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## YALE LAW & POLICY REVIEW

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### Twenty Years After the Passage of the Palermo Protocol: Identifying Common Flaws in Defining Trafficking through the First Global Study of Domestic Anti-Trafficking Laws

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*On November 15, 2000, the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol). Twenty years later, with 178 state parties, the Palermo Protocol has reached almost universal ratification. While this is impressive, the actual implementation of the Protocol's obligation to criminalize all forms of trafficking at the national level is even more notable. Presently, the vast majority of countries in the world criminalize trafficking in persons, as defined under international law. While this paper acknowledges and celebrates this uniformity, it also seeks to highlight some notable gaps in criminal provisions across dozens of countries' current laws.*

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**IDENTIFYING COMMON FLAWS IN DEFINING TRAFFICKING**

*Through an unprecedented review of over 300 trafficking and trafficking-related laws spanning 188 countries, this Article identifies three primary definitional inconsistencies that remain. The Article describes these trends, attempts to uncover why they exist, and ultimately explains how they can negatively affect efforts to combat trafficking in persons. By doing so, it provides the vital information necessary to guide policy and legislative reform efforts by international organizations, NGOs, and government stakeholders to achieve global consensus on the definition of trafficking in persons. This definitional consensus will truly complete the groundwork of the modern counter-trafficking in persons movement—it will be the end of the beginning, and the collective fight can continue most effectively, toward the beginning of the end.*

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## I. INTRODUCTION

### A. Focus

On November 15, 2000, the United Nations General Assembly adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol). Twenty years later, with 178 state parties,<sup>1</sup> the Palermo Protocol has reached almost universal ratification and is considered the “principal, legally binding global instrument to combat trafficking in persons.”<sup>2</sup> It can be argued that the Protocol is one of the most widely accepted international laws relating to a human rights issue and demonstrates an unusual level of widespread concurrence among the international community.

While this almost-universal ratification is impressive, the actual implementation of the Palermo Protocol’s obligation to criminalize all forms of trafficking at the national level is even more notable. Prior to the passage of the Palermo Protocol, there was no international consensus on

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1. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol]. Nations that have yet to become party to the Protocol include: Bhutan, Republic of the Congo, Iran, North Korea, Marshall Islands, Pakistan, Papua New Guinea, Solomon Islands, Somalia, South Sudan, Tonga, Uganda, Vanuatu, and Yemen.
  2. Conf. of the Parties to the U.N. Convention on Transnat’l Organized Crime, Rep. on Its Fourth Session, U.N. Doc. CTOC/COP/2008/19, at 11 (2008).

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how to define “trafficking in persons,”<sup>3</sup> much less how to create a legal framework to address the crime. Various disagreements regarding not only what constituted trafficking in persons, but also whether it was a priority for the international community,<sup>4</sup> rendered previous attempts to establish consensus inadequate. For example, while initial iterations of a counter-trafficking in persons legal framework began to take shape in the early and mid-1900s, they were narrowly focused on sex trafficking, and, in large part, only offenses involving women and children as victims, failing to address the much broader scope of the crime.<sup>5</sup> Without international consensus on a definition of the crime, it was impossible to begin establishing the robust legal framework necessary to address the complex and multi-faceted crime of trafficking in persons.

The drafters of the Palermo Protocol recognized that need and rose to the occasion. The Protocol not only established an international definition of trafficking in persons that encompassed the expansive scope of the crime, but also provided the international community with a comprehensive and victim-centered legal framework to build upon.<sup>6</sup> Using a novel three-pronged approach, sometimes referred to as the “3-P Paradigm,” the drafters emphasized the importance of prosecuting traffickers, protecting victims, and preventing trafficking, which would eventually serve as the blueprint for counter-trafficking efforts worldwide.

The passage of the Palermo Protocol was followed by two decades of extraordinary commitment by the international community to expand global counter-trafficking efforts. Immediately after its passage, states

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3. *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised*, U.N. OFF. ON DRUGS & CRIME 1 (2018), [https://www.unodc.org/documents/human-trafficking/2018/Issue\\_Paper\\_International\\_Definition\\_TIP.pdf](https://www.unodc.org/documents/human-trafficking/2018/Issue_Paper_International_Definition_TIP.pdf) [<https://perma.cc/FLQ2-SQLP>] [hereinafter *The International Legal Definition of Trafficking in Persons*].
  4. Paulette Lloyd & Beth A. Simmons, *Framing for a New Transnational Legal Order: The Case of Human Trafficking*, in *TRANSNATIONAL LEGAL ORDERS* 400, 427-28 (Terence C. Halliday & Gregory Shaffer eds., 2015).
  5. *Id.* at 403.
  6. While there is an expanding body of scholarly work focused on how the Protocol could be improved, that debate is outside the scope of this Article, which acknowledges the transformational role that the Protocol had in the advancement of a strong international legal framework to combat human trafficking.

moved at a considerably rapid pace to ratify the Protocol<sup>7</sup> and implement their newfound international obligations, including criminalizing trafficking in persons within their own national laws for the first time.<sup>8</sup> Many have attempted to explain the surprisingly strong momentum of the movement, with some asserting that the egregious and omnipresent nature of the crime rendered it a human rights priority for all, while others argue that the Protocol's placement within the United Nations Convention Against Transnational Organized Crime (UNTOC) framed the issue as a transnational organized crime priority which more easily obtained global support.<sup>9</sup> Whatever the reason, it is clear that twenty years after the Protocol's passage, significant consensus around the definition of trafficking in persons now exists. As the United Nations aptly states, "[T]here exists a remarkable level of uniformity between states with respect to definitions and understandings, particularly when measured against the situation that existed prior to the adoption of the Trafficking in Persons Protocol."<sup>10</sup> While this paper acknowledges and celebrates this uniformity, it also seeks to highlight some notable gaps in criminal provisions across dozens of countries' current laws.

It is important to note that this paper does not attempt to represent a comprehensive analysis of all legal issues arising from the implementation of the Palermo Protocol's obligations by state parties. Instead, through an unprecedented review<sup>11</sup> of over 300 trafficking and trafficking-related

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7. Lloyd & Simons, *supra* note 4, at 405-406; *see* Palermo Protocol, *supra* note 1.
  8. Lloyd & Simons, *supra* note 4, at 408-411; *see* ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 500 (2010); *Freedom First: Celebrating 20 Years of Progress to Combat Human Trafficking*, U.S. DEPT. STATE 42-43 (2020), <https://www.state.gov/wp-content/uploads/2020/01/JTIP-Freedom-First-Report-Web-508.pdf> [<https://perma.cc/L2LX-K82E>].
  9. *See* Lloyd & Simons, *supra* note 4, at 417-418; GALLAGHER, *supra* note 8, at 4-5.
  10. *The International Legal Definition of Trafficking in Persons*, *supra* note 3, at 22.
  11. This Article represents the first time the trafficking and trafficking-related laws of this many countries have been analyzed for definitional compliance with the Palermo Protocol. At present, there is no publicly available single repository that houses all of the world's trafficking and trafficking-related laws in English, making such an endeavor particularly notable and challenging. As a result, past scholarship on this subject has been limited in

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laws spanning 188<sup>12</sup> countries, the author has been able to identify three primary definitional inconsistencies that remain within some national laws. This Article describes these trends, attempts to uncover why they exist, and ultimately explains how they can negatively affect efforts to combat trafficking in persons. By doing so, it provides the information

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quantitative scope, generally surveying a small number of countries. However, it is important to note that the United Nations Office of Drugs and Crime's Database of Legislation currently offers the most comprehensive public repository of trafficking-persons laws in their original languages. See *Human Trafficking Knowledge Portal*, U.N. OFF. ON DRUGS & CRIME, <https://sherloc.unodc.org/cld/en/v3/htms/index.html> [<https://perma.cc/F7TQ-JQJ9>].

12. The author has reviewed the trafficking and trafficking-related laws for the following 188 countries: Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Aruba, Australia, Austria, Azerbaijan, the Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Burma, Burundi, Cabo Verde, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Comoros, Democratic Republic of Congo, Republic of the Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Curaçao, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Eswatini, Ethiopia, Fiji, Finland, France, Gabon, the Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hong Kong, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, North Korea, South Korea, Kosovo, Kuwait, Kyrgyz Republic, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Luxembourg, Macau, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Moldova, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, North Macedonia, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Rwanda, Saint Lucia, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Sint Maarten, Slovak Republic, Slovenia, Solomon Islands, Somalia, South Africa, South Sudan, Spain, Sri Lanka, Saint Vincent and the Grenadines, Sudan, Suriname, Sweden, Switzerland, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, the United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, and Zimbabwe.

necessary to guide policy and legislative reform efforts by international organizations, NGOs, and government stakeholders to achieve global consensus on the definition of trafficking in persons. This definitional consensus will truly complete the groundwork of the modern counter-trafficking in persons movement—it will be the end of the beginning, and the collective fight can continue most effectively, toward the beginning of the end.

*B. Overview of Trafficking in Persons as Defined by the Palermo Protocol*

Article 3(a) of the Palermo Protocol establishes the international legal definition of the base offense of trafficking in persons:

“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, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . . .

The crime requires three elements: an *act* (the recruitment, transportation, transfer, or harboring or receipt of persons), conducted using a *means* (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 purpose), for a *purpose* (exploitation). Each of these elements must be present in order to constitute a trafficking offense, unless the offense involved a child victim, which will be discussed further below.<sup>13</sup> While the Palermo

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13. *The International Legal Definition of Trafficking in Persons*, *supra* note 3, at 32 (“While exploitation is the essence of the crime, exploitation alone does not amount to trafficking in persons and not all exploitation occurs in the context of trafficking in persons. ‘Acts’ and ‘means’ are essential additional elements of the crime against adults, and ‘acts’ are essential additional elements of the offence in relation to children. Where acts and means are

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Protocol includes a list of examples of exploitation that would satisfy the “purpose” element of the crime (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), the list is not exhaustive. In other words, state parties are obligated to criminalize all forms of trafficking as defined under the Protocol,<sup>14</sup> but may expand the list within their own domestic definition of trafficking, as long as such inclusion reflects the intent and purpose of the Protocol.<sup>15</sup>

Article 3(b) addresses the irrelevance of the consent of a victim when determining whether a trafficking offense has occurred:

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 . . .<sup>16</sup>

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absent in relation to adults, or acts are absent in relation to children, the exploitation that has occurred will not constitute trafficking in persons under international law and should be addressed by alternative legislative provisions or approaches.”)

14. Palermo Protocol, *supra* note 1, art. 5(1), at 3 (“Each State Party shall 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, when committed intentionally.”); *Legislative Guides for the Implementation of the U.N. Convention Against Transnational Organized Crime and the Protocols Thereto*, U.N. OFF. ON DRUGS & CRIME 267 (2004), [https://www.unodc.org/documents/congress//background-information/Transnational\\_Organized\\_Crime/Legislative\\_guide\\_E.pdf](https://www.unodc.org/documents/congress//background-information/Transnational_Organized_Crime/Legislative_guide_E.pdf) [<https://perma.cc/7NNV-3YQV>] [hereinafter *2004 Legislative Guides*] (“[A]ll State parties to the Protocol are obliged by article 5 to criminalize trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, the full range of conduct covered by the definition.”).
15. *2004 Legislative Guides*, *supra* note 14, at 276-77 (“While article 11, paragraph 6, of the Convention states that the description of the offences is in principle reserved to the domestic law of a State party, drafters should consider the meaning of the provisions of the Convention and the Protocol concerning offences and not simply incorporate the language of the Protocols verbatim. In the drafting of the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters.”).
16. Palermo Protocol, *supra* note 1, at 2.

This provision asserts that if one of the “means” enumerated under Article 3(a) is utilized, the consent of the victim may not be used as a defense by alleged perpetrators.<sup>17</sup>

Article 3(c) and (d) create an exception to the three-part formulation of the crime by establishing that the otherwise required “means” element need not be proven when the trafficking offense involved a victim under the age of eighteen:

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.<sup>18</sup>

The importance of this “no means provision” is paramount, as it underscores the well-established legal principle that a child cannot consent to a commercial sex act.

### C. *Overview of the Status of Legal Frameworks Globally*

Twenty years after the passage of the Palermo Protocol, the criminalization of at least some forms of trafficking has become almost omnipresent within national legal frameworks worldwide. According to the U.S. Department of State, as of March 31, 2021, at least 155 countries have criminalized trafficking.<sup>19</sup> While many of these countries criminalize trafficking in persons through standalone trafficking laws, others criminalize trafficking crimes through various laws within their criminal

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17. *2004 Legislative Guides*, *supra* note 14, at 270 (“Once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence.”).

18. Palermo Protocol, *supra* note 1, at 2.

19. *Trafficking in Persons Report*, U.S. DEP’T STATE (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report> [<https://perma.cc/7WQC-DD7F>] [hereinafter *2021 Trafficking in Persons Report*] (assessing that 155 countries met the Trafficking Victims Protection Act’s Minimum Standard 1, which requires the Department to assess whether a country has criminalized all forms of trafficking in persons). The Department assessed 188 countries in the 2021 Trafficking in Persons Report. As such, there may be other countries whose laws criminalize at least some forms of trafficking in persons.

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frameworks. Either approach is acceptable and effective in satisfying obligations under Article 5 of the Palermo Protocol, which requires all state parties to criminalize all forms of trafficking in persons, as defined under Article 3, but does not require them to adopt stand-alone anti-trafficking legislation or criminalize all forms of trafficking within one law:

##### Article 5. Criminalization

1. Each State Party shall 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, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.<sup>20</sup>

##### *D. Overview of the Primary Gaps in Criminal Provisions*

Although the vast majority of countries now criminalize all forms of trafficking in persons, the definition of trafficking in persons varies across national laws. This is to be expected, as the Palermo Protocol allows for flexibility in national implementation. This approach provides necessary discretion to legislators and the practitioners, who are responsible for adapting international legal standards to the needs and contexts of their respective countries. However, flexibility can inadvertently lead to inconsistencies.<sup>21</sup> This Article will highlight three reoccurring flaws in national anti-trafficking laws which, while only appearing in a small number of countries, may significantly affect those countries' ability to successfully combat trafficking in persons: (1) the omission of the "means"

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20. Palermo Protocol, *supra* note 1, at 2-3.

21. *The International Legal Definition of Trafficking in Persons*, *supra* note 3, at 25.

element within the definition of the base offense of trafficking in persons, (2) the inclusion of the “means” element within the definition of a trafficking offense involving a child victim, and (3) the requirement of movement within the definition of trafficking.

## II. COUNTRIES THAT DO NOT INCLUDE THE “MEANS” AS AN ESSENTIAL ELEMENT OF THE CRIME

As explained above, Article 3(a) of the Palermo Protocol defines trafficking in persons to consist of a combination of three basic elements: (1) an act (recruitment, transportation, transfer, harboring or receipt of persons), (2) a means by which the act is achieved (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or benefits to achieve consent of a person having control over another person), and (3) a purpose (exploitation). In other words, while each of the individual elements may, alone, constitute a separate criminal offense, the trafficking in person crime must involve all three elements in order to constitute a trafficking offense.<sup>22</sup> Article 3(c) creates an exemption for instances of trafficking which involve a child victim, stating that the “means” element need not be proven under that circumstance. This exemption will be discussed further under Part III below.

Some countries’ legal frameworks fail to include the “means” element within the definition of trafficking, expanding the definition of trafficking to be inconsistent with the definition under international law. This expansion, which is often intentional on the part of legislators, may pose significant issues to the respective country’s anti-trafficking efforts, both domestically and internationally.

### A. Which Countries Incorrectly Omit the “Means” Element from the Definition of Trafficking?

As of March 31, 2021, only twenty-two countries fail to include the “means” element within the definition of the base offense of trafficking under their domestic criminal law: Argentina, Belgium, Canada, Colombia,

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22. 2004 *Legislative Guides*, *supra* note 14, at 268 (“As defined, trafficking consists of a combination of three basic elements, each of which must be taken from a list set out in the definition. . . . The obligation is to criminalize trafficking as a combination of constituent elements and not the elements themselves.”).

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Cuba, El Salvador, Gabon, Guatemala, Israel, Kazakhstan, Luxembourg, Mozambique, Nepal, Nicaragua, Panama, Paraguay, Russia, Slovenia, Switzerland, Tonga, Uruguay, and Uzbekistan. While these countries do not include the “means” element within the definition of the base offense of trafficking, the vast majority<sup>23</sup> consider the “means” as aggravating factors within their criminal provisions, which trigger higher penalties. For example:

##### Luxembourg Penal Code

###### Article 382-1:

(1) The offense of human trafficking is constituted by the act of recruiting, transporting, transferring, harboring, or receiving a person, or exercising or transferring control over a person, for the purpose of:

- 1) committing against that person the offense of procurement for prostitution or procurement for a sexual act; or the offense of sexual assault or sexual coercion;
- 2) exploiting that person’s labor or services, in form of forced or compulsory labor or services, servitude, slavery, or similar practices, generally under conditions that are contrary to human dignity;
- 3) removing organs or tissues in violation of applicable law;
- 4) making such person commit a felony or misdemeanor offense against his or her will.

(2) The offense provided for in paragraph 1 shall be punished with a custodial sentence of 3 to 5 years and a fine of 10,000 to 50,000 euros;

(3) The attempt to commit the offense provided for in paragraph 1 shall be punished with a custodial sentence of 1 to 3 years and a fine of 5,000 to 10,000 euros.

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23. The anti-trafficking laws for Argentina, Belgium, Cuba, El Salvador, Gabon, Kazakhstan, Luxembourg, Nicaragua, Panama, Paraguay, Russia, Slovenia, Switzerland, Uruguay, and Uzbekistan all explicitly list the “means” element as an aggravating factor.

Art. 382-2:

offenses provided for in Article 382-1, paragraph 1 shall be punished by imprisonment of five to ten years and a fine of 50,000 to 100,000 euros in the following cases:

...

- 5) the offense was committed by abusing a person's particularly vulnerable situation because of its illegal or precarious administrative situation, social situation precarious a state of pregnancy, illness, infirmity or physical or mental disability; or
- 6) the offense was committed by means of threat or use of force or other forms of coercion, abduction, of fraud, of deception; or
- 7) the offense was committed by giving or receiving of payments or benefits to achieve the consent of a person having authority over the victim;<sup>24</sup>

However, some countries do not include the requisite "means" element within the definition of the base offense of the crime, nor do they explicitly include it as an aggravating factor. For example:

Mozambique 2008 Law on Preventing and Combatting the Trafficking in People

Article 10: Trafficking in Persons

Anyone who recruits, transports, shelters, furnishes or receives a person by any means whatsoever—including under pretext of providing domestic or overseas employment, or education or training—for purposes of prostitution, forced labor, slavery, or involuntary or indentured servitude shall be subject to a term of imprisonment of between 16 and 20 years.<sup>25</sup>

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24. CODE PÉNAL art. 382-1, 382-2 (Lux.). This law was originally written in French and was translated by the U.S. Department of State's Office of Language Services—Translation Division. See Appendix A for additional examples of laws that include the "means" element as an aggravating factor.
  25. Law on Preventing and Combatting the Trafficking in People, 2008 (Law No. 6/2008) (Mozam.). This law was originally written in Portuguese and was

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### *B. Some Countries Appear to Purposefully Omit the “Means” Element From the Definition of Trafficking in Order To Facilitate Law Enforcement Efforts*

While some countries unintentionally omitted the “means” element from the definition of the base offense of trafficking, many countries have done so purposefully. The majority of these countries appear to have deliberately omitted the element from the base offense in order to facilitate prosecutions. This is unsurprising, as the “means” element is widely accepted as a particularly difficult element of the crime to prove, especially when traffickers utilize more subtle means of deception and coercion in lieu of overt force or threat of force.<sup>26</sup>

The government of Israel, for example, has been transparent about its intentional departure from the Palermo Protocol’s definition of trafficking. Shortly after the passage of Israel’s Prohibition of Trafficking in Persons Law in October 2006, the Ministry of Justice publicly released an explanatory memorandum detailing the contents of the new law. In it, the government explains that it purposefully chose to omit the “means” element of the crime in order to facilitate prosecutions:

It is immediately apparent that the elements of the crime differ from those espoused in the main trafficking Protocol.... Trafficking may transpire even if no threat, violence or abuse of

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translated by the U.S. Department of State’s Office of Language Services—Translation Division.

26. Hilary Aham & Jennifer Toritto Leonardo, *Human Trafficking: The Fundamentals*, 65 U.S. ATT’YS’ BULL. 3, 14 (2017), <https://www.justice.gov/usao/page/file/1008856/download> [<https://perma.cc/89XD-YCGB>] (“Proving coercion can be challenging, particularly when the means of coercion are psychological and invincible, and when traumatized victims are reluctant to cooperate with law enforcement and may have difficulty articulating the complex combinations of fear, dependence, love, and loyalty that compel them to remain under the trafficker’s control.”); see also Alessandra P. Serrano, *Evidence Considerations in Proving Sex Trafficking Cases Without a Testifying Victim*, 65 U.S. ATT’YS BULL. 115, 116 (2017), <https://www.justice.gov/usao/page/file/1008856/download> [<https://perma.cc/89XD-YCGB>] (“In §1591 prosecutions, the most challenging elements to prove without a testifying victim typically are: (1) proof of force, fraud, or coercion; (2) knowledge of the victim’s age for prosecutions involving a minor victim; and (3) evidence that a commercial sex act would occur.”).

power occurs. This definition facilitates the proving of the offence, as does the statement that no consideration is required, nor a transaction of a particular kind... The legislative technique adopted by the Law is to define the offence in broad terms, rather than specify a series of concrete actions which constitute it. This technique was consciously chosen, under the assumption that too many words often creates classifications which allow evasion and miss the essence of the offence. On the other hand, when the hard core of the offence is defined, a wide array of circumstances which merit inclusion, are more likely to fit.<sup>27</sup>

Similarly, the government of Belgium opted to retain the “means” element only when defining aggravating circumstances of the base offense of trafficking. In 2013, the Group of Experts on Action against Trafficking in Human Beings (GRETA), which is responsible for monitoring the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, released an evaluation of Belgium’s counter-trafficking efforts. In that report, GRETA highlighted the Belgian government’s intentional decision to omit the “means” element within the domestic definition of trafficking:

The offence of [trafficking in human beings] in Belgian law hinges on two constitute elements, namely the action and the purpose of exploitation. The Belgian authorities have stated that this is the result of a deliberate choice on the part of the Belgian legislator to focus on the effectiveness of criminal proceedings and the protection of victims. According to them, this approach made it easier to come up with the evidence required to convict the perpetrators of trafficking.<sup>28</sup>

While the government of Belgium amended the anti-trafficking provision of its criminal code in 2016, it simply extended the list of “means” included

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27. Rahel Gershuni, *Israel's New Comprehensive Trafficking Legislation*, STATE OF ISR. MINISTRY OF JUST. 3-4 (2006), <https://www.justice.gov.il/En/Units/Trafficking/MainDocs/israeltraffickinglawexplained.pdf> [<https://perma.cc/72L6-9HXC>] (citations omitted).

28. Grp. of Experts on Actions against Trafficking in Hum. Beings, *Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Belgium*, COUNCIL EUR. 20 (2013), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680630d0f> [<https://perma.cc/4BTF-CUCQ>].

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under the “aggravating circumstances” of the crime, rather than including the “means” as an essential element of the base offense.<sup>29</sup>

C. *While Still in Compliance with Palermo, Omitting the “Means” Element from the Definition of Trafficking can Hinder Anti-Trafficking Law Enforcement and Protection Efforts*

As stated above, Article 5 of the Palermo Protocol requires all state parties to criminalize all forms of trafficking in persons, as defined under Article 3.<sup>30</sup> Countries that do not include the “means” element within the definition of the base offenses of trafficking in persons can still meet their obligations under the Palermo Protocol because their definition may still criminalize all forms of trafficking in persons.<sup>31</sup> However, by choosing to omit this element, or include the element only in trafficking in persons offenses involving aggravating circumstances, these countries are expanding the definition of trafficking to be inconsistent with the definition under international law.

Many anti-trafficking stakeholders have taken issue with this approach, expressing the need for domestic laws to align closely with the international definition. On the international level, the United Nations Office on Drugs and Crime (UNODC), which is the entity responsible for assisting state parties in their efforts to implement the Palermo Protocol,<sup>32</sup> explicitly states the importance of including the “means” element within

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29. Grp. of Experts on Actions against Trafficking in Human Beings, *Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Belgium*, COUNCIL EUR. 7-8 (2017), <https://rm.coe.int/greta-2017-26-frg-bel-en/1680782ae0> [<https://perma.cc/Q4ZS-RDS3>]; see also *Article 433 Quinquies: Belgium*, LAB. EXPLOITATION ACCOUNTABILITY HUB, <https://accountabilityhub.org/provision/art-433-quinquies> [<https://perma.cc/RL9V-SSRB>].

30. Palermo Protocol, *supra* note 1, at 3.

31. *2004 Legislative Guides*, *supra* note 14, at 270 (“In reconciling other obligations, drafters should bear in mind that national legislation may general be broader or “more strict and severe” (art. 34, para.3, of the Convention) than is actually required without affecting national conformity.”).

32. *Human Trafficking*, U.N. OFF. ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/human-trafficking/our-response.html> [<https://perma.cc/4LKP-MW2C>].

the definition of trafficking in persons through its recently updated model law on trafficking in persons:

Some national examples of trafficking in persons offences have been drafted in a way so as to exclude physical element #2 (i.e., the prohibited means) in all cases . . . . While doing so will still allow State Parties to meet their obligations under the Protocol, there are significant benefits to closely aligning with the Protocol's three-part definition. Doing so yields improvements in international cooperation in investigating and prosecuting cases, more effective and tailored victims' services globally, and more accurate standardization of research and data gathering.<sup>33</sup>

Regional bodies have also paid particular attention to this issue and encourage member states to align their definitions with the international definition of trafficking. For example, the Organization of American States (OAS) adopted a declaration in March of 2018 calling on its members to explicitly promote the "promulgation or update of national anti-trafficking laws that clearly define and criminalize the specific acts, means, and purpose of human trafficking crimes, as required of state parties to the Palermo Protocol."<sup>34</sup> This is a particularly notable step, as ten of the twenty-two countries that currently do not include the requisite means within their domestic definition of trafficking are within this region. Since

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33. *Model Legislative Provisions Against Trafficking in Persons*, U.N. OFF. ON DRUGS & CRIMES 36 (2020), [https://www.unodc.org/documents/human-trafficking/2020/TiP\\_ModelLegislativeProvisions\\_Final.pdf](https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf) [<https://perma.cc/CYT8-QJT7>] [hereinafter *Model Legislative Provisions*]; see also *2004 Legislative Guides*, *supra* note 14, at 269 ("The main reason for defining the term 'trafficking in persons' in international law was to provide some degree of consensus-based standardization of concepts. That, in turn, was intended to form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases. Apart from direct advantages in that area, it was also hoped that the agreed definition would also standardize research and other activities, allowing for better comparison of national and regional data and giving a clearer global picture of the problem.")

34. The Permanent Council of the Org. of Am. States, Comm. on Hemispheric Sec., Fifth Meeting of National Authorities on Trafficking in Persons, *Hemispheric Effort Against Trafficking in Persons (Declaration of Mexico)*, ORG. AMER. STATES (Mar. 13, 2018), <http://www.oas.org/en/council/csh/topics/tratapersonas.asp#V> [<https://perma.cc/XN2H-HCMU>].

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the 2018 OAS declaration, multiple countries within the region have taken steps to amend their legislation. For example, on May 8, 2018, the government of Costa Rica amended Law No. 9095 (Law to Combat Trafficking in Persons and Create the National Coalition to Combat the Smuggling of Migrants and Trafficking in Persons of October 26, 2012, or CONATT), fully addressing this gap. The earlier 2012 law only established the use of force, fraud, or coercion as aggravating factors, rather than essential elements of the crime:

##### Article 5 – Trafficking in Persons of Law No. 9095 CONATT

Trafficking in persons shall mean promoting, facilitating or favoring the entry or exit of the country or the displacement, within the national territory, of persons of any sex to carry out one or more acts of prostitution or subject them to exploitation or servitude, whether sexual or labor, slavery or practices similar to slavery, forced labor or services, servile marriage, forced begging, illegal removal of organs or irregular adoption.<sup>35</sup>

However, the updated 2018 law states:

Article 3. Articles 5 and 6 of Law No. 9095 to Combat Trafficking in Persons and Create the National Coalition to Combat Smuggling of Migrants and Trafficking in Persons (CONATT) of October 26, 2012, as amended. The text reads as follows:

##### Article 5: Trafficking in Persons

Trafficking in persons shall mean using technology or any other means to employ threats, force, other forms of coercion, abduction, deception, trickery, abuse of power, exploitation of a vulnerability, or the giving or receiving of payments or concessions to obtain the consent of a person who has authority over another person, or to promote, facilitate, encourage, or engage in the recruitment, transfer, transport, housing, hiding, retaining, delivery, or receipt of one or more people within or outside the country for the purpose of forced labor or services and other forms of labor

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35. Law to Combat Trafficking in Persons and Create the National Coalition to Combat the Smuggling of Migrants and Trafficking in Persons art. V, Law No. 9095 (2012) (Costa Rica) [hereinafter CONATT]. This law was originally written in Spanish and was translated by the U.S. Department of State's Office of Language Services—Translation Division.

exploitation, servitude, slavery or like practices, servile or forced marriage, irregular adoption, forced begging, forced pregnancy and abortion, and any type of sexual exploitation.<sup>36</sup>

After the Western Hemisphere, Europe includes the second largest number of countries whose anti-trafficking laws omit the “means” element from the definition of trafficking. GRETA has regularly emphasized the significance of this gap in various European country reports. For example, a 2015 country report for Hungary states:

GRETA notes that . . . the offence of THB in Hungarian law hinges on two constituent components, namely an action and the purpose of exploitation, while the means are considered as aggravating circumstances . . . . Whilst recognising that this may facilitate the prosecution of traffickers in terms of evidential requirements, GRETA stresses the need for the Hungarian authorities to keep under review the possibility that this may lead to confusion with other criminal offences or difficulties when it comes to mutual assistance in the anti-trafficking field with countries which have incorporated the means in their own definition of THB.<sup>37</sup>

In a positive step, Hungary addressed these multilateral and regional appeals by amending the definition of trafficking in persons within their criminal code in July 2020 to include the “means” element as an essential element of the base offense of trafficking.<sup>38</sup> Unfortunately, when doing so, Hungary inadvertently created an additional definitional issue by failing to include an exception for offenses involving child victims, as explained in the following Section.<sup>39</sup>

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36. CONATT, Law No. 9095 (2018) (Costa Rica). This law was originally written in Spanish and was translated by the U.S. Department of State’s Office of Language Services—Translation Division.

37. *Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Hungary*, GRP. OF EXPERTS ON ACTIONS AGAINST TRAFFICKING IN HUM. BEINGS, COUNCIL EUR. 17 (2015), [https://ec.europa.eu/anti-trafficking/greta-report-hungary\\_en](https://ec.europa.eu/anti-trafficking/greta-report-hungary_en) [<https://perma.cc/S9GU-ESSX>].

38. Section 192, Hungary Criminal Code of 2012 (as amended in 2020).

39. Off. to Monitor & Combat Trafficking in Persons, *2021 Trafficking in Persons Report: Hungary*, U.S. DEP’T STATE (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report/hungary> [<https://perma.cc/G7Y9-F7LN>].

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### III. COUNTRIES THAT REQUIRE THE “MEANS” ELEMENT TO CONSTITUTE A CHILD TRAFFICKING OFFENSE

While countries should include the “means” element of the crime within the definition of the base offense of trafficking in persons, they must also ensure that the law includes an exemption of the “means” requirement for cases involving child victims. Article 3(c) and (d) of the Palermo Protocol establish that the means element is not required when the trafficking offenses involve a child:

The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) ‘Child’ shall mean any person under eighteen years of age.

The vast majority of countries’ domestic anti-trafficking laws successfully meet this requirement, either by taking the approach of the Palermo Protocol via Article 3(c) to include what is referred to as a “no-means provision” within the definition of trafficking in persons, or by simply including a separate child trafficking offense that only requires the demonstration of the “act” and the “purpose” to constitute the crime.

An example of a national law that takes the “no-means provision” approach, consistent with the Palermo Protocol, is the Philippines’ Expanded Anti-Trafficking Act of 2012:

#### Philippines Expanded Anti-Trafficking Act of 2012

##### Sec. 3. Definition of Terms – As used in this Act:

- (a) Trafficking in Persons – refers to the recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim’s consent or knowledge, within or across national borders by means of threat, or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or 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 which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs.

The recruitment, transportation, transfer, harboring, adoption or receipt of a child for the purpose of exploitation or when the adoption is induced by any form of consideration for exploitative purposes shall also be considered as “trafficking in persons” even if it does not involve any of the means set forth in the preceding paragraph.<sup>40</sup>

This approach, while most similar to that of the Palermo Protocol, is not necessarily preferable or more effective, as states can and should pick the best approach for their national criminal legal frameworks.<sup>41</sup> National laws that create a separate child trafficking offense that explicitly omits the “means” element from the definition of the crime are also consistent with the Palermo Protocol. For example:

Trinidad and Tobago’s Trafficking in Persons Act, 2011

16. Trafficking in Persons

A person who, for the purpose of exploitation –

- (a) recruits, transports, transfers, harbours or receives persons into or within Trinidad and Tobago;
- (b) recruits, transports or transfers persons from Trinidad and Tobago to another jurisdiction;
- (c) receives persons from Trinidad and Tobago into another jurisdiction; or
- (d) harbours persons from Trinidad and Tobago in another jurisdiction, by means of –
  - (i) threats or the use of force or other forms of coercion;
  - (ii) abduction;
  - (iii) fraud or deception;
  - (iv) the abuse of power or the abuse of a position of vulnerability; or
  - (v) the giving or receiving of payment or benefits to achieve the consent of a person having control over another person,

commits the offence of trafficking in persons and is liable on conviction on indictment, to a fine of not less than five hundred

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40. Expanded Anti-Trafficking Act of 2012, Rep. Act No. 10634, §3 (Phil.). For additional examples of laws that take the “no-means provision” approach, see Appendix B.

41. *Model Legislative Provisions*, *supra* note 33, at 35-36.

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thousand dollars and imprisonment of not less than fifteen years . . . .

#### 18. Trafficking in Children

(1) A person who –

- (a) recruits, transports, transfers, or receives a child into or within Trinidad and Tobago;
- (b) harbours a child in Trinidad or Tobago; or
- (c) recruits, transports or transfers a child from Trinidad and Tobago to another jurisdiction,

for the purpose of exploitation, commits the offence of trafficking in children and is liable on conviction on indictment to a fine of not less than one million dollars and imprisonment for not less than twenty years.

(2) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is sufficient to establish the offence of trafficking in children.<sup>42</sup>

#### A. *Which Countries Incorrectly Require the “Means” Element for a Trafficking Offense Involving a Child Victim?*

As of March 31, 2021, only twenty countries required the “means” element for trafficking offenses involving child victims: Algeria, Bhutan, Bolivia, Brazil, Burma, Cameroon, Dominican Republic, Equatorial Guinea, Ecuador, Hungary, India, Indonesia, Iran, Iraq, Liberia, New Zealand, Papua New Guinea, Venezuela, Vietnam, and Zambia. All but two of these countries simply do not differentiate between trafficking crimes involving adult victims, and those that involve child victims with respect to the required elements of the crime.<sup>43</sup> For example:

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42. For additional examples of countries that create a separate child trafficking offense which explicitly omit the “means” element from the definition of the crime, see Appendix C.

43. See Algeria (Penal Code of 2015), Bolivia (Article 281 bis of Bolivia’s Criminal Code), Brazil (Article 149a of law 13.344), Burma (2005 Anti-Trafficking Law), Cameroon (Law No. 2011/024 of 14 December 2011 Relating to the Fight Against Trafficking in Persons and Slavery), Dominican Republic (Law No. 137-03), Equatorial Guinea (Law on the Smuggling of Migrants and Trafficking in Persons 2004), India (Section 370 of the Indian Penal Code), Indonesia (Eradication of the Criminal Act of Human Trafficking

### Algeria Penal Code of 2015

Article 303 bis.4: Trafficking is considered the recruitment, transportation, transfer, lodging or receiving of one or several persons, through threat, use of force, other forms of constraint, abduction, fraud, abuse of authority or a situation of vulnerability or through the offer or acceptance of payment or benefits in order to achieve the consent of a person having control over another for the purpose of exploitation.

Exploitation is understood to be: exploitation of prostitution of others or all other forms of sexual exploitation, other exploitation through begging, work, or forced service, slavery or similar practices, servitude or organ harvesting.<sup>44</sup>

This approach—taken by all the countries listed above except Bhutan and Vietnam—while correctly establishing the base offense of trafficking in persons in line with Article 3(a) of the Palermo Protocol, fails to provide the necessary qualification that offenses involving child victims need not include the “means” element. In other words, it incorrectly omits the qualification established under Article 3(c) of the Palermo Protocol.

In the case of Bhutan, child trafficking is explicitly defined to require a demonstration of the “means” element, in direct conflict with Article 3(c) of the Palermo Protocol:

### Bhutan’s 2011 Child Care Protection Act

#### Trafficking of a Child

224. A person shall be guilty of trafficking of a child if a person recruits, transport, transfer, harbor or procure a child by means of threat, use of force, coercion, abduction, fraud, deception, abuse of power, position of vulnerability, transaction involving payments or benefits to achieve the consent of a person having control over

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2007), Iran, Iraq (2012 Law of Trafficking in Persons), Liberia (2005 Act to Ban Trafficking in Persons), Nepal (the Human Trafficking and Transportation Control Act), New Zealand (Section 98D of the Crimes Act of 1961), Papua New Guinea (Section 208C of Papua New Guinea Criminal Code), Sudan (The Combating of Human Trafficking Act of 2014), Venezuela (Organic Law on Women’s Right to Life Free from Violence), and Zambia (Anti-Human Trafficking Act of 2008).

44. This law was originally written in French and was translated by the staff at the U.S. Embassy in Algiers.

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another person, for the purpose of exploitation. The offence of trafficking of a child shall be felony of the third degree.

In the case of Vietnam, the criminal code correctly removes the “means” element for cases involving *some* children, but establishes an age range that does not apply to all children under the age of eighteen, as required by the Palermo Protocol:<sup>45</sup>

##### Criminal Code of Vietnam (2015)

###### Article 150: Human Trafficking

1. Any person who uses violence, threatens to use violence, deceives, or employs other tricks to commit any of the following acts shall face a penalty of 05 - 10 years’ imprisonment:

- a) Transferring or receiving human people for transfer for money, property, or other financial interests;
- b) Transferring or receiving human people for sexual slavery, coercive labor, taking body parts, or for other inhuman purposes;
- c) Recruiting, transporting, harboring other people for the commission of any of the acts specified in Point a or Point b of this Clause.

###### Article 151: Trafficking of a Person Under 16

1. A person who commits any of the following acts shall face a penalty of 07 - 12 years’ imprisonment:

- a) Transferring or receiving a person under 16 for transfer for money, property, or other financial interests, except for humanitarian purposes;
- b) Transferring or receiving a person under 16 for sexual slavery, coercive labor, taking body parts, or for other inhuman purposes;
- c) Recruiting, transporting, harboring a person under 16 for the commission of any of the acts specified in Point a or Point b of this Clause.

Each of these three distinct approaches produces the same result: the definition of trafficking in persons fails to encompass all forms of

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45. Palermo Protocol, *supra* note 1, at art. 3(d).

trafficking as established under international law. Specifically, the law does not criminalize all child trafficking cases in which certain “means” do not exist.

*B. Legislative Error Appears to Be the Primary Reason Some Countries Incorrectly Require the “Means” Element for Trafficking Offenses Involving Child Victims*

Unlike the two other trends discussed in this paper, the failure to ensure that the “means” element is not required for trafficking crimes involving children generally appears to be the result of legislative error, rather than an intentional decision by drafters. This seems particularly likely given that of the twenty countries in this category, at least eleven countries’ criminal frameworks include related child-exploitation and labor laws that do not require a demonstration of means in crimes that would constitute trafficking under international law.<sup>46</sup> For example, the Dominican Republic’s 2003 Law on Human Smuggling and Trafficking defines all forms of trafficking to require a demonstration of “means:”

Article 1. For the purposes of this law, the following definitions shall apply:

(a) Trafficking in persons: The recruitment, transport, transit, or receipt of persons through the use of threats, force, coercion, abduction, fraud, deceit, abuse of power or vulnerable circumstances, or the concession or receipt of payments or benefits to obtain the consent of a person with authority over

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46. See Penal Code 319 bis (Alg.); Article 281 bis of Criminal Code (Bol.); Lei No. 13.344, de 6 de Outubro de 2016, Diário Oficial da União [D.O.U.] de 7.10.2016 (Braz.); Anti Trafficking in Persons Law (Law No. 5/2005) (Myan.); Law to Combat Child Labor and Trafficking in Children. (No. 14-034.AU) (Comoros); Law on Illicit Traffic in Migrants and Trafficking in Persons (Law No. 137-03) (Dom. Rep.); Penal Code § 370 (India); Law No. 28 of 2012 Trafficking in Persons (Iraq); Human Trafficking and Transportation (Control) Act, 2064 (Act No. 5-2007) (Nepal); Crimes Act 1961, § 98D (N.Z.); Criminal Code art. 150 (Viet.). In addition to these eleven countries, other countries within this subgroup may also have child-exploitation and/or labor laws that do not require a demonstration of means and could be used to prosecute trafficking crimes. A full review of the legal frameworks in question would be required to confirm, which is outside the scope of this Article.

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another for the purpose of taking advantage of these persons through sexual exploitation, pornography, indentured servitude, forced labor or services, servile marriage, irregular adoptions, slavery and/or like practices, or the extraction of organs . . . .<sup>47</sup>

However, its Child Protection Code of 2003 criminalized various child sexual exploitation offences without requiring a demonstration of “means,” many of which would constitute child sex trafficking under international law:

Art. 25.- PROHIBITION OF COMMERCIALIZATION, PROSTITUTION AND PORNOGRAPHY. The commercialization, prostitution and use of child and adolescent pornography are prohibited.

Paragraph I.- Commercialization of children and adolescents is understood to be any act or transaction by virtue of which a child and adolescent is transferred by one person or group of persons to another, in exchange for remuneration or any other remuneration. For these purposes, it will be sanctioned to offer, deliver or accept by any means a boy, girl or adolescent, for the purpose of sexual exploitation, sale and / or use of their organs, forced labor or any other destination that denigrates the person of a boy, girl or adolescent.

Paragraph II.- Prostitution of children and adolescents is understood to be the use of any of these in sexual activities in exchange for remuneration or any other remuneration.

Paragraph III.- The use of children and adolescents in pornography is understood to be any representation, by any means, of children and adolescents, engaged in explicit, real or simulated sexual activities or any representation of the genital parts of children, girls and adolescents for primarily sexual purposes.<sup>48</sup>

Some countries that fall into this category are currently making efforts to align their trafficking laws with other laws relating to child exploitation

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47. 2003 Law on Human Smuggling and Trafficking (Law No. 137-03) (Dom. Rep.). This law was originally written in Spanish and was translated by the U.S. Department of State’s Office of Language Services—Translation Division.

48. Child Protection Code of 2003 (Law No. 136-03) (Dom. Rep.). This law was originally written in Spanish and was translated by the U.S. Department of State’s Office of Language Services—Translation Division.

that comply with the Palermo Protocol's "no means" provision. For example, Burma's 2005 Anti-Trafficking in Persons Law currently requires a demonstration of the "means" element, even in cases involving child victims:

(3)(a) Trafficking in Persons means recruitment, transportation, transfer, sale, purchase, lending, hiring, harbouring or receipt of persons after committing any of the following acts for the purpose of exploitation of a person with or without his consent:

- (1) threat, use of force or other form of coercion;
- (2) abduction;
- (3) fraud;
- (4) deception;
- (5) abuse of power or of position taking advantage of the vulnerability of a person;
- (6) giving or receiving of money or benefit to obtain the consent of the person having control over another person.<sup>49</sup>

However, in July 2019, the Burmese government enacted its Child Rights Law, which criminalizes trafficking in persons crimes involving child victims without requiring a demonstration of the "means" element:

Chapter XVIII Sale, Prostitution, Pornography of Children and Extradition

66. Whoever commits any of the following acts against children with or without the consent of the child shall be considered as a criminal offender:

- (a) subjecting children to sexual exploitation, transferring body organs of a child for benefits, or subjecting children to forced labour or selling, offering, transferring or receiving a child for such practices.<sup>50</sup>

The Burmese government appears to recognize the inconsistency between these laws and is attempting to draft new legislation to bring the 2005

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49. *Anti-Trafficking in Persons Law*, WARNATH GROUP 1 (2005), <https://www.warnathgroup.com/wp-content/uploads/2015/03/Burma-TIP-Law-2005.pdf> [<https://perma.cc/6U5U-LQ3N>].

50. This law was originally written in Burmese and was translated by the U.S. Department of State's Office of Language Services—Translation Division.

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Anti-Trafficking in Persons Law into accord with the new Child Rights Law, and ultimately, the Palermo Protocol.<sup>51</sup>

Similarly, Comoros's 2014 Law to Combat Child Labor and Trafficking in Children previously required a demonstration of the "means" element for all trafficking crimes:

##### Section IV Article 13: Trafficking in Children

"Trafficking in children" shall mean

1. The recruitment, transportation, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, abduction, or fraud, of deception, of abuse of power or of a position of vulnerability, or the giving or receiving of payment or benefits to achieve the consent of a person;
2. Forms of exploitation including exploitation of the prostitution of another person or other forms of sexual exploitation; forced labor; slavery or similar practices; servitude; or the removal of organs.<sup>52</sup>

However, another provision of the same law criminalized various child exploitation offenses, including those that would constitute child trafficking crimes, without requiring a demonstration of "means:"

##### Section I Article 8: Exploitation of Children

For the purpose of this Law, "exploitation" shall mean any activity to which a child is subjected that offers no economic, moral, emotional, or psychological benefit for said child but directly or indirectly produces economic, moral, or psychological advantages for the perpetrator or for any other person.

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51. Off. to Monitor & Combat Trafficking in Persons, *2021 Trafficking in Persons Report: Burma*, U.S. DEP'T STATE (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report/burma> [<https://perma.cc/XH9C-AKGL>] ("Authorities drafted legislation in late 2019 to replace the 2005 anti-trafficking law in an effort to criminalize all forms of trafficking in accordance with international standards and expand law enforcement mandates for certain interagency stakeholders; the draft remained pending at the end of the reporting period.").

52. This law was originally written in French and was translated by the U.S. Department of State's Office of Language Services—Translation Division.

Exploitation shall also include prostitution of children and all forms of use of children for sexual purposes, forced labor or services, unlawful adoption, early or forced marriage, or any form of abuse for economic or sexual purposes that are harmful to the health or physical, mental, spiritual, moral, or social development of a child.

Any person who employs children and engages in sexual relations with them or subjects them to physical, psychological, or sexual abuse shall be punished by 5 to 10 years imprisonment and a fine of 1 to 2 million Comorian Francs.<sup>53</sup>

In February of 2021, the government of Comoros rectified this mistake by amending its penal code to no longer require a demonstration of “means” for trafficking offenses involving child victims, thereby not only bringing their domestic law in line with the Palermo Protocol, but also bringing consistency within their own criminal legal framework:

Article 266-11 of the Comorian Criminal Code:

“Trafficking in persons” shall mean the recruitment, transportation, harboring, transfer, or receipt of persons, by means of threat or use of force or other forms of coercion, abduction, or fraud, of deception, of abuse of power or of a position of vulnerability, or the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation.

Exploitation shall include the prostitution of another person or other forms of sexual exploitation; forced labor or services; slavery or practices similar to slavery; servitude or the removal of organs.

The consent of a victim of trafficking in persons to exploitation as that term is defined above shall be irrelevant where any of the means set forth in the [first] paragraph 1 of Article 266-12 have been used.

“Trafficking in children” refers to the acts defined in the [first] paragraph of Article 266-12 when committed for purposes of exploitation against any person under 18 years of age.

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53. This law was originally written in French and was translated by the U.S. Department of State’s Office of Language Services—Translation Division.

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Trafficking in persons, when committed intentionally, or an attempt to commit trafficking in persons shall be punished by 7 to 10 years' imprisonment and a fine of 30 million Comorian Francs.<sup>54</sup>

By making these amendments, Comoros's anti-trafficking laws now criminalize all forms of child trafficking.

Recent amendments to Ecuador's and Hungary's anti-trafficking laws further support the idea that legislative error may be the primary reason behind this particular gap. Both countries' anti-trafficking laws previously did not include the "means" element as an essential element of the base offense of trafficking. However, both countries recently amended their laws to include the "means" element.<sup>55</sup> This was a positive step that was encouraged by relevant regional bodies for several years.<sup>56</sup> Unfortunately, each country failed to include the necessary "no-means provision" or

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54. This law was originally written in French and was translated by the U.S. Department of State's Office of Language Services—Translation Division.

55. See Off. to Monitor & Combat Trafficking in Persons, *2021 Trafficking in Persons Report: Ecuador*, U.S. DEP'T STATE (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report/ecuador> [<https://perma.cc/9MKY-V64G>] [hereinafter *2021 Ecuador Trafficking in Persons Report*] ("The government amended the definition of trafficking . . . to correctly establish[] the use of force, fraud, or coercion as an essential element of an adult trafficking offense."); Off. to Monitor & Combat Trafficking in Persons, *2021 Trafficking in Persons Report: Hungary*, U.S. DEP'T STATE (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report/hungary> [<https://perma.cc/P6H4-MSZP>] [hereinafter *2021 Hungary Trafficking in Persons Report*] ("The 2020 amendments helped align the Hungarian definition of trafficking with the international definition by . . . including force, fraud, or coercion as an essential element of the base offense of adult trafficking.").

56. See *Report Concerning the Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Hungary*, GRP. OF EXPERTS ON ACTIONS AGAINST TRAFFICKING IN HUM. BEINGS, COUNCIL EUR. 17 (May 29, 2015), <https://www.refworld.org/publisher,COEGRETA,,HUN,55af84fce,0.html> [<https://perma.cc/X8D7-JARK>]; see also Comm. on Hemispheric Security, *Fifth Meeting of National Authorities on Trafficking in Persons: Hemispheric Effort Against Trafficking in Persons (Declaration of Mexico)* art. 23, ORG. OF AM. STATES (Mar. 13, 2018), <http://www.oas.org/en/council/csh/topics/tratapersonas.asp#V> [<https://perma.cc/JS4K-UVJ9>].

otherwise indicate that the “means” element was not required for crimes involving child victims, thereby creating an additional, and arguably more problematic, definitional issue within their anti-trafficking laws.<sup>57</sup>

*C. Requiring the Means Element for Trafficking Offenses Involving Child Victims Is Inconsistent with International Law and Renders Some Countries Out of Compliance with the Palermo Protocol*

The Palermo Protocol very clearly establishes that child trafficking crimes do not require a demonstration of the “means” element. Unlike the previous gap discussed—countries that fail to include the “means” element within the definition of the base offense of trafficking, thereby rendering the definition broader than the Palermo Protocol—failing to comply with this requirement triggers automatic conflict with the Palermo Protocol. While national legislation may define trafficking in broader terms than the international definition established in the Palermo Protocol, it must not define trafficking in a way that fails to criminalize all forms of trafficking or that conflicts with other general principles of international law.<sup>58</sup> By requiring a demonstration of the “means” element in trafficking crimes involving child victims, certain acts of child trafficking—such as the exploitation of a child through prostitution, in which none of the “means” listed are involved—would not constitute trafficking under the national laws in question. While many of the countries in question do address this gap elsewhere in their criminal legal frameworks, such a clear inconsistency with international law is problematic. Not only does it perpetuate a flawed understanding of the concept of trafficking, but it also ultimately results in a failure to identify, protect, and provide services to some of the most vulnerable trafficking victims: children.

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57. See *2021 Ecuador Trafficking in Persons Report*, *supra* note 55 (“However, the amendment did not include a necessary provision indicating that the element was unnecessary in the case of sex trafficking offenses involving child victims.”); *2021 Hungary Trafficking in Persons Report*, *supra* note 55 (“However, inconsistent with international law, the amended Article 192 required a demonstration of force, fraud, or coercion to constitute a child sex trafficking offense.”).

58. *2004 Legislative Guides*, *supra* note 14, at 270.

## IDENTIFYING COMMON FLAWS IN DEFINING TRAFFICKING

### IV. COUNTRIES THAT DEFINE TRAFFICKING TO REQUIRE MOVEMENT

In the years following the ratification of the Palermo Protocol, one of the most common misconceptions about the crime of trafficking in persons was that it required movement. This is unsurprising, given the term “trafficking” generally implies just that. However, the crime of trafficking in persons does not require movement; in fact, some of its most prevalent forms do not involve any movement whatsoever. The Palermo Protocol and its parent convention, the UNTOC, do not require movement as an element of human trafficking.<sup>59</sup> Article 34(2) of the UNTOC, read *mutatis mutandis* on the Palermo Protocol, provides that the offenses in the Convention “shall be established in the domestic law of each State Party independently of the transnational nature.” Similarly, movement is not necessary to prove trafficking in persons. Although several of the actions specified in the Palermo Protocol’s definition of human trafficking do involve movement (e.g., transportation and transfer), other actions can be taken independent of movement (e.g., recruitment and harbouring). While the Palermo Protocol is clear on this point and the misconception is far less common than it was two decades ago, a small number of countries’ national anti-trafficking laws still incorrectly require movement to constitute a trafficking in persons offense.

#### A. Which Countries Incorrectly Define Trafficking to Require Movement?

The vast majority of countries worldwide do not require movement in order to constitute a trafficking crime, demonstrating significant consensus within the international community. As of March 31, 2021, only eleven countries required movement in order to constitute a trafficking crime: Australia, Fiji, Hong Kong,<sup>60</sup> Libya, the Republic of Maldives, Panama, South Korea, South Sudan, Tonga, the United Kingdom, and Zimbabwe. Of the countries that require movement to constitute a trafficking offense, most do not require that movement to be transnational. For example:

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59. *Fact Sheet No. 36: Human Rights and Human Trafficking*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (2014), [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf) [<https://perma.cc/A6KL-YN3Z>].

60. Hong Kong is a special administrative region of China, with devolved executive, legislative, and judicial powers.

### Panama Penal Code

#### Trafficking in Persons Offenses 456A:

A person shall be penalized with 15 to 20 years imprisonment if he or she promotes, directs, finances, markets, encourages, facilitates, or arranges through any form of individual or mass communication or any other means, the entry or exit from the country or movement within the country of any person of either sex to engage in one or various acts of prostitution or to subject that person to exploitation, sexual or labor servitude, slavery or slavery-like practices, forced work or service, servile marriage, begging, illicit organ removal, or irregular adoption.<sup>61</sup>

However, some countries recognize a trafficking offense only if the movement of the victim was transnational, further limiting the applicability of the offense. For example:

### South Sudan Penal Code

#### Article 282: Trafficking in Persons

Whoever procures, entices or leads away, even with his or her consent, any person for sale or immoral purposes to be carried outside Southern Sudan, commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding seven years or with a fine or with both.<sup>62</sup>

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61. Penal Code of the Republic of Panama, Article 456A, [http://www.oas.org/juridico/pdfs/mesicic5\\_pan\\_res\\_ane\\_act\\_corr\\_2.pdf](http://www.oas.org/juridico/pdfs/mesicic5_pan_res_ane_act_corr_2.pdf) [<https://perma.cc/J5WR-WMLK>]. This law was originally written in Spanish and was translated by the U.S. Department of State's Office of Language Services—Translation Division. For additional examples of countries that require either domestic or transnational movement to constitute the crime of trafficking, please see Appendix D.

62. Penal Code Act of 2008, Article 282 (Pan.). For additional examples of countries that require transnational movement of a victim to constitute a trafficking offense, please see Appendix E.

#### IDENTIFYING COMMON FLAWS IN DEFINING TRAFFICKING

*B. There Is No Uniform Rationale Amongst the Countries that Incorrectly Define Trafficking to Require Movement, but It Is Apparent that Some Do So Intentionally*

As stated above, there are only eleven countries that still incorrectly define trafficking to require movement. There does not appear to be a single overarching rationale for doing so that applies to all or even most of these countries. In some of them, there is no standalone trafficking law, and the domestic anti-trafficking legal framework consists of several overlapping criminal provisions, leading to confusion. In others, anti-trafficking laws were drafted many years ago when the misconception of a movement requirement was more widespread, and those countries have yet to take steps to bring their anti-trafficking laws in line with current international standards. On the other hand, in some of these countries, there exist comprehensive anti-trafficking laws, and the decision to define trafficking to require movement was intentional.

A prominent example of a country which intentionally chose to require movement to constitute a trafficking offense is the United Kingdom. The United Kingdom's Modern Slavery Act of 2015 (MSA) requires an element of travel to constitute a human trafficking offense. Section 2 of the MSA states that a person commits a "human trafficking" offense "if the person arranges or facilitates the travel of another person ("V") with a view to V being exploited."<sup>63</sup> It appears that the definition of human trafficking within the MSA drew from existing criminal provisions and was recycled alongside another criminal offense, namely "slavery, servitude, and forced or compulsory labor," to address all forms of modern slavery.<sup>64</sup> During

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63. Modern Slavery Act 2015, c. 30, § 2 (UK). See Appendix D for the full text of MSA Section 2.

64. HC Deb (4 Sept. 2014) col. 129. Fiona Mactaggart (Labor MP from Slough) stated:

We know that Britain is not catching and convicting the overwhelming numbers of people responsible for such a heinous crime. We are catching and convicting tiny numbers, and the Bill with not change that, which is why the Committee has a responsibility to come up with a much better definition of what trafficking is. The definition is there. It exists in international treaties to which we are signatories and which we have a responsibility to implement, but which we are not implementing in the Bill . . . In this Bill we are not changing the law. We are merely putting together two

parliamentary debates over the legislation, several Members of Parliament (MPs) advised the government that the definition of human trafficking was deficient and problematic. More than one MP explicitly stated that the requirement of a nexus to travel was in direct conflict with the international definition of trafficking. These MPs offered amended language that reflected the definition of trafficking set forth in the Palermo Protocol. Some excerpts from the debates are included below:

Fiona Mactaggart (Labor MP from Slough): “There is a fundamental misconception in the Bill that to be trafficked requires someone to travel somewhere. That is wrong. It is not in the convention that we signed up to. It is not in any of the international definitions.”<sup>65</sup>

Diana Johnson (Labor MP from Kingston upon Hull North): “It is the focus on travel that we believe is problematic, and which makes the UK’s definition of human trafficking incompatible with international definitions used . . . by the International Labour Organisation and the United Nations, and in the Palermo Protocol and the EU directive.”

“The problem is not just that we are out of line with international definitions, but that the focus on travel fails to capture the reality of modern trafficking. The point is that a person can be trafficked in one place.”<sup>66</sup>

Mark Durkan (Social Democratic Labor Party MP from Foyle): “Testing whether a trafficking offence has been committed or whether anyone has been part of the trafficking chain simply in relation to whether they were directly involved in or indirectly facilitated the travel is not good enough or robust enough.”<sup>67</sup>

The legislators also stressed the practical implications that the definition would have from an international policy perspective:

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bits of law under which we know our police officers are currently failing to catch and convict people . . .”

65. *Id.* at col. 127.

66. *Id.* at col. 135.

67. *Id.* at col. 150.

#### IDENTIFYING COMMON FLAWS IN DEFINING TRAFFICKING

Fiona Mactaggart (Labor MP from Slough): “I think that it is both necessary and correct for us to write into legislation the definitions that have been agreed by countries all over the world, and which are the mechanisms that are used to make assessments in America, for example. When we did the pre-legislative scrutiny we heard from Luis CdeBaca . . . The report that is produced in America used the definition of trafficking that is in the new clauses because by focusing on the acts, the means, and the purposes of trafficking, and being quite inclusive about [what] those are, people know that they can catch the exploiters.”<sup>68</sup>

Despite these robust efforts to challenge the definition of human trafficking within the draft legislation, the Home Office firmly rejected the assertions made by the various Members of Parliament and did not ultimately accept the new proposed language. The Parliamentary Under-Secretary of State for the Home Office, Karen Bradley, made it clear during the parliamentary debates that the inclusion of movement within the definition of trafficking was a deliberate one:

We believe that [travel] is totally required because the offence is trafficking. Trafficking, by common sense and any definition, involves movement. It is therefore clear that travel is required and that is required in the international convention . . . I will say again that, clearly, for trafficking to take place, there has to be travel or movement. Our current law is wholly consistent with international obligations and so is this Bill.<sup>69</sup>

Although the Palermo Protocol makes no such requirement, at the end of the legislative process, the Home Office prevailed and the ensuing MSA retained the element of travel to constitute a human trafficking offense.

A similar parliamentary debate took place when Scotland, a devolved jurisdiction of the United Kingdom, was simultaneously developing its own anti-trafficking legislation, the Human Trafficking and Exploitation Act (HTEA) of 2015.<sup>70</sup> Initially, the drafters of the HTEA had intended to align

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68. *Id.* at col. 131.

69. *Id.* at col. 150.

70. Human Trafficking and Exploitation (Scotland) Act of 2015, <http://www.legislation.gov.uk/asp/2015/12/contents/enacted> [<https://perma.cc/BA4L-T7DQ>].

their definition of human trafficking directly with the MSA's definition.<sup>71</sup> However, the Justice Committee, upon taking evidence from various anti-trafficking experts, expressed concern that the inclusion of a travel requirement within the definition of human trafficking would be inconsistent with international standards.<sup>72</sup> As a result, the Scottish government reconsidered the draft legislation and ultimately decided to remove the travel element from the definition of human trafficking within the HTEA.<sup>73</sup>

*C. Defining Trafficking to Require Movement Is Inconsistent with the Palermo Protocol and Renders Some Countries Out of Compliance with International Law*

Like the requirement of a demonstration of the "means" element in child trafficking crimes, the requirement of movement unduly limits the definition of trafficking in persons in a manner that is inconsistent with international law. By requiring movement to constitute a trafficking offense, some countries fail to criminalize all forms of trafficking, rendering their national trafficking laws out of compliance with the Palermo Protocol. As a result, these countries are perpetuating a flawed

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71. Justice Committee's Stage 1 Report on the Human Trafficking and Exploitation (Scotland) Bill, 9th Report, Session 4, at 12-13 (2015), [https://archive2021.parliament.scot/S4\\_JusticeCommittee/Reports/juR-15-09w.pdf](https://archive2021.parliament.scot/S4_JusticeCommittee/Reports/juR-15-09w.pdf) [<https://perma.cc/5UX9-6PV9>].

72. *Id.* at 15 ("29. The Committee notes the concerns of a large number of witnesses regarding the emphasis in the section 1 definition on 'travel' and therefore asks the Scottish Government to give further consideration to the working in this section.")

73. The Scottish Parliament (Pàrlamaid na h-Alba), Justice Committee, Official Report, Tuesday 16 June 2015, Session 4, "Human Trafficking and Exploitation (Scotland) Bill: Stage 2," at column 16, <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=10021&mode=pdf> [<https://perma.cc/ANW6-SYPY>] (Cabinet Secretary for Justice: "After careful consideration, we now believe that the focus on travel is unhelpful and unnecessary in this context. Therefore, amendments 13 to 17 will amend the definition in section 1 by removing the need to establish that a victim's travel has been arranged or facilitated and, instead, reframing the offence to criminalise certain defined and listed relevant actions, including the arranging or facilitating of those actions. As before, the relevant actions must be undertaken with a view to another person being exploited.").

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understanding of the concept of trafficking. Ultimately, their laws will fail to identify, protect, and provide services to the many victims of trafficking crimes that do not involve movement, though these victims are entitled to protection and services under international law.

Conversely, some countries whose laws incorrectly define trafficking to require movement are still in compliance with their obligations under Article 5 of the Palermo Protocol because other provisions within their criminal legal framework could be used to prosecute trafficking crimes that do not involve movement. For example, in the United Kingdom, only trafficking crimes involving movement can be prosecuted as “human trafficking” under Section 2 of the MSA cited above. However, trafficking crimes that do not involve movement could be prosecuted under Section 1 of the same law, which addresses “slavery, servitude, and forced or compulsory labor”:

1. Slavery, servitude and forced or compulsory labour

(1) A person commits an offence if—

(a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or

(b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.

(3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances.

(4) For example, regard may be had—

(a) to any of the person’s personal circumstances (such as the person being a child, the person’s family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons;

(b) to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).

(5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.<sup>74</sup>

However, even where a country's domestic legal framework can be used to prosecute all forms of trafficking through a combination of offenses, a national definition inconsistent with and more limited than the international definition of trafficking is still problematic. Inconsistency can be detrimental to international law enforcement. Undue limitation can hinder victim identification and protection efforts. Additionally, other countries seeking to develop or strengthen anti-trafficking frameworks may mistakenly reference one of these countries' flawed definitions of trafficking. Influenced by a flawed definition, these countries may unknowingly perpetuate common misconceptions that the international community has been fighting for nearly two decades.

## V. CONCLUSION

As with most international laws, the Palermo Protocol and its parent convention, the UNTOC, include a significant level of flexibility concerning how state parties can implement their obligations. This approach is consistent with the essential international legal principle of state sovereignty. Therefore, it is unsurprising that the Palermo Protocol does not direct state parties to adopt a uniform definition of trafficking. Instead, Article 5 simply requires that state parties criminalize all forms of trafficking, as defined under the law. However, while state parties are not required to adopt a uniform definition of trafficking, the drafters of the Palermo Protocol purposefully set forth a definition of the crime to "provide some degree of consensus-based standardization of concepts."<sup>75</sup> Standardization would not only support international law enforcement coordination, but also improve protection and prevention efforts worldwide.<sup>76</sup>

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74. Modern Slavery Act 2015, c. 30, § 1 (UK).

75. *2004 Legislative Guides*, *supra* note 14, at 269.

76. *Id.*

#### IDENTIFYING COMMON FLAWS IN DEFINING TRAFFICKING

Since the adoption of the Palermo Protocol in 2000, the global community has achieved tremendous success in achieving such consensus. At present, at least 155 countries fully criminalize trafficking.<sup>77</sup> The vast majority of these countries define trafficking in a way that is consistent with the Palermo Protocol's definition. However, a small number of countries retain three inconsistencies in the definition of trafficking: 1) some fail to include the "means" element in the base offense of trafficking, 2) some incorrectly require the demonstration of a "means" element for trafficking crimes involving children, and 3) some incorrectly require the element of "movement" to constitute a trafficking offense. In some of these countries, the inconsistencies rise to the level of noncompliance with state obligations under the Palermo Protocol; in others, they do not.

Various stakeholders have emphasized the importance of consistency in national and international definitions of trafficking. The United Nations has underscored this point repeatedly in its guidance on state parties' implementation of the Palermo Protocol. Regional bodies have followed suit in monitoring reports of Member States or official declarations. The U.S. State Department's Office to Monitor and Combat Trafficking Persons notes the three definitional issues discussed in this paper in every applicable country narrative when describing that country's domestic legal framework and highly recommends amending domestic human trafficking laws to reduce any inconsistencies with the international legal framework.<sup>78</sup> In its annual Trafficking in Persons Report, the U.S. State Department offers specific recommendations regarding how each government can better meet the minimum standards the Department uses to assess each government's anti-trafficking framework. These recommendations serve as the primary tool to guide U.S. diplomatic engagement with foreign counterparts over the next year.<sup>79</sup>

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77. *2021 Trafficking in Persons Report*, *supra* note 19 (assessing that 155 countries met the Trafficking Victims Protection Act's Minimum Standard 1, which requires the Department to assess whether a country has criminalized all forms of trafficking in persons). The Department assessed 188 countries in the 2021 Trafficking in Persons Report. As such, there may be other countries whose laws criminalize at least some forms of trafficking in persons.

78. *Id.*

79. *Trafficking in Persons Report*, U.S. DEP'T STATE (2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> [<https://perma.cc/3EET-8W6J>] ("Diplomatic Engagement: Throughout the year, the report serves as a roadmap for

The focus on the importance of aligning domestic laws with the international definition of trafficking in persons is well-founded. When the definition of trafficking under domestic law is under-inclusive, such as those that require a demonstration of the “means” element for offenses involving children and those that require movement, the deviation is obviously problematic. These approaches omit entire forms of internationally recognized human trafficking, resulting in a failure to properly identify trafficking offenses and their victims. Under-inclusive definitions thereby impede efforts to investigate, prosecute, and convict traffickers, as well as efforts to protect and tailor services for victims of these crimes.

When the definition under domestic law is over-inclusive, such as those that do not include a demonstration of the “means” as an essential element of the base offense of trafficking, different but equally significant problems can arise. While a broader definition may arguably facilitate the prosecution of certain forms of trafficking within a domestic context, a lack of agreement on the definition of trafficking can undermine crucial international law enforcement coordination. Multinational law enforcement teams cannot effectively conduct joint action if the crimes that each nation is investigating and prosecuting under its own laws differ materially from each other. Definitional differences can also complicate or prevent extraditions, as the country receiving the request must confirm that the offense specified by the requesting country is recognized under its own law. Finally, despite major investments and creative cross-sector collaboration on the domestic and international levels, effective research and data collection efforts on human trafficking continue to be frustrated by the complexity of overlapping but non-identical definitions of what constitutes the crime. These research efforts can only reach their full potential once we have achieved a common understanding of what constitutes the crime in question.

The global community has demonstrated a nearly universal commitment to combating trafficking in persons—a significant feat by any

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diplomatic engagement with governments around the world on human trafficking. Each TIP Report country narrative lays out a justification for the tier ranking followed by prioritized recommendations for how the government can better meet the TVPA minimum standards. Department of State officials from U.S. embassies and consulates, as well as the TIP Office, use the TIP Report when they meet with foreign government officials across a variety of agencies to draw attention to human trafficking, discuss policy recommendations, and work toward solutions.”)

#### **IDENTIFYING COMMON FLAWS IN DEFINING TRAFFICKING**

measurement. This robust consensus is laudable and necessary given the scope of trafficking world-wide. Comprehensive national anti-trafficking criminal frameworks are the basis upon which each country can effectively combat this complex crime. However, aligning individual national frameworks with international law is of paramount importance in an increasingly global and fluid world, as countries must increasingly work together to effectively prosecute traffickers, identify and protect victims, and prevent trafficking. The good news is, we are almost there.

## APPENDIX A

### Paraguay Law No. 4788, “Comprehensive Law Against Trafficking in Persons”

#### Article 5: Elements of the Offense of Trafficking in Persons

1. Anyone who, for the purpose of subjecting another person to sexual exploitation, recruits, transports, transfers, harbors, or receives the direct victim, shall be punished by up to eight years’ imprisonment.
2. Anyone who, for the purpose of subjecting another person to servitude, servile marriage, forced labor or service, slavery, or a practice similar to slavery, recruits, transports, removes, harbors, or receives a direct victim, shall be punished by up to eight years’ imprisonment.
3. Anyone who, for the purpose of subjecting another person to unlawful removal of his/her organs or tissues, recruits, transports, removes, harbors, or receives the direct victim, shall be punished by up to eight years’ imprisonment.

#### Article 6: Aggravating Circumstances

In the case in the above Article, a punishment of 2 to 15 years’ imprisonment of shall apply when:

1. the direct victim is between 14 and 17 years of age inclusive;
2. the perpetrator uses the threat of or use of force, coercion, kidnapping, fraud, deceit, abuse of power, or the giving of payment or benefits to a person who has authority over the direct victim;
3. the perpetrator is a public official or commits the act by means of abuse of public office; or,
4. for purposes of trafficking in persons, the direct victim is removed from the territory of Paraguay to foreign territory or from foreign territory to Paraguayan territory.<sup>80</sup>

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80. This law was originally written in Spanish and was translated by the U.S. Department of State’s Office of Language Services—Translation Division.

**APPENDIX B**

Ghana's 2005 Human Trafficking Act, amended in 2009

1. Meaning of Trafficking

(1) Human trafficking means the recruitment, transportation, transfer, harbouring, trading or receipt of persons within and across national borders by

- (a) the use of threats, force or other forms of coercion, abduction, fraud, deception, the abuse of power or exploitation of vulnerability, or
- (b) giving or receiving payments and benefits to achieve consent.

2) Exploitation shall include at the minimum, induced prostitution and other forms of sexual exploitation, forced labour or services, salary or practices similar to slavery, servitude or the removal of organs.

3) Placement for sale, bonded placement, temporary placement, placement as service where exploitation by someone else is the motivating factor shall also constitute trafficking.

4) Where children are trafficked, the consent of the child, parents or guardian of the child cannot be used as a defence in prosecution under this Act, regardless of whether or not there is evidence of abuse of power, fraud or deception on the part of the trafficker or whether the vulnerability of the child was taken advantage of.

**APPENDIX C**

Georgia Criminal Code (2016)

Article 1431 - Human trafficking

1. Purchase or sale of human beings, or any unlawful transactions in relation to them, by means of threat, use of force or other forms of coercion, of abduction, blackmail, fraud, deception, by abuse of a position of vulnerability or power or by means of giving or receiving of payment or benefits to achieve the consent of a person having control over another person, as well as recruitment, carriage, concealing, hiring, transporting, providing, harbouring or receiving of a human being for exploitation, -

shall be punished by imprisonment for a term of seven to twelve years, with deprivation of the right to hold an official position or to carry out a particular activity for up to three years.

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#### Article 1432 - Child trafficking

1. Purchase or sale of children, or other unlawful transactions in relation to them, as well as their recruitment, carriage, concealment, hiring, transportation, provision, harbouring or reception for exploitation, -

shall be punished by imprisonment for eight to twelve years, with deprivation of the right to hold an official position or to carry out a particular activity for up to three years.

### **APPENDIX D**

#### United Kingdom's Modern Slavery Act of 2015

##### Article 2: Human Trafficking

(1) A person commits an offence if the person arranges or facilitates the travel of another person ("V") with a view to V being exploited.

(2) It is irrelevant whether V consents to the travel (whether V is an adult or a child).

(3) A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.

(4) A person arranges or facilitates V's travel with a view to V being exploited only if—

- (a) the person intends to exploit V (in any part of the world) during or after the travel, or
- (b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.

(5) "Travel" means—

- (a) arriving in, or entering, any country,
- (b) departing from any country,
- (c) travelling within any country.

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(6) A person who is a UK national commits an offence under this section regardless of—

- (a) where the arranging or facilitating takes place, or
- (b) where the travel takes place.

(7) A person who is not a UK national commits an offence under this section if—

- (a) any part of the arranging or facilitating takes place in the United Kingdom, or
- (b) the travel consists of arrival in or entry into, departure from, or travel within, the United Kingdom.

#### Zimbabwe's Trafficking in Persons Act of 2014

##### Article 3: Crime of Trafficking in Persons:

(1) Any person who—

- a. Trafficking any individual by transporting him or her into, outside or within Zimbabwe –
  - i. Involuntarily, that is to say by any of the following means –
    - A. Force, violence or threats thereof; or
    - B. Administering drugs to subdue the victim or causing the victim to be addicted to drugs; or
    - C. Abduction or detention of the victim; or
    - D. Fraud, extortion or deception; or
    - E. The abuse of power or trust over the victim; or
    - F. The giving or inducements to the victim or a person having control over the victim for the purpose of facilitating the transportation of the victim; or
  - ii. Voluntarily, for an unlawful purpose; or
- b. Knowingly does any of the following acts –
  - i. Recruits, transfers, harbours or receives another person that he or she knows or suspects is being or is likely to be trafficked; or
  - ii. Attempts, assists, abets, conceals, procures, incites, solicits, connives at, or conspires with others for, the commission of the crime of trafficking; or
  - iii. Leases or subleases or allows the use of any premises or land which belongs to him or her or over which he or she has control for the purpose of trafficking; or

- iv. Advertises or assists in the advertising, printing, publication, broadcasting or distribution by any means, any material that promotes trafficking in persons; or
- v. Being an internet service provider operating in Zimbabwe, is aware of any site on its server that contains information in contravention of subparagraph (iv); or
- vi. For the purpose of trafficking assists any other person to obtain false identity or travel documents or tampers with identity or travel documents; or
- vii. Facilitates in any way the cross-border transportation of victims in contravention of paragraph (a); or
- viii. Benefits either directly or indirectly from the proceeds of trafficking; or
- ix. For the purposes of trafficking confiscates, destroys or conceals the identity or travel documents of an individual in order to unlawfully deny such individual his or her freedom of movement, or access to any public services;

shall be guilty of the crime of trafficking in persons.

#### **APPENDIX E**

##### Hong Kong Crimes Ordinance, Cap. 200

###### Article 129: Trafficking in persons to or from Hong Kong

- (1) A person who takes part in bringing another person into, or taking another person out of, Hong Kong for the purpose of prostitution shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.
- (2) It shall not be a defence to a charge under this section to prove that the other person consented to being brought into or taken out of Hong Kong whether or not she or he knew it was for the purpose of prostitution or that she or he received any advantage therefor.

##### Libya Penal Code

###### Article 418: Trafficking in Women on an International Scale:

Anyone who forces a woman, by force or threat, to move to a place abroad where he knows that she will be exploited for prostitution

**IDENTIFYING COMMON FLAWS IN DEFINING TRAFFICKING**

purposes shall be punishable by imprisonment for no more than ten years.

And a fine between one hundred and five hundred dinars.

The same penalty applies to anyone who forces by any means a minor or an adult weak-minded woman to move to a place abroad with the knowledge that she will be exploited for prostitution.

If the act was accompanied by violence or threat, then the penalty shall be increased by half.

The penalty is doubled in the cases provided for in the last paragraph of Article 415, and also if the act was committed against two or more people, even if their destinations are different.