficking

Recognizing that comprehensive international cooperation amongst state parties to prevent and combat trafficking would be well nigh impossible without agreement on what counts as trafficking, the drafters of the Palermo Protocol agreed upon the aforementioned definition articulated in Article 3. Of course, the drafters were well aware that merely defining trafficking in this

¹⁶ See REBECCA EVERLY, INT’L DEV. LAW ORG., PREVENTING AND COMBATING THE TRAFFICKING OF GIRLS IN INDIA USING LEGAL EMPOWERMENT STRATEGIES: A RIGHTS AWARENESS AND LEGAL ASSISTANCE PROGRAM IN FOUR DISTRICTS OF WEST BENGAL 4 (2011), available at <http://www.idlo.int/Publications/FinalReportGirlsProject.pdf>.

¹⁷ See SUMMARY OF REGIONAL AND SUB-REGIONAL STRUCTURES AND INITIATIVES TO COUNTER TRAFFICKING IN PERSONS 20 (2010), http://www2.ohchr.org/english/issues/trafficking/docs/Dakar_summary_structures_en.pdf.

¹⁸ See *NATO Guidelines on Combating Trafficking in Human Beings for Military Forces and Civilian Personnel Deployed in NATO-Led Operations*, NATO (July 9, 2004), <http://www.nato.int/docu/comm/2004/06-istanbul/docu-traffic-app1.htm>.

¹⁹ Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, *Integration of the Human Rights of Women and a Gender Perspective: Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, ¶¶ 32–33, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (by Sigma Huda) [hereinafter Huda Report].

²⁰ Palermo Protocol, *supra* note 4, pmbi., art. 2.

protocol would not give legal effect to the definition.²¹ Thus, in order to ensure that the Article 3 definition was given effect in domestic criminal laws, the protocol obligated state parties to “adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol.”²²

Despite their obligation under the Palermo Protocol to criminalize sex trafficking as it is defined in Article 3, many state parties have failed to do so, choosing instead to target a narrower scope of conduct. This failure is demonstrated below, through a detailed comparative analysis of the protocol’s definition of sex trafficking as compared to the definitions found in several state parties’ domestic criminal laws. Part II examines various possible explanations for these gaps and recommends ways to narrow the gaps, thus better realizing the Palermo Protocol’s goal of developing a more unified international approach to preventing and combating trafficking.

Before moving on to this analysis, however, it is worth noting how state parties’ obligations under Article 5 are being monitored—and questioning whether adequate mechanisms are currently in place to identify instances of noncompliance. State parties’ compliance with their obligations under the UN Transnational Organized Crime Convention and its protocols are monitored by the Conference of the Parties to the United Nations Convention on

²¹ That is, the Palermo Protocol did not have the legal effect of criminalizing trafficking in any legal system. Moreover, at the time of drafting the protocol, there was no standing International Criminal Court (“ICC”)—thus, insofar as one might be tempted to say that there currently exists an international criminal legal system, such a system certainly did not exist at the time of the Palermo Protocol’s drafting. *See About the Court*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/About+the+Court> (last visited Mar. 24, 2012). Even now, the trafficking does not fall under the jurisdiction of the ICC. *See Rome Statute of the International Criminal Court art. 5, done July 17, 1998, 2187 U.N.T.S. 3* [hereinafter Rome Statute] (claiming jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression). Some have mistakenly claimed that trafficking can be prosecuted in the ICC. *See, e.g.,* Tina R. Karkera, Comment, *The International Criminal Court’s Protection of Women: The Hands of Justice at Work*, 12 AM. U. J. GENDER SOC. POL’Y & L. 197, 230 (2004). While Article 7(2)(c) of the Rome Statute does indeed mention trafficking in connection with enslavement in elaborating the definition of crimes against humanity, it does not equate trafficking to enslavement, nor does it suggest that trafficking would amount to a crime against humanity. Rome Statute, *supra*, art. 7(2)(c). Moreover, insofar as acts of trafficking might form the factual basis for a charge of crimes against humanity before the ICC, the criminal offense that would be charged in such a case would be “crimes against humanity” not “trafficking.” Jane Kim, *Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute*, GENDER & SEXUALITY L. ONLINE, Feb. 23, 2011, at 20–21, http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf.

²² Palermo Protocol, *supra* note 4, art. 5(1). The obligation extends to criminalizing attempted trafficking and complicity liability for trafficking as well. *See id.* art. 5(2).

Transnational Organized Crime (“Conference of Parties”).²³ In 2006, the Conference of Parties undertook a survey of state parties regarding their compliance with Article 5 obligations.²⁴ The general questions posed regarding this matter were framed in the following terms: (1) “Is TIP [trafficking in persons] criminalized [in your domestic law]?” and (2) “If yes, is TIP defined as a criminal offense as in article 3?”²⁵ The survey also asked state parties to answer questions regarding the precise elements of their domestic criminal law’s definitions of trafficking, to ensure that the range of means recognized to satisfy the definition of trafficking under the state party’s domestic law is equally as broad as the range of means articulated in Article 3 of the Palermo Protocol.²⁶ Furthermore, state parties were asked to confirm that the victim’s consent is deemed irrelevant where any of those means have been used, thus ensuring compliance with Article 3(b).²⁷ Thus far, responses from 103 state parties have been submitted to the Conference of Parties.²⁸

Curiously, however, many state parties that report being in full compliance with their Article 5 obligations are clearly not in compliance, according to any reasonable analysis of their domestic criminal law’s definitions of sex trafficking. Rather, in many instances, state parties which claim to define trafficking as broadly as it is defined in international law under Article 3 of the Palermo Protocol have in fact adopted domestic criminal law definitions which are substantially narrower than Article 3.²⁹ In other words, these state parties

²³ *Conference of Parties to the United Nations Convention Against Transnational Crime and the Protocols Thereto*, UNITED NATIONS OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP.html> (last visited Mar. 23, 2011). Beginning with its first session in June and July 2004, the Conference of Parties has met approximately biennially, with its sixth session scheduled for October 15–19, 2012. *Id.* The Conference of Parties website provides a database of documents generated during the sessions. *Id.*

²⁴ See Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Third Session, Vienna, 9–18 Oct. 2006, *Information Submitted by States in their Responses to the Questionnaires for the First Reporting Cycle*, U.N. Doc. CTOC/COP/2006/CRP.2 (Aug. 28, 2006).

²⁵ *Id.* at 106–08.

²⁶ *Id.* at 106–11.

²⁷ *Id.* at 112–15.

²⁸ Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Fifth Session, Vienna, 18–22 Oct. 2010, *Status of Responses to the Checklist/Questionnaires on the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, 7–11, U.N. Doc. CTOC/COP/2010/CRP.6 (Sept. 29, 2010). Ninety-six countries responded during the first reporting cycle and an additional seven countries responded during the second reporting cycle. *Id.*

²⁹ See UNITED NATIONS INTER-AGENCY PROJECT ON HUMAN TRAFFICKING, *HUMAN TRAFFICKING LAWS: LEGAL PROVISIONS FOR VICTIMS* (2010), available at http://www.no-trafficking.org/reports_docs/legal_prov_vics.pdf.

are criminalizing a smaller set of cases than they are obligated to criminalize. As such, these state parties currently stand in violation of Article 5.

The remainder of this Part defends this claim regarding widespread noncompliance with Article 5 obligations by way of a comparative analysis of the elements of the Palermo Protocol's Article 3 definition of trafficking and the definitions articulated in various state parties' domestic criminal codes. In Part III, several possible explanations for noncompliance with Article 5 obligations are considered.

C. *Analyzing the UN Palermo Protocol Definition of Sex Trafficking*

The definition, in relevant part, states as follows:

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

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.³⁰

As Table 1 illustrates, the Palermo Protocol defines sex trafficking according to three elements: the act committed by the purported trafficker, the means by which that act is accomplished, and the object for which the act is committed. These elements correspond to the three key areas where the Palermo Protocol definition of sex trafficking diverges from the definitions adopted by several state parties.

³⁰ Palermo Protocol, *supra* note 4, art. 3. Consistent with the limited scope of this Article, the definition as set forth above focuses on the language defining sex trafficking of adult victims, omitting language relating to labor trafficking, organ trafficking, or trafficking of minors.

Table 1: The Palermo Protocol Definition of Sex Trafficking

Act	Means	Object
“recruitment, transportation, transfer, harbouring or receipt of persons” ³¹	“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” ³²	“the exploitation of the prostitution of others or other forms of sexual exploitation” ³³

Nearly every analysis that has been offered of the Palermo Protocol definition of trafficking breaks it down into three elements.³⁴ These analyses label the first two elements of the definition as the “act” and “means” elements, respectively.³⁵ There is, however, some variety of labels that have been used to characterize the third element of the definition. Most often, this element is referred to as the “purpose” element of trafficking.³⁶

³¹ *Id.* art. 3(a).

³² *Id.*

³³ *Id.*

³⁴ See ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 29 (2010); Kevin Bales & Becky Cornell, *The Next Step in the Fight Against Human Trafficking: Outlawing the Trade in Slave-Made Goods*, 1 *INTERCULTURAL HUM. RTS. L. REV.* 211, 219 (2006); Anna Marie Gallagher, *Triply Exploited: Female Victims of Trafficking Networks—Strategies for Pursuing Protection and Legal Status in Countries of Destination*, 19 *GEO. IMMIGR. L.J.* 99, 102 (2004) [hereinafter Anna Marie Gallagher 2004]; Anne T. Gallagher, Response, *Human Rights and Human Trafficking: Quagmire or Firm Ground?: A Response to James Hathaway*, 49 *VA. J. INT’L L.* 789, 811 (2009) [hereinafter Anna T. Gallagher 2009]; Ryszard Piotrowicz, *The UNHCR’s Guidelines on Human Trafficking*, 20 *INT. J. REFUGEE L.* 242, 244 (2008); Katherine L. Morrow, Comment, *Soccer, Sex and Slavery: Human Trafficking in the World Cup*, 17 *TUL. J. INT’L & COMP. L.* 243, 245 (2008); Anne Marie Tavella, Comment, *Sex Trafficking and the 2006 World Cup in Germany: Concerns, Actions and Implications for Future International Sporting Events*, 6 *NW. U. J. INT’L HUM. RTS.* 196, 198 (2007). In her 2006 report analyzing the definition, the then-Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons analyzed the definition in terms of four elements, with the fourth element capturing the issue of “victim status” (meaning, the status of the victim as either a child or an adult). See Huda Report, *supra* note 19, ¶ 35. Since this Article is concerned solely with adult trafficking, this fourth element is irrelevant to the analysis.

³⁵ See GALLAGHER, *supra* note 34, at 29–33.

³⁶ *Id.* at 34–42.

If one's focus is restricted to the Palermo Protocol definition itself, the use of the label "purpose" to characterize this element is appropriate, given its direct correspondence to the language of Article 3. However, if one engages in a comparative analysis between the Palermo Protocol definition and domestic law definitions of trafficking, as this Article does, then it will be preferable to use the more generic label "object" in characterizing this third element. By using the label "object" rather than "purpose," one may leave open the issue of the defendant's mens rea in committing the acts that constitute trafficking.³⁷ For, while the Palermo Protocol defines trafficking in terms that require proof that "the exploitation of the prostitution of others or other forms of sexual exploitation"³⁸ was the defendant's purpose in acting, many domestic criminal laws opt for a broader range of *mentes reae* in defining trafficking.³⁹

Employing this tripartite analysis of the definition of trafficking will assist in isolating the salient ways in which domestic criminal law definitions of trafficking differ from the definition articulated in Article 3 of the Palermo Protocol. After explaining the scope of the language in Article 3 as it pertains to each of the three elements, the relevant language of state parties' domestic laws will be analyzed, so as to illustrate the discrepancies between the definitions. As will be demonstrated in the next Part, numerous gaps exist in the way sex trafficking is defined in international and domestic law. These gaps undermine the Special Rapporteur's claim that there is now an accepted international definition of trafficking and frustrate the Palermo Protocol's aspiration for a comprehensive and coordinated international response to trafficking.

³⁷ A similar move was made in the analysis offered by the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons in her 2006 report, where she labeled this third element the "end result" element of trafficking. Huda Report, *supra* note 19, ¶ 35. As she explained, she chose "end result" instead of "purpose" to avoid "begging the question of the requisite mental state that must be established in order to establish that a person has engaged in an act of trafficking." *Id.* at 20 n.3 (noting that Bosnia and Herzegovina had adopted a negligence standard in defining the requisite mental state for trafficking, rather than requiring a showing of "purpose"). This Article refers to the third element of trafficking by the label "object" rather than "purpose" in order to avoid the implication that any actual result must be established in order for the definition to be satisfied. For, under the terms of the Palermo Protocol, the definition of trafficking can be satisfied even before the exploitation of prostitution or other forms of sexual exploitation occurs.

³⁸ Palermo Protocol, *supra* note 4, art. 3.

³⁹ See, e.g., 18 U.S.C. § 1591 (2006) (defining the mens rea of trafficking in terms of knowledge); Sexual Offences Act, 2003, c. 42, §§ 57–59 (Eng.) (defining the mens rea of trafficking in terms of intentionality with respect to the act that constitutes trafficking and either intentionality or belief as to the commission of a "relevant offence").

II. SEX TRAFFICKING DEFINITIONS IN DOMESTIC LAW: IDENTIFYING THE GAPS BETWEEN INTERNATIONAL AND DOMESTIC DEFINITIONS

While some state parties to the Palermo Protocol have not yet amended their domestic criminal codes post-ratification,⁴⁰ a number of other state parties have adopted definitions of trafficking that correspond precisely to the language in Article 3 of the Protocol. Bulgaria⁴¹ and Turkey,⁴² for example, define trafficking using precisely the same terminology as articulated in the Palermo Protocol. Moreover, a small number of state parties has opted to define trafficking in a way that covers a broader range of conduct than that delineated in Article 3 of the Palermo Protocol. The criminal laws of Uzbekistan,⁴³ Slovenia,⁴⁴ and Sri Lanka,⁴⁵ for example, define trafficking in a way that captures all of the “act” and “object” elements relating to sex trafficking as specified in the Palermo Protocol, but do not require proof of any particular use of “means” in order to satisfy the definition of trafficking. Rather, the use of illicit means such as threats or compulsion instead feature as aggravating circumstances, elevating the potential range of penalties for the offense.⁴⁶ In comparison, the definition of trafficking in the Mauritius criminal code closely tracks the language employed to define trafficking in Article 3 of the Palermo Protocol, extending just beyond its scope to specify that trafficking in adopted children is explicitly covered under its terms.⁴⁷

⁴⁰ State parties that have yet to amend their penal codes in order to comply with Article 5 of the Palermo Protocol include Croatia, India, Luxembourg, and Malta. KAZNENI ZAKON [CRIMINAL CODE], Sept. 29, 1997 (Croat.); PEN. CODE (1860) (India); CODE PÉNAL [C. PÉN.] (Lux.); Criminal Code, 1854, c. 9 (Malta). Existing trafficking criminal laws in these countries largely reflect a definition of trafficking that is consistent with the previous Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. 1949 Convention, *supra* note 2; *see also, e.g.*, KAZNENI ZAKON art. 178 (Croatia); Immoral Traffic (Prevention) Act, 1956, No. 104, Acts of Parliament, 1956 (India); C. PÉN. art. 379 (Lux.); White Slave Traffic (Suppression) Ordinance, 1930, c. 63, § 2 (Malta).

⁴¹ Zakon ot 20 maí 2003 g. za Borba s Trafika na Khora [Law No. 46 of May 20, 2003 on Combating Human Trafficking], additional provisions, § 1, DÜRZHAVEN VESTNIK [OFFICIAL GAZETTE], May 20, 2003 (Bulg.).

⁴² CEZA KANUNU [PENAL CODE] art. 80 (Turk.).

⁴³ UGOLOVNIY KODEKS RESPUBLIKI UZBEKISTAN [UK RU] [CRIMINAL CODE] art. 135 (Uzb.).

⁴⁴ KAZENSKI ZAKON [PENAL CODE] URADNI LIST [OFFICIAL GAZETTE] No. 55/2008, as amended, art. 113 (Slovn.).

⁴⁵ Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, 2005, No. 30, § 14, GAZETTE OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2005, Supp. (Sri Lanka) (limiting definition of trafficking to sex trafficking of women and children).

⁴⁶ Compare Palermo Protocol, *supra* note 4, art. 3(1), with UK RU art. 135 (Uzb.), and KAZENSKI ZAKON art. 113 (Slovn.), and Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, §14 (Sri Lanka).

⁴⁷ Combating of Trafficking in Persons Act, 2009, No. 2, § 2, GOVERNMENT GAZETTE OF MAURITIUS, Supp. 2009 (Mauritius).

Other state parties have opted to formulate their own definitions of trafficking in their domestic criminal codes, defining the offense in terms that capture a narrower range of conduct than that defined in the Palermo Protocol. Below, this Article examines several of the gaps that exist between the definition of sex trafficking in international law, as represented in the definition articulated in Article 3 of the Palermo Protocol, and the definition of sex trafficking in domestic laws, as represented in the domestic anti-trafficking laws of several state parties. The analysis below focuses primarily on the instances in which domestic criminal laws define trafficking more narrowly than it is defined in Article 3, thereby illustrating instances of noncompliance by the state party with its obligations under Article 5 of the Palermo Protocol.

A. Gaps Regarding the Irrelevance of Consent

Perhaps the key difference between the Palermo Protocol's definition and those found in domestic anti-trafficking criminal laws is whether the consent of the trafficked person is relevant to a determination of whether she has been trafficked. Under Article 3(b) of the Palermo Protocol, the victim's consent to engage in prostitution is deemed irrelevant, whereas the victim's consent remains a central consideration in many state parties' domestic anti-trafficking criminal laws.

The protocol explicitly states that the "consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used."⁴⁸ While a number of state parties have complied with their Article 5 obligations to explicitly make consent of the victim irrelevant in all circumstances,⁴⁹ many more have failed to do so. Despite adopting the definition of trafficking set out in Article 3(a) of the Palermo Protocol, the language in Article 3(b) has not been adopted in the criminal laws of several state parties, including those of Armenia,⁵⁰ Azerbaijan,⁵¹ Bosnia and Herzegovina,⁵² Denmark,⁵³ Gambia,⁵⁴ Ghana,⁵⁵ Macedonia,⁵⁶ Moldova,⁵⁷

⁴⁸ Palermo Protocol, *supra* note 4, art. 3(b).

⁴⁹ See *supra* notes 43–45.

⁵⁰ K'REAKAN ORENSGIRK' [CRIMINAL CODE] art. 132 (Arm.).

⁵¹ UGOLOVNIYI KODEKS AZERBAIDZHANSKOI RESPUBLIKI [UK AR] [CRIMINAL CODE] (Azer.), available at <http://legislationline.org/download/action/download/id/1658/file/4b3ff87c005675cfd74058077132.htm>.

⁵² Zakon br. 48/2010 o Izmjenama i dopunama Krivičnog Zakona Bosne i Hercegovine [Law on Amendments to the Criminal Code of Bosnia and Herzegovina] art. 69 (Bosn. & Herz.).

⁵³ STRAFFELOVEN [PENAL CODE] § 262 a (Denmark).

⁵⁴ Trafficking in Persons Act (2007) § 28 (Gam.).

Mozambique,⁵⁸ Montenegro,⁵⁹ Portugal,⁶⁰ the Russian Federation,⁶¹ Romania,⁶² Rwanda,⁶³ Saudi Arabia,⁶⁴ Serbia,⁶⁵ Sierra Leone,⁶⁶ South Africa,⁶⁷ Sweden,⁶⁸ Thailand,⁶⁹ Trinidad and Tobago,⁷⁰ Turkmenistan,⁷¹ Ukraine,⁷² the United States,⁷³ and Zambia.⁷⁴ Rather than adopting the entire definition of

⁵⁵ Human Trafficking Act 694 of 2005 (Ghana).

⁵⁶ KRIVIČNI ZAKONIK [CRIMINAL CODE] art. 418 (Maced.).

⁵⁷ Lege Nr. 241 din 20 octombrie 2005 Privind Prevenirea și Combaterea Traficului de Ființe Umane [Law No. 241 of Oct. 20, 2005, on Preventing and Combating Trafficking in Human Beings] art. 2, MONITORUL OFICIAL [OFFICIAL GAZETTE], Dec. 9, 2005 (Mold.).

⁵⁸ Lei No. 6/2008 de 9 Julho 2008 [Law No. 6/2008 of July 9, 2008] art. 28, BOLETIM DA REPÚBLICA [BULLETIN OF THE REPUBLIC], July 9, 2008 (Mozam.).

⁵⁹ KRIVIČNI ZAKONIK [CRIMINAL CODE] art. 444 (Montenegro).

⁶⁰ CÓDIGO PENAL [C.P.] [PENAL CODE] art. 169 (Port.). Despite its failure to adopt Article 3(b) in its criminal code, Portugal reported to the Conference of Parties that the consent of the victim is not relevant to a determination of whether trafficking has taken place. See Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Third Session, Vienna, Oct. 9–18, 2006, *Information Submitted by States in Their Responses to the Questionnaires for the First Reporting Cycle*, 114, U.N. Doc. CTOC/COP/2006/CRP.2 (Aug. 28, 2006) [hereinafter *Information Submitted by States*].

⁶¹ UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 127.1 (Russ.).

⁶² Lege Nr. 678 din 21 noiembrie 2001 Privind Prevenirea și Combaterea Traficului de Persoane [Law of Nov. 21, 2001 on the Prevention and Combat of Trafficking in Persons] art. 12, MONITORUL OFICIAL AL ROMÂNIEI [OFFICIAL GAZETTE], Oct. 13, 2005. Like Portugal, Romania reported to the Conference of Parties that the consent of the victim is not relevant to a determination of whether trafficking has taken place. See *Information Submitted by States*, *supra* note 60, at 114.

⁶³ Protocol To Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of Dec. 15, 2000. OFFICIAL GAZETTE, June 15, 2003 12th ed. (Rwanda).

⁶⁴ Royal Decree No. M/40 of 2009 (Law for Combating Crimes of Trafficking in Persons), Um Al-Quaran, 16 Shaban 1430 A.H. (Aug. 7, 2009) (Saudi Arabia).

⁶⁵ KRIVIČNI ZAKONIK [CRIMINAL CODE] art. 338. (Serb.). Like Portugal and Romania, Serbia reported to the Conference of Parties that the consent of the victim is not relevant to a determination of whether trafficking has taken place. See *Information Submitted by States*, *supra* note 60, at 114.

⁶⁶ Anti-human Trafficking Act, 2005, No. 44, § 2, SIERRA LEONE GAZETTE, 2005, Supp. (Sierra Leone).

⁶⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 § 70(b)(2) (S. Afr.).

⁶⁸ BROTTSBALKEN [BRB] [CRIMINAL CODE] 4:1 (Swed.). Like Portugal, Romania, and Serbia, Sweden reported to the Conference of Parties that the consent of the victim is not relevant to a determination of whether trafficking has taken place. See *Information Submitted by States*, *supra* note 60, at 114.

⁶⁹ Anti-trafficking in Persons Act B.E. 2551, § 6 (2008) (Thai.). Like Portugal, Romania, Serbia, and Sweden, Thailand reported to the Conference of Parties that the consent of the victim is not relevant to a determination of whether trafficking has taken place. See *Information Submitted by States*, *supra* note 60, at 114.

⁷⁰ Trafficking in Persons Act (Act. No. 14 /2011) (Trin. & Tobago).

⁷¹ Zakon Turkmenistana o Bor'be s Torgovlyei Lyud'mi [Law of Turkmenistan on Combating Trafficking in Persons] art. 1, TURKMENISTAN: ZOLOTŌI VEK [TURKMENISTAN: THE GOLDEN AGE] Dec. 14, 2007, No. 155-III.

⁷² KRYMINAL'NII KODEKS UKRAĪNI [CRIMINAL CODE] art. 149 (Ukr.).

⁷³ 18 U.S.C. § 1591 (2006). Like Portugal, Romania, Serbia, Sweden, and Thailand, the United States reported to the Conference of Parties that the consent of the victim is not relevant to a determination of whether trafficking has taken place. See *Information Submitted by States*, *supra* note 60, at 114–15. The

trafficking set out in Article 3, as required by Article 5 of the Palermo Protocol, these state parties have chosen to remain silent on the issue of whether a victim's consent is relevant to determining whether the offense of trafficking has been committed.

What is the effect of such silence? To a large extent, the answer will vary according to jurisdictionally specific norms of statutory interpretation. Typically, however, the matter will be governed by general principles of criminal law regarding the relevance of consent to criminal liability.⁷⁵ Pursuant to these principles, if coercion, force, threats, or the like are elements of a criminal offense, then the consent of the victim will be deemed relevant to negating these elements.⁷⁶ Absent any statutory provision to the contrary, the courts will typically find that a woman has not been a victim of sex trafficking if she has consented.⁷⁷ In the absence of statutory language specifically addressing the issue of consent, courts are likely to treat a victim's consent as relevant to determining whether the defendant is guilty of the offense of sex trafficking.⁷⁸ Indeed, it was precisely for this reason that anti-trafficking advocates were particularly concerned to ensure that trafficking was defined in such a way so as to render the victim's consent irrelevant.⁷⁹ By including the language of Article 3(b) in the Palermo Protocol definition of trafficking, the definition obviates the general criminal law principles regarding consent that would otherwise apply. Given that there is specific language addressing the issue of consent in the Palermo Protocol definition, courts that apply this language are no longer free to consider the victim's consent relevant. Rather, if the language of Article 3(b) is adopted into domestic criminal codes, as is

United States' report is particularly unconvincing in light of the relevance of consent to a finding of trafficking in the case of *United States v. Marcus*, 487 F. Supp. 2d 289, 305 & n.11 (E.D.N.Y. 2007), *vacated on other grounds*, 538 F.3d 97 (2nd Cir. 2008) (per curiam), *rev'd*, 130 S. Ct. 2159 (2010).

⁷⁴ Anti-human Trafficking Act (Act No. 11/2008) § 2 (Zam.).

⁷⁵ I GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 23 (2007); *see also Marcus*, 487 F. Supp. 2d at 305 & n.11 (interpreting the U.S. domestic criminal sex trafficking statute, 18 U.S.C. § 1591, and noting that the possibility of the victim having consented is relevant to determining the defendant's guilt on a charge of sex trafficking under this definition); Vera Bergelson, *The Right To Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 173–75 (2007) (reviewing the current state of the law of consent in the United States).

⁷⁶ *See FLETCHER, supra note 75*, at 24–25.

⁷⁷ *But cf. GALLAGHER, supra note 35*, at 28 (misinterpreting the relevance of consent as limited to the provision of an affirmative defense). While Gallagher is correct to note that consent cannot be used as a defense to trafficking, per operation of the language in Article 3(b), she fails to recognize that Article 3(b) also renders the victim's consent irrelevant for the purpose of negating a prima facie case of trafficking. *See Palermo Protocol, supra note 4*, art. 3(b).

⁷⁸ *See, e.g., Marcus*, 487 F. Supp. 2d at 305 & n.11.

⁷⁹ *See GALLAGHER, supra note 35*, at 26–27.

required by Article 5, courts will be required to treat the victim's consent as irrelevant in determining whether a case of sex trafficking has been proven. By omitting the language of Article 3(b) from their domestic criminal codes, the state parties noted above have permitted the issue of consent to remain a relevant consideration in the adjudication of trafficking cases, thereby violating their obligations under Article 5 of the Palermo Protocol.

B. Gaps Regarding the Acts that Constitute Trafficking

The acts that constitute trafficking under the Palermo Protocol's definition include "recruitment, transportation, transfer, harbouring or receipt of persons."⁸⁰ Definitions of trafficking under many state parties' domestic criminal laws, however, articulate act elements that are substantially narrower than the range of acts listed in the Article 3 definition. This narrowing of the act element is primarily accomplished in two ways.

First, while there is no requirement under the Palermo Protocol definition for a victim to have been transported over a border, nor indeed is any transportation or transfer of the victim required whatsoever,⁸¹ the requirement of border-crossing or transportation within a country's borders has been added into the definition of trafficking in many state parties' domestic criminal codes. For example, Australia,⁸² Austria,⁸³ and the United Kingdom⁸⁴ all define trafficking in terms that require either cross-border transportation of the victim or, at least, movement within the domestic jurisdiction.⁸⁵ Without evidence proving border-crossing or intra-border transportation, the criminal offense of trafficking cannot be established in these jurisdictions. The addition of this extra element into the definition of trafficking is in clear contrast to the definition of trafficking set forth in Article 3(a) of the Palermo Protocol.⁸⁶

⁸⁰ Palermo Protocol, *supra* note 4, art. 3(a).

⁸¹ *See id.*

⁸² *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) sch 1, s 9 (Austl.).

⁸³ STRAFGESETZBUCH [STGB] [PENAL CODE] BUNDESGESETZBLATT [BGBl] No. 60/1974, as amended, § 217.

⁸⁴ Sexual Offences Act, 2003, c. 42, § 57 (U.K.).

⁸⁵ Mozambique adds the additional element of border-crossing as an alternative to an element requiring that the act be part of an exchange of illicit economic benefit. Lei No. 6/2008 de 9 Julho 2008 [Law No. 6/2008 of July 9, 2008] art. 28, BOLETIM DA REPÚBLICA [BULLETIN OF THE REPUBLIC], July 9, 2008 (Mozam.). For further discussion of elements in the definition of trafficking that require economic benefit or motive, see *infra* notes 87–94 and accompanying text.

⁸⁶ While it is true that movement-focused action elements of "transportation" and "transfer" are to be found in Article 3(a), these elements are listed as merely two of five independent alternative action elements; thus, each one is independently sufficient to satisfy the act element of trafficking. *See* Palermo Protocol, *supra*

Second, while the acts that constitute trafficking under the Palermo Protocol definition are indifferent to whether money or other items of value were exchanged, this is not the case with respect to several state parties' definitions of trafficking. While the definition of trafficking in Article 3 does not conceptualize trafficking in terms of buying, selling, profiting, or exchanging, several state parties, including France,⁸⁷ Georgia,⁸⁸ Germany,⁸⁹ Hungary,⁹⁰ and Israel,⁹¹ have adopted domestic criminal law definitions of trafficking that do impose such requirements. Specifically, these domestic laws define trafficking in such a way as to limit its scope to acts that are performed in exchange for actual or promised remuneration or other benefit,⁹² or to acts that constitute buying, selling, or other unlawful transaction in relation to the victim.⁹³

The language of exchange or transaction featured in these definitions of trafficking creates another element of the offense that must be proven to launch a successful prosecution. The effect is identical to that discussed above regarding the elements of border-crossing and transportation, insofar as this language creates an additional element of the offense that must be proven to secure a criminal conviction for trafficking. Thus, in every criminal prosecution for trafficking, the prosecutor in these domestic jurisdictions will be required to prove that the defendant engaged in some exchange or transaction with respect to the victim. Mere recruitment, transportation, transfer, harboring, or receipt of a person without an exchange or transaction simply will not suffice to establish an act constituting trafficking. As such, these state parties have, in effect, criminalized only one part of what the Palermo Protocol recognizes as trafficking. In failing to criminalize the full

note 4, art. 3(a). As often noted by those reflecting on the wide range of act elements in the Palermo Protocol definition, it is possible for someone to be trafficked “without ever leaving home.” Julie Carroll, *Escape from Slavery: Minnesota Girl's Plight Highlights Problem of Human Trafficking*, THECATHOLICSPIRIT.COM (Dec. 14, 2010, 4:22 PM), <http://thecatholicspirit.com/featured/escape-from-slavery>; see also, e.g., UNITED NATIONS OFF. ON DRUGS & CRIME, ANTI-HUMAN TRAFFICKING MANUAL FOR CRIMINAL JUSTICE PRACTITIONERS: MODULE 1, at 12 (2009), available at http://www.unodc.org/documents/human-trafficking/TIP_module1_Ebook.pdf (“[T]rafficking in persons . . . need not involve the crossing of any border.”).

⁸⁷ CODE PÉNAL [C. PÉN.] art. 225-4-1 (Fr.).

⁸⁸ SAK'ART'VELOS SISKHLIS SAMART' LIS KODEK'SI [CRIMINAL CODE] art. 143¹ (Geor.).

⁸⁹ STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT I [BGBL. I] 3322, as amended, § 232–33 (Ger.).

⁹⁰ BÜNTETŐ TÖRVÉNYKÖNYV [BTK.] [CRIMINAL CODE] art. 175/B (Hung.).

⁹¹ Prohibition of Trafficking in Persons (Legislative Amendments), 5767–2006, SH No.2067 (Isr.).

⁹² See C. PÉN. art. 225-4-1 (Fr.).

⁹³ Prohibition of Trafficking in Persons (Legislative Amendments), p. 4 (Isr.).

range of conduct defined in Article 3, these state parties thereby stand in violation of their obligations under Article 5.⁹⁴

C. Gaps Regarding the Means by Which Trafficking Occurs

The means element of the Palermo Protocol's definition can be satisfied in a wide range of circumstances, and only *one* of these means must be established in order for the act to constitute trafficking under Article 3.⁹⁵ The means articulated are extremely broad—ranging from “the threat or use of force” all the way to “the abuse of power or of a position of vulnerability.”⁹⁶ Indeed, twelve mutually independent and sufficient means are included in the Palermo Protocol's definition of trafficking:

- (1) Threat of force;
- (2) Use of force;
- (3) Other forms of coercion;
- (4) Abduction;
- (5) Fraud;
- (6) Deception;
- (7) Abuse of power;
- (8) Abuse of a position of vulnerability;
- (9) Giving of payments to achieve the consent of a person having control over another person;
- (10) Giving of benefits to achieve the consent of a person having control over another person;
- (11) Receiving of payments to achieve the consent of a person having control over another person; and
- (12) Receiving of benefits to achieve the consent of a person having control over another person.⁹⁷

⁹⁴ The fact that France stands in violation of its Article 5 obligations makes it all the more perplexing that it has been hailed by the Conference of Parties for providing technical assistance to those state parties that acknowledge their noncompliance with Article 5's domestic criminal law definition of trafficking. See Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Fourth Session, Vienna, Oct. 8–17, 2008, *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: Consolidated Information Received from States for the First Reporting Cycle*, ¶ 31, U.N. Doc. CTOC/COP/2005/3/Rev.2 (Aug. 25, 2008).

⁹⁵ See Palermo Protocol, *supra* note 4, art. 3.

⁹⁶ See *id.* art. 3(a).

⁹⁷ *Id.*

Arguably, the means that lend the greatest scope to the Palermo Protocol's definition are those encompassed in the language of "by means of. . .the abuse of power or of a position of vulnerability"⁹⁸ (analyzed above as two distinct means of "abuse of power" and "abuse of a position of vulnerability"⁹⁹). Because the means are independently sufficient, any one of the twelve can satisfy the means element of the Palermo Protocol's trafficking definition. Thus, it follows that the Protocol's definition of trafficking can be satisfied even when one of these two means is the *only* illicit means by which trafficking occurs. In other words, according to the terms of the Palermo Protocol definition, trafficking can occur even in cases where the victim is not threatened, not forced, not coerced, not abducted, not defrauded, and not deceived.

It is therefore incorrect to claim—as some have—that the Palermo Protocol definition of sex trafficking is grounded in a distinction between cases in which threats or force are used and cases in which these particular means are not used.¹⁰⁰ Rather, the list of illicit means is far more expansive—and each means element is articulated as an *alternative* element of the definition—which is to say that any one of the various means listed will suffice to satisfy this element of the offense.

Despite the tremendous breadth of means by which trafficking is recognized to occur under the Palermo Protocol's definition, many state parties have adopted a more restrictive list of means elements, resulting in a narrower definition of trafficking than the one articulated in the Palermo Protocol. Before focusing attention on these examples, however, it is worth pausing to note that several state parties have gone in the opposite direction, choosing to broaden the scope of trafficking in their domestic law by remaining silent on the means by which trafficking occurs. State parties, including Belarus,¹⁰¹ Colombia,¹⁰² El Salvador,¹⁰³ France,¹⁰⁴ Slovenia,¹⁰⁵ Sri Lanka,¹⁰⁶ and

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *Contra* Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, NEMESIS, July/Aug. 2003, at 79, 83, 87 (claiming that the numerous means elements listed in the Article 3 definition of sex trafficking "essentially require the use of force and/or deception" to satisfy the definition of trafficking, and that force or deception is an "essential element" of trafficking); *see also* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657 (2010) (claiming that the protocol "define[s] trafficking as the movement or recruitment of men, women, or children, using force, fraud, or coercion, for the purpose of subjecting them to involuntary servitude or slavery").

¹⁰¹ UGOLOVNIY KODEKS RESPUBLIKI BELARUS' [UK RB] [CRIMINAL CODE] art. 181 (Belr).

¹⁰² CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 188A (Colom.).

Uzbekistan,¹⁰⁷ have adopted definitions of trafficking which do not specify any particular means by which trafficking occurs. By not limiting trafficking to instances involving any particular means, these definitions implicitly declare that trafficking can occur *by any means whatsoever*—thereby allowing for considerably broader application across a wider range of cases. Similarly, albeit more explicitly, the definition of trafficking in the criminal law of Lao People’s Democratic Republic reaches the same result by including the catchall phrase “by other means” in its definition of trafficking—thereby allowing the means element of the definition to be satisfied regardless of whether one of the specified means are used.¹⁰⁸

Another variation in the means element of trafficking can be seen in definitions adopted by state parties such as Belarus,¹⁰⁹ Bosnia and Herzegovina,¹¹⁰ France,¹¹¹ Luxembourg,¹¹² Malaysia,¹¹³ and the Russian Federation.¹¹⁴ While these definitions do not require that any particular means be used in order for a case to count as trafficking, the criminal statutes in these domestic jurisdictions do consider the use of illicit means to constitute an aggravating circumstance, which enhances applicable penalties.¹¹⁵ For example, in Belarus, while the penalty for a person convicted of recruiting, transporting, transferring, harboring, or receiving a person is five to seven years imprisonment, if that person performed the same act but used deceit or

¹⁰³ CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 367-B (El Sal.).

¹⁰⁴ CODE PÉNAL [C. PÉN.] art. 225-4-1 (Fr.).

¹⁰⁵ KAZENSKI ZAKON [PENAL CODE] URADNI LIST [OFFICIAL GAZETTE] No. 55/2008, as amended, art. 113 (Slovn.).

¹⁰⁶ Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, 2005, No. 30, § 14, GAZETTE OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2005, Supp. (Sri Lanka).

¹⁰⁷ UGOLOVNIY KODEKS RESPUBLIKI UZBEKISTAN [UK RU] [CRIMINAL CODE] art. 135 (Uzb.).

¹⁰⁸ Law of 22 October 2004 on the Development and Protection of Women art. 24, *translated in* Decree of 15 November 2004 of the President of the Lao People’s Democratic Republic on the Promulgation of the Law on Development and Protection of Women (Laos).

¹⁰⁹ Ab uniasienni zmienienniaŭ u niekatoryja kodeksy Respubliki Bielaruš pa pavieličenni adkaznasci za handaľ liudźmi i inšych złačynstvaŭ, zviazanych z [On Amending Certain Codes of the Republic of Belarus to Increase Liability for Human Trafficking and Other Related Offenses] art. 7, ZAKON RESPUBLIKI BIELARUŠ [LAW OF THE REPUBLIC OF BELARUS] 2005, No. 15-3 (Belr.).

¹¹⁰ Zakon br. 48/2010 o Izmjenama i dopunama Krivičnog Zakona Bosne i Hercegovine [Law on Amendments to the Criminal Code of Bosnia and Herzegovina] art. 69 (Bosn. & Herz.).

¹¹¹ CODE PÉNAL [C. PÉN.] art. 225-4-2 to 225-4-5 (Fr.).

¹¹² CODE PÉNAL [C. PÉN.] art. 379bis (Lux.).

¹¹³ Anti-trafficking in Persons Act (Act No. 670/2007) art. 12–13 (Malay.).

¹¹⁴ UGOLOVNIY KODEKS ROSSIJSKOJ FEDERASTII [UK RF] [Criminal Code] art. 127 (Russ.).

¹¹⁵ *See supra* text accompanying note 46.

took advantage of the victim's vulnerability, the penalty would be increased to a term of ten to twelve years of imprisonment.¹¹⁶

However, as noted above, many state parties depart from the Palermo Protocol definition in a manner that *narrows* the scope of cases that count as trafficking by articulating a limited list of means by which the offense can occur and failing to include catch-all language that expands the scope of cases that count as trafficking. Perhaps not surprisingly, state parties that have adopted a narrower range of means (as compared to the Palermo Protocol) have done so by dropping the language of “abuse of power” and “abuse of a position of vulnerability.” The Australian Criminal Code, for example, limits the range of means that will satisfy the definition of trafficking to cases involving the use of “force,” “threats,” or “decei[t],”¹¹⁷ while the United States’ definition limits the range of means to include only “force, fraud, or coercion.”¹¹⁸ The criminal codes of Georgia,¹¹⁹ Kazakhstan,¹²⁰ and Tajikistan¹²¹ follow this limiting approach as well, restricting the range of means available to satisfy the definition of trafficking well below the broad range of means articulated in Article 3 of the Palermo Protocol.

By failing to include other means such as, inter alia, “abuse of power” and “abuse of a position of vulnerability,” the Australian and U.S. definitions of sex trafficking fail to capture a substantial range of cases that are included under the Palermo Protocol definition. Thus, for this reason alone, the definition of sex trafficking in these state parties’ criminal codes fails to satisfy their obligations under Article 5 of the Protocol.

Despite adopting domestic criminal trafficking laws which clearly omit language regarding means of “abuse of power” and “abuse of a position of vulnerability”—the means elements which give the Palermo Protocol definition its considerable breadth—numerous state parties nonetheless

¹¹⁶ Ab uniasienni zmianienniaŭ u niekatoryja kodeksy Respubliki Bielaruś pa pavieličenni adkaznasci za handaŭ ludźmi i inšych zlačynstvaŭ, zviazanych z [On Amending Certain Codes of the Republic of Belarus To Increase Liability for Human Trafficking and Other Related Offenses] art. 7, ZAKON RESPUBLIKI BIELARUŚ [LAW OF THE REPUBLIC OF BELARUS] 2005, No. 15-3 (Belr.).

¹¹⁷ *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) sch 1, s 9 (Austl.).

¹¹⁸ See 18 U.S.C. § 1591 (2006). Consistent with the scope of this Article, the Authors focus on sex trafficking of adults, not children. Under the relevant statute, child sex trafficking need not entail the use of force, threats of force, fraud, or coercion. *Id.* § 1591(a)(2).

¹¹⁹ SAK’ART’VELO SISKHLIS SAMART’LIS KODEK’SI [CRIMINAL CODE] art. 143¹ (Geor.).

¹²⁰ UGOLOVNYI KODEKS RESPUBLIKI KAZAKHSTAN [UK RK] [CRIMINAL CODE] art. 128 (Kaz.).

¹²¹ UGOLOVNYĬ KODEKS RESPUBLIKI TADZHIKISTAN [UK RT] [CRIMINAL CODE] arts. 130–132, 134 (Taj.).

reported to the Conference of Parties that their domestic law's definitions of trafficking were fully compliant with the Article 3 definition.¹²² Indeed, state parties such as Nigeria,¹²³ and the United States, reported to the Conference of Parties that their definitions of trafficking included each and every means element listed in the Palermo Protocol Article 3 definition—despite the fact that these elements are plainly omitted from the statutes defining trafficking in their domestic criminal law.¹²⁴

III. EXPLAINING THE GAPS?

What might explain the gaps between the Palermo Protocol's definition of trafficking and the definitions found in the domestic criminal laws of numerous state parties identified above? This Part surveys five possible explanations for the apparent gaps and concludes that none of these explanations provides a satisfying answer to reconcile these inconsistencies. As such, the Authors conclude that the state parties identified above as having defined trafficking more narrowly in their domestic criminal codes than it is defined in Article 3 of the Palermo Protocol are *prima facie* in violation of their obligations under the Protocol. Given the apparent gaps between their international obligations and their presently enacted domestic laws, these noncompliant state parties should be called upon by the Conference of Parties to provide an explanation and defense of their domestic criminal code trafficking definitions.

One possible explanation for these gaps is that noncompliance with Article 5 obligations by some state parties is due to a lack of technical expertise within those nations and an as yet unmet need for technical assistance in drafting adequate criminal codes. This explanation has been advanced by the Conference of Parties in attempting to account for the persistent failure of state parties to comply with a variety of obligations under the Protocol.¹²⁵ Yet, as an explanation for a failure to comply with Article 5 obligations, the explanation seems inadequate for at least two reasons. First, the obligations of Article 5 are

¹²² *Information Submitted by States, supra* note 60, at 109–11.

¹²³ *Id.* at 110; *cf.* Trafficking in Persons (Prohibition) Law Enforcement and Administration (Amendment) Act No. (24) (2003) 90:89 O.G., A425 (Nigeria) (defining and limiting trafficking to the range of means of “deception, coercion or debt bondage”).

¹²⁴ *Information Submitted by States, supra* note 60, at 111.

¹²⁵ See Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Fourth Session, Vienna, 8–17 Oct. 2008, *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: Consolidated Information Received from States for the First Reporting Cycle*, 13, U.N. Doc. CTOC/COP/2005/3/Rev.2 (Aug. 25, 2008).

relatively straightforward and simple to implement. The Article 5 obligation is essentially to criminalize the conduct that is defined as trafficking in Article 3. Since the language of Article 3 sets forth a clear definition of trafficking, it would seem to require very little by way of technical expertise to simply adopt that language verbatim into a state party's domestic criminal code. Indeed, as noted above, Bulgaria and Turkey have managed to comply with their Article 5 obligations by doing precisely that.¹²⁶ Moreover, the explanation of an unmet need for technical assistance rings particularly hollow when one considers that the very countries that are typically the source of legal expertise and technical assistance, such as the United States, the United Kingdom, Australia, and France, are themselves not presently in compliance with their Article 5 obligations.

A more cynical explanation for the gaps is simply that there is no effective method in place to ensure that state parties comply with their Article 5 obligations and, moreover, no effective way to hold state parties accountable under the international law regime in the event of noncompliance. At present, the only method for monitoring compliance by state parties is the Conference of Parties, which has no enforcement power and has seemingly done little by way of criticizing or even highlighting noncompliance by state parties.¹²⁷ Indeed, in reflecting upon the implementation of Article 5 obligations, the Conference of Parties has staked out a somewhat defeatist position on the matter, noting “the fact that the Protocol did not provide model legislative provisions,” and concluding from this that “States parties should draft or amend national legislation in line with their domestic circumstances.”¹²⁸ A more robust recommendation might have suggested that noncompliant state parties adopt the language of Article 3 verbatim into their domestic criminal codes, or at the very least, provide an explanation as to why the state party believes that its present criminal code is in compliance. In any event, however, the lack of oversight and enforcement capacity within the Conference of Parties does not explain why state parties are choosing to define trafficking more narrowly in their domestic laws than it is defined in the Palermo Protocol—it merely explains why they are not being held accountable for doing so.

¹²⁶ See *supra* notes 41–42 and accompanying text.

¹²⁷ See Implementation of the Palermo Protocol, *supra* note 125, at 3, 14–15.

¹²⁸ Report on the Meeting of the Working Group on Trafficking in Persons Held in Vienna from 27 to 29 January 2010, ¶ 35, U.N. Doc. CTOC/COP/WG.4/2010/6 (Feb. 17, 2010). Moreover, as the example of the United States well demonstrates, it appears that state parties have thus far been free to claim they are in full compliance when they clearly are not. See *supra* notes 123–24 and accompanying text.

Perhaps a realistic, albeit cynical, explanation is to be found in the persistent economic crisis and the age of austerity to which it has given rise. According to this explanation, state parties are defining trafficking more narrowly in their domestic laws because they are unable to expend the resources to assist victims or prosecute defendants whose cases would fall under the broader Palermo Protocol definition. If state parties can limit trafficking to a narrower range of cases, then fewer resources will be required to address the problem. On the other hand, if state parties were to define trafficking as broadly as it is in the Palermo Protocol, it could conceivably require them to expend tremendous resources in addressing this problem. As the former Special Rapporteur, Sigma Huda remarked, the Protocol

does not necessarily require States to abolish all possible forms of prostitution. It does, however, require States to act in good faith towards the abolition of all forms of . . . prostitution in which people are recruited, transported, harboured, or received 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 one person having control over another, for the purpose of exploiting that person's prostitution.¹²⁹

From this observation, the Special Rapporteur concluded, “[f]or the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking.”¹³⁰ If these conclusions are correct, then the scope of the trafficking problem is indeed immense, perhaps particularly so in countries with legalized prostitution. As the Special Rapporteur further concluded, “State parties with legalized prostitution industries have a heavy responsibility to ensure that . . . their legalized prostitution regimes are not simply perpetuating widespread and systematic trafficking.”¹³¹ While the truth or falsity of these conclusions falls beyond the scope of this Article, it bears noting that adopting a broad definition of trafficking, like that articulated in Article 3 of the Palermo Protocol, will carry an economic cost for state parties in seeking to prevent, suppress, and punish trafficking. That said, economic austerity is not in itself a defense for a state party's failure to comply with its obligations under international law. It is, rather, perhaps a reason why a state might choose not to undertake such obligations in the first place. As such, the economic

¹²⁹ Huda Report, *supra* note 19, ¶ 41.

¹³⁰ *Id.* ¶ 42.

¹³¹ *Id.* ¶ 43.

austerity explanation fails to provide a satisfying rationale for the gaps between the international and domestic definitions of trafficking.

Another possible explanation for the gaps identified in this Article can be found in the fact that the Palermo Protocol's definition may be too vaguely formulated to satisfy domestic legal systems' principles of fair notice. The principle of maximum certainty, as it has been coined by Andrew Ashworth, is reflected to some extent in most criminal legal systems within liberal democracies and places principled restraints on the state's formulation of criminal offense definitions.¹³² This principle is satisfied "where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."¹³³ This explanation may go some way toward providing a satisfying explanation of the inconsistencies, insofar as terms such as "abuse of position of vulnerability" and "exploitation" remain undefined in the Palermo Protocol and raise difficult issues of implementation. Yet, there are at least two reasons why the potential vagueness of the Article 3 definition does not go the entire way toward explaining state parties' noncompliance with their Article 5 obligations. First, if the vagueness of Article 3's terms is genuinely the reason why a state party was unable to implement its terms, then under principles of international law, the party should enter a reservation to Article 5 and explain why it believes its present domestic law definition is the closest it can come to enacting the Palermo Protocol's definition without violating domestic constitutional prohibitions against vague criminal law definitions. Simply claiming to be in compliance, as the United States has done, is insufficient to meet Article 5 obligations.¹³⁴ Second, if the perceived vagueness of the Palermo Protocol definition is genuinely deemed problematic, the language thought to be impermissibly vague could be defined with more specificity in domestic law. For example, abuse of a position of power could be defined to reflect longstanding legal interpretations of what counts as an "abuse of legal position." Of course, such a specification would arguably violate the spirit of the Palermo Protocol definition, which was intended to capture a broader scope of "power" than just legal power.¹³⁵ Still, a state party might easily remedy a

¹³² ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 74 (5th ed. 2006) (citing the United States' constitutional doctrine of "fair warning" and "void for vagueness" noted in *Kolender v. Lawson*, 461 U.S. 352, (1983)).

¹³³ *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) 3, 22 (1993).

¹³⁴ See *supra* note 124 and accompanying text.

¹³⁵ Working Group on Trafficking in Persons, Vienna, Austria, 10–12 Oct. 2011, *Analysis of Key Concepts: Focus on the Concept of "Abuse of Power or of a Position of Vulnerability" in Article 3 of the*

perceived vagueness in the term “abuse of power” without limiting the scope of the term to abuses of legal power or official position. The definition of “abuse of power” could, for example, specify that the term refers to abuses of legal power or official position, parental or family power, power of employment, or power of threatening to expose a secret, thereby incorporating well-established legal definitions of blackmail. In any event, given the failure of state parties to claim vagueness as justification for their failure to define trafficking consistently with their obligations under Article 5 of the Palermo Protocol, and the relative ease with which vague terms can be clarified in domestic criminal codes, concerns regarding the vagueness of the Article 3 definition’s terms fail to provide a satisfying explanation for state parties’ noncompliance.

The final explanation for the gaps between the Palermo Protocol’s definition of trafficking and the various definitions of sex trafficking found in domestic anti-trafficking laws is both the most plausible answer and the most worrisome. It seems plausible to assume that these gaps are best explained by a continuing disagreement regarding the nature of sex trafficking—disagreements that persist despite the apparent support for the Protocol’s definition.¹³⁶ This explanation strikes the Authors as the most plausible, insofar as the analysis above yields the conclusion that there remain numerous distinct and inconsistent ways of conceptualizing what counts as sex trafficking in domestic criminal laws. It seems reasonable to conclude from this evidence that the primary reason why state parties define trafficking in their domestic criminal codes in a manner that is inconsistent with the Palermo Protocol’s definition is simply because the lawmakers, and presumably, the constituencies, in these domestic jurisdictions do not conceptualize trafficking as constituting as broad a phenomenon as that defined in Article 3. In other words, perhaps many political actors throughout the world remain convinced that trafficking has not occurred in cases where the victim consents to the intended exploitation; that a person who has merely been subjected to an abuse of a position of vulnerability (rather than to force or threats of force) does not count as a trafficking victim; or that cases that do not involve border-crossing constitute criminal wrongdoing that is distinct from trafficking.¹³⁷ If this is so, then the reasonable conclusion is that despite the uniformity aspired to by the

Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, ¶¶ 6–15, U.N. Doc. TOC/COP/WG.4/2011/3 (Aug. 4, 2011).

¹³⁶ See GALLAGHER, *supra* note 34, at 25–29.

¹³⁷ See *id.* (discussing key issues during the Palermo Protocol drafting process).

drafters of the Palermo Protocol, trafficking has remained, and perhaps will remain, somewhat of a moving target, with those wishing to combat it often finding themselves talking past one another due to a failure to join issue on precisely what sex trafficking is. If this explanation is indeed correct, it goes a long way toward undermining the Special Rapporteur's claim that we have developed an accepted international definition of trafficking.¹³⁸ Yet, as with the explanation grounded in vagueness discussed above, if the explanation for the gaps between international and domestic definitions of trafficking lies in the fact that there remain persistent disagreements regarding the nature and scope of trafficking, state parties remain under an obligation to assert a reservation to Article 5 and to explain precisely how and to what extent their conceptualization of trafficking differs from that adopted in the Palermo Protocol. As such, while this persistent disagreement may provide the best explanation for the gaps this Article has identified, it provides little by way of justification for the widespread noncompliance with Article 5 by state parties.

CONCLUSION

This Article has addressed the persistent failure to implement and monitor the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. Specifically, this Article has examined the failure of state parties to comply with their obligation under Article 5 of the Palermo Protocol to amend their criminal codes so that the offense of trafficking is defined as set out in Article 3 of the Protocol. As the analysis presented in this Article demonstrates, numerous state parties presently stand in breach of their obligations due to their failure to define trafficking in terms that match the scope of conduct defined in the Palermo Protocol's definition. While this Article has considered several possible explanations for these gaps, the Authors have concluded that none of these explanations provides a satisfying answer to reconcile the inconsistencies between international and domestic law definitions of trafficking. As such, the conclusion to be reached from this analysis is that the state parties identified above as having defined trafficking more narrowly in their domestic criminal codes than it is defined in Article 3 of the Palermo Protocol are *prima facie* in violation of their obligations under the Protocol. Given the apparent gaps between their international obligations and their presently enacted domestic laws, these noncompliant state parties should be

¹³⁸ See Huda Report, *supra* note 19.

called upon by the Conference of Parties to provide an explanation and defense of their domestic criminal code trafficking definitions.